

State of Illinois  
Circuit Court of Cook County

Chambers of  
Timothy C. Evans  
Chief Judge

50 West Washington Street  
Suite 2600  
Richard J. Daley Center  
Chicago, Illinois 60602  
(312) 603-6000

**TO:** All Judges who hear criminal and quasi-criminal matters

**FROM:** Timothy C. Evans  
Chief Judge  
Circuit Court of Cook County

Handwritten signature of Timothy C. Evans in black ink.

**RE:** *assigned counsel, criminal proceedings, determination of indigency*

**DATE:** August 13, 2013

I have recently received credible reports from various members of the local criminal bar that decisions denying court appointed counsel in criminal cases or requiring reimbursement of the county for such services sometimes appear to be based solely on the fact that a bond was posted on the defendant's behalf. Although the extent to which this may be happening is not clear to me, the vital importance of the constitutional right to counsel compels me to bring this matter to your attention and to take certain actions at this time.

To clarify the court's statutory obligations to litigants and sureties, I have entered General Administrative Order 2013-11, a copy of which is enclosed. The order is meant to restate the provisions of 725 ILCS 5/113-3 addressing the determination of indigency and to provide advance authorization to the circuit clerk's staff to assist defendants or people acting on behalf of defendants in completing the form affidavit without requiring express direction from the trial judge. Although it is my belief and intention that this authorization will facilitate your decisions and reduce the time you and the litigants spend on these issues, I leave to your discretion the decisions about when assistance by the clerk may occur while your court is in session.

Also enclosed are two references I have prepared for your information when deciding the issue of indigency for purposes of both assignment of counsel and reimbursement of the county for services received from assigned counsel. They are meant only to clarify the issues to be addressed by the court at these points in a criminal case and not to direct, either by policy or specific outcome, what your findings of facts or rulings on the merits should be.

TCE:sab/lhk

Enclosures

**Notice to criminal defendants regarding possible payment of fees for services rendered by Public Defender's Office from bond pursuant to *People v. Love*, 177 Ill. 2d 550, 687 N.E.2d 32 (1997)**

**PLEASE KEEP A COPY OF THIS MEMORANDUM ON THE BENCH AT ALL TIMES.**

A. Notice prior to the appointment of an assistant public defender

After a judge reviews a defendant's Affidavit of Assets and Liabilities (Financial Affidavit) and decides appointment of an assistant public defender is appropriate, the judge may issue the following notice to defendant:

*"Based on your Affidavit of Assets and Liabilities, it is appropriate for me to appoint an assistant public defender to represent you in this matter.*

*"If you choose to be represented by the Public Defender's Office, after entry of final judgment in your case, the court may order that your bond be used to pay for the services rendered to you by the Public Defender's Office. As required by the Supreme Court opinion in *People v. Love*, I or another judge will conduct a hearing to determine whether your bond should be used in this way. Do you understand what I have just read to you? Do you have any questions?"*

B. Notice after entry of a final order disposing of the case before conducting a hearing for a bond refund to the Public Defender's Office

Immediately following entry of a final judgment disposing of the case, judges may issue the following notice:

*"If you can remember to the very beginning of your case, before I appointed an assistant public defender to represent you, I explained to you that at the conclusion of this trial we would hold a hearing to determine whether your bond will be used to reimburse the county for the services rendered by the public defender to you.*

*"I will make my decision based on factors including but not limited to: (1) information in your Financial Affidavit, (2) details I learned from your case, (3) the time spent representing you, (4) the nature of the legal services provided to you, (5) expenses reasonably incurred by the public defender on your behalf, (6) whether the bond money belongs to a third party such as a friend or relative, as well as other relevant facts.*

*"Do you understand what I have just read to you? Do you have any questions?"*

C. The Court Must Hold a Hearing to Determine if a Public Defender Fee Should be Imposed

Pursuant to 725 ILCS 5/113-3.1(a), "the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." Any bail bond "may be used in the court's discretion in whole or in part to comply with any payment order" and "the court may give special consideration to the interests of relatives or other third parties who may have posted a money bond on behalf of the defendant to secure his release." 725 ILCS 5/113-3.1(c).

In all cases where the public defender has been appointed and a bond is posted, the judge must hold a hearing to determine if the bond should be refunded to the Public Defender's Office for services rendered. *People v. Love*, 177 Ill. 2d 550; *People v. Gutierrez*, 2012 IL 111590 (2012)(notice and a hearing on defendant's ability to pay required before imposition of a public defender's fee). The posting of a bail bond is not a conclusive presumption of a defendant's ability to pay for legal services and a hearing is required even where bond is posted. The court should consider whether a third party provided the money for the bond and may, in its discretion, give special consideration to those interests. *People v. Love*, 177 Ill. 2d 550.

**Requirement that a defendant is entitled to an examination of his/her financial circumstances prior to the court denying a request for a public defender.**

Please keep a copy of this memorandum on the bench at all times.

**Introduction:** The Sixth Amendment to the United States Constitution and the Illinois Code of Criminal Procedure of 1963 require the appointment of counsel for a defendant who lacks the means to pay for a constitutionally adequate criminal defense. *See, e.g., People v. Love*, 177 Ill. 2d 550, 553 (1997); 725 ILCS 5/113-3. The right to court appointed counsel does not depend on a request by the defendant. *Kitchens v. Smith*, 401 U.S. 847 (1971) *citing Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *People v. Harden*, 78 Ill. App. 2d 431 (4<sup>th</sup> Dist. 1966). A defendant's request for the appointment of the public defender cannot be denied on the grounds that the defendant has posted bail without a hearing to determine indigency. *People v. Cook*, 81 Ill. 2d 176 (1980); *People v. Castile*, 71 Ill. App. 3d 728 (1<sup>st</sup> Dist. 1979); *People v. Power*, 60 Ill. 2d 151 (1975). "[F]ailure to appoint counsel for an indigent [is] a unique constitutional defect . . . rising to the level of a jurisdictional defect . . ." *Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 404 (2001), *citing Custis v. United States*, 511 U.S. 485 (1994).

A. Statutory Provision Regarding Appointment of the Public Defender

Pursuant to 725 ILCS 5/113-3(b), "In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel." In making its determination, "the court shall require an affidavit signed by any defendant who requests court-appointed counsel. Such affidavit shall be in the form established by the Supreme Court containing sufficient information to ascertain the assets and liabilities of that defendant."

B. The Court Must Examine the Financial Resources of the Defendant

The court is to make its decision "on the basis of as complete a financial picture as is feasible and the trial court should give consideration to the fact that the defendant need not be totally devoid of means to be indigent, it being sufficient if she lacks the financial resources on a practical basis to retain counsel." Further, a defendant's ability to pay must include a balancing of assets against liabilities and consideration of a defendant's income. *People v. Castile*, 71 Ill.App.3d 728 (1<sup>st</sup> Dist. 1979).

In order to facilitate this inquiry into the defendant's financial status, the court may direct the Clerk of the Circuit Court to assist the defendant in the completion of the affidavit. 725 ILCS 5/113-3(b).

C. The Posting of a Bond Does Not Substitute for an Inquiry Into the Financial Resources of the Defendant

It has been held to be reversible error to refuse to appoint the Public Defender solely because the

defendant has posted bond. *People v. Power*, 60 Ill.2d 151 (1975).

The court must make a serious inquiry as to the defendant's financial status. *People v. Pernermon*, 108 Ill.App.3d 73 (4<sup>th</sup> Dist. 1982).

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

General Administrative Order No. 2013- 11

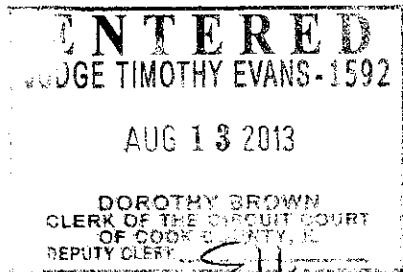
Subject: Appointment of Public Defender

IT IS HEREBY ORDERED:

In all cases in which the defendant requests appointment of the public defender pursuant to 725 ILCS 5/113-3, the court shall require the defendant to sign and submit an "Application, Affidavit and Order to Defend as an Indigent Person" (Form No. CCG 0690), or other such form as is established by the supreme court or this court, containing sufficient information to ascertain the assets and liabilities of that defendant. The circuit clerk is hereby authorized to assist the defendant in the completion of the affidavit. The court shall consider the information set forth in this affidavit, any further information from the defendant, and information from the State in deciding whether to appoint the public defender.

Dated this 13<sup>th</sup> day of August, 2013. This order shall be spread upon the records of this court and published.

ENTER:



A handwritten signature in black ink, appearing to read "Timothy C. Evans", written over a horizontal line.

Timothy C. Evans  
Chief Judge  
Circuit Court of Cook County