



COLORADO

**Department of
Regulatory Agencies**

2014 Sunrise Review: Bail Recovery Agents

*Office of Policy, Research and Regulatory Reform
October 15, 2014*



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**Department of
Regulatory Agencies**

Executive Director's Office

October 15, 2014

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunrise reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed its evaluation of the sunrise application for regulation of bail recovery agents and is pleased to submit this written report. The report is submitted pursuant to section 24-34-104.1, Colorado Revised Statutes, which provides that DORA shall conduct an analysis and evaluation of proposed regulation to determine whether the public needs, and would benefit from, the regulation.

The report discusses the question of whether there is a need for regulation in order to protect the public from potential harm, whether regulation would serve to mitigate the potential harm, whether the public can be adequately protected by other means in a more cost-effective manner and whether the imposition of any disqualifications for regulation based on criminal history serves public safety or consumer protection interests.

Sincerely,

Barbara J. Kelley
Executive Director



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Background

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunrise Process

Colorado law, section 24-34-104.1, Colorado Revised Statutes (C.R.S.), requires that individuals or groups proposing legislation to regulate any occupation or profession first submit information to the Department of Regulatory Agencies (DORA) for the purposes of a sunrise review. The intent of the law is to impose regulation on occupations and professions only when it is necessary to protect the public health, safety or welfare. DORA must prepare a report evaluating the justification for regulation based upon the criteria contained in the sunrise statute:¹

- (I) Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety, or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;
- (II) Whether the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing professional or occupational competence;
- (III) Whether the public can be adequately protected by other means in a more cost-effective manner; and

¹ § 24-34-104.1(4)(b), C.R.S.

(IV) Whether the imposition of any disqualifications on applicants for licensure, certification, relicensure, or recertification based on criminal history serves public safety or commercial or consumer protection interests.

Any professional or occupational group or organization, any individual, or any other interested party may submit an application for the regulation of an unregulated occupation or profession. Applications must be accompanied by supporting signatures and must include a description of the proposed regulation and justification for such regulation.

Methodology

DORA has completed its evaluation of the proposal for the regulation of bail recovery agents. During the sunrise review process, DORA performed a literature search; contacted and interviewed the applicant; reviewed licensure laws in other states; and interviewed bail recovery agents. In order to determine the number and types of complaints filed against bail recovery agents in Colorado, DORA contacted the Colorado Division of Insurance, Colorado Association of Chiefs of Police, County Sheriffs of Colorado, Denver/Boulder Better Business Bureau, and the Office of the Colorado Attorney General-Consumer Protection Section.

Profile of the Profession

To understand what a bail recovery agent does, one must know something about a commercial bail system.

When a person gets arrested, in many cases, the court will allow the defendant to be released from jail if a bail bond is executed that guarantees he or she will return for a future court appearance. The bail bond is set at an amount that the court believes is sufficient to both protect the public and to guarantee that the defendant will appear for the hearing. The bail bond is refunded when the conditions of the bail are met, i.e., the defendant appears in court.

A commercial surety bail bond is a contract between a licensed bail agent and an indemnitor to secure the release of a person from jail after the court sets the bail bond amount. Consider the bail bond as an insurance policy. The licensed bail agent charges a premium to write a policy that insures a defendant will appear in court when he or she is required to appear. For example, if the bail bond is \$1,000 the premium for a \$1,000 policy may be \$100 to \$150. This allows a defendant to pay a non-refundable \$100 to \$150 premium, rather than paying the refundable \$1,000 bail bond to the court.

If the defendant does not satisfy the conditions of bail or does not show up for court, he or she is a fugitive, or "bail jumper," and the licensed bail agent is responsible for paying the full amount of the bail to the court. If a fugitive is located and returned to custody, the court does not demand payment of the entire bail amount by the licensed bail agent. Therefore, there is financial incentive for the licensed bail agent to recover a fugitive thereby avoiding having to pay the entire bail amount. The retrieval and re-incarceration of a fugitive is called bail recovery.

"Bail recovery agents," the term used generically in this sunrise review, are also referred to as bounty hunters and bail enforcement agents. Bail recovery agents are individuals, not licensed as licensed bail agents, who track, capture, and return to custody, fugitives for a fee or "bounty." Bail recovery agents do not provide a service that is patronized by the general public. Bail recovery agents contract with, or are hired by, licensed bail agents.

In Colorado prior to 2012, if bail recovery services were provided for a licensed bail agent by a person not licensed as a bail agent, the licensed bail agent procuring the services was directed by statute to confirm that the person providing the services was qualified. To have been qualified, a bail recovery agent must not have been convicted of or pled guilty or *nolo contendere* to any felony during the prior 15 years, have had a Colorado Bureau of Investigation background check performed, and have taken Police Officer Standards and Training-approved bail recovery training. These provisions were removed from statute following a 2011 sunset review of licensed bail agents but not as a sunset review recommendation. The Department of Regulatory Agencies was not able to ascertain the reason(s) why the bail recovery provisions were eliminated.

Proposal for Regulation

The Professional Bail Agents of Colorado (PBAC or Applicant) has submitted a sunrise application to the Department of Regulatory Agencies (DORA) for review in accordance with the provisions of section 24-34-104.1, Colorado Revised Statutes (C.R.S.). The application identifies licensure of bail recovery agents as the appropriate level of regulation to protect the public. In the application, the PBAC gave no reasoning as to the justification(s) for full licensure, provided no list of qualifications to obtain a license or standard practices or procedures on which to base a licensing regime, and provided no grounds for discipline for the profession.

However, the Applicant did provide a narrative concerning minimum competencies. It explained that, "The minimum competencies should be just short of becoming a Police Officer Standards and Training certified peace officer in Colorado." It claimed that the current standards required of licensed bail agents are, "grossly inadequate" because there is no training in:

- Arrest and control techniques;
- Dealing with the subject and/or the public;
- Reasonable force;
- How to conduct an investigation; and
- How to track suspects.

In subsequent interviews with PBAC representatives and other potential licensees, they indicated a desire to increase the level of training to that of a police officer for making non-lethal arrests. Their justification for this is that bail recovery agents arrest fugitives. They are sometimes in intense situations with violent criminals. Therefore, training in what constitutes reasonable force as well as safe apprehension and safe transport of a fugitive is necessary. The claim is that this is necessary to protect any bystanders, the fugitive, and the bail recovery agent from harm.

Summary of Current Regulation

The Colorado Regulatory Environment

Common law, affirmed in 1872 by the U.S. Supreme Court,² asserts the ability of bail recovery agents to have virtually unimpeded access while in the act of fugitive recovery, which is generally referred to as the “bonding agent privilege”. In 2011, the Colorado Supreme Court opined that this common law privilege had been superseded by Colorado statutes and no longer applies.³

Currently in Colorado law, the only requirement concerning bail recovery is that prior to becoming a licensed bail agent, an individual must complete a 16 hour Police Officer Standards and Training (POST)-approved curriculum in bail recovery. However, if a person is not also acting as a licensed bail agent, no training is required for bail recovery work.

Regulation in Other States

According to the information submitted with the application for sunrise review, there are currently 33 states that regulate bail recovery in some manner. Analysis of the data illustrates that regulation takes several forms. Given there are no affirmative requirements or prohibitions on unlicensed individuals from performing bail recovery activities, Colorado qualifies as a state that has bail recovery regulation only through its bail bond agent licensing program.

According to Johnson and Stevens,⁴ who examined state legislative and administrative codes in all 50 states, 24 states control bail recovery agents through licensure or the imposition of other occupational regulations. These controls include age, criminal history, and pretraining and educational requirements. Some states also require continuing education and training for licensure and/or regulation. They also found 18 states have no licensing or other occupational requirements for bail recovery agents.

Table 1 displays the states that regulate bail recovery in some manner according to the information provided by the Applicant. The second column lists the titled professionals that are subject to some form of bail recovery regulation in that state. The third column lists the agency in the state with jurisdiction over bail recovery.

² *Taylor v. Taintor*, 83 U.S. 366 (1872).

³ *Oram v. People*, 255 P.3d 1032 (Colo. 2011).

⁴ Brian R. Johnson and Ruth S. Stevens, (2013), “*The Regulation and Control of Bail Recovery Agents: An Exploratory Study*” (2013). Peer Reviewed Publications. Paper 3. pp.198-200. Retrieved August 22, 2013, from <http://scholarworks.gvsu.edu/scjpeerpubs/3>

Table 1
States That Regulate
Bail Recovery Agents

| State | Regulated Profession(s) | Regulating Agency |
|----------------|--|---|
| Alaska | Grouped with bail bond agents | Department of Insurance |
| Arizona | Bail recovery agents | Department of Insurance |
| Arkansas | Bail bond agents and private investigators, no bail recovery agents | Professional Bail Bond Company and Professional Bail Bondsman Licensing Board |
| California | Bail bond agents, private investigators, bail recovery agents | Insurance Department |
| Colorado | Bail bond agents | Division of Insurance |
| Connecticut | Bail recovery agents | Commissioner of Emergency Services and Public Protection |
| Delaware | Bail recovery agents | Board of Examiners of Bail Enforcement Agents |
| Georgia | Bail recovery agents | Georgia Association of Professional Bondsmen and Department of Public Safety |
| Idaho | Bail bond agents | Department of Insurance |
| Indiana | Bail recovery agents | Department of Insurance |
| Iowa | Bail recovery agents | Department of Public Safety |
| Kansas | Bail bond agents | Insurance Department |
| Louisiana | Bail recovery agents | Department of Insurance |
| Maryland | Bail bond agents | Insurance Administration |
| Michigan | Bail bond agents | Courts |
| Minnesota | Bail bond agents | Courts |
| Mississippi | Bail bond agents and bail recovery agents | Insurance Department |
| Nevada | Bail recovery agents | Division of Insurance |
| New Hampshire | Bail recovery agents | Secretary of State |
| New Mexico | Bail recovery agents | Office of the Superintendent of Insurance |
| New York | Bail recovery agents | Department of State |
| North Carolina | Bail recovery agents employed by bail bond agents | Department of Insurance |
| North Dakota | Bail bond agents | Department of Insurance |
| Ohio | Bail bonds agents, bail recovery agents designated by bail bond agents | Department of Insurance |
| Oklahoma | Bail recovery agents | Council on Law Enforcement Education and Training |
| South Carolina | Bail recovery agents employed by bail bond agents | State Law Enforcement Division and Department of Insurance |
| South Dakota | Bail recovery agents designated by bail bond agents | Division of Insurance |

| State | Regulated Profession(s) | Regulating Agency |
|---------------|---|---|
| Tennessee | Bail recovery agents must work for bail bond agents | Tennessee Association of Professional Bail Agents |
| Texas | Bail bond agents | Courts |
| Utah | Bail recovery agents | Bail Bond Recovery Licensure Board |
| Virginia | Bail recovery agents | Criminal Justice Services Board |
| Washington | Bail recovery agents designated by bail bond agents | Department of Licensing |
| West Virginia | Bail recovery agents employed by bail bond agents | State Police |

In states that do not regulate bail recovery, the task of recovering fugitives sits with the states' law enforcement agencies.

Analysis and Recommendations

Public Harm

The first sunrise criterion asks:

Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety, or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument.

The question of whether to regulate bail recovery agents presents a somewhat unique perspective for a sunrise review. Until recently, bail recovery agents, who were not licensed bail agents, were subject to minimal regulation. A bail recovery agent must not have been convicted of or pled guilty or *nolo contendere* to any felony during the 15 years prior to being hired, have had a Colorado Bureau of Investigation background check performed to verify that fact, and have taken Police Officer Standards and Training (POST) bail recovery training. Reviewing the occupation for regulation means analysis should take into account cases of public harm and endangerment, prior to and subsequent to “deregulation.”

The lone instance of harm that was submitted with the sunrise application by the Applicant is from a 2011 Colorado Supreme Court decision.⁵ During August of 2004, a bail recovery agent and his partner posed as Denver police officers investigating a disturbance at a location where a fugitive purportedly resided. They pulled open the front door to the residence, forcing entrance, and causing a female occupant to fall outside of the house. The bail recovery agent then pointed a taser at a person he believed was the fugitive, ordered him to the ground, and handcuffed him. After the bail recovery agent was convinced that he had handcuffed the wrong man, he released him. Following the incident, he and his partner were arrested, tried, and convicted of second degree burglary and felony menacing for their actions. In that decision, the Colorado Supreme Court upheld the conviction.

Contact with the Colorado Division of Insurance (DOI), which licenses bail bond agents, yielded another case of harm.⁶ However, it too does not have significant applicability for this sunrise review of bail recovery agents, because the individual who committed the harm was performing bail recovery, but was a licensed bail agent.

⁵ *Oram v. People*, 255 P.3d 1032 (Colo. 2011).

⁶ *People of the State of Colorado v. Straw, Randall Dale* - 2010CR002674 - Adams County District Court.

In this case a licensed bail agent wrote a bail bond and the defendant failed to appear. This licensed bail agent contracted with another licensed bail agent to act as a bail recovery agent and recover the fugitive. The bail recovery agent obtained an address for the fugitive. In August 2010, he, along with two other individuals, kicked in the door of the house to gain entrance. Once inside, he ransacked the house, handcuffed a person, dragged him outside, and confiscated a gun that was found in the residence. However, the bail recovery agent seized the wrong person. Subsequent to the incident, the bail recovery agent was convicted of multiple crimes including burglary and assault.

The reason this case is salient in this sunrise review is to reinforce that the individual's license as a bail agent did not stop his harmful conduct.

Finally, the Department of Regulatory Agencies (DORA) also contacted public law enforcement officials inquiring as to their interactions with bail recovery agents. It is the state's law enforcement officers that are most often in contact with bail recovery agents. When a fugitive is captured by a bail recovery agent he or she surrenders that person to law enforcement at some level. DORA's inquiries with the Colorado Association of Chiefs of Police, the County Sheriffs of Colorado, and the Office of the Colorado Attorney General yielded no cases of harm associated with any aspect of bail recovery.

Need for Regulation

The second sunrise criterion asks:

Whether the public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional or occupational competence.

There were no proposed standards of practice for bail recovery submitted with the PBAC application. However, the PBAC did submit a short list of minimum competencies. Among those are control techniques, conducting investigations, tracking subjects, and avoiding excessive force.

One might infer, as does the Applicant, that training in non-lethal apprehension and transport technics is necessary for an occupation where physical force is sometimes necessary. It asserts that safety is critical and should be mandatory for bail recovery agents. However, the Applicant does not further demonstrate how a licensure program would enhance public protection.

Alternatives to Regulation

The third sunrise criterion asks:

Whether the public can be adequately protected by other means in a more cost-effective manner.

Prior to 2012, to have been qualified to be a bail recovery agent a person must not have been convicted of, pled guilty to, or pled *nolo contendere* to any felony during the prior 15 years; have undergone a Colorado Bureau of Investigation background check; and have taken the POST bail recovery training. These provisions were struck from statute following a sunset review of licensed bail agents, but not as part of a sunset review recommendation. However, similar provisions are still required of every bail agent that is licensed in Colorado. Reinstating these requirements for bail recovery agents is a possible policy alternative.

Another alternative to licensing bail recovery agents is practiced in some other states. There are states that allow only licensed bail agents or their employees to perform bail recovery. If Colorado were to adopt such a regulatory regime, there would be a Colorado licensee directly responsible for someone in his or her employ. It would be his or her responsibility to ensure that all laws are followed.

However, neither of these alternatives to regulation addresses the fact that harm occurs very rarely. Both cases of harm cited in this review occurred prior to the time when the nominal regulation of bail recovery agents was repealed by the General Assembly, in 2012.

Under the prior regulatory provisions, there were no codified standards of practice to be enforced by the DOI. The DOI was merely charged with making sure that licensed bail agents verified that the bail recovery agents whom they hired or with whom they contracted, satisfied the relevant conditions. It was the bail bond agents who were licensed by the DOI and subject to discipline, and not the bail recovery agents. Records pertaining to licensed bail agents suggest that during the time prior to the repeal of the background check and training provisions of law, there was little reported harmful activity involving bail recovery agents.

Accordingly, the evidence strongly suggests that there is no public interest need for any licensure program regulating bail recovery agents.

Collateral Consequences

The fourth sunrise criterion asks:

Whether the imposition of any disqualifications on applicants for licensure, certification, relicensure, or recertification based on criminal history serves public safety or commercial or consumer protection interests.

The Applicant did not propose any specific disqualifications based on criminal history.

However, it did articulate that disqualifiers should be “similar to, but perhaps less strict than, those for POST-certified law enforcement officers.” The Office of the Colorado Attorney General maintains a website concerning POST certification. The website states that no certification can be granted to a person who has been convicted of a felony or certain misdemeanors; and that individuals with domestic violence convictions may not be eligible to serve as peace officers, due to federal laws.⁷

Conclusion

Significantly, bail recovery agents do not provide a service that is patronized by the general public. Bail recovery agents contract with, or are hired by, licensed bail agents.

There are several regulatory schemes employed among states concerning bail recovery. Eight states prohibit the recovery of fugitives by bail recovery agents. In four of those states, there is no commercial bail system. While there are 18 states that have no regulation of bail recovery agents, there are also 18 that require a license.⁸

⁷ Colorado Attorney General. *Basic POST Certification*. Retrieved August 26, 2014, from http://www.coloradoattorneygeneral.gov/departments/criminal_justice/post_board/certification_process/basic_post_certification

⁸ Brian R. Johnson and Ruth S. Stevens, (2013), “*The Regulation and Control of Bail Recovery Agents: An Exploratory Study*” (2013). Peer Reviewed Publications. Paper 3. pp. 196-200. Retrieved August 22, 2013, from <http://scholarworks.gvsu.edu/scjpeerpubs/3>,

The purpose of professional regulation is to ensure that certain classes of individuals operate with at least minimum competency. Minimum competency is generally determined by industry or customary standards of operation or practice. States that regulate bail recovery agents generally regulate them together with the bail bond agents who hire them, through a state department of insurance. There are standards of practice which outline what actions are permissible and expected of licensees and what actions are not. The Applicant did not advocate specific standards of practice in its application but did suggest certain minimum training. However, the Applicant did not set forth a rationale as to why a training regime justifies a full licensure regulatory program.

The apparent absence of harm is key in this discussion. Without instances of documented harm to the public health, safety or welfare since the nominal regulation of bail recovery agents was repealed, there is no rational basis to justify increased governmental restriction of the occupation.

Given that the case for any regulation of bail recovery agents is tenuous, the notion that full licensure is necessary, as was requested by the Applicant, is wholly unsupportable. There are no proposed standards of practice; there are very few people who perform bail recovery services on a contract basis; and ultimately it is the responsibility of the person who employs the bail recovery agent to ensure that the person is appropriate for the tasks. Thus, there is no compelling reason to impose a more stringent regulatory regime than is currently in place.

Recommendation – Do not regulate bail recovery agents.