

BAIL COMMISSIONER HANDBOOK

2019

New Hampshire Judicial Branch
Circuit and Superior Court

Available online at <http://www.courts.state.nh.us/bailcommissioners>

Bail Commissioner’s Handbook
2019 Edition

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I. INTRODUCTION

This handbook was written as a guide for bail commissioners who serve in the Circuit Court and Superior Court of New Hampshire. Its purpose is to document those practices, policies and procedures that bail commissioners should follow when performing their statutory responsibilities. Newly appointed bail commissioners will find this handbook useful as an orientation and training manual, while experienced bail commissioners may use it as a reference document.

Annually, during the month of September or October, a judge from each Circuit Court is mandated by law to hold a meeting with all bail commissioners who serve under the jurisdiction of the judge's court. The meeting is held under the direction of the Administrative Judge of the Circuit Court. The purpose of these meetings is to educate bail commissioners on changes in the laws concerning their powers and duties. It is an opportunity for bail commissioners to ask questions and make suggestions for practice changes. A copy of the applicable laws concerning bail commissioners and a copy of the latest edition of this handbook will be provided at the annual meeting.

A. HOW OUR BAIL SYSTEM EVOLVED

Our present bail system evolved from early English law. Under the English system, one individual assumed the responsibility for the appearance of another in court. If the accused failed to appear at trial, the person responsible, called a surety, had to pay the fine of the defendant. As time went on, it became customary for the surety to deposit a fixed amount of money with the court in exchange for the release of the accused. If the accused failed to appear, the amount deposited by the surety was forfeited to the court. Eventually the bail system provided for the accused to post money for his appearance, without requiring a surety.

B. THE ROLE OF THE BAIL COMMISSIONER

Chief Justice Warren Burger once likened the “adversary” system of justice in the United States to a “three-legged stool”: the court, prosecution, and defense each represent a leg of the stool. Under the adversary system, the prosecution, represented by the police, county attorney, or attorney general, presents evidence against the defendant. Defense counsel presents evidence on behalf of the accused, and the court weighs the information to reach an impartial determination of guilty or not guilty.

A bail commissioner is an officer of the court and is therefore required to be an impartial representative of the court. As an officer of the court, the bail commissioner is subject to the Judicial Code of Conduct (<http://www.courts.state.nh.us/rules/scr/scr-38.htm>). There is an expectation that all bail commissioners adhere to the mission statement of the judicial branch, which states:

To preserve the rule of law and protect the rights and liberties guaranteed by the United States and New Hampshire Constitutions, the courts will provide accessible, prompt, and efficient forums for the fair and independent administration of justice, with respect for the dignity of all we serve.

It is important to remember that at the time bail is fixed, there has been no determination of whether a defendant is guilty or not and there is a legal presumption of innocence. The responsibility of the bail commissioner is to make a fair and equitable decision regarding the pre-trial release of a person accused of committing a crime. While information provided by the police regarding the defendant's behavior at the time of arrest should be considered, police recommendations should be considered in conjunction with objective criteria gathered from the accused and other reliable sources. It is imperative that the bail commissioner treat the defendant with dignity and respect throughout the bail process.

II. WHAT IS BAIL?

A. PURPOSE OF BAIL

The purpose of bail is to insure the appearance in court of a person who has been accused of a criminal offense, without needlessly depriving the accused of his or her right to freedom, while considering the safety of the community, any alleged victim, and the defendant. Most persons arrested for an offense will be eligible to be released pending judicial proceedings so long as they comply with provisions of the bail statute. There are exceptions to this general rule and they are set by statute:

B. OFFENSES INELIGIBLE FOR BAIL

Murder

Bail commissioners have the power to fix the amount of and receive bail, except that in cases of murder, the power lies in the superior court alone (RSA 597:18, 597:4).

Offenses Punishable by Life Imprisonment

Any person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail (RSA 597:1-c).

Fugitive from Justice Charge

A bail commissioner may not set bail when an individual is arrested on a fugitive from justice charge (RSA 612:16).

Violation of a Domestic Violence Protective Order

A bail commissioner may not set bail on a complaint that alleges violation of a domestic violence protective order (RSA 173-B:9) or a protective order under the Child Protection Act (RSA 169-C:21-a). See RSA 597:2, VI.

C. PERSONS INELIGIBLE FOR BAIL

Probationers and Parolees

A bail commissioner may not set bail if a person on probation or parole for a conviction of a violent crime (murder, attempted murder, manslaughter, aggravated felonious sexual assault, felonious sexual assault, first degree assault, or negligent homicide) or a substantially similar crime in any state or federal court in this or any other state is arrested based upon a judicial finding of probable cause to believe that a person has committed a violation of RSA 630 (Homicide), RSA 631 (Assault), RSA 632-A:2-4 (Sexual Assault) or RSA 633:1-3 (Kidnapping

and False Imprisonment); such person shall be detained without bail pending a bail hearing before the court (RSA 597:1-d).

D. NEW OFFENSE AFTER RELEASE ON BAIL

For persons charged with an offense who, at the time the offense was committed, was released pending trial:

- A bail commissioner *may release* such person in accordance with RSA 597:2 if the bail commissioner finds there are conditions of release that will assure the person will not flee or pose a danger to himself or herself or others in the community, and that such person will abide by such conditions.
- RSA 597:2, VIII provides that if a person is charged with an offense while on release pending trial for a felony or misdemeanor, such person *may be detained* for not more than 72 hours from arrest, excluding Saturdays, Sundays and holidays.

E. TYPES OF BAIL

There are two categories of bail used, monetary bail and non-monetary bail.

Studies have shown that the imposition of monetary bail sometimes seems like discrimination against the poor and that the amount of bail is too often based solely on the nature of the offense, with little regard for other important factors (see Section on “Making the Release Decision”). Bail commissioners must exercise caution when imposing cash bail as it could raise a constitutional question of equal protection under the N.H. Constitution and the Fourth Amendment to the U.S. Constitution. Absent factors that indicate the defendant will likely not appear or is a threat to the safety of himself/herself or to others, the bail commissioner should consider personal recognizance bail, possibly including an unsecured appearance bond, rather than monetary bail (RSA 597:2).

1. Non-Monetary Bail:

Prior to 1969, monetary bail was used almost exclusively as the method for insuring an accused’s appearance at trial. During the sixties, however, studies of the bail system demonstrated that methods other than monetary bail could be used effectively to insure an accused’s appearance in court. These studies showed non-monetary forms of bail could be used as effectively as cash bail if information was gathered about the defendant’s family, residence, employment history, etc. Properly used, non-monetary bail with conditions, as necessary, makes it possible to release persons without cash or corporate surety bail.

a. Personal Recognizance (P.R.) With/ Without Conditions

The most common form of non-monetary bail is personal recognizance bail, whereby the accused is bailed upon his or her promise alone to appear in court. In New Hampshire, an individual can be bailed on personal recognizance without conditions (RSA 597:2).

The bail commissioner is empowered to set personal recognizance bail with specific conditions IF conditions are necessary. The accused is released subject to certain specific conditions governing his/her use of time, travel, association with other people,

etc., to insure the safety of others or the defendant, and to maximize the likelihood of the defendant's appearance in court. The bail commissioner must be able to articulate specific reasons for the setting of additional conditions of bail. The defendant or the State may request a hearing on the conditions of bail before a judge within 48 hours from the time bail is set by a bail commissioner, Sundays and holidays excepted (RSA 597:6-e). Types of conditions that may be used should be discussed with the presiding judge.

b. Unsecured Appearance Bond

If mere personal recognizance is insufficient, the bail commissioner may require in limited circumstances the execution of an unsecured appearance bond. In the past, this bond had been used in every case where personal recognizance bail had been set; however recently its use has been curtailed to only those situations in which personal recognizance has been deemed insufficient and the court wishes to include a financial obligation (but not actual cash bail).

c. Third-Party Release

Third-party release is a form of non-monetary bail whereby the accused is released into the custody of a designated person or organization. Under this form of bail, the third party's promise that the accused will appear in court is deemed sufficient guarantee for the release of the accused. A responsible adult must agree to supervise the defendant and report any violation of a release condition to the court. The adult assures the court that the defendant will appear as required, will abide by all bail conditions as set, and will not pose a danger to the safety of the community. The personal surety should sign the conditions of release and be given a copy. This might be useful in situations where the accused is intoxicated and perhaps unable to understand the bail process.

2. Monetary Bail:

Pursuant to RSA 597:18, bail commissioners are empowered on application of a person who is arrested for a bailable offense, at any time before his/her arraignment, to fix the amount of, and receive, bail in the same manner as the court might do, except in cases provided for by RSA 597:4 (requiring bail pending a murder proceeding to be set by the superior court).

The purpose of bail is, again, to insure the defendant's appearance in court, while providing for the safety of the community, any alleged victim and the defendant. Bail is not a process whereby the defendant pays a fine or begins serving a sentence in advance, thus eliminating the obligation to appear in court.

Monetary bail comes in three forms:

a. Cash Bail

Cash bail is the most common form of monetary bail. When cash bail is imposed, the accused is required to pay over to the bail commissioner a certain amount of cash to insure that he or she will appear in court. The amount of cash bail should not be so great that the person will be detained pretrial simply because he or she cannot make bail (RSA 597:2, III(b)(1)).

b. Corporate Surety Bail

Bonds are another form of monetary bail; however, instead of a cash sum presented, a licensed bondsman provides a bond in the sum set by the bail commissioner, to guarantee the defendant's appearance in court. Bail commissioners should be sure to check the bond. The amount may be greater than the bail but should never be less. It is a good practice to write the bail/power number on the bail bond form as well should the two be separated.

RSA chapter 598-A governs the actions of professional bondsmen. The clerk of court maintains a list with the names of professional bondsmen in each jurisdiction. If the accused fails to appear, the corporate surety bail is forfeited and the bondsman, after notice, must submit the amount of the bond to the court. If a professional bondsman makes bail, the bail commissioner may be required to travel to the correctional facility to accept the bond and complete the bail paperwork.

c. Cash by Personal Surety

Another individual can also post cash bail on behalf of the person who has been arrested. The individual posting bail, the personal surety, is assuring the appearance of the defendant at court hearings. In that instance the bail paperwork must indicate that the surety has posted the bail on behalf of the defendant. The surety is then added as a party to the case. Should the surety wish to have bail revoked and returned, the surety may file a motion seeking that relief but will likely be required to produce the defendant before the court so that the defendant may post bail from another source.

Sometimes sureties will release the bail to the defendant at the time it is posted so that the money may be used by the defendant to fulfill financial obligations. In that case, it may be returned to the defendant when either the case closes or bail is amended to Personal Recognizance (P.R.). The surety in such a case should state unequivocally on the bail bond that money is released to the defendant. Absent that indication, the money should be returned only to the surety.

If monetary bail is imposed, the bail should be set as cash/corporate surety, as opposed to cash only. A bail commissioner should never set monetary bail in violation-level cases. Cash bail should never be set for a person charged with a class B misdemeanor: the person should be released on his or her personal recognizance, unless such release would endanger the safety of the person or the public (RSA 597:2, IX).

III. DUTIES OF THE BAIL COMMISSIONER

A. AUTHORITY OF A BAIL COMMISSIONER

The authority of a bail commissioner encompasses two distinct roles: the quasi-judicial function of setting bail, and the ministerial function of accepting bail that has been set by a court.

1. Authority to Set Bail

New Hampshire statutes provide bail commissioners with the authority to set bail prior to arraignment (first court appearance) for persons accused of committing a criminal offense. Such decisions are to be made without "undue delay." Therefore, the purpose of having bail

commissioners is to make certain that qualified person(s), acting as agents of the court, are available during non-business hours (or at any time when a court or judge is not readily available to conduct an arraignment) to make rational, informed, and prompt bail decisions. It is the duty of the bail commissioner to determine the most appropriate and least restrictive form of bail which will insure the defendant's appearance in court, the safety of the public and the accused's right to freedom.

2. Authority to Accept Bail

A bail commissioner may accept bail that has been set by the court or by a bail commissioner. If the bail commissioner is accepting bail on behalf of a person who has been arraigned, where bail was set by the court at arraignment, the bail commissioner may not modify the bail amount or the bail conditions set by the court.

If the person for whom the bail is to be accepted is arrested based upon an Electronic Bench Warrant (EBW), the bail commissioner should consider what type of bail the judge has set on the EBW. If the EBW reflects that a judge has set monetary bail (cash or surety), then the bail commissioner can accept the bail, but the defendant will nonetheless need a court date before the originating court, that is, the court that issued the EBW. The same response is appropriate if the judge has recommended, but not set, monetary bail (in which case, the EBW will be coded "Cash Bail Recommended"). In either case, the bail commissioner should refrain from amending the amount or conditions of bail imposed by the judge. If, however, the EBW bail type is "to be determined," or "TBD," the bail commissioner may determine whether to set bail, either monetary or personal recognizance, as well as any conditions of bail, and shall direct the defendant to appear before the originating court by video arraignment if the defendant does not make bail, or before the originating court if he does make bail.

There is one category of EBW that may be settled by a bail commissioner's acceptance of funds from a defendant: "cash to settle," or CTS, bail. In such a case, if the defendant signs a waiver of bail and pays the full amount due on the EBW, the EBW is considered resolved. The CTS bail is also the only category of bail expressed in an EBW that the bail commissioner is given authority to reduce. If the defendant does not have the money to post cash bail that was set for an unpaid fine, then the bail commissioner is instructed to reduce bail to personal recognizance and the defendant shall be bailed to appear at the next session of the originating court.

Bail Commissioners are authorized to accept bail money in Family Division civil contempt proceedings; however, they may not change or modify the bail set by the court.

B. TERMS OF OFFICE/ QUALIFICATIONS

Bail commissioners shall be commissioned for five-year terms (RSA 597:17). The bail commissioner must be a justice of the peace (RSA 597:15; RSA 597:15-a) and it is the responsibility of the person selected to be a bail commissioner to obtain that appointment.

C. RELATIONSHIP WITH JUSTICE AND CLERK

The Administrative Judge of the Circuit Court appoints Circuit Court bail commissioners, while the Chief Justice of the Superior Court appoints Superior Court bail commissioners for the county over which the judge presides. The bail commissioner is required by statute (RSA

597:19) to make returns (documents, and cash, if any) to the clerk of court before the accused party is due to appear in court.

D. ETHICS/CONFLICTS

No person whose appointment would present a conflict of interest or an appearance of bias in the carrying out of his or her duties as a bail commissioner may be appointed as a bail commissioner (RSA 597:15; RSA 597:15-a). There is the potential for conflict, or an appearance of conflict, if the bail commissioner has another relationship, besides bail commissioner, with any law enforcement department. This could be a familial or business relationship with an officer in the department, for example. Any potential conflict should be revealed to the administrative judge. The administrative judge will determine whether or not a conflict exists.

E. ACCOUNTING/ RECORD KEEPING

Bail commissioners are required to account for all monies received in the bail process and to remit funds to the court on a timely basis. Procedures governing these activities are discussed in detail in Section VII of this manual.

F. COMPENSATION

Bail commissioners shall be entitled to a fee of \$40.00 in cases where bail is set, or where bail is collected after being set by the court. A bail commissioner is entitled only to a single \$40.00 fee for setting and collecting bail in the same transaction. Section VIII of the Handbook sets out policies for imposing and collecting fees (RSA 597:20). If the defendant is indigent, the fee will be waived (RSA 597:20). And our Supreme Court has held that bail commissioners must inform arrestees that if they cannot pay the fee at the time of setting bail, then the fee may be paid over time or it may be waived by the court for indigency. Follansbee v. Plymouth Dist. Court, 151 N.H. 365, 371 (2004).

IV. MAKING THE RELEASE DECISION

A. NEED FOR OBJECTIVE CRITERIA

While several forms of pre-trial release exist, the difficult task for the bail commissioner is to decide which form of bail to use. Bail commissioners frequently lack sufficient objective criteria with which to make a bail decision, and must therefore also consider subjective criteria. The more the decision is based on objective facts, the better. The establishment and consistent application of objective criteria help not only the bail commissioner but also the court in its subsequent review of the bail commissioner's release decision. Further, a rational and informed decision based upon objective criteria protects the individual's right to freedom, and saves the expense associated with unnecessary detention.

B. FACTORS TO CONSIDER

- Schedule court appearances as soon as possible for defendants who present a high risk. Willful failure to appear in court and the possibility of re-arrest are more likely to occur if disposition of the case is delayed.

- Pursuant to Circuit Court Rule of Criminal Procedure 4(b), arraignments for defendants who are not detained shall be scheduled no sooner than 35 days from the date of arrest. This rule is inapplicable where another time frame is required by statute—*e.g.*, DWI arraignments, which should take place within 14 business days pursuant to RSA 265-A:3-a; or Administrative Order—*e.g.*, Domestic Violence crimes, which, by virtue of Administrative Order, should be scheduled for arraignment on the court’s next regular session day..
- Pursuant to Superior Court Rule of Criminal Procedure 10, arraignments for defendants who are not detained shall be scheduled no more than 20 days after arrest.

1. Statutory Determinations – Likelihood to Appear and Dangerousness

The Criminal Justice Reform and Economic Fairness Act of 2018 incorporated factors to consider into RSA 597:2, “Release of a Defendant Pending Trial.”

a. Appearance

Persons must be released at pretrial/pre-arraignment on their personal recognizance, or upon execution of an unsecured appearance bond, or cash or corporate surety bail, subject to the condition that they not commit a crime and any other appropriate conditions – **unless** the bail commissioner or court determines **by a preponderance of the evidence** (anything more than 50-50) that the person’s appearance cannot be assured (597:2 III (a)).

Evidence of homelessness or a lack of a mailing address, by itself, does not constitute prima facie evidence that a person will not appear (RSA 597:2, III(c)).

If a person has failed to appear on any previous matter charged as a felony, class A misdemeanor, or driving or operating while impaired, 3 or more times within the past 5 years, there shall be a rebuttable presumption that release will not reasonably assure the appearance of the person as required (RSA 597:2, III(g)).

If the bail commissioner finds that the person’s appearance cannot be assured and thus orders the person to be detained, the bail commissioner should document the facts that led to that conclusion (RSA 597:2, III(d)).

b. Conditions to impose

When determining the amount of the unsecured appearance bond or cash or corporate surety bail, the bail commissioner:

- Shall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition.
- Shall consider whether the person is the parent and sole caretaker of a child and whether, as a result, such child would become the responsibility of the division of children, youth and families.
- Shall consider whether the person is the sole income producer for dependents.

If the bail commissioner determines **by a preponderance of the evidence** that release, even with standard conditions, will not reasonably assure the appearance of the person, then the release order should include the following conditions, as long as the person is not detained solely as a result of the financial condition:

- The condition that the person not commit a crime during the period of release; and
- Any other conditions that will reasonably assure the appearance of the person, which may include:
 - Executing an agreement to forfeit, upon failing to appear within 45 days of the date required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court or justice may specify; or
 - Furnishing bail for his or her appearance by recognizance with sufficient sureties or by deposit of moneys equal to the amount of the bail required as the court may direct; and
- Any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of the person or the public.

c. Dangerousness

If a person is charged with any criminal offense or various specific offenses related to Domestic Violence (see next section), and if the bail commissioner or court determines **by clear and convincing evidence** (a tougher standard to meet than the preponderance of the evidence standard) that release will endanger the safety of that person or the public, a bail commissioner may order preventive detention without bail. In the alternative, the person may be subject to restrictive conditions, such as electronic monitoring and supervision (RSA 597:2, IV).

To determine whether release will endanger the safety of the person or the public, all relevant factors should be considered.

Evidence of substance misuse or homelessness may be considered, but this evidence cannot be the sole basis of a dangerous determination.

2. Factors specific to Domestic Violence

Domestic violence means the commission or attempted commission of one or more of the offenses listed in RSA 173-B:1, I (assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, or harassment) against a family or household member or an intimate partner. That is, if the defendant and victim are romantic partners, spouses, ex-spouses, persons cohabiting (that is, living together in an intimate relationship) with each other, persons who cohabited with each other but who no longer share the same residence, or otherwise related by blood or marriage, the concerns surrounding domestic violence are probably implicated. Domestic violence situations result in a series of additional factors to consider when setting bail, as follows.

a. Preventive Detention

Preventive detention at the time of arrest may be authorized by a bail commissioner if there has been a domestic violence-related criminal matter, e.g., 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) or with violation of a protective order issued under RSA 458:16, III. 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. Conditions of bail are extremely important in those cases in which the defendant is entitled to pre-trial release.

RSA 597:2 also encourages a deeper assessment and analysis of whether the defendant in a domestic violence case poses a danger. The statute no longer lists examples of conduct to be considered by the court as evidence that the defendant poses a danger. Previous versions of the statute enumerated the following factors as potential indicators of future violence or lethality:

- i. Threats of suicide;
- ii. Acute depression;
- iii. History of violating protective orders;
- iv. Possessing or attempting to possess a deadly weapon in violation of an order;
- v. Death threats or threats of possessiveness toward another;
- vi. Stalking; and
- vii. Cruelty to or violence directed towards pets.

These factors are no longer enumerated in the statute, but can nonetheless be considered in the “totality of the circumstances” inquiry that bail commissioners must undertake in determining whether the release will endanger the safety of the person, the victim, or the public.

The court or bail commissioner may want to consider these other risk factors identified by the Domestic Violence Fatality Review Committee of the Governor’s Commission on Domestic and Sexual Violence:

- i. Escalation of physical violence;
- ii. Escalation of other forms of abuse;
- iii. Sexual abuse of the victim;
- iv. Recent acquisition or change in use of weapons;
- v. Suicidal ideation, threats or attempts;
- vi. Homicidal ideation, threats or attempts;
- vii. Change in alcohol or other drug use/abuse;
- viii. Stalking or other surveillance/monitoring behavior;
- ix. Centrality of the victim to the perpetrator (“he/she’s all I have”);
- x. Jealousy/obsessiveness about, or preoccupation with, the victim;
- xi. Mental health concerns connected with violent behavior;
- xii. Other criminal behavior or injunctions (*e.g.*, resisting arrest);
- xiii. Increase in personal risk taking (*e.g.*, violation of restraining orders);

- xiv. Interference with the victim's help-seeking attempts (*e.g.*, pulling a phone jack out of the wall);
- xv. Imprisonment of the victim in the home;
- xvi. Symbolic violence, including destruction of the victim's property or harming pets;
- xvii. The victim's attempt to flee the batterer or to terminate the relationship;
- xviii. Batterer's access to the victim or the victim's family;
- xix. Pending separation, divorce or custody proceedings;
- xx. Recent termination from employment.

When a bail commissioner orders preventive detention, the bail commissioner should note any of the factors that led to that determination on the Orders and Conditions of Bail form, in the "Other" box.

b. Mandatory Detention

In cases which allege a violation of RSA 173-B protective orders or RSA 633:3-a stalking protective orders, the defendant **must** be detained until arraignment, pursuant to RSA 173-B: 9, I(a), and RSA 597:2, VI. The same is true for protective orders filed under the Child Protection Act, RSA chapter 169-C (see RSA 169-C:21). Therefore, there is no role for a bail commissioner.

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

c. Brady Criminal Bail Protective Orders Pending Arraignment

Criminal Bail Protective Orders may only be issued only when the defendant has the following relationship with the victim:

- i. Defendant is married to the victim;
- ii. Defendant is divorced or separated from the victim;
- iii. Defendant has a child in common with the victim;
- iv. Defendant is the parent/stepparent of the victim; **or**
- v. Defendant and victim are currently or have previously been cohabiting in an intimate relationship.

If the relationship between the defendant and victim is not one of the above, issue a regular bail order.

A Criminal Bail Protection Order may be appropriate in the case of felonies, class A or class B misdemeanors.

When determining whether a criminal protective order should be issued with bail in domestic violence 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 following:

- the facts of the case, including
- relationship of the parties,
- current charges,
- whether a Lethality Assessment was conducted by Law Enforcement and if so, the results of the assessment and

- information from the scene.

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.

Filing the bail paperwork with the clerk's office quickly is always critical, particularly if the Defendant qualifies for and wishes to apply for court-appointed counsel. However, if a Brady Criminal Bail Protection Order is issued, the bail commissioner is required to file that the next business day.

C. COLLECTION AND VERIFICATION OF INFORMATION

The effective use of objective criteria in making pre-trial release decisions is contingent upon the quality of information collected. It is unrealistic to assume that in every instance the bail commissioner will have all the information available with which to make a perfectly informed bail decision. However, the following procedures and forms are designed to help the bail commissioner collect the information considered most important and readily available. While verification of all information may not be possible, such as employment data, the majority of the information can be verified at the police station or by placing a call to the defendant's contacts.

A pre-release questionnaire, NHJB-2934-DS, Bail Pre-Release Questionnaire, may be completed for each defendant, though it is not required by the court. The Superior Court or Circuit Court bail order forms both include necessary information from the defendant. Use of the standard questionnaire ensures that consistent and complete information is available to make a release decision. The defendant's mobile phone number should be obtained, if possible, to allow participation in the upcoming text message reminder program. If the contact information is initially completed by the defendant, the commissioner should attempt to verify all responses with the defendant.

Bail commissioners should be careful not to discuss the circumstances surrounding the pending charges or offense, as such discussion may be viewed as a violation of the defendant's rights. It would be inappropriate for the bail commissioner to discuss the alleged offense with the defendant.

Verification of the information provided in the questionnaire may be difficult. Bail commissioners should verify any previous criminal history and pending warrants or charges by checking with the local police.

V. COMPLETING THE BAIL FORMS

At the outset of the interaction between the bail commissioner and the defendant, the defendant must be presented with the **What You Need to Know** (WYNTK) form – **NHJB-3100-DSe**. The bail commissioner completes the top portion of the form, and gives it to the defendant. Neither the bail commissioner nor the court needs to receive a copy. However, the section of the bail order indicating that the defendant has received a copy of the WYNTK form must be

completed if the defendant is released (RSA 597:2, VII). Because the form is not going to the court, bail commissioners may make double sided copies if they wish (no court forms can be double sided). This form advises the defendant of his/her right to the services of a bail commissioner, the fee of said service, the twenty-four hour timeframe for court appearance if a bail commissioner is not requested, the right to pay the bail commissioner at a later date or petition the court to waive the fee, as well as the right to request an attorney, the penalties for violating conditions of bail, and information about witness tampering under RSA 641:5.

After the bail commissioner has made the release decision, there are forms that must be completed to bail the defendant.

When issuing a Criminal Bail Protective Order in cases where there is a domestic violence related criminal case and a qualifying relationship, the **Domestic Violence/ Stalking Criminal Order of Protection including Orders and Conditions of Bail (Brady Criminal Bail Protective Order)-NHJB-2422-DS** must be used for issuing bail. The form may not be modified and must be used in all criminal cases where a criminal protective order is appropriate. The form explicitly addresses restrictions on personal contact, possession of firearms, and use of alcohol and drugs. NHJB-2422-DS uses a national model first page so that the order will be recognizable and enforceable across the country. It is important to complete the front of the order with as much information as is available. If the case is in the Superior Court, the CBPO form is sufficient on its own and no separate Bail Order is needed. If the case is in the Circuit Court, the bail commissioner must fill out and submit both the CBPO and the Circuit Court Bail Order. This is because the Circuit Court needs the dates, offenses and levels of offenses to determine whether defendants are entitled to legal representation.

The Superior Court Bail Order – NHJB-2789-Se, or the Circuit Court Bail Order – NHJB-2369-D, is the form to be used for all bail orders not related to domestic violence. The specific conditions for the defendant's release are to be noted on this form. The form is to be completed by the bail commissioner and signed by the defendant at the time bail is made. The bail commissioner can indicate on the Superior Court Bail Order whether a Nebbia/ source of funds hearing is requested as a condition of bail (RSA 597:2, III(f)).

IF the bail commissioner finds it necessary to set an unsecured appearance bond, OR if the bail commissioner is collecting bail set by the Court, the bail commissioner must complete a **Bail Bond - NHJB-2335-DS**. This form is also to be completed by the bail commissioner and signed by the defendant at the time bail is made. This form has been updated as to the contact information section for surety and defendant information. If personal recognizance bail is set, the bail bond is UNNECESSARY.

Legibility is of the utmost importance on all forms, but particularly so with the bond form. First, the bail commissioner's name must be clear. If it is unclear, it becomes difficult for the court to disburse any bail commissioner's fees that may be collected. It is recommended the bail commissioner use one of the following methods to insure legibility:

1. Clearly print their name below their signature;
2. Attach a business card with preprinted information to the bond form;
3. Use a name stamp, *i.e.* a Justice of the Peace stamp, below their signature.

Legibility is also crucial in regard to the defendant's information on the bond form. Cash bonds are entered in the court's case management system as soon as they are received. This means the bond may be entered before the police department files their complaint(s). The bond and complaint must be linked. If a name is illegible, misspelled, or the first and last names are transposed, the bond and complaint cannot be linked until the discrepancy is resolved. This takes extra time and effort on the part of the court staff. Thus, it is critical that a bail commissioner takes the time to very carefully write out the defendant's name and then verify its accuracy.

In cases where a third party has posted bail for the Defendant, the bail commissioner should also clarify and note on the bond form whether the surety intends to release the bail to the defendant. It is recommended that the surety sign or initial the notation. A clear release (or no release) of bail can save immeasurable trouble later for the court.

Completeness of the form is also imperative, including entry of a statute number for the charge, a charge description, an offense date, and a level of offense. Electronic complaints coming in from the police departments to the courts via J-One also necessitate the inclusion of the Agency Case Number (ACN) on all bail forms. Effective 7/15/2013, defendants charged with an eligible offense must also be advised of their right to apply for counsel prior to arraignment and so it is even more critical to note the offense level on bail forms because the defendant may appear in court seeking counsel prior to the court receiving the complaints.

All bail accepted for a person's appearance at any other court must be remitted to the clerk of that court within 48 hours after receipt of bail, Sundays and holidays excluded.

As for Criminal Protective Orders issued by a bail commissioner, such an 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 Protective Order Registry on the day that it is received by the court. If the Criminal Protective Order is issued during the night, on the weekend or over a holiday when the court is closed for business, a copy should be given to the arresting agency with instructions to FAX it to the Department of Safety at 603-271-1153 so the order may be entered into the state registry. The bail commissioner must nonetheless return the Criminal Protective Order to the court on the next business day, even if law enforcement has already faxed it.

VI. COUNSEL PRIOR TO ARRAIGNMENT

Another duty of the bail commissioner is to ensure that a notice is given to all arrestees charged with class A misdemeanors and/or felonies of their right to apply for counsel prior to arraignment. Bail commissioners should provide arrestees with a **Request for a Lawyer form - NHJB 4044-DSe**. If the arrestee completes the form while the bail commissioner is there, the bail commissioner should collect it from them. The completed Request for a Lawyer form, along with all other bail forms, should be submitted to the court before the close of the next business day.

VII. COLLECTING AND REMITTING CASH BAIL

Bail commissioners are responsible for collecting, recording and remitting cash bail (if any is taken) to the court. This section of the handbook identifies those administrative procedures and policies which are to be followed by bail commissioners at this stage of the bail process.

Bail commissioners are legally liable for all the cash bail they collect. To reduce the risk of loss, all bail collected should be placed in a secure location pending remittance to the court. In those jurisdictions in which large sums of cash bail are frequently taken, bail commissioners are encouraged, under the supervision of the court, to open a non-interest-bearing checking account for the purpose of depositing bail. In no instance should cash bail be placed in a bail commissioner's personal bank account, or co-mingled with personal funds. A checking account provides a safe place to hold cash bail until it can be remitted to the court. It also has the benefit of providing an accurate record of bail deposited, while enabling the commissioner to remit a single check to the court. It is recommended the title "bail commissioner" be included on the check after the bail commissioner's name. This eliminates any question of co-mingled funds.

In more rural areas of the state, where cash bail is infrequently received and banks are not conveniently located, bail commissioners may find that it is not necessary to maintain a checking account for bail. In those instances, bail commissioners should hold cash bail in a fireproof safe or box in their home if it cannot be deposited with the court immediately. If an unusual situation arises and a large amount of cash bail is received by a bail commissioner, it is recommended that the bail commissioner contact the clerk of court immediately, so that the money can be deposited in the court account or make other provisions for its safe-keeping. In all instances, bail commissioners are instructed to remit cash bail to the court as soon as is feasible.

The following guidelines regarding the timely submission of bail to the court are to be followed by all bail commissioners:

1. If a non-interest-bearing checking account is maintained, bail must be remitted to the court at least weekly, and more frequently if directed by the court.
2. If no checking account is maintained, bail must be remitted to the court no later than three days following receipt of bail.

VIII. FEES – PROCEDURE AND POLICY

- A. Bail commissioners are entitled to one fee per defendant, not one fee per offense charged.
- B. Bail commissioners shall not set bail by telephone.
- C. Bail commissioners are not entitled to reimbursement for travel expenses incurred in the performance of their duties.
- D. By statute, court staff who are bail commissioners are entitled to collect the \$40 fee only when called while not on active duty (RSA 597:20).
- D. Under no circumstances should an accused's right to bail be denied because the accused cannot pay the bail commissioner's fee.
- E. If the accused cannot pay the bail commissioner's fee at the time bail is set, the bail commissioner may:
 - 1) Waive his/her fee; or
 - 2) Make arrangements with the accused to pay the fee at a later date.
- F. Bail commissioners are reminded that it is the responsibility of the bail commissioner, not the court, to make arrangements for defendants who cannot pay at the time of service.

- G. Clerks of court are not permitted to pay bail commissioners' fees from court funds.
- H. If the bail commissioner chooses to use electronic devices to receive fees, such as Square or PayPal, it is critical that the bail commissioner understand the federal requirements regarding secure credit card transactions. <http://www.pcicomplianceguide.org/merchants-mobile-device-credit-card-payments.php>
- I. Bail commissioners are court appointees, they are not court employees, and as such, are responsible for accounting for and reporting income received from bail commissioner fees. If you have any questions about this, please consult a tax professional.

NOTE: Under no circumstances may a bail commissioner ever retrieve money, checks, credit cards, ATM or debit cards, or other methods of payment from the personal effects of a detained individual, regardless of whether those items have been secured by law enforcement for safekeeping or located in a vehicle, backpack, or any other personal property of the individual, and regardless of whether the individual authorizes the bail commissioner to obtain those items.

IX. CHECKLIST

- What You Need to Know
- (In a Brady-qualifying relationship DV case) Criminal Order of Protection **PLUS**
 - Circuit Court Bail Order (unless the case involves a felony)
- (In any other case) Circuit Court Bail Order **OR** Superior Court Bail Order
- Bail Bond (IF required for cash, corporate surety or an unsecured appearance bond, not to be used in cases of strict personal recognizance bail)
- Request for a Lawyer