

NOTICE TO THE BAR

BAIL FORFEITURE RECOVERY PROCESS; BAIL BOND SYSTEM – REPORT OF THE BAIL JUDGE SUBCOMMITTEE OF THE CONFERENCE OF CRIMINAL PRESIDING JUDGES – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the February 2016 Report of the Bail Judge Subcommittee of the Conference of Criminal Presiding Judges, which is published with this notice. The Bail Judge Subcommittee was formed to identify issues and concerns with the bail forfeiture recovery process and the bail bond system, some of which were included in the Report of the State of New Jersey Commission of Investigation, *Inside Out, Questionable and Abusive Practices in New Jersey's Bail-Bond Industry* (May 2014) (<http://www.nj.gov/sci/pdf/BailReportSmall.pdf>).

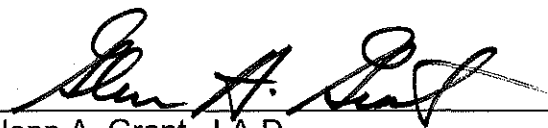
The recommendations of the Bail Judge Subcommittee consist of proposed rule amendments and non-rule actions covering the following topics: (1) Bail Forfeiture Recovery Process; (2) Discounted Bail Options; (3) Bail-Agent Access Rules for County Jails; (4) Licensing of Bail Agencies and Bail Agents (5) Oversight and Enforcement of Bail Agencies and Bail Agents; (6) Collection of the Filing Fee for Persons Released on Their Own Recognizance; and (7) Failure to Collect the Filing Fee when Bail was Posted.

Please send any comments on the report in writing by June 9, 2016 to:

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Comments on the report may also be submitted by e-mail to the following address:
Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). Comments are subject to public disclosure upon receipt.



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 9, 2016

**REPORT OF THE
BAIL JUDGE SUBCOMMITTEE
OF THE CONFERENCE OF
CRIMINAL PRESIDING JUDGES**

Endorsed by:

**Judicial Council
Judiciary Management and Operations Committee
Administrative Council
Conference of Criminal Presiding Judges
Conference of Civil Presiding Judges
Conference of Municipal Presiding Judges
Conference of Bail Forfeiture Judges
Conference of Criminal Division Managers
Conference of Municipal Division Managers**

(February 2016)

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I. SUBCOMMITTEE'S CHARGE

The Bail Judge Subcommittee of the Conference of Criminal Presiding Judges (hereafter Subcommittee) was charged with examining the current bail system in New Jersey. The Subcommittee was asked to identify the issues and concerns with the bail forfeiture recovery process and the bail bond system, some of which were included in the Report of the State of New Jersey Commission of Investigation, *Inside Out, Questionable and Abusive Practices in New Jersey's Bail-Bond Industry* (May 2014), (hereafter SCI Report).

The State Commission of Investigation (hereafter Commission) found that the bail-bond system in New Jersey was "highly prone to subversion by unscrupulous and improper practices that make a mockery of the public trust." See SCI Report at 1. Moreover, the SCI Report stated that "Operating in the shadows of poor government oversight, the system is dominated by an amalgam of private entrepreneurs who profit from the process but are subject to weak controls easily manipulated or ignored with little or no consequence." Ibid. Additionally, the Commission found that the bail forfeiture recovery process and amounts collected were not uniform statewide. Based upon their findings, the Commission recommended numerous changes to the bail bond system.

The Subcommittee's primary focus was to identify the problems in the bail bond system and the bail forfeiture recovery process, and recommend practical steps to improve them. Due to the bail reform laws, effective January 1, 2017, other Administrative Office of the Courts (hereafter AOC) Committees are in the process of recommending changes to our bail system to conform with the statutory changes, N.J.S.A. 2A:162-15 et seq., and the constitutional amendment,¹ thus, those areas are beyond the scope of this Subcommittee.

II. LEGAL UNDERPINNINGS OF THE CURRENT BAIL SYSTEM IN NEW JERSEY

A. The Right to Bail

The right to bail is guaranteed by N.J. Const. art. I, ¶ 11, which provides that "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great." This provision has been incorporated in Rules 3:26-1 and 7:4-1. Further, this constitutional provision has been

¹ N.J. Const. art. I, ¶ 1, effective January 1, 2017, has been revised to state: "All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process."

revised, effective January 1, 2017. See footnote 1. Additionally, our Constitution mandates that “[e]xcessive bail shall not be required.” See N.J. Const. art. I, ¶ 12.

Bail is defined as money or a bond deposited with the court to obtain the temporary release of the defendant on the condition that the defendant will appear in court, when required, and comply with the conditions of bail. See Attachment A of Directive # 13-04, “Glossary of Terms,” § VI. at 6. When bail is set it can be satisfied in the following ways: (1) Cash bail (Full Cash² or Ten-Percent³); (2) Corporate Surety Bond⁴; (3) Property Bond⁵; and (4) Release on their Own Recognizance (ROR Bail).⁶

Regardless of the type of bail set, the defendant will sign the *New Jersey Bail Recognizance*⁷ form acknowledging that he or she will appear at all scheduled court appearances, and that he or she agrees to the Conditions and Special Conditions as set forth in the Bail Recognizance. See R. 3:26-1(a); see also Attachment A of Directive # 13-04.

B. Overview of the Bail Forfeiture Process

Bail forfeitures are governed by Rules 3:26-6 (Superior Court) and 7:4-5 (Municipal Court). The procedures for determining remission (refunds) of bail are set forth in Directive # 13-04, *Revision to Forms and Procedures Governing Bail and Bail Forfeitures*, issued November 17, 2004. Additionally, the *Remittitur Guidelines* provide further guidance to courts in determining the amount to remit. See Attachment F of the Supplement to Directive # 13-04, issued November 12, 2008.

When a defendant breaches a condition of his or her recognizance, the court is required to order forfeiture of the bail, and a notice of the forfeiture is sent to county counsel, the defendant, and the surety or insurer, bail agent or bail agency listed on the bail

² See N.J.S.A. 2A:162-12b as to the presumption for full cash bail to the exclusion of other forms of bail when a defendant is charged with a crime with bail restrictions.

³ See R. 3:26-4(g) permitting bail to be satisfied for certain crimes by the deposit in court of cash in the amount of ten-percent and defendant’s execution of a recognizance for the remaining ninety percent.

⁴ A corporate surety bond is usually posted by a bail agent (bondsman) who represents an insurance company that is approved by the Department of Banking and Insurance. The bond is a contract between the court and the insurance company whereby the insurance agency agrees to be responsible for the full amount of the bail should the defendant fail to appear in court.

⁵ The defendant or a surety posts real property, e.g. a house to satisfy the bail amount.

⁶ No monetary bail is set by the court on defendants who are released on their own recognizance.

⁷ A recognizance is defined as a bond or contractual obligation of record entered into, binding the defendant to be in court at all stages of the proceedings. It is a legal document pledging a sum of money subject to forfeiture, if the obligation is not fulfilled. See Attachment A of Directive # 13-04, “Glossary of Terms,” § VI. at 6.

recognizance. See R. 3:26-6(a). For forfeiture of municipal bail, see R. 7:4-5. If the failure is due to a defendant's non-appearance in court, a bench warrant is issued. The notice directs that judgement for the outstanding bail will be entered unless a written objection seeking to set aside the forfeiture is filed within 75 days of the date of the notice. Ibid. Additionally, the notice advises the insurer that until it satisfies the judgment, it will be removed from the Bail Registry, along with the names of its bail agents and agencies, guarantors, and any other person or entities authorized to administer or manage its bail bond business in New Jersey. Ibid. The bail agent or agency, guarantor or other person or entity authorized by the insurer who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment is satisfied. Ibid.

In the absence of a motion to set aside a forfeiture, the court, after 75 days, is required to summarily enter a judgment of default for any outstanding bail. See R. 3:26-6(c). If following the court's decision on an objection, the forfeiture is not set aside or satisfied, the court is required to enter judgment for any outstanding bail and, in the absence of satisfaction, thereof execution may issue thereon. Ibid. After entry of such judgment, the court may remit in whole or in part in the interest of justice. Ibid. If a registered insurer fails to satisfy a judgment entered pursuant to R. 3:26-6(c) and R. 7:4-5(c), the Clerk of the Superior Court is required to send the insurer a notice that if the judgment is not satisfied within fifteen days, it will be removed from the Bail Registry, along with its bail agents or agencies, guarantors, or other persons or entities authorized to administer or manage its bail bond business in New Jersey, until the judgment has been satisfied. See R. 1:13-3(e)(2).

C. Background

Pursuant to R. 3:26-6(b) and (c), the court can set aside an order of forfeiture or judgment and remit it in whole or in part, "in the interest of justice." The "interest of justice" standard for setting aside an order for forfeiture or judgement was incorporated in R. 3:26-6, as part of the comprehensive changes in the 1969 revision to the *Rules Governing the Courts of the State of New Jersey*. See R. 3:26-6 (1969). The prior version, codified at R.R. 3:9-7(b), permitted setting aside the forfeiture "if it appears that justice does not require the enforcement of the forfeiture." See R.R. 3:9-7(b) (1958). For forfeitures in Municipal Courts, R. 7:5-1 stated that R. 3:26-6 was applicable. See R. 7:5-1 (1969).

In the time leading up to the 1969 revisions, it was recognized that there were no definite procedures for the declaration and enforcement of bail forfeitures. See Pressler,

Current N.J. Court Rules, comment on R. 3:26-6 (1969). A survey conducted by the Administrative Director of the Courts found that bail forfeitures were not being routinely declared and enforced in 1967. Ibid. To remedy this situation, paragraph (a) was amended to require the prosecutor to move for a declaration of forfeiture and fixed responsibility upon county counsel and the municipal attorney, as appropriate, to collect the forfeited amount upon receiving notice of the forfeiture. Ibid.

Following the revisions to R. 3:26-6, the foremost court opinion interpreting these changes was State v. Hyers, 122 N.J. Super. 177 (App. Div. 1973). Based upon R. 3:26-6, Hyers established standards for setting aside an order for forfeiture when "its enforcement is not required in the interest of justice." Advising that this determination is "essentially equitable in nature," Hyers set forth the following factors for consideration besides the reason for the defendant's non-appearance: (a) whether the applicant is a commercial bondsman; (b) the bondsmen's supervision, if any, of defendant during the time of his release; (c) the bondsmen's efforts to insure the return of the fugitive; (d) the time elapsed between the date ordered for the appearance of the defendant and his return to court; (e) the prejudice, if any, to the State because of the absence of defendant; (f) the expenses incurred by the State by reason of the default in appearance, the recapture of the fugitive and the enforcement of the forfeiture; and (g) whether reimbursement of the expenses incurred in (f) will adequately satisfy the interests of justice. Id. at 180.

To promote statewide uniformity, Directive # 15-76, issued on August 11, 1977, recirculated the "Procedures for Enforcement of Corporate Surety Bonds," dated August 28, 1972. The Directive emphasized that county clerks and the clerks of Municipal Courts, in addition to sending a letter and copy of the judgment to the Commissioner of the New Jersey Department of Insurance, were to also send a copy to the AOC to ensure that the appropriate officials could be provided with a list of companies that failed to satisfy judgments on forfeited bonds. Likewise, once the judgment was satisfied, the AOC was to be informed so the list could be updated to reflect that bail bonds could once again be accepted from that company.

On October 6, 1997, R. 7:4-5, effective February 1, 1998, was adopted to govern bail forfeitures in Municipal Courts. See R. 7:4-5 (1999). For the most part, R. 7:4-5 followed R. 3:26-6, except that paragraph (a) provided that the court may forfeit the bail on its own or the prosecuting attorney's motion. Additionally, if forfeiture was ordered, the municipal court administrator or deputy court administrator were to forfeit the bail.

Effective September 1, 1998, additional revisions were adopted to R. 3:26-6. Paragraph (a) was amended to authorize the court, on its own motion, to order forfeiture rather than requiring the prosecutor to do so. Further, the criminal division manager, rather than the clerk of the court, was required to send the notice of the forfeiture to the interested parties advising that judgment would be entered if a motion to set aside the forfeiture was not filed within 45 days from the date of the notice. Paragraph (c) was amended to implement the change in paragraph (a) requiring, in a contested proceeding, that county counsel represent the government and are responsible for collection. See Pressler, *Current N.J. Court Rules*, comment on R. 3:26-6 (1999). To conform with these revisions, Directive # 5-00, issued June 21, 2000 and which superseded Directive #15-76, was promulgated to include these procedures.

On November 1, 2000, the Supreme Court entered an order relaxing and supplementing Rules 1:13-3(e), 3:26-6(a) and 7:4-5, effective January 2, 2001. The order set forth additional requirements for notice to corporate surety companies, their licensed insurance producers, and limited insurance representatives prior to the Clerk of the Superior Court precluding the corporate surety company's licensed insurance producers and limited insurance representatives from writing bail statewide. Subsequently, Directive # 7-00, issued December 14, 2000 and which superseded Directive # 5-00, was promulgated to conform with these additional notice requirements.

By Supreme Court order, effective June 11, 2002, Rules 1:13-3(e), 3:26-6(a) and 7:4-5, were relaxed to extend the time period for filing application to vacate or set aside a bail forfeiture from 45 to 75 days. Subsequently, Directive # 3-02, issued on July 18, 2002 and which superseded Directive #7-00, was promulgated to conform with this change. On May 20, 2003, the Supreme Court issued another order amending the Court's prior orders to conform with the statutory terminology changes in the *New Jersey Insurance Producer Licensing Act of 2001* (L. 2001, c. 210).

On December 17, 2003, Directive # 13-03 was issued to implement amendments to Rules 3:26-6 and 1:13-3, Directive # 3-02 and the Supreme Court's supplemental orders dated November 1, 2000, June 11, 2002, and May 20, 2003. Attached to this Directive was the *Judiciary Corporate Surety Bail Forfeiture and Judgment Protocol* and the *Order for Bench Warrant and Bail Forfeiture*, which was developed to ensure that the bail was ordered forfeited at the same time the bench warrant was ordered for failure to appear. To standardize the procedures and forms, a *Consent Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment* was included for statewide use.

Additionally, the *Remittitur Guidelines* were promulgated for handling applications to set aside bail forfeitures.

Effective September 1, 2004, Rules 1:13-3(e), paragraphs (a) and (c) of 3:26-6, and 7:4-5 were revised to conform with the Supreme Court order dated June 11, 2002, which set a 75 day time period for filing the application to vacate or set aside a bail forfeiture. See Pressler, *Current N.J. Court Rules*, comment on R. 3:26-6 (2005). Paragraph (b) was also amended to make clear that the setting aside of a forfeiture judgment may be in whole or in part and may be ordered before or after the judgment is ordered. Ibid. Additional changes were made to paragraph (c) to ensure that judgments included language that failure to satisfy the judgment would result in removal from the bail registry of the corporate surety and its agents. Ibid. Paragraph (c) also required a copy of the judgment to be mailed to the county counsel, surety or insurer, bail agent or agency named in the judgment. Ibid.

On November 17, 2004, Directive # 13-04, which superseded Directive # 13-03, was promulgated to conform with the statutory amendments in the *New Jersey Insurance Producer Licensing Act of 2001* (L. 2001, c. 210), the requirements under N.J.S.A. 17:31-10, et. seq., concerning the issuance of bail bonds by surety companies (L. 2003, c. 202), and revisions to Rules 1:13-3, 3-26-6, 7:4-3, and 7:4-5. Attached to this Directive was a revised *Bail Recognizance* form, *Judiciary Corporate Surety Bail Forfeiture and Judgment Protocol*, *Default Judgment on Forfeited Recognizance Forms*, and the *Consent Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment*. While the *Remittitur Guidelines* were not revised in this Directive, they were subsequently revised pursuant to the issuance of court opinions from the Appellate Division and Supreme Court. See Supplements to Directive # 13-04, the October 9, 2007 Supplement, which was then superseded by the November 12, 2008 Supplement.

III. SUBCOMMITTEE'S DELIBERATIONS

The Subcommittee initially discussed the bail bond system and the bail forfeiture process and whether any facets needed to be revised. Additionally, the Subcommittee considered the Commission's findings and recommendations in the SCI Report. These findings and recommendations, if applicable, have been incorporated in the discussion of the Subcommittee's recommendations.

At the outset, the Subcommittee recognized that changes were needed to the *Remittitur Guidelines*. The members agreed that the current *Guidelines* were too lenient and, as noted in the SCI Report, often resulted in recovery rates that were far lower than the original bond amount. Additionally, the members agreed that the process for

determining the remission amount needed to be simplified and streamlined. The Subcommittee was also mindful that any changes made to the *Guidelines* would still need to encourage or provide incentive for sureties to ensure the defendant's appearance in court.

In order to fully understand the bail forfeiture recovery process, the Subcommittee invited county counsel from various counties to discuss their thoughts on (1) the current procedures for forfeiture and remission of funds; (2) assessment of the *Remittitur Guidelines*; (3) negotiating with corporate sureties for remission of funds; and (4) reasons justifying a stay or multiple stay orders before full payment on the judgment was due.

One area that county counsel believed needed to be changed was the time frames in the *Remittitur Guidelines*. Specifically, the time frames should be tightened for defendants who were returned to court within a short period after their nonappearance. Currently, the *Remittitur Guidelines* provide for an initial range that incorporates the first six months. County counsel suggested breaking down this time period into smaller ranges since the majority of defendants return to court within the first six months.

In accordance with the Commission's recommendation, the Subcommittee reviewed Connecticut's bail forfeiture procedures. Pursuant to Connecticut's Court Rules, bail agents and sureties are entitled to remission depending on how soon the defendant is returned to court, which must be within one year from the date the bond was ordered forfeited. See Conn. Practice Book § 38-22, Rebate of Forfeited Bonds. Connecticut also requires statewide adherence to the amounts in the rebate schedule, which are non-negotiable. See SCI Report at 54-55.

Connecticut defines the amount of recovery as follows:

- (1) 46 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within 210 days of the date such bond was ordered forfeited;
- (2) 38 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within 240 days of the date such bond was ordered forfeited;
- (3) 30 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within 270 days of the date such bond was ordered forfeited;
- (4) 23 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within 300 days of the date such bond was ordered forfeited;

(5) 15 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within 330 days of the date such bond was ordered forfeited;

(6) 7 percent of the amount of the bond ordered forfeited if the arrested person is returned to the jurisdiction of the court within one year of the date such bond was ordered forfeited.

[Conn. Practice Book § 38-22, *Rebate of Forfeited Bonds.*]

IV. TABLE OF RECOMMENDATIONS

For the reasons stated in the next section, the Subcommittee makes the following recommendations:

- RECOMMENDATION 1.** Adoption of the proposed revisions to Rules 3:26-6 and 7:4-5.
- RECOMMENDATION 2.** Adoption of the “Revised Remission Guidelines” and issuance of a revised Directive.
- RECOMMENDATION 3.** Issuance by Directive of a standard “Order to Stay Entry of Judgment.”
- RECOMMENDATION 4.** Issuance by Directive of a revised “Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment.”
- RECOMMENDATION 5.** The Office of the Attorney General should be charged with overseeing bail forfeiture settlements and collections.
- RECOMMENDATION 6.** The Judiciary should not regulate the financial arrangements of defendants with bail bondsmen.
- RECOMMENDATION 7.** The Judiciary should not regulate county jails or the use of jailhouse runners.
- RECOMMENDATION 8.** A statute should be enacted to criminalize bail agencies employing unlicensed individuals and bail agents operating without a license.
- RECOMMENDATION 9.** The Preclusion and Removal lists should include unlicensed bail agents.
- RECOMMENDATION 10.** The Department of Banking and Insurance should continue to be responsible for investigating the licensing of bail bond agents and agencies.
- RECOMMENDATION 11.** The Office of the Attorney General should be charged with the enforcement of licensure requirements for bail bond agents and agencies and the prosecution of any violations.

RECOMMENDATION 12. Adoption of a statewide policy to eliminate the filing fee for persons released on their own recognizance.

RECOMMENDATION 13. Adoption of a statewide policy that unless otherwise ordered by the court, any filing fee shall be collected at the time bail is posted. Any unsatisfied bail fee shall be deducted from the bail refund amount.

V. RECOMMENDATIONS

The Subcommittee's recommendations have been broken down into the following topics: (1) Bail Forfeiture Recovery Process; (2) Discounted Bail Options; (3) Bail-Agent Access Rules for County Jails; (4) Licensing of Bail Agencies and Bail Agents (5) Oversight and Enforcement of Bail Agencies and Bail Agents; (6) Collection of the Filing Fee for Persons Released on Their Own Recognizance; and (7) Failure to Collect the Filing Fee when Bail was Posted.

A. Bail Forfeiture Recovery Process

1. SCI Report

In reviewing bail forfeiture recovery outcomes, the Commission found that the amount of bail imposed by the court is rarely, if ever collected. See SCI Report at 52. The Commission explained that there are numerous elements that may influence the final settlement. Id. at 53. In particular, the SCI Report states:

When deciding the amount of forfeited bail that should be collected, the court, based upon a complex set of remission guidelines... considers factors such as the degree of the surety's supervision of the defendant, the length of time the defendant was a fugitive and whether the defendant committed another crime while a fugitive. Further while balancing those factors, the court is authorized to provide an incentive to the surety to recapture a fugitive defendant and provide substantial remission in order to not deter the surety from posting future bails. Complicating the collection rates further is the fact that some counties have developed unique policies and procedures for handling certain forfeiture matters...As a result, forfeiture collection rates vary from county to county with some doing better than others.

[Id. at 53-54.]

Based upon its findings the Commission recommended the enactment of statutory requirements on remission amounts.

2. Subcommittee's Recommendations

RECOMMENDATION 1. Adoption of the proposed revisions to Rules 3:26-6 and 7:4-5.

At the outset, the Subcommittee concluded that the *Remittitur Guidelines* needed revisions. It also agreed with the Commission that the determination of the remission amount needed to be simplified.

To permit the adoption of revised *Guidelines* that would not run counter to the current standards for determining the remission amount as defined in case law, the Subcommittee proposes revisions to Rules 3:26-6 and 7:4-5. The revisions delete references to "interest of justice" in paragraphs (a), (b), and (c), and permit the court to set aside an order of forfeiture or judgment in whole or in part, "pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines."

The Subcommittee was also cognizant that the time period varied statewide for granting a stay before full payment on the judgment was due. County counsel also noted this lack of uniformity. It was asserted by one member that there have been instances where multiple stays had been granted in individual cases. It was also acknowledged that there is a limit of thirty days if the court enters an order to stay removal of the insurer, bail agency or agent from the Bail Registry pending the motion to vacate a judgment. See Attachment C of Directive # 13-04 Judiciary Corporate Surety Bail Forfeiture and Judgment Protocol, § VI.D. at 4.

The Subcommittee decided that setting a specific time period for a stay of thirty days in Rules 3:26-6 and 7:4-5 would promote consistency in these applications.

The following options were considered for paragraph (c):

- (1) Limiting the time period to a total of 105 days (75 days plus 30 days for one stay);
- (2) 75 days and one stay by consent order of no more than 30 days; or
- (3) 75 days and one stay by consent order of no more than 30 days, unless upon motion to the court a longer period is permitted based upon a finding of exceptional circumstances.

In crafting the proposed language, the Subcommittee decided that the application to permit one stay of no more than thirty days should be simplified to permit submission of a consent order. It was thought that county counsel would most likely agree to the one stay of thirty days, and thus, it would be rare that a more formal application would need to be made for a stay of thirty days.

The Subcommittee was mindful, however, that there could be circumstances for which the court would want the discretion to permit a longer period and thus, a motion should be filed to demonstrate those circumstances. Therefore, the Subcommittee preferred option 3, which permits the court upon motion to grant a longer period.

Additionally, the Subcommittee decided that after thirty-days, entry of judgment shall follow unless the court finds "exceptional circumstances." The Subcommittee preferred the higher standard of "exceptional circumstances" rather than "good cause" to ensure that the granting of additional time does not become the norm.

The proposed changes to Rules 3:26-6 and 7:4-5 follows.

Rule 3:26-6. Forfeiture

(a) Declaration; Notice. Upon breach of a condition of a recognizance, the court on its own motion shall order forfeiture of the bail, and the finance division manager shall forthwith send notice of the forfeiture, by ordinary mail, to county counsel, the defendant, and any surety or insurer, bail agent or agency whose names appear on the bail recognizance. Notice to any insurer, bail agent or agency shall be sent to the address recorded in the Bail Registry maintained by the Clerk of the Superior Court pursuant to R. 1:13-3. The notice shall direct that judgment will be entered as to any outstanding bail absent a written objection seeking to set aside the forfeiture, which must be filed within 75 days of the date of the notice. The notice shall also advise the insurer that if it fails to satisfy a judgment entered pursuant to paragraph (c), and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry. In addition the bail agent or agency, guarantor or other person or entity authorized by the insurer to administer or manage its bail bond business in this State who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment has been satisfied. The court shall not enter judgment until the merits of any objection are determined either on the papers filed or, if the court so orders for good cause, at a hearing. In the absence of objection, judgment shall be entered as provided in paragraph (c), but the court may thereafter remit it, in whole or in part, [in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines.

(b) Setting Aside. The court may, either before or after the entry of judgment, direct that an order of forfeiture or judgment be set aside, in whole or in part, [if its enforcement is not required in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines upon such conditions as it imposes.

(c) Enforcement; Remission. In the absence of a motion, when a forfeiture is not set aside or satisfied, the court shall, upon expiration of the 75 days provided for in paragraph (a), summarily enter a judgment of default for any outstanding bail and execution may issue thereon.

The time period of 75 days may be extended by the court to permit one stay by consent order of no more than 30 days. Entry of judgment shall follow, unless upon motion to the court a longer period is permitted based upon a finding of exceptional circumstances.

After entry of such judgment, the court may remit it in whole or in part, [in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines. If, following the court's decision on an objection pursuant to paragraph (a) of this rule, the forfeiture is not set aside or satisfied in whole or in part, the court shall enter judgment for any outstanding bail and, in the absence of satisfaction thereof, execution may issue thereon.

Judgments entered pursuant to this rule shall also advise the insurer that if it fails to satisfy a judgment, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry, as provided in paragraph (a). A copy of the judgment entered pursuant to this rule is to be served by ordinary mail to county counsel, and on any surety or any insurer, bail agent or agency named in the judgment. Notice to any insurer, bail agent or agency shall be sent to the address recorded in the Bail Registry. In any contested proceeding, county counsel shall appear on behalf of the government. County counsel shall be responsible for collection of forfeited amounts.

HISTORY: Source-R.R. 3:9-7 (a)(b)(c) (first sentence) (d); paragraphs (a) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b) and (c) amended July 28, 2004 to be effective September 1, 2004[.]; paragraphs (a), (b) and (c) amended _____ to be effective _____.

Rule 7:4-5. Forfeiture

(a) Declaration; Notice. On breach of a condition of a recognizance, the court may forfeit the bail on its own or on the prosecuting attorney's motion. If the court orders bail to be forfeited, the municipal court administrator or deputy court administrator shall immediately forfeit the bail pursuant to R. 7:4-3(e) and shall send notice of the forfeiture by ordinary mail to the municipal attorney, the defendant, and any non-corporate surety or insurer, bail agent, or bail agency whose names appear on the bail recognizance. Notice to any insurer, bail agent, or bail agency shall be sent to the address recorded in the Bail Registry maintained by the Clerk of the Superior Court pursuant to R. 1:13-3. The notice shall direct that judgment will be entered as to any outstanding bail absent a written objection seeking to set aside the forfeiture, which must be filed within 75 days of the date of the notice. The notice shall also advise the insurer that if it fails to satisfy a judgment entered pursuant to paragraph (c) of this rule, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry. In addition, the bail agent or agency, guarantor, or other person or entity authorized by the insurer to administer or manage its bail bond business in this State who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment has been satisfied. The court shall not enter judgment until the merits of any objection are determined either on the papers filed or, if the court so orders, for good cause, at a hearing. In the absence of a written objection, judgment shall be entered as provided in paragraph (c) of this rule, but the court may thereafter remit it, in whole or in part, [in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines.

(b) Setting Aside. The court may, upon such conditions as it imposes, direct that an order of forfeiture or judgment be set aside in whole or in part, [if required in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines.

(c) Enforcement; Remission. If a forfeiture is not set aside or satisfied, the court shall, on motion, enter a judgment of default for any outstanding bail, and execution may issue on the judgment.

The time period of 75 days provided for in paragraph (a) of this rule may be extended by the court to permit one stay by consent order of no more than 30 days. Entry of judgment shall follow, unless upon motion to the court a longer period is permitted based upon a finding of exceptional circumstances.

After entry of the judgment, the court may remit the forfeiture in whole or in part, [in the interest of justice] pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines.

If, following the court's decision on an objection pursuant to paragraph (a) of this rule, the forfeiture is not set aside or satisfied in whole or in part, the court shall enter judgment for any outstanding bail and, in the absence of satisfaction thereof, execution may issue thereon.

Judgments entered pursuant to this rule shall also advise the insurer that if it fails to satisfy a judgment, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry as provided in paragraph (a) of this rule. A copy of the judgment entered pursuant to this rule is to be served by ordinary mail on the municipal attorney, and on any surety or any insurer, bail agent, or bail agency named in the judgment. Notice to any surety or insurer, bail agent, or bail agency shall be sent to the address recorded in the Bail Registry. In any contested proceeding, the municipal attorney shall appear on behalf of the government. The municipal attorney shall be responsible for the collection of forfeited amounts.

HISTORY: Source-R. (1969) 7:5-1, 3:26-6. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) caption and text amended, and paragraphs (b) and (c) amended July 28, 2004 to be effective September 1, 2004[.]; paragraphs (a), (b) and (c) amended _____ to be effective _____.

RECOMMENDATION 2. Adoption of the “Revised Remission Guidelines” and issuance of a revised Directive.

If the proposed changes to Rules 3:26-6 and 7:4-5 are adopted, the Subcommittee recommends the adoption of the *Revised Remission Guidelines* (hereafter *Guidelines*). The changes in the *Guidelines* will streamline and simplify the determination to remit bail and the amount to remit. Consistent with the current *Remittitur Guidelines*, the State should be reimbursed for its costs prior to any remission amount being granted under the *Guidelines*. See Attachment F of the Supplement to Directive #13-04, *Revision to Forms and Procedures Governing Bail and Bail Forfeitures*,” issued November 12, 2008.

The Subcommittee strongly believes that the primary factor in determining the amount to remit should be the length of time that defendant was a fugitive, rather than the supervision efforts provided by the surety or the defendant's commission of another crime while on bail. The rationale was that whatever the surety's efforts were leading up to the defendant's non-appearance were ineffective. Therefore, the surety's methods of maintaining contact with the defendant while he or she was out on bail, e.g. weekly telephone calls, verification of address, are not relevant for this determination.

It is the intent of the Subcommittee that factor 1, which is the length of time the defendant is a fugitive, should be the court's primary focus in determining whether to remit bail and the remission amount. The court should then take into account the following factors, if applicable: (1) The prejudice to the State, and the expense incurred by the State, as a result of the fugitive's non-appearance, recapture and enforcement of the forfeiture; (2) The detriment to the State also includes the intangible element of injury to the public interest where a defendant deliberately fails to make an appearance in a criminal case; (3) Non-appearing defendants imprisoned out-of-state; (4) State's knowledge of a defendant's imprisonment; and (5) Deportation of defendant while on bail.

Additionally, it should be noted that the policy concerns in the *Remittitur Guidelines* have not been eliminated from the court's analysis. The court should balance the applicable factors with the following policy concerns: (1) The necessity of providing an incentive to the surety to take active and reasonable steps to recapture a fugitive defendant and; (2) That if remission were unreasonably withheld, corporate sureties might be overcautious in their willingness to post bail, resulting in an impairment of an accused's constitutional right to pretrial bail.

In crafting the factors for this determination, the Subcommittee was mindful that certain factors that the court is required to consider under the *Remittitur Guidelines* have

been eliminated from its analysis. The factors that would be eliminated are: (1) Whether the surety has made a reasonable effort under the circumstances to effect the recapture of the fugitive defendant; (2) Whether the applicant is a commercial bondsmen; (3) The degree of the surety's supervision of the defendant while he or she was released on bail; (4) The surety's immediate substantial efforts to recapture the defendant; (5) The amount of the posted bail; and (6) The defendant's commission of another crime while a fugitive.

Additionally, the Subcommittee believed it was important to set ranges to provide judges with flexibility based upon the individual circumstances of the case. The Subcommittee agreed with the suggestions made by county counsel that the time frames should be tightened to provide for more ranges, particularly within the initial six months.

Further, the remission amount is limited to a one-year time period for the defendant to be at large. This time period is calculated from the date of the defendant's failure to appear in court and the court's issuance of a bench warrant. The justification for this one-year limitation is to encourage sureties to be cognizant of the defendant's whereabouts and to file these applications earlier in the process.

After this one-year period, 100% of the bail should be forfeited unless exceptional circumstances are demonstrated by the surety. The Subcommittee preferred the higher standard of "exceptional circumstances" rather than "good cause." It is intended that granting a remission amount outside this one-year period should not be the norm, but rather should only be granted if exceptional circumstances are found by the court.

The Subcommittee also recognized that additional time spent in the custody of law enforcement should be excluded once the State and/or the court is advised in writing by the surety that the defendant is incarcerated. It was asserted that the surety has an affirmative obligation to advise the court that the defendant is incarcerated and thus, the onus should be on them to provide written notification to the State and/or the court that the defendant is in custody.

The Subcommittee proposes issuance by Directive of the following *Revised Remission Guidelines* to replace the *Remittitur Guidelines*.

REVISED REMISSION GUIDELINES

The *Revised Remission Guidelines* (hereafter *Guidelines*) previously titled *Remittitur Guidelines*, have been revised to simplify and streamline the process for handling applications to set aside or remit a forfeiture in Superior and Municipal Courts. To conform with the [proposed] deletion of the “interest of justice” standard in Rules 3:26-6 and 7:4-5, court opinions, formerly included in the *Remittitur Guidelines*, have been deleted since they interpreted that standard. See Attachment F of the Supplement to Directive # 13-04, “Bail - Further Revised Remittitur Guidelines,” issued November 12, 2008. Additionally, those court opinions placed emphasis on factors which are not relevant under these *Guidelines*, such as the surety’s supervision efforts or the commission of a new crime while the defendant is out on bail.

REMISSION OF A FORFEITURE

The decision to remit bail, as well as the amount of bail, are matters within the sound discretion of the trial judge. This exercise of discretion should adhere to the following policy concerns that have been expressed over the years: (1) The necessity of providing an incentive to the surety to take active and reasonable steps to recapture a fugitive defendant, and; (2) That if remission were unreasonably withheld, corporate sureties might be overcautious in their willingness to post bail, resulting in an impairment of an accused’s constitutional right to pretrial bail.

Pursuant to [proposed] Rules 3:26-6 and 7:4-5, the court may remit the forfeiture in whole or in part, “pursuant to the court rules and/or administrative directives, including but not limited to the Revised Remission Guidelines.” The court’s primary focus under these *Guidelines* in determining whether to set aside forfeiture and the amount to remit is the length of time the defendant is a fugitive. See factor 1. This factor is calculated from the date of the defendant’s failure to appear in court and the court’s issuance of a bench warrant. The remission amount is based upon defendant’s time at large, which is limited to a one-year period. Thereafter, 100% of the bail is forfeited unless exceptional circumstances are demonstrated by the surety.

FACTORS TO WEIGH IN DETERMINING REMISSION

The following factors need to be weighed, within the framework of the policy concerns, in determining whether to remit bail and the amount to be remitted.

1. The length of time the defendant is a fugitive. The court’s primary focus in determining whether to set aside forfeiture and the amount to remit is the defendant’s time at large, which is calculated from the date of defendant’s failure to appear in court and the court’s issuance of a bench warrant. Additional time spent in the custody of law enforcement is excluded once the State and/or the court is advised in writing by the surety that the defendant is incarcerated. Where the defendant remains a fugitive when the remission motion is made, the essential undertaking of the surety remains unsatisfied, and the denial of any remission is entirely appropriate. The time period for remission is limited to one year. Thereafter, 100% of the bail is forfeited, unless exceptional circumstances are demonstrated by the surety.

2. The prejudice to the State, and the expense incurred by the State, as a result of the fugitive's non-appearance, recapture and enforcement of the forfeiture.
3. The detriment to the State also includes the intangible element of injury to the public interest where a defendant deliberately fails to make an appearance in a criminal case.
4. **Non-Appearing Defendants Imprisoned Out-of-State.** The court should proceed with forfeiture or remission proceedings upon receipt of written notification by the surety that the defendant is in custody out-of-state. The fact that non-appearing defendants were found in custody out-of-state and had not been returned to New Jersey when the remission or exoneration was sought is a factor that the court should balance when determining a remission amount. The court should consider whether bail should be remitted when defendants were located in out-of-state custody and a detainer was lodged.
5. **State's Knowledge of a Defendant's Imprisonment.** The court may consider the failure of the State to notify the surety or the court of the fact that a defendant has been found and securely incarcerated when the State has resources, such as use of a NCIC database, to locate defendants that are not available to the surety. The absence of such notification may increase the surety's costs in attempting to locate a defendant and deprive the surety of an early opportunity to avoid bail forfeiture. Additional time spent in the custody of law enforcement is excluded once the State and/or the court is advised in writing by the surety that the defendant is incarcerated.
6. **Deportation of Defendant While on Bail.** Where deportation is the sole reason a defendant is unable to attend court, a crucial factor that the trial court should consider is whether the defendant was a fugitive from New Jersey at the time of deportation. The court should consider whether the defendant while compliant with the terms of his or her release, voluntarily attended a deportation hearing or was brought there by the authorities and thereafter was deported; or, whether the defendant was a fugitive when captured and then subsequently deported. If the former, then some degree of remission should be considered; if the latter, then remission generally should be denied.

GUIDELINES

The following are a broad set of guidelines that have been developed to provide judges with a *starting point* when determining whether to grant a remission for applications made either before or after judgment is enforced, and, if granted, the amount to remit. In making this determination, the judge should consider the particular facts in an individual case, along with subsequent case law to determine what effect those facts have on increasing or decreasing the remission amounts in the *Guidelines* after balancing the factors that have been weighed in accordance with the policy concerns. The motion judge should make a record, including an explanation of what factors were considered under these *Guidelines*, and if none were considered, a statement of the ways that the surety failed to present a prima facie basis for relief.

REVISED REMISSION GUIDELINES
(Amount remitted to bondsman or surety)
(Amount forfeited to State and County)

State is reimbursed its costs.

<u>Time at Large</u>	<u>Amount Remitted</u>	<u>Amount Forfeited</u>
1-30 days	90-99%	1-10%
31-60 days	80-89%	11-20%
61-90 days	60-79%	21-40%
91-180 days	40-59%	41-60%
181-270 days	20-39%	61-80%
271-365 days	1-19%	81%-99%
366 days or more	0%	100%

Where Defendant Is A Fugitive When Remission Motion Is Made
Amount Remitted – 0% Amount Forfeited – 100%

RECOMMENDATION 3. Issuance by Directive of a standard “Order to Stay Entry of Judgment.”

To ensure statewide consistency and adherence to the language in proposed Rules 3:26-6(c) and 7:4-5(c), the Subcommittee proposes issuance by Directive of the new *Order to Stay Entry of Judgment*.

The Subcommittee has included two options to stay entry of judgment set forth in proposed Rules 3:26-6(c) and 7:4-5(c) based upon the circumstances: (1) no more than 30 days from the date of the order; or (2) the number of days to be determined by the court based upon a finding of “exceptional circumstances.”

The proposed new court order follows.

STATE OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL
_____ COUNTY

v.

Defendant

CABS #: _____

RECOGNIZANCE #: _____

INDICTMENT or CDR #: _____

Insurer/Surety

POWER OF ATTORNEY #: _____

Bail Agency

Total of Bond: _____

Bail Agent

Date Posted: _____

ORDER TO STAY ENTRY OF JUDGMENT

THIS MATTER having been brought before this Court on the application of _____, attorney for the Surety for an Order Staying Entry of Judgment in this matter, and _____, Office of County Counsel, [consenting/opposing] hereto; and having considered the proofs shown,

IT IS THEREFORE ORDERED on this _____ day of _____, _____, that the entry of judgment is to be stayed for [**Choose appropriate option:** (1) no more than 30 days from the date of this order; or (2) _____ days from the date of this order for exceptional circumstances shown], after which judgment shall be entered.

IT IS FURTHER ORDERED, that a copy of this Order be served upon all parties within _____ days of the date hereof.

This is to notify the insurer that if it fails to satisfy a judgment, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry. In addition the bail agent or agency, guarantor or other person or entity authorized by the insurer to administer or manage its bail bond business in this State who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment has been satisfied.

J.S.C.

We hereby consent to the form and entry of this Order:

County Counsel

Attorney for Surety

Distribution:
Clerk of Superior Court Insurer/Surety Defendant
Finance Division Bail Agency County Counsel
Criminal Division Bail Agent

RECOMMENDATION 4 Issuance by Directive of a revised “Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment.”

The Subcommittee recommends revising the *Consent Order to Vacate Bail Forfeiture and/or Judgment and Discharge the Bond upon Payment* in Attachment D of Directive # 13-04. The Subcommittee has retained the “good cause” standard, included in the current order, for negotiated amounts that fall within the range for the remission amount for defendant’s time at large.

However, the Subcommittee believes that when the negotiated amount does not fall within the range for the remission amount for defendant’s time at large, the surety should demonstrate “exceptional circumstances.” It is intended that this modification will provide further encouragement for county counsel and sureties to settle on remission amounts that fall within the ranges provided for in the proposed “Revised Remission Guidelines.”

Additionally, the Subcommittee proposes including the two options in the first paragraph to permit selection of the appropriate standard based upon the circumstances.

The order references the “Directive # ___” rather than specifically referring to Directive # 13-04 to allow for the possibility that a new number may be assigned when the Directive is promulgated. Further, in light of the pending changes to the bail system this language may need to be revisited and thus, the broader reference to “Directive” rather than the “Revised Remission Guidelines” allows for some flexibility.

The proposed language underlined in the revised court order follows.

STATE OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – CRIMINAL
COUNTY

v.

Defendant

CABS #: _____

RECOGNIZANCE #: _____

INDICTMENT or CDR #: _____

Insurer/Surety

POWER OF ATTORNEY #: _____

Bail Agency

Total of Bond: _____

Bail Agent

Date Posted: _____

ORDER TO VACATE BAIL FORFEITURE AND/OR JUDGMENT AND DISCHARGE THE BOND UPON PAYMENT

THIS MATTER having been opened to the Court on _____ by _____ attorney for _____, and the Court having considered the papers submitted, and _____, Office of County Counsel [consenting/opposing] hereto, and [**Choose appropriate option:** (1) for good cause shown, the amount below falls within the remission amount for defendant's time at large in Directive # _____; or (2) where the amount below does not fall within the remission amount for defendant's time at large in Directive # _____, exceptional circumstances have been demonstrated by the surety],

IT IS THEREFORE ORDERED on this _____ day of _____, 20____, that _____ shall pay the sum of \$ _____, on or before _____, which sum shall be distributed proportionally between the State of New Jersey and the County of _____; and

IT IS FURTHER ORDERED that the bail forfeiture and/or judgment entered shall be vacated and the bond discharged upon the State's receipt of the aforesaid payment; and

IT IS FURTHER ORDERED that if the aforesaid amount is not paid to the State of New Jersey within the time set forth herein, this order will become null and void, the original amount of the bail bond will be immediately due and owing to the State of New Jersey, and a default judgment previously entered will remain in full force and effect; and

IT IS FURTHER ORDERED that if a forfeiture was ordered but a judgment has not been entered, then the parties agree to waive the requirement contained in R. 3:26-6(a) that a judgment not be entered until 75 days after the forfeiture was ordered, and a default judgment shall be entered immediately for the original amount of the bail bond; and

IT IS FURTHER ORDERED, that a copy of this Order be served upon all parties within _____ days of the date hereof.

This is to notify the insurer that if it fails to satisfy a judgment, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry. In addition the bail agent or agency, guarantor or other person or entity authorized by the insurer to administer or manage its bail bond business in this State who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment has been satisfied.

J.S.C.

We hereby consent to the form and entry of this Order:

County Counsel

Attorney for Surety

Distribution:

Clerk of Superior Court	Insurer/Surety	Defendant
Finance Division	Bail Agency	County Counsel
Criminal Division	Bail Agent	

RECOMMENDATION 5. The Office of The Attorney General should be charged with overseeing bail forfeiture settlements and collections.

The Subcommittee acknowledges the Commission's findings that the recovery rates for bail forfeiture settlements are not uniform statewide. Further, the Commission questioned ceding county counsel with "all responsibility for handling and execution of forfeiture matters," and thus, recommended that the Office of the Attorney General have direct supervision of these matters. See SCI Report at 64.

The Subcommittee believes that the adoption of the *Revised Remission Guidelines* should increase uniformity. To further ensure that county counsel and sureties negotiate settlements that fall within the ranges set forth in the *Guidelines*, the Subcommittee recommends that the Office of the Attorney General oversee bail forfeiture settlements and collections.

B. DISCOUNTED BAIL OPTIONS

1. SCI Report

The Commission's investigation revealed that bail agents often make arrangements that have the practical effect of circumventing and undercutting court-imposed bail set by judges. See SCI Report at 2. In particular, the SCI Report states:

[S]ome [bail] agents routinely cut deals that enable clients to get out of jail for the cash equivalent of as little as 1 percent or less of the total bail – a down payment substantially below the standard bond "premium" of ten percent. The remaining premium balance is then owed by installment over time with no effective guarantee that it will ever be paid.

[ibid.]

Based upon its findings, the Commission recommended: (1) Enactment of legislation to require the premium charged by bail bond agencies be no less than the 10% option available through the court, unless a judge determines that charging a lesser percentage of the full bail and/or offering a special installment plan is appropriate; (2) Where arrangements allow installments over time, the fulfillment of such terms should be made a condition of whether or not the defendant's release is continued; and (3) Bail agents should be required to disclose to the court and to the appropriate prosecutorial authorities, the terms and conditions that depart from the standard 10% rule. Id. at 62-63.

2. Subcommittee's Recommendation

RECOMMENDATION 6. The Judiciary should not regulate the financial arrangements of defendants with bail bondsmen.

The Subcommittee believes that the Judiciary should not try to control the financial arrangements with bail bondsmen. This is an area that falls under the authority of the Department of Banking and Insurance. The Judiciary's means to offset this practice is through the amount the judge orders forfeited. Moreover, the adoption of the *Revised Remission Guidelines* should significantly curtail these abuses.

C. BAIL-AGENT ACCESS RULES FOR COUNTY JAILS

1. SCI Report

The Commission's investigation revealed multiple instances where bail agents rely on accused criminals in county jails to solicit business and gain customers. See SCI Report at 2. Bail-bond agents often recruit prisoners, known as runners, and offer cash and other incentives to steer them new clients, which are not criminal acts in New Jersey unlike in other states. Ibid. Additionally, the Commission found that county jails maintain "weak and wildly inconsistent policies governing access by commercial bail-bond agents to the inmate populations." Id. at 63.

Based upon its findings, the Commission recommended that the Legislature should: (1) Call upon an appropriate statewide organization, such as the New Jersey Jail Wardens Association, to develop a uniform set of best practices that could be adopted by the State's county jails. Ibid.; (2) Make it a crime to solicit bail-bond business on the grounds of or within a jail or prison or any other place where criminal defendants and incarcerated inmates appear and/or are confined, or employ, compensate or otherwise use an inmate or inmates to solicit bail-bond business. Id. at 61; and (3) Make it a crime to facilitate three-way telephone calls for incarcerated inmates, with license revocation automatic for any bail agent or agency that orchestrates or otherwise participates in such arrangements. Ibid.

2. Subcommittee's Recommendation

RECOMMENDATION 7. The Judiciary should not regulate county jails or the use of jailhouse runners.

The Subcommittee believes that these areas fall under the authority of the Department of Corrections and not the Judiciary.

D. LICENSING OF BAIL AGENCIES AND BAIL AGENTS

1. SCI Report

The Commission found multiple instances in which defendants seeking bail or their relatives and/or friends seeking to post bail unwittingly entered into bail-bond arrangements

with unlicensed individuals. Id. at 65. The SCI Report noted that N.J.S.A. 17:22A-40 empowers the Department of Banking and Insurance to take a range of civil disciplinary action against individuals and entities that violate regulations governing the terms of their bail-bond licensure, or who perform bail bond activities without a valid license. Id. at 60.

However, because there are no criminal sanctions, the Commission recommended that legislation should be enacted to make it a crime to perform the acts of a bail-bond agent or agency without a license or to employ, compensate or otherwise use unlicensed individuals to solicit bail-bond business. Ibid. Further, such activity should also result, where relevant, in immediate administrative action for license revocation. Id. at 61.

2. Subcommittee's Recommendations

RECOMMENDATION 8. A statute should be enacted to criminalize bail agencies employing unlicensed individuals and bail agents operating without a license.

The Subcommittee agreed with the Commission that bail agencies employing unlicensed individuals and bail agents operating without a license should be criminal acts. While it was asserted that these actions should be a crime of the fourth degree, the Subcommittee agreed that the degree of the crime is within the purview of the Legislature to determine.

RECOMMENDATION 9. The Preclusion and Removal lists should include unlicensed bail agents.

The Subcommittee noted that unlicensed bail agencies and bail agents are to be removed from the Bail Registry pursuant to R. 1:13-3(e)(1). In conformance with this Rule, the Subcommittee recommends that the Preclusion and Removal lists maintained by the Clerk of the Superior Court include unlicensed bail agents.

E. OVERSIGHT AND ENFORCEMENT OF BAIL AGENCIES AND BAIL AGENTS

1. SCI Report

The SCI Report states that "this investigation has revealed questionable and unscrupulous activity... within key segments of the commercial bond industry... and that the current system for policing that industry simply is not up to the task." Id. at 58. Further, the Department of Banking and Insurance acknowledged that its regulatory functions are spread thin across multiple offices and that those functions are comingled with standard insurance regulatory matters. Id. at 59.

Therefore, the Commission recommended that oversight of bail-bond agencies and their personnel should be transferred from the Department of Banking and Insurance to the Department of Law & Public Safety. Id. at 59-60. The Department of Law & Public Safety would investigate and audit the activities of bail-bond licensees, and enforce sanctions against violators. The Department of Banking and Insurance would then retain jurisdiction over bail-related entities, such as surety firms, that operate strictly within the regulated insurance sector. Id. at 59-60.

To defray the taxpayer cost of moving the State's regulatory authority, the Commission also recommended an increase in the licensing and renewal fees for bail-bond agents and agencies. The current fee for licensing is \$75.00 with renewals required every 2 years at a rate of \$75.00. The Commission recommended increasing the initial fee up to \$300.00. Additionally, renewals should be made mandatory on an annual basis at a rate up to \$250.00. Id. at 60.

2. Subcommittee's Recommendations

RECOMMENDATION 10. The Department of Banking and Insurance should continue to be responsible for investigating the licensing of bail bond agents and agencies.

The Subcommittee discussed the Commission's recommendation that licensing of bail-bond agencies and their personnel should be transferred from the Department of Banking and Insurance to the Office of the Attorney General. The Subcommittee was mindful that the Department of Banking and Insurance is the State's regulatory agency for the insurance industry. As such, the Subcommittee decided that the Department of Banking and Insurance should continue to be responsible for investigating the licensing of bail agents and agencies.

RECOMMENDATION 11. The Office of the Attorney General should be charged with the enforcement of licensure requirements for bail bond agents and agencies and the prosecution of any violations.

The Subcommittee agrees with the Commission that the Office of the Attorney General should be charged with the enforcement of licensure requirements for bail bond agents and agencies and the prosecution of any violations.

F. COLLECTION OF THE FILING FEE FOR PERSONS RELEASED ON THEIR OWN RECOGNIZANCE

RECOMMENDATION 12. Adoption of a statewide policy to eliminate the filing fee for persons released on their own recognizance.

An issue queried by a member, which was not included in the SCI Report, concerned the collection of a filing fee for persons released on their own recognizance. It was asserted that there is no statewide policy for charging a filing fee for persons released on their own recognizance. Another member pointed out that the bail reform laws will prohibit such a fee for certain defendants. In light of the pending changes to the bail system, the Subcommittee believes that this issue should be revisited to ensure consistency.

Currently, N.J.S.A. 22A:2-29 requires a fee for the filing of all papers related to recognizance or civil bail. R. 1:43 sets a \$50 fee for posting or discharging bail. Additionally, R. 3:26-4(a) provides that “[a] person admitted to bail shall, together with that person's sureties, sign and execute a recognizance before the person authorized to take bail or, if the defendant is in custody, the person in charge of the place of confinement.” Moreover, “[t]he recognizance shall contain the terms set forth in R. 1:13-3(b) and shall be conditioned upon the defendant's appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court.”

Directive # 13-04 requires the Bail Recognizance to be completed whenever the court authorizes the defendant's release on his or her own recognizance. See Attachment A “Instructions for the Preparation of the Bail Recognizance” at 1. Additionally, Recommendation #1 of the “Statewide Bail Policies” in Directive # 9-05 states that “[n]o monetary amount of bail may be set when a defendant is released on his or her own recognizance.”

Pursuant to the bail reform laws, effective January 1, 2017, a fee or other monetary assessment related to processing is prohibited for eligible defendants.⁸ In particular, N.J.S.A. 2A:162-23b states:

Notwithstanding any law to the contrary, an eligible defendant who is released from jail on personal recognizance or subject only to non-monetary conditions pursuant to section 3 or 8 of P.L.2014, c.31 (C.2A:162-17 or C.2A:162-22) shall not be assessed any fee or other monetary assessment related to processing the eligible defendant's release.

⁸ An “eligible defendant” is defined as “a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or a disorderly persons offense.” See N.J.S.A. 2A:162-15.

The Subcommittee decided against charging a filing fee because there is no financial obligation involved when an individual is released on his or her own recognizance. Additionally, the bail reform laws will specifically eliminate fees or assessments for eligible defendants. Therefore, to ensure consistency, the Subcommittee recommends the adoption of a statewide policy to eliminate the filing fee for persons released on their own recognizance.

G. FAILURE TO COLLECT THE FILING FEE WHEN BAIL WAS POSTED

RECOMMENDATION 13. Adoption of a statewide policy that unless otherwise ordered by the court, any filing fee shall be collected at the time bail is posted. Any unsatisfied bail fee shall be deducted from the bail refund amount.

A question raised by a member, which was not included in the SCI Report, was how the Finance Division should discharge the bail when the filing fee was not collected at the time the monetary bail was posted. Whenever bail is posted on behalf of a defendant, a bail fee of \$50 is required pursuant to R. 1:43. It was asserted that the fee should simply be deducted when the bail money is discharged by the court or upon conclusion of the case. However, it was acknowledged by another member that there is no formal statewide policy that would permit automatically deducting this fee from the bail refund amount.

To ensure consistency, the Subcommittee recommends adoption of a statewide policy that unless the court orders otherwise, the filing fee shall be collected at the time the bail is posted. Additionally, the policy should provide that any unsatisfied bail fee shall be deducted from the bail refund amount.

Respectfully submitted,

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