

CHAPTER 12 – BAIL- Criminal Orders of Protection

STATUTORY REFERENCES: **RSA 173-B: 9 (Violation of Protective Orders; Penalty)**
 RSA 597 (Bail and Recognizance)
 RSA 597:2 (Release of Defendant Pending Trial)
 RSA 21-M (k) (Rights of Victims of Crime)

A. BAIL FORMS

PROTOCOL 12-1

Form NHJB-2422-DS, entitled Domestic Violence/Stalking Criminal Order of Protection including Orders and Conditions of Bail should be used for issuing bail in cases where there is a domestic violence related, stalking or sexual assault criminal case. The new bail form explicitly addresses restrictions on personal contact, possession of firearms, and use of alcohol and drugs.

COMMENT

The first page of NHJB-2422-DS is based on a national model so that the order will be recognizable and enforceable across the country.

B. GUIDELINES FOR ISSUING BAIL AND CRIMINAL PROTECTIVE ORDERS PENDING ARRAIGNMENT

INTRODUCTION

In general, a person is entitled to pretrial release, the conditions of which will be dependent upon the court's assessment of whether the defendant poses a risk of flight or danger to himself/herself or another. Pursuant to RSA 597:2, VI, if the charge is a class B misdemeanor, the court shall order, pending arraignment, that the person be released on his/her own recognizance, unless the court determines that such a release will endanger any person in the community.

COMMENT:

A Criminal Order of Protection may be appropriate in felony cases or in a class A or class B misdemeanor.

PROTOCOL 12-2

Where there is a civil protective order that the court or bail commissioner is aware of, the bail order should duplicate the conditions of the civil protective order to the extent allowable under RSA 597, and not simply incorporate conditions of the civil order by reference.

NOTE: Incorporation of a civil protection order by reference will not provide conditions of bail that survive in the event the petition is withdrawn or the civil case is dismissed.

COMMENT

Not all of the conditions allowed for protective orders under RSA 173-B are authorized by RSA 597, specifically conditions having to do with child support and visitation.

PROTOCOL 12-3

When determining whether a criminal protective order should be issued with bail in domestic violence, stalking and sexual assault cases, the judge or bail commissioner shall talk with the representative from the arresting agency to make an assessment about the nature of the case. Specifically, inquiry should be made as to the facts of the case, including relationship of the parties, current charges and information from the scene. Conditions of bail are extremely important in those cases in which the defendant is entitled to pre-trial release.

NOTE: If the bail will include conditions of release that restrain the defendant from committing acts of abuse, and prohibit harassing, stalking or threatening the victim, or engaging in conduct which would place the victim in reasonable fear of bodily injury, then the criminal protective order should be used.

PROTOCOL 12-4

RSA 597:2, III-a specifically authorizes the court or justice (this includes bail commissioners) to order preventive detention without bail, or to impose alternative restrictive conditions such as electronic monitoring, in cases involving domestic violence related offenses, where there is clear and convincing evidence that the defendant poses a danger to another.

COMMENT

RSA 597:2 encourages an in depth assessment and analysis of whether the defendant in a domestic violence case poses a danger. The statute lists seven examples of conduct to be considered by the court as evidence that the defendant poses a danger. They are:

- a. Threats of suicide;
- b. Acute depression;
- c. History of violating protective orders;
- d. Possessing or attempting to possess a deadly weapon in violation of an order;
- e. Death threats or threats of possessiveness toward another;
- f. Stalking; and
- g. Cruelty to or violence directed towards pets.

Research has shown that each of these listed factors may be a strong indicator of future violence or lethality.

Other risk factors identified by the Domestic Violence Fatality Review Committee of the Governor's Commission on Domestic and Sexual Violence that the court or bail commissioner may want to consider are:

- a. Escalation of physical violence;
- b. Escalation of other forms of abuse;
- c. Sexual abuse of the victim;
- d. Recent acquisition or change in use of weapons;
- e. Suicidal ideation, threats or attempts;
- f. Homicidal ideation, threats or attempts;
- g. Change in alcohol or other drug use/abuse;
- h. Stalking or other surveillance/monitoring behavior;
- i. Centrality of the victim to the perpetrator ("he/she's all I have");
- j. Jealousy/obsessiveness about, or preoccupation with, the victim;
- k. Mental health concerns connected with violent behavior;
- l. Other criminal behavior or injunctions (e.g., resisting arrest);
- m. Increase in personal risk taking (e.g., violation of restraining orders);
- n. Interference with the victim's help-seeking attempts (e.g., pulling a phone jack out of the wall);
- o. Imprisonment of the victim in the home;
- p. Symbolic violence including destruction of the victim's property or harming pets;
- q. The victim's attempt to flee the batterer or to terminate the relationship;
- r. Batterer's access to the victim or the victim's family;
- s. Pending separation, divorce or custody proceedings; and
- t. Recent termination from employment.

PROTOCOL 12-5

Preventive detention at the time of arrest may be authorized by a bail commissioner if there has been a domestic violence-related criminal matter, i.e., where a person is charged with any offense listed in RSA 173-B: I (assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, or harassment).

PROTOCOL 12-6 Mandatory Detention

When a defendant is arrested for violation of a protective order issued pursuant to RSA 173-B or RSA 633:3-a, the defendant **must be detained until arraignment**, pursuant to RSA 173-B: 9, I (a). It is not necessary for the bail commissioner to write a bail order in these cases.

NOTE: The bail commissioner should remind the law enforcement agency to contact the court for arraignment.

C. ENTRY OF ORDERS BY BAIL COMMISSIONERS

PROTOCOL 12-7

All such bail and criminal protective orders issued by bail commissioners shall be filed with the court (this may be done by fax) before the end of the next business day.

D. BAIL CONSIDERATIONS AT ARRAIGNMENT

In addition to the Protocols above, the following Protocols should be employed at arraignment.

PROTOCOL 12-8

The judge shall review the criminal order of protection at the time of arraignment. After the judge's review of the order, it will become final for purposes of disqualifying the defendant from purchasing a firearm under federal law; the box on the first page of the order should be checked by the judge. Minor changes to the order of protection should be handwritten on the bail order, signed and dated. If the judge makes major changes to the content of the order, the new order should be issued. This order will have the same PNO number as the previous order.

PROTOCOL 12-9

Whenever possible, the prosecuting agency should be asked to provide a hard copy of the following documents: The defendant's criminal history, including NH criminal record check; NH license check; motor vehicle history; domestic violence restraining order history, if known; Triple I check (interstate); and FBI criminal check. The judge should make a note in the court file whether the documents were presented. In any event, the court should require the law enforcement officer to at least make an oral presentation of the defendant's criminal record. In the event that the defendant was arrested without a warrant and detained the offer of proof should be accompanied by an affidavit (known as a Gerstein affidavit (Gerstein v. Pugh, 420 U.S. 103 (1975))).

PROTOCOL 12-10

In domestic violence-related criminal cases, all courts must perform a search of their own records to determine the existence of any current or expired domestic violence restraining orders that may be relevant to the inquiry on the issue of safety or preventive detention and to guarantee that any outstanding orders are consistent in their terms.

PROTOCOL 12-11

Preventive detention without bail *may* be ordered by the court at arraignment in the following circumstances:

- a. If there has been a violation of a domestic violence protective order issued pursuant to RSA 173-B, RSA 633-3-a, RSA 458:16, III, or RSA 461-A and there is clear and convincing evidence the person poses a danger to another; or
- b. If there has been a domestic violence-related criminal matter, i.e. where a person is charged with any offense listed in RSA 173-B:1, I (assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, or harassment).

COMMENT

Judges are reminded that it may be appropriate to grant a civil protective order, if requested by a petitioner, in addition to the criminal protective order even if a defendant is held without bail, because of the additional protection available under an order issued pursuant to RSA 173-B.

PROTOCOL 12-12

After a determination of dangerousness, the court must assess the recidivism risk by inquiring about past violation of domestic violence orders or related offenses. The court must also assess the risk of flight by inquiring about attachment to the community and residential history.

PROTOCOL 12-13

As an alternative to preventive detention, the court may issue a criminal order of protection with restrictive conditions including, but not limited to, electronic monitoring and supervision.

COMMENT

Electronic monitoring is not available in all sections of the state. It is generally coordinated by the Department of Corrections, Probation and Parole, at a cost to the defendant. Before imposing electronic monitoring as a condition of release, the court

should obtain assurances from the Department of Corrections, or other bail monitoring services, that such monitoring is available.

PROTOCOL 12-14 Firearms

In a domestic violence-related criminal case, the court should routinely issue an appropriate weapons relinquishment order as a condition of bail. The court shall also include, as a condition of any criminal protective order and condition of bail, a prohibition against purchasing, possessing or obtaining firearms or ammunition.

PROTOCOL 12-15

The defendant and the State are permitted to file motions to amend bail (RSA 597:6-e, D). Filings by the alleged victim may be accepted at the discretion of the court and should be copied to the prosecutor and the court shall provide a copy to the defendant.

E. BAIL PENDING APPEAL

PROTOCOL 12-16

When a person has been found guilty of a misdemeanor in the district court and is either awaiting imposition of the sentence or has filed a de novo appeal, the court must reconsider bail in accordance with RSA 597:1. The same considerations set forth in Section D: Protocols 12-8 through 12-15 should be followed.

F. VICTIM NOTIFICATION OF BAIL ORDERS

PROTOCOL 12-17

When issuing criminal protective orders and conditions of bail in domestic violence cases, courts should address the issue of victim notification with the prosecutor at the arraignment in order to guarantee that proper notification is made.

COMMENT

It is important that victims of domestic violence be made aware of all outstanding orders for protection, including bail orders. Since the court system is often not aware of the victim's location, the prosecuting agency is the most likely contact point.

G. USE OF THE DOMESTIC VIOLENCE REGISTRY

PROTOCOL 12-18

For Criminal Protective Orders issued by a bail commissioner the order shall be returned to the court before the close of the next business day. Staff shall fax the order from the bail commissioner to the AOC on the day that it is received by the court, for entry into the Protection Order File. The AOC DVPOR Fax # is (271-8485).

PROTOCOL 12-19 Entry of the Criminal Order of Protection into NCIC

All criminal orders of protection issued by the court shall be refaxed to the AOC for entry into the Protection Order File on the date of issuance by the judge.

PROTOCOL 12-20

Upon final disposition of the case, the bail order expires. Staff shall notify the AOC of the termination of the protective order.