

BANGOR DAILY NEWS

Maine's bail system: will it be improved?



By Emily Guerin, Mary Helen Miller, Naomi Schalit and John Christie, © Maine Center for Public Interest Reporting

Posted April 12, 2011, at 5:21 p.m.

Final in a four-part series

Gov. Paul LePage's [proposed budget](#) restores to the state judicial system a position that in the past has helped to improve the hiring and training of [state bail commissioners](#).

According to Leigh Saufley, the chief justice of the Maine Supreme Judicial Court, the governor has agreed to fund a criminal process manager, a position left vacant by the Baldacci administration since January 2010. The budget is subject to the approval of the Legislature.

The salary range is \$47,000 to \$61,500 and the job requires a law degree.

After the previous criminal process manager left the position, the selection and training of bail commissioners became the responsibility of the deputy chief judge of the district courts, Robert Mullen, who also has bench and administrative duties.

Referring to the governor's decision as "a piece of good news," Saufley said filling the position will "improve training and oversight for the bail commissioner system."

Saufley's comments came in an interview with the Maine Center for Public Interest Reporting after publication of its series called "Maine's Bail System: A 19th Century Holdover."

The series documented long-standing shortcomings in the bail system, from nominal training and oversight of bail commissioners to the inconsistent data they have about defendants to the wide range of bails for similar crimes.

Bail commissioners are appointed, trained and supervised by the state's judiciary.

"What you've heard very consistently — they [bail commissioners] are independent contractors, legislatively created, a small amount of oversight from judicial branch and no resources to do it — that part hasn't changed," Saufley said, even after the 2005 state-commissioned study that cited the system's problems.

The state's budget problems limit making the needed improvements, Saufley said. "Improvements in a system that has very few resources are always incremental."

She was also "heartened" to hear that Mark Westrum, the administrator of [Two Bridges Jail](#) in Wiscasset, has received a \$500,000 grant from the U.S. Department of Justice for a pilot program that could improve the decision-making process when bail is set.

In conjunction with the [Muskie School of Public Service](#) and Volunteers of America, Westrum, a former sheriff, will develop a "risk assessment instrument" that would significantly improve the amount and quality of information bail commissioners have when setting bail.

As part of the intake process at the Lincoln-Sagadahoc County jail, [Volunteers of America](#) caseworkers will do a thorough interview of the defendant and plug that information into a computer program that calculates the defendant's flight risk and threat to community safety. The bail commissioner will have access to those calculations when setting bail.

The program is being developed specifically for the Lincoln-Sagadahoc county jail, but Westrum hopes it will eventually be adopted by jails around the state.

Rogue commissioners

The center's series also prompted fresh critiques of the system from lawyers who work with defendants or victims.

In Maine, bail usually is not set by a judge or court clerk, as it is in most states. Instead, except in major crimes such as murder, Maine relies on bail commissioners, a position created by the Legislature in the late 19th century.

Bail commissioners are not court employees and they are not required to be certified, pass a test or have any educational credentials except for attending a one-day training session.

Walter McKee, one of the state's top criminal defense lawyers, has a problem with the state's archaic bail system that he illustrates with one of his own cases.

"I had a client in [Penobscot County](#), a university student that was charged with sending threatening text

messages. No prior record whatsoever, 19 years old, wonderful family," McKee recalled.

At the time of the arrest, the charge was a misdemeanor, a minor transgression often not punishable by jail time.

Given the defendant's clean past and the nature of the offense, McKee said he would have expected his client to be released on unsecured bail. That means you are released from custody without paying any cash upfront, but an amount is set that you will have to pay if you fail to show up for your court date.

The call on whether McKee's client would get to go home or come up with a large cash bail on the spot was in the hands of one the state's 100-plus bail commissioners.

Anyone setting bail — a judge or a bail commissioner — is required to abide by the U. S. Constitution that says a person charged with the crime is presumed innocent. That means that bail should not be used to try to keep the person incarcerated until their trial unless there is reason to believe the defendant either will flee or is a risk to public safety.

McKee said there was no reason to believe his client would not show up for trial, nor, given he had no record and the level of the alleged crime, was there a risk to public safety.

"If you poll 30 bail commissioners, they'd all say this is an unsecured bail situation every day of the week," said McKee, who is the former president of the Maine Association of Criminal Defense Lawyers and a former Maine National Guard lawyer, known as a JAG.

Instead, the bail commissioner on call that Saturday night set a \$5,000 cash bail, meaning the 19-year-old would have to come up with that much cash or he would spend the weekend in jail with hopes a judge would reduce his bail when court was next in session.

"This bail commissioner, for whatever reason," McKee said, "decided this was, quote, a serious offense, even though it was only ticketed as a misdemeanor."

McKee said, "If this person didn't have some incredible resources or luck of the draw, that the family knew somebody who could cobble together some money, they would have been sitting there in jail at least until Monday or maybe even Tuesday."

The defendant was eventually convicted, but was not sentenced to any jail time, which McKee said demonstrates a judge — unlike the minimally trained commissioner — recognized his client was not a risk.

"I think what we've seen," McKee said, "is a number of — for lack of a better term — rogue bail commissioners that will set bail at unreasonably high amounts for low-end crimes that wreaks havoc on a defendant."

McKee, a partner in the [Augusta](#) firm Lipman, Katz & McKee, said bail commissioners should be instructed to grant "a significant presumption for anyone who has been arrested on a misdemeanor charge of an unsecured bond."

In that instance, defendants with minor charges and good records would not be jailed for lack of a cash bail.

Plug a hole

If a defendant or his attorney feels the bail set by a bail commissioner is improper, they can ask a judge to reset the bail. But judges hear bail cases only three days a week in Maine — Mondays, Wednesdays and Fridays.

A person arrested on Friday who could not pay the cash bail, for example, would be in jail until Monday (Tuesday if Monday were a holiday) before a judge could consider their bail.

Robert Ruffner, a former prosecutor who is now a criminal defense lawyer in [Portland](#), said that's too long to wait for the sole reason that you don't have the few hundred dollars or more to pay the bail.

Ruffner said it would be better if the courts could handle these cases Monday through Friday. The current system, he said, places too much responsibility on "lay people," although he said some have years of experience.

"The problem with the use of the bail commissioners is they're being asked to plug a hole that they were never asked to do" because the courts are not funded well enough to do the job themselves, Ruffner said.

Judge Mullen said the only way to conduct bail hearings every day would be to add judges and courtrooms "or not to do something else that we are doing now."

Faye Luppi, a former prosecutor and the current coordinator of the Violence Intervention Partnership, which works to prevent domestic violence, confirmed the center's findings about the lack of information provided to bail commissioners.

She said despite improvements made over the past 10 years, the "biggest problem" is getting bail commissioners all of the relevant history about the defendant so the commissioners can make an informed decision when they decide if a person arrested for domestic violence should be released or a bail set.

"There needs to be clarification whose responsibility it is to run the criminal history. Law enforcement? Dispatch? Jail intake?" she said. "How is the bail commissioner supposed to get the information at two o'clock in the morning when the jail calls him and says they need a bail set?"

She says the solution doesn't necessarily require more money, but everyone involved in the information sharing needs to get together and "figure out whose responsibility it is to do each of the steps in the chain of information."

Luppi will be on a panel at this year's bail commissioner training in May and intends to bring up that issue at the time.

Ruffner said there likely will not be any major attention to the problems from the Legislature, "Until something so spectacular happens in terms of someone languishing in jail because of some oversight ... I don't think that there's the will to get the money to do it right, so I don't think much is going to change."

The Maine Center for Public Interest Reporting is a nonpartisan, nonprofit journalism organization based in Hallowell. Emily Guerin and Mary Helen Miller were interns with the center after graduating from Bowdoin College. Naomi Schalit and John Christie are senior reporters. Email: mainecenter@gmail.com. Web: pinetreewatchdog.com.

<http://new.bangordailynews.com/2011/04/12/politics/maine%e2%80%99s-bail-system-a-19th-century-holdover/> printed on April 13, 2011