

**ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY**

PHILIP S. CARCHMAN, J.A.D.
ACTING ADMINISTRATIVE DIRECTOR
OF THE COURTS



RICHARD J. HUGHES JUSTICE COMPLEX
PO Box 037
TRENTON, NEW JERSEY 08625-0037
(609) 984-0275
FAX: (609) 292-3320

MEMORANDUM

TO: Assignment Judges
Criminal Presiding Judges

FROM: Philip S. Carchman

DATE: September 5, 2007

RE: Bail Review Procedures

At the request of Chief Justice Rabner, retired Assignment Judge Arthur D'Italia conducted a review of the procedures currently used in setting and consolidating bail for indictable offenses. Judge D'Italia found that while all contested bail motions are argued and decided on the record, a common, though not universal, practice is that the prosecutor and defense counsel confer regarding possible bail reductions and agree to the reductions, prior to seeking the judge's approval, without there being a record or "paper trail" of such agreement. Additionally, in some vicinages, bail reductions and increases are made on initial bail reviews (R. 3:26-2(c)) in chambers on the papers without the input of either the prosecutor or defense counsel.

These practices raise two issues that should be addressed. The first is to ensure that some record is made of any agreement by the prosecutor in the event of a bail reduction. This can be accomplished in a number of ways. Optimally, a statement in open court on the record is preferred. Absent that, and to avoid unnecessary filings, a prosecutor's signing or initialing the "bail slip" to confirm such agreement is sufficient. So, too, an e-mail, fax or other confirming writing will suffice. Recognizing that some bail issues will be decided outside of regular court hours, a phone conversation with the judge followed by a confirming writing by the next business day will provide the necessary record. Ultimately, you may adopt whatever procedure you deem appropriate to make certain that the requisite record is established. The judge's determination should either be on the record or in an order, with copies of the order or bail determination form forwarded to both parties.

The second issue requiring attention involves bail applications that are decided on the papers without input from either party. Again, we must ensure that an adequate record is being made. Where a judge is going to reduce bail, the prosecutor should be notified and any agreement memorialized as above, or if there is opposition, the matter should be addressed in open court. Conversely, where the judge is going to increase bail, defendant or defense counsel should be notified and their position memorialized.

Clearly, if a previously set bail is illegal, e.g., no ten percent option when permitted by statute, the judge, sua sponte, may adjust or conform the bail without notification. But, again, copies of an order or a statement on the record should accompany that determination.

As we all know, our judiciary thrives on the transparency of our actions. Ensuring a complete record furthers that objective.

During Judge D'Italia's review, he cited the bail guidelines that were approved in 2004. A reminder is appropriate here that these are guidelines and judges should consider them when fixing bail. (See Directive #9-05).

Finally, the Chief Justice will be referring these bail issues to the Supreme Court Criminal Practice Committee, the Conference of Criminal Presiding Judges and the Conference of Municipal Court Presiding Judges for their review and further recommendations.

Please distribute this memorandum to all judges in your vicinage.

c: Chief Justice Stuart Rabner
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