

Chicago Appleseed Fund for Justice Chicago Council of Lawyers

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April 22, 2013

Dear Chief Judge Evans,

The following is a description of the court's practices regarding appointment of counsel and reimbursement of appointed counsel. The description is based upon Chicago Appleseed court observations and interviews with Cook County practitioners representing the views of the defense, the state, and the judiciary. This description accompanies related submissions to the court, including a legal analysis and supporting documents, which we submitted to the court on March 25, 2013.

In instances where a defendant has posted bond, the court sometimes denies defendants a public defense without holding a material hearing as to the defendant's ability to pay. Where a defendant has posted bond but has been provided a public defense, the court sometimes orders that bond funds be used to reimburse the Cook County Public Defender's Office without a material hearing as to the defendant's ability to pay. Legal research provided pro bono by DLA Piper has concluded that both of these practices violate affected defendants' Sixth Amendment Right to Counsel as well as the Illinois Criminal Code of Procedure, 725 ILCS 5/113.

Denial of a Public Defender Solely on the Basis of Posting Bond

In Cook County, the appointment of a public defender typically occurs at the preliminary hearing, which are held across the county, in all of the branch courts and at the George N. Leighton Criminal Court building. Denial of a public defense follows a basic pattern: The defendant's name is called and he appears before the judge. The judge notes that the defendant has posted bond by saying something along the lines of, "Mr. So-and-so, I see you have a bond up." The judge then says, "Since you have a bond up, you will need

to find an attorney. Do you have an attorney?" The actual words vary, but the substance is the same: the judge informs the defendant that, since he posted bond, he is no longer entitled to a public defense. In other words, the posting of bond substitutes for a meaningful hearing of a defendant's ability to ability to afford counsel.

The defendant's response reportedly varies more substantively. Some defendants reply to the judge that they do have an attorney. Others say they are looking for one, and intend to have one in time for their next court date (typically arraignment). Some point out that the bond funds do not belong to them--that a friend, family member, or creditor owns the funds. Many others insist that they cannot afford an attorney, despite having posted bond.

Often the judge will then reiterate to the defendant that he needs to obtain an attorney. The judge will often recommend to the defendant that he retain a "bar attorney." The bar attorney is a private criminal defense attorney who pays a fee to either the Chicago Bar Association or Cook County Bar Association for the privilege of waiting in courts in order to retain clients in need of representation. When a defendant retains a bar attorney, he typically guarantees payment for representation by assigning his bond funds to that attorney.

This practice takes places in most of the branch courts, though it is reportedly less common at 26th Street. We cannot explain this procedural variation.

Reimbursement of Appointed Counsel Without Indigence Hearing

Where a defendant has posted bond but has been provided a public defense, the court sometimes orders that bond funds be used to reimburse the Cook County Public Defender's Office without a material hearing as to the defendant's ability to pay. The order to reimburse appointed counsel is made at the disposition of the case. Typically, an assistant state's attorney moves for the reimbursement of appointed counsel when moving for payment of fees, fines, and court costs. The amount awarded varies, and tends to be based upon the judge's discretion, the complexity of the case, and the amount of bond funds held on deposit. Often, the court orders reimbursement without considering the defendant's financial circumstances, or whether a third party posted bond on behalf of the defendant.

Posting of Bond As a Substitute for Material Hearing as to Ability to Pay

Based on stakeholder interviews, it seems that Cook County justice system practitioners interpret the posting of bond as a fair substitute for a material hearing as to ability to pay. If a defendant can afford to post bond, the reasoning goes, then he must also be able to afford an attorney. This reasoning overlooks several scenarios where a defendant may post bond but still, in fact, be indigent and entitled to a public defense:

- The bond money is borrowed by the defendant. In this case the bond funds are actually a liability, and are being treated as an asset.
- The bond money is provided by a third party.
- The bond money comprises all or most of the defendant's personal assets.

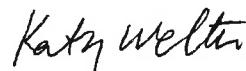
Instead of presuming that defendants who post bond are not indigent, the court can distinguish between indigence and non-indigence by holding a hearing that considers an affidavit of a defendant's assets and liabilities. Note that 725 ILCS 5/113-3(b) does not require the court to hold a material hearing as to ability pay in every criminal case. Rather, it must only do so prior to refusing to appoint counsel or ordering reimbursement of appointed counsel.

Chicago Appleseed recommends that the court conduct material hearings as to ability to pay prior to refusing defendants a public defense or ordering reimbursement of appointed counsel. These hearings would bring the county in accordance with the applicable statutes and jurisprudence on this matter, as discussed further in the enclosed legal research memorandum.

Regards,



Malcolm Rich
Executive Director



Katy Welter
Law and Policy Analyst



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March 25, 2013

Dear Chief Judge Evans:

I am writing to update you on our work regarding appointed counsel and public defender bond reimbursements. In brief, it appears that the County is not implementing correctly the "Payment for Court-Appointed Counsel" statute, [725 ILCS 5/113-3.1](#). There are a number of issues with the current implementation:

- Adequate notice is not provided to defendants and third parties that cash held on bond with the County may be used to reimburse court-appointed counsel, which may include public defenders.
- The defendant's financial circumstances are not being considered properly when determining reimbursement amounts.
- Whether a third party has posted bond is not being considered properly when determining reimbursement amounts.
- Reimbursement amounts regularly exceed the statutory cap on reimbursement.
- The posting of bond is being used as conclusive evidence of a defendant's ability to pay for a defense.

Below we describe the background and legal research relating to this issue.

Background

In the past several months, more than one Cook County criminal justice practitioner brought to Chicago Appleseed's attention a relatively new practice of reimbursing the Cook County Public Defender's office (PD) using a defendant's bond funds held on deposit with the Clerk of the Court. We have confirmed that the reimbursement amount is set without material consideration of the defendant's financial ability, or whether the bond was funded by a third party. Sometimes, reimbursement amounts exceed the statutory limit.

Another, related, practice is also taking place. At bond hearings, some judges have instructed defendants that posting bond is conclusive evidence of the defendants' ability to pay. Further, some defendants who posted bond had their bond funds reallocated to the public defender. (In at least one observed instance, a judge recommended that the defendant hire private counsel, who were standing in the back of the courtroom.) The judge's instruction regarding the impact of posting bonds has placed defendants in the position of choosing between pretrial release from jail and a public defense, regardless of their actual financial situation and whether a third party staked bail on their behalf.

Attached are two primary documents relating to this matter: **Cash Bail Bond Form**, which is provided to defendants and/or third parties when bail is posted, and the **Order for the Payment of Court-Appointed Counsel**.

Law

DLA Piper provided *pro bono* assistance in researching the legality of the above practices under Illinois statutory and common law. The resulting memo (which is attached), concludes that the current appointed counsel reimbursement procedures do not comply with the notice and hearing requirements of law. We will provide the supporting case law electronically by request.

Please note that just last year, in *People v Gutierrez*, the Illinois Supreme Court was quite clear about this matter: "Pursuant to statute, a public defender fee may be imposed only by the circuit court after notice and a hearing on the defendant's ability to pay. We again remind the trial courts of their duty to hold such a hearing before imposing these fees, and we trust that we will not have to speak on this issue again." Both defendants and third parties have been found to have standing to litigate these issues.

The forms themselves—in particular, the Cash Bail Bond Form—also appear to provide inadequate notice to defendants that their bond funds may be used to reimburse appointed counsel.

In the wake of recent appellate decisions, some Illinois counties have developed new practices in order to comply with "Payment for Court-Appointed Counsel" statute, 725 ILCS 5/113-3.1. Chicago Appleseed would be glad to assist the court in determining how Cook County can follow suit.

Sincerely,



Malcolm Rich
Executive Director
Chicago Appleseed
Chicago Council of Lawyers



Katy Welter
Law and Policy Analyst
Chicago Appleseed



MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL

TO: Katy Welter, Law and Policy Analyst
Chicago Appleseed Fund for Justice

FROM: Joseph A. Roselius

DATE: January 29, 2013

RE: Constitutionality of Cook County Bail-Bond Practices

Issue

1. Does withholding a portion of a defendant's cash bond payment without a hearing to determine if the defendant is indigent violate the defendant's equal protection and due process rights under the Fourteenth Amendment?
2. Does the court violate a defendant's Sixth Amendment right to counsel by finding that the defendant is able to pay for counsel solely because the defendant posted a cash bond and therefore refusing to appoint counsel?

Brief Answer

Cook County courts may not withhold a portion of a defendant's cash bond payment to pay the costs of appointed counsel without providing notice and a hearing under 725 ILCS 5/113.3. Further, the fact that a defendant has posted a cash bond, standing alone, does not conclusively establish the defendant's ability to pay or prevent them from being appointed counsel. These practices violate due process and equal protection rights under the Fourteenth Amendment and the Sixth Amendment right to counsel.

Background

When a defendant in Cook County is released on bond pending trial, he or she is ordered to pay 10% of the bail amount up front as security (e.g. if the bail is

set at \$20,000, the defendant must pay \$2,000 bond in cash to be released).¹ The bond is often paid by a spouse, relative, or friend of the defendant rather than the defendant. If the defendant shows up for court and otherwise complies with the conditions of bond, the clerk normally returns 90% of the bond to the defendant or the party who originally paid, while retaining 10% of the bond as a processing fee as well as any other fees and costs.

Clerks in Cook County recently began to withhold amounts in addition to the 10% processing fee as payment for the Public Defender. This amount is withheld even if the defendant has fully complied with the conditions of bond.

Courts have also instructed a defendant that posting bond is conclusive evidence that the defendant is not indigent and thus the court will not appoint the Public Defender to represent the defendant. Alternatively, the courts have ruled that posting bond is conclusive evidence of the ability to pay for counsel and therefore any bond will be used to pay the Public Defender's attorney's fees. In short, the defendant is told that he can either post bond or have a Public Defender, but not both.

Analysis

- 1. The court violates the defendant's constitutional rights and the Code of Criminal Procedure by withholding a portion of the cash bond without providing notice and a hearing.**

Section 113-3.1(a) requires the trial court to conduct a hearing into the defendant's ability to pay "as a precondition to ordering reimbursement" for the Public Defender. *People v. Love*, 177 Ill.2d 550, 555 (1997); *People v. Schneider*, 403 Ill. App. 3d 301, 303 (2d Dist. 2010); *People v. Webb*, 276 Ill. App. 3d 570, 574 (3d Dist. 1995). A summary reimbursement order without notice and an opportunity to be heard "violate[s] an indigent defendant's right to procedural due process." *Id.* at 558 (quoting *People v. Cook*, 81 Ill.2d 176, 186 (1980)). A reimbursement order without a hearing could also chill a defendant's exercise of his Sixth Amendment right to counsel because "if he knows that the money or other property posted for his bail will be subject to seizure to pay for legal services, regardless of his inability to pay he may choose not to exercise this constitutionally assured right." *Id.* (quoting *Cook*, 81 Ill.2d at 186).

The *Love* and *Cook* courts also explicitly rejected the argument that posting a cash bond "conclusively establishe[s] [a] defendant's ability to pay reimbursement . . . up to the amount of the bond." *Love*, 177 Ill.2d at 560; *see also Cook*, 81 Ill.2d at 181-83 (declining to adopt the presumption that "the posting of bail, without more, was a sufficient indicium of ability to pay wholly or partially for

¹ The definitions of "bail" and "bond" are not entirely clear. For the purposes of this memorandum, bail will be defined as the larger amount and bond will be defined as the smaller percentage of the bail amount that the defendant or a third party must put up to get the defendant released prior to trial.

legal counsel"). The *Love* court also held that the trial court "should consider whether the bond money was posted by a third party" because "the fact that bail money is posted may have no bearing on whether the *defendant* has the ability to pay reimbursement for the services of appointed counsel." 177 Ill.2d at 562-63. As the Court recognized, "bail money may be borrowed or may be posted by relatives or friends." *Id.* at 562 (citing *Cook*, 81 Ill.2d at 181).

The court must also, "at a minimum," provide the defendant with "notice that the trial court is considering imposing a payment order" and "give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances." *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (2d Dist. 1999); see also *People v. Gutierrez*, 2012 IL 111590, ¶¶ 25-26 (expressing disappointment that 14 years after *Love* defendants are still being denied proper notice and hearings). That notice must "inform[] defendant of the court's intention to hold such a hearing, what action the court may take as a result of the hearing, and the opportunity defendant will have to present evidence or otherwise be heard." *Spotts*, at 704. Further, "remedial legislation affording a hearing achieves nothing unless the hearing is meaningful; *i.e.*, the evidence adduced at the hearing is duly considered in reaching a decision." *Webb*, 276 Ill. App. 3d at 574.

That said, there is nothing in the statute that prohibits payment of the fee out of bond money paid by a third party, provided that the court actually provides notice and a hearing and considers the third party's interest in the bond money. *People v. Maxon*, 318 Ill. App. 3d 1209, 1216 (4th Dist. 2001). The *Maxon* court also noted that the bail bond form in that case indicated that attorney's fees could be paid out of the bond payment. *Id.* This case does seem to be against the great weight of the case law, however.

As described above, the courts in Cook County have not been following this procedure and are therefore likely systematically violating the due process rights and right to counsel of the accused by automatically reimbursing the public defender out of the cash bonds posted by defendants. In short, a cursory hearing that relies solely on evidence of a cash bond to prove ability to pay is unconstitutional. Some other evidence of ability to pay must be presented.

2. The court violates the defendant's constitutional rights by refusing to appoint counsel solely because the defendant has posted bond.

Under the Code of Criminal Procedure, "if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel." 725 ILCS 5/113-3(b). The defendant must provide an affidavit containing sufficient information to ascertain the assets and liabilities of that defendant. *Id.*

Illinois courts have long held that it is reversible error to refuse to appoint the Public Defender solely because the defendant has posted bond. *People ex rel. Baker v. Power*, 60 Ill.2d 151 (1975); *People v. Eggers*, 27 Ill.2d 85, 87-88 (1963); *Peo-*

ple v. Castile, 71 Ill. App. 3d 728, 730 (1st Dist. 1979); *People v. Wood*, 91 Ill. App. 3d 414, 419 (5th Dist. 1980). Many other states are in accord. *Hill v. Arkansas*, 304 Ark. 348, 351 (Ark. 1991) (“the state cannot force an appellant to choose between posting bond and being able to obtain counsel and pay the cost of an appeal”) (citing *Eggers*, 27 Ill.2d 85); *Scott v. Arkansas*, 94 Ark. App. 297, 302 (Ark. Ct. App. 2006) (same); *Graves v. Indiana*, 503 N.E.2d 1258, 1260 (Ind. 1987); *Moore v. Indiana*, 401 N.E.2d 676, 679 (Ind. 1980); *Vera v. Florida*, 689 So.2d 389, 390 (Fla. Ct. App. 1997); *Tennessee v. Gardner*, 626 S.W.2d 721, 724 (Tenn. Ct. App. 1981); *Ex parte King*, 550 S.W.2d 691, 694 (Tex. Crim. App. 1977).

Instead, the trial court must determine whether the defendant is indigent “on the basis of as complete a financial picture as is feasible” by “balancing assets against liabilities” and considering the defendant’s income. *Castile*, 71 Ill. App. 3d at 730. The defendant “need not be totally devoid of means,” but rather that the defendant must lack “the financial resources on a practical basis to retain counsel.” *Id.*

To the extent that Cook County courts are refusing to appoint counsel solely because the defendant has managed to post bond, they are likely violating the defendant’s rights. Illinois and many other states hold that the state cannot force a defendant to choose between posting bond and having counsel appointed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CASH DEPOSIT BAIL BOND: CRIMINAL OR QUASI-CRIMINAL (10% OF BAIL, \$25.00 MINIMUM DEPOSIT)

D

ORIGIN OF BOND
USING AGENCY NO. _____

Bail set by Rule of the Illinois Supreme Court OR
By (PRINT NAME OF JUDGE) (JUDGE'S NO.)

(OFFICE USE)

BAIL AMOUNT
DEPOSIT AMOUNT

00
100
00
100

DEFENDANT (Person Preparing Bond - Always complete this section)
Full Name (PRINT) (Last) (First) (MI)
Address (PRINT) Apt. No.
City and State (PRINT) Zip Code

STATEMENT OF DEFENDANT: I understand and accept the terms and conditions set forth below...
ASSIGNMENT OF BAIL BOND BY THE DEFENDANT: I hereby authorize the return of the money posted above to the person shown on this bond...

Table with columns: COURT COMPLAINT OR INDICTMENT NUMBER(S), CHARGE, DISPOSITION

DISPOSITION entered by (Signature of Deputy Clerk) Br. or Sub. CT Court Date / /

COURT APPEARANCE: Defendant named above shall appear in the Circuit Court of Cook County, Illinois located at:
Address (Number and Street) City/Town/Village Illinois
Branch No. in Room No. on at a.m. p.m.

CONDITIONS OF BOND: The defendant is hereby released on the conditions as indicated below:

- Appear to answer the charge in court until discharge or final order of court.
Obey all court orders and process; not leave this State without permission of court...
Undergo medical or psychiatric treatment as ordered by the court.

CONDITIONS - Continued on reverse side.
NOTICE TO PERSON PROVIDING BAIL MONEY OTHER THAN THE DEFENDANT

- 1. I understand that the money I have posted is for the bail for the defendant named on this bond...
2. I understand that even if the defendant follows all court orders, that this money may be ordered by the Judge to pay for the defendant's attorney fees, court costs...
3. I understand that if the defendant fails to comply with the conditions reflected on this bond, I may lose all of my money should the court enter a forfeiture of bail order.
4. I understand in all cases, 10 % of any amount posted as bail is retained by the Clerk of the Circuit court, by law.

Provider's Name (print):
Relationship to Defendant:
Address:
City: State: Zip:
Area Code/Telephone No.:
Provider's Signature:

Date Month Day Year
FOUR

This bail bond form was prepared by:
(Signature of Peace Officer) Star No. Police Dept.
Or Clerk of the Circuit Court of Cook County, by (Signature of Deputy Clerk) Loc. (Branch or Suburban Court)

D PROVIDER'S COPY

FOR APPROPRIATE REFUND, DEPOSIT THIS COPY WITH COURT CLERK ON DATE OF FINAL ORDER OF COURT.

CONDITIONS OF BOND (Continued)

FAILURE TO APPEAR - TRIAL IN ABSENTIA

If you have been charged with an offense that is classified as a felony, your failure to appear constitutes a waiver of your rights to confront witnesses and to be present at your trial. A trial could proceed and if found guilty the court could impose a sentence in your absence.

FAILURE TO APPEAR - BAIL JUMPING:

Your failure to appear may result in the filing of an additional charge of Bail Jumping. Sentences imposed upon conviction for this offense shall be served consecutively to sentences imposed for convictions related to the original offenses for which you were admitted to bail.

FAILURE TO APPEAR - FORFEITURE OF BAIL:

Your failure to appear in court as ordered by the court may result in an arrest warrant issued for your arrest, a forfeiture of your bail money and a judgment for the full amount of the bail set by the court.

VIOLATION OF OTHER CONDITIONS - POSSIBLE PENALTIES:

Violating any of the conditions indicated on the reverse side of this form may result in the issuance of an arrest warrant for your arrest, forfeiture of bail, revocation of bail, imposition of additional conditions, an increase in the bail amount and/or the filing of additional charges. Felony offenses committed while admitted to bail are subject to consecutive sentencing upon conviction relative to a sentence imposed upon conviction of the original offenses for which you were admitted to bail.

NOTICE TO PERSON PROVIDING BAIL MONEY

For information pertaining to bail bonds or hearings related to this matter, contact the Clerk of the Circuit Court's Bond Information Hotline at (312) 603-4737.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

v.

No. _____

Bond No. _____

Amount of Bond \$ _____

Amount of Deposit \$ _____

Defendant

ORDER FOR PAYMENT OF COURT-APPOINTED COUNSEL

This case comes before the Court for reimbursement for representation by court-appointed counsel, the defendant having received notice of the motion and a hearing having been held in accordance with 725 ILCS 5/113-3.1, the Court makes the following findings:

1. The Public Defender was appointed as counsel for defendant, pursuant to 725 ILCS 5/113-3, after a finding of indigency and determination that defendant desired counsel;
2. The Court has considered defendant's financial circumstances, including but not limited to the time spent by the Public Defender representing defendant, the nature of the service provided, the statutory limit identified by Section 113-3.1 (may not exceed \$500 for misdemeanor, \$5,000 for felony, or \$2,500 for appeal of conviction of class offense), whether bond was posted, and whether a third party provided the posted money bond;
3. The above-numbered case has been disposed and a final judgment has been entered;
4. The hearing on this motion was conducted within 90 days after the entry of a final order pursuant to statute disposing of the case at the trial level.

IT IS HEREBY ORDERED that the Clerk of the Circuit Court shall forward the amount of \$ _____ to Cook County for reimbursement for the services of the Public Defender as court-appointed counsel. Pursuant to 725 ILCS 5/110-7(f), 10% of the amount deposited on D-bonds shall be retained by the Clerk. Payment shall be made:

- by deduction of the sum ordered from defendant's posted money bond, posted pursuant to 725 ILCS 5/110-7;
- by cash payment from defendant;
- other _____

ENTERED:

Dated: _____

Judge

Judge's No

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS