

## **Electronic Monitoring**

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Much like Pre-Trial Release Programs originating in the 1960's, Electronic Monitoring (EM) has slowly and steadfastly integrated itself into the criminal justice system. EM is not new. It was first used from 1964 through 1970 on probationers in Cambridge and Boston, Massachusetts. It has gained widespread use over the past 20 years in the British Isles, Australia and Canada. While almost every jurisdiction originally restricted EM to post conviction individuals, it has recently gathered support as a tool for pre-trial defendants.

Today, there are numerous EM manufacturers and providers who are inundating the law enforcement and criminal justice systems with sales presentations and proposals. Even members of the commercial surety business are promoting EM. The Professional Bail Agents of The United States (PBUS), Armando Roche/Roche Monitoring Services LTD and certain individual bail agents are directly or indirectly promoting its use. Will their efforts backfire and hurt commercial bail? Are they visionaries or are they sleeping with the enemy?

Proponents of pre-trial EM preach the same gospel. Their foremost selling point is that EM reduces jail populations and therefore saves government a lot of money. They claim EM can be used when no other form of release is adequate. That being released on EM allows the defendant to work, spend time with and support their families. The use of EM is likened to an extension of jail detention and can be used to help restrict the defendants movement and as surveillance of their whereabouts. In many respects these are worthy points. However, as with all issues, there are other factors to consider.

It appears in the rush to embrace pre-trial EM and reap the purported savings, many government officials and members of the criminal justice system are losing site of the most important element of granting a defendant pre-trial release. That always has been and must remain utilizing the method that best guarantees the defendant will appear in court to face the charges. When that basic and important principle is overlooked justice is not well served. There is little if any evidence to show that EM on its own has any positive effect on defendant's pre-trial appearance rates. When used in conjunction with other conditions and release methods such as surety bonds the appearance rates are at least equal to traditional monetary bail.

The arguments against wholesale use of pre-trial EM are many and come from a variety of sources. Some are concerned that much like PTR Programs, EM will be ordered for defendants who do not require it and would do fine without a monitor and thus would be

forced to pay for something that is not needed. Others consider it a form of punishment prior to conviction and say it evokes more onerous pre-trial conditions than are necessary. Civil Libertarians worry about the “prisonization” of society, the Big Brother effect, intrusions into the lives of the wearer and their family, violations of the Right to Privacy, the public appearance of guilt, and the “net widening” of law enforcement and government control over individuals. Another argument is whether the time spent under EM, which proponents tout as extended detention, will count as time served for sentencing purposes.

In addition, problems relating to equipment failures and false violation notices concern many defense attorneys. Because the use of EM is fee based some worry about discrimination. They argue the well off can afford it while the poor can not. It is a fact that EM can not stop a defendant from fleeing or committing new crimes and depending on the system in use could take days to register a violation or removal. Even with real time notification there is no guarantee authorities can respond quickly enough to catch a fleeing subject or prevent a crime. There is no evidence that EM lowers re-arrest or recidivism rates.

Other questions are: Is it possible judges could order EM just because it is the newest “cool” thing to come along? Today, everyone loves the latest gee whiz gizmos the electronic geniuses come out with. Can EM be likened to a real life video game? Who decides which monitoring companies are to be favored? Could it lead to corruption? Could there be a for profit conflict if monitoring companies do not disclose failures or violation rates? How dangerous is it to give civilians authority to act on behalf of the state as it relates to pre-trial defendants? These and many other questions remain unanswered.

Can EM be a useful tool in the pre-trial release of defendants? Yes, it can be, provided it is used as an additional tool or condition and not as the only condition of release. Since EM can not prevent defendants from fleeing or committing additional crimes it should not be seen as a pre-trial panacea. Hopefully, informed judges will realize this and use it wisely.

State legislatures across America are considering bills to allow EM as both a pre-trial and post conviction tool. Some are wisely placing limits and restrictions on its use. At least one is considering whether or not to allow licensed bail agents to also be EM retailers. Any entity considering EM for pre-trial use should seriously consider the following suggestions:

1. Use only on repeat offenders and certain violent or sexual crime cases.
2. Use only on remanded defendants who have not obtained release else wise.
3. Use only if less onerous conditions will not suffice.
4. Use only with the consent of the defendant.
5. Use only with other assurances such as a monetary bail bond.

6. If ordered, the least obtrusive method of EM should be used.
7. To avoid conflict and favoritism issues, bail agents should be prohibited from being EM retailers.

In conclusion, EM has the potential to be a cost effective pre-trial tool. However, there are still many legal, ethical, and technological issues to resolve. In spite of advances in EM technology, concerns of failures and tampering remain. “Net-widening” and privacy/civil rights issues are also unresolved. Policies to ensure the least intrusive method of EM is ordered must be adopted. Finally, procedures to monitor and regulate administrators and providers for unethical or illegal practices must be in place.