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Most who set bail in Maine are lacking legal training

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AUGUSTA – If you are arrested in Maine, everyone you deal with – with one exception – will be a professional.

The police officer who arrested you is certified and has at least 100 hours of training. The prosecuting attorney, your own attorney and the judge all went to law school and passed the rigorous bar exam.

The amateur link in the criminal justice chain is the person who will make the on-the-spot decision about both your immediate liberty and the community's safety.

Will you be released on little or no bail and be back on the street in a matter of hours?

Or will bail be set high, and if you can't come up with the cash, will you be jailed one or two nights until a judge can review your case?

Those decisions are made by a person called a bail commissioner. Just about anyone with a clean criminal record can be a Maine bail commissioner. No education is required, no test, no certification.

A judge reviews your application, and if there is a need for another bail commissioner in your county, you can be on the job after one day's training.

The bail commissioner is an obscure but essential part of Maine's criminal justice system that dates back to 1883, and critics say is in need of serious updating.

More than five years ago, problems with the bail system were brought to light by a study commissioned by the state-appointed Corrections Alternatives Advisory Committee. An examination by the Maine Center for Public Interest Reporting has found that five years after the study, while some improvements have been made, the system, which one expert calls "an infrastructure whose time has passed," still has some of the same shortcomings. These include:

- Insufficient training;
- Commissioners sometimes lack full criminal histories when setting bail;
- Inconsistency in bail amounts and conditions;
- Potential conflicts of interest by bail commissioners being paid by the people whose bail they set.

Vestige

The position of bail commissioner was created by the Legislature in 1883, when Chester A. Arthur was president, the Brooklyn Bridge was built and Maine's population was half of what it is today.

Since then, Legislatures have passed laws requiring the professionalization of lawyers, judges and police officers – but not the people who set the initial bail for just about every crime but murder.

"It's a mature system" said Maine Chief Justice Leigh A. Saufley. "There are parts of the system that could use some work."

Mark Westrum, the former Sagadahoc County sheriff and currently administrator of Two Bridge Regional Jail in Wiscasset, calls the bail system "the No. 1 public safety issue" in the state.

"There are people who get released who shouldn't get released," he said, while he also recalled cases where defendants spent a weekend in jail unnecessarily.

He said there are cases such as clammer caught without a license who couldn't come with bail.

“The bail commissioner decides he has to go jail for the weekend until the judge can see him. He's in jail for a stupid offense, and it costs the county \$161 a day to keep him there,” Westrum said. “It's crazy.”

Robert Mullen, the deputy chief judge of the state's district courts, oversees the bail commissioner training in addition to his courtroom duties.

“For the most part,” he said, “the commissioners are doing a competent job,” adding that “in an ideal world, the bail commissioners would be lawyers or have law school-type training.”

Zachary Heiden, legal director of Maine Civil Liberties Union, said, “It seems like there's little or no training and little or no oversight or standards. All that can add up arbitrariness and that's antithetical to due process. The guarantee of due process is the promise the government will treat everyone the same. If two people with the same offense are being treated differently, there's something troubling there.”

How bail works

After defendants are arrested and taken to jail, the only way they can be released is if there is assurance they will show up for their court date. That assurance often comes in the form of bail – cash deposited or property promised to the state that will be returned when the defendant appears in court. For minor offenses, a personal promise to appear in court may take the place of bail.

According to Maine's bail code, bail should be set in the least restrictive way that will ensure a defendant's appearance in court, protect community safety and prevent the defendant from bullying victims, witnesses, jurors, or other officers of the court. Because a defendant is presumed innocent until proven guilty, the Eighth Amendment of the U. S. Constitution prohibits setting bail unreasonably high and unlawfully keeping a defendant in jail.

After a police officer makes an arrest and brings a defendant to jail, his next step will usually be to call a bail commissioner from that county. He will explain over the phone why he made the arrest and provide any background information or criminal history he might have.

The bail commissioner will then decide whether bail is appropriate, and if so, what the amount and conditions should be.

Later, the bail commissioner comes to the jail to fill out the paperwork for the defendant's release. If a defendant can't pay the bail, he stays in jail for up to three days until he can request a judge to have his bail changed. There are currently 115 bail commissioners in the state. Depending on the county, commissioners can receive anywhere between one phone call a month in rural areas to multiple calls per day in urban parts. Calls come at all hours of the day and night.

The bail commissioners are not government employees. They are independent contractors. They are paid \$60 each each time they set bail – by the defendants, not the state or county.

There is no government record of how much they make per week or per year, although it can be estimated based on how many bails they set. Five per week, for example, would yield an annual income of \$15,600, which those in the field say is probably close to what a commissioner makes in a busy county, but they could make much less in a rural county.

Bail commissioners – most are men – come from all types of backgrounds... former police officers, insurance salesman, ex-newspaper reporter, real state sales, maintenance workers.

The study

Concerns about the growing number of defendants in Maine jails led the Legislature to create the Corrections Alternative Advisory Committee, which commissioned a study of how defendants were processed before they went to trial.

The study, by Luminosity Inc, based in Florida, considered every aspect of the process, including the bail commissioner system. Its September 2006 report concluded:

“The requirements of Bail Commissioners are insufficient to ensure the most effective application of the Maine Bail Code as it relates to setting pre-conviction bail.”

Only two of the 10 bail recommendations in the study had been implemented when the Correction Committee got an update in 2009 from Mark Rubin, research associate in justice policy at the Muskie School of Public Service.

Community safety was added to the list of factors bail commissioners consider when setting bail, and the conditions of release form was modified to prevent unconstitutional search and seizure practices. However, in a 2009 presentation, Rubin assessed the status of the other recommendations. The finding included:

- Bail commissioners are not always receiving necessary information about a defendant’s criminal history when setting bail.
- County jails have not implemented automated fingerprint identification systems that would yield more information about a defendant’s criminal history.
- Improvements in selection, training, and oversight of bail commissioners are ongoing.
- No minimum standards have been developed regarding the information provided to bail commissioners when setting bail, except for domestic violence crimes.
- The system for compensating bail commissioners has not been reformed, though the bail commissioner’s fee was raised from \$40 to \$60.
- Pretrial services have not been expanded in order to conduct investigations prior to a defendant’s initial court appearance.

In a recent interview, Rubin said, overall, “The system is in need of some consistency. Every bail commissioner is using different methods in assigning bail across the counties and jurisdictions.”

“To me,” said Mullen, “the system works. I don’t want to say surprisingly well, it does work well to me. If we had attorneys – or some

states have magistrates and I don't know what their training or background is. Sounds like they might be lawyers. We don't have the funding for that type of program."

Part 2: Bail commissioners can lack the information they need to set the right bail.

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