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NEW JERSEY STATE BAR ASSOCIATION

THOMAS HOFF PROL, PRESIDENT
Laddey Clark & Ryan, LLP
60 Blue Heron Road, Suite 300
Sparta, NJ 07871-2608
973-729-1880 • FAX: 973-729-1224
tprol@lcrlaw.com

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Pretrial Release & Detention/Speedy Trial Rules (Criminal)
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Recommended Court Rules to Implement the Bail Reform Law

Dear Judge Grant:

Thank you for allowing the New Jersey State Bar Association (NJSBA) the opportunity to review and comment on the various proposed court rule changes necessitated by the recently enacted Bail Reform Law. Thank you, in particular, for extending the time for comments to ensure that our Board of Trustees had the opportunity to adequately review the proposals.

The NJSBA recognizes the amount of time and effort the Court has devoted to preparing for the implementation of bail reform by Jan. 1, 2017. The Court and the Attorney General's Office are to be commended for the herculean effort both have made to ensure all of the proper policies and procedures are in place, and for working with the NJSBA and other groups to educate those who use the system about the new law.

It is important to reiterate the NJSBA supported the Bail Reform Law, and supported limited filing fee increases to fund its implementation. Our members, however, continue to be concerned about the lack of funding to the counties and the lack of resources for personnel, including pre-trial services personnel, judges, prosecutors and public defenders. The NJSBA is concerned about the potential for additional filing fees being considered to meet those funding needs. As we have noted previously, attorneys and litigants are still grappling with the effects of the original fee increase, and are not able to absorb additional monetary burdens that, rightfully, should be funded by the State.

There is also a concern about the timing of the overall Attorney General guidelines that are to be promulgated addressing the issuance of a Complaint-Summons and a Complaint-Warrant that

form the basis of bail reform. This will be an integral part of the process, and practitioners are anxious to review and familiarize themselves with the guidelines.

With respect to the rule proposals themselves, it was difficult to obtain consensus from both defense counsel and prosecutors, especially since the system will be entirely new and practitioners are not sure what to expect. I will note below the concerns offered by both sides on certain issues for your consideration. The NJSBA hopes the door is left open to consider adjustments where our collective future experience indicates is warranted.

A summary of the concerns expressed by both defense counsel and prosecutors is as follows:

Supreme Court Criminal Practice Committee Report on Bail Reform – Part I Pre-Trial Release

1. R. 3:2-3 – Defense counsel had concerns about a judicial officer, not a judge, taking testimony as to the determination of probable cause for indictable offenses before the issuance of an arrest warrant or filing of a complaint-warrant.

2. R. 3:3-1 – Defense counsel had concerns about individuals other than a Superior Court judge making determinations as to probable cause and whether a complaint-warrant or a complaint-summons should be issued on indictable offenses. In addition, it was recommended that the crime of manslaughter, which does not involve purposeful conduct, be removed from the group of offenses in which a warrant is presumed for detention of the defendant.

3. R. 3:4-2 – Defense counsel had concerns that the proposed rules require the initial bail hearing and first appearance to be held within 48 hours, but the best practice recommendation conveyed to them was that such proceedings be held within 24 hours. Defense counsel noted the importance of holding a hearing within the required timeframe, whether 24 or 48 hours, even when the arrest takes place on a Friday prior to the weekend. The importance of receiving all required discovery at the first hearing if the State seeks detention was also stressed. Furthermore, defense counsel believed that only Superior Court judges should be permitted to conduct first appearances.

4. R. 3:26-1 – Practitioners noted that the Johnson factors and the current bail schedules are being eliminated from the court rules in the proposal, but they will still need to be considered by the Court at an initial bail hearing.

5. R. 3:26-2 – Defense counsel expressed concerns about whether the financial burden placed on defendants of limited means by monetary bail and non-monetary conditions of bail for release would be considered by the Court in making those determinations, as the impact could be significant. An example noted by practitioners was an electronic monitoring device being required as a condition for defendant's release, but where the cost of the device is expected to be borne by a defendant who cannot afford it.

Supreme Court Criminal Practice Committee Report on Bail Reform – Part II Pre-Trial Detention

1. New Rule 3:4A – There were a number of concerns expressed by both prosecutors and defense counsel about what would be permitted and what standards would be utilized for the required detention hearings. Differences were expressed about the extent of discovery that should be required to be provided by the State prior to the detention hearing – all available discovery, or only the discovery relied upon by the State at the hearing. Concerns were expressed about the type and extent of testimony that would be provided at the detention hearing, with defense counsel wanting as much testimony as possible, and prosecutors concerned that the hearing would transform into a mini-trial. There was also concern about whether testimony at the detention hearing would be able to be used at a later proceeding. Finally, concerns were expressed about the three-part standard required to be met for detention, with prosecutors predicting the difficulty in meeting the standard will lead to the release of most defendants, and defense counsel arguing that a high standard is necessary when an individual's liberty interest is at stake.

Again, the NJSBA believes it is important for the Court to be aware of these concerns and to consider whether and to what extent they should be addressed in the final rules that are ultimately adopted. The NJSBA urges the Court, though, to re-examine the rules at regular, periodic intervals once bail reform is implemented and users of the system gain real-life experience with how it works.

The NJSBA does not have any comments on the Report of the Municipal Court Practice Committee on Part VII Court Rules Necessary to Implement the Bail Reform and Speedy Trial Law, or the Report of the Bail Judge Subcommittee of the Conference of Criminal Presiding Judges.

Again, I commend the Court for the work being done to meet the Jan. 1 deadline to implement the new Bail Reform Law. The NJSBA appreciates the opportunity to participate in this important rule-making process, and the active role the Court has taken to ensure our members are educated about the new processes and standards that will be required of them.

If you have any questions regarding any of our comments, please do not hesitate to contact me.

Respectfully,

Thomas H. Prol
President

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cc: Robert B. Hille, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director