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WITNESS COMPENSATION—ILLINOIS' NOVEL PROPOSAL

State criminal justice systems are all too often hampered by the failure of witnesses to testify in court. Endless delays, excessive pre-trial detentions, frustrated attendant witnesses, and dismissed charges flow from such absenteeism. The Illinois General Assembly could take a substantial step towards curing this malady by adopting a novel plan, witness compensation, designed to induce the recalcitrant to testify.

On January 9, 1974, Representative Roman Kosinski (D-Chicago) introduced companion House Bills 2126 and 2127.¹ House Bill 2126 provides for the payment of certain stated fees and allowances to witnesses called by either party in a felony case. The witnesses are to be paid by the county where the felony charged was committed, and the county is to be reimbursed by the Comptroller of the State. Proposed H.B. 2127 appropriates \$500,000 to the Comptroller of the State for reimbursement.

These Bills recognize the serious problems that testifying in court can create for a witness. In many cases of grave felonies witnesses "are literally worn out, both psychologically and economically, by the many continuances allowed to . . . the parties"² to a criminal prosecution. Many witnesses simply cannot afford to attend numerous trial dates.³ House Bill 2127 embodies the belief that payment of a reasonable compensation would reduce the financial losses of witnesses while they perform their civic duty: testifying to crimes that are so detrimental to soci-

1. H.B. 2126, *as amended*, 78th Ill. Gen. Assembly (1974), *replacing* ILL. REV. STAT. ch. 53, § 65 (1973), *amending* ILL. REV. STAT. ch. 53, § 47 (1880) [hereinafter cited as H.B. 2126, ch. 53, § 47]; H.B. 2127, 78th Ill. Gen. Assembly (1974) [hereinafter cited as H.B. 2127]. At the time of this Note's preparation, H.B. 2126 and H.B. 2127 had been passed by a wide margin in the Illinois House of Representatives and forwarded to the Senate Committee on Rules. Passage in the Illinois Senate by the close of 1974 is uncertain.

2. H.B. 2127.

3. *Id.* Illinois Lieutenant Governor Neil Hartigan noted in a letter to the Bills' sponsor:

It is ironic that everyone else involved with each trial—from the attorneys to the bailiffs, the clerks and the judges—all receive compensation while the witnesses, who are so important to the fair pursuit of justice not only receive no pay, but must sacrifice some of their earnings in order to participate. It is only fitting that witnesses in these important trials receive some compensation for their expenses and the income which they lose.

ety as to be classified as felonies against the people of the State.⁴ Such a system of witness compensation would also encourage courts to minimize the number of continuances in the interest of economy and justice.⁵

If passed and signed into law, the Bills would amend two areas of the Illinois Revised Statutes. One such area is the Judgment and Execution provisions of the Criminal Law and Procedure Code.⁶ Under these provisions, when any person is convicted of an offense under Chapter 38, the court can order the offender to pay the costs of the prosecution.⁷ A judgment lien is then created on the real and personal property of every convicted person to the extent necessary to pay the fines and costs of prosecution.⁸ With the passage of a witness compensation law, the convicted offender's duty to pay the costs of prosecution would include the amount of witnesses' fees in those cases where the judge, at his discretion, enters a judgment for costs.

The main statutory impact of the prospective Bills would occur in the Fees and Salaries Act,⁹ which governs the fees of witnesses. The existing provision allows only nominal compensation to witnesses: ten dollars for each day's attendance and eight cents per mile each way for necessary travel.¹⁰ This rate presently applies uniformly to civil and criminal actions, including appearances for depositions and grand jury testimony.

The pending compensation Bill differentiates among the various judicial proceedings. Witnesses attending a trial of any civil matter would receive ten dollars for each day's attendance.¹¹ In the case of attendance at the trial, or any other stage of a misdemeanor prosecution, a witness would also receive ten dollars for each day's attendance, provided that the judge determines that the witness would otherwise suffer severe economic hardship.¹² The Bill provides that persons having their depositions taken receive the same compensation as witnesses attending civil cases in circuit courts.¹³

4. H.B. 2127.

5. *Id.*

6. ILL. REV. STAT. ch. 38, §§ 180-3 to -5 (1973).

7. *Id.* § 180-3; Galpin v. City of Chicago, 249 Ill. 554, 94 N.E. 961 (1911), *aff'g* 159 Ill. App. 135 (1910).

8. ILL. REV. STAT. ch. 38, § 180-4 (1973). *See Id.* § 180-5. A convicted person may acknowledge a judgment in favor of the People of the State of Illinois; failure to pay within five months will result in execution.

9. ILL. REV. STAT. ch. 53, § 65 (1973).

10. *Id.*

11. H.B. 2126, ch. 53, § 47(a)(1).

12. H.B. 2126, ch. 53, § 47(a)(2).

13. H.B. 2126, ch. 53, § 47(a)(4).

The key provision in this section of the Bill concerns the compensation to witnesses in felony cases. In the case of a felony, at the trial or any other stage of the prosecution, including appearances before the grand jury, the witness would receive a sum equal to eight hours' wages¹⁴ determined by the prevailing Illinois minimum wage rate for adults. This payment would be awarded for each day's attendance of four hours or more; a sum equalling one half that amount would be paid to a witness for any day's attendance of less than four hours.¹⁵

In addition, felony witnesses, like all other witnesses, would be entitled to receive ten cents per mile for necessary travel.¹⁶ Extra consideration would be given to a witness who must travel to a county other than the one in which he resides. Each day's travel of four hours or more from one county to another would constitute a full day's attendance for compensation purposes. Any cross-county travel of less than four hours would entitle the witness to one half that amount.¹⁷

The Bill does not apply to every witness. It specifies that a public official or employee of any governmental unit would not be compensated if he appears in his official capacity.¹⁸ Likewise, any person otherwise compensated for the period of his attendance, or any person attending as a consequence of the duties of his employment, would receive no compensation.¹⁹

In addition to describing the classes and eligibility of witnesses, the pending Bill details the administration of the compensation program. Payments to the witnesses would be administered at the county level. Routinely, the county where the trial occurs would compensate the witness.²⁰ However, in those criminal cases where a witness from a foreign county or state would be required to attend, he would be paid out of the county treasury where the crime was committed on the certificate of the clerk of the court where the trial is being held.²¹

In order to protect the scheme from false or exaggerated attendance claims, the Bill requires witnesses to verify their claims for fees. In criminal cases, each witness or deponent would be required to file an affidavit

14. H.B. 2126, ch. 53, § 47(a)(3).

15. *Id.*

16. H.B. 2126, ch. 53, § 47(a).

17. *Id.*

18. *Id.*

19. *Id.*

20. H.B. 2126, ch. 53, § 47(b).

21. *Id.*

stating the following: the number of days of attendance;²² the distance travelled;²³ and, in the case of attendance from a foreign county or state, the number of days travelled.²⁴

Furthermore, to qualify under the plan, the witness' presence at the trial must be necessary. The State's Attorney or the accused must request the witness' attendance (and the affidavit must so state), and the judge must certify that the witness was in fact a material one.²⁵ The sponsors of the Bill inserted a deterrent clause aimed at those who would seek to enter fraudulent claims for compensation. The Bill provides that any witness who knowingly makes a false statement in his affidavit in support of his claim for fees, or any attorney who knowingly makes a false certification as to the materiality of any witness commits a Class B misdemeanor.²⁶

The Bill would also provide for reimbursement to the counties. Counties would be recompensed monthly within thirty days of receipt of their claim by the Comptroller.²⁷ The claim would have to be substantiated by (1) an itemized statement showing the amount paid and the attendance record of each witness,²⁸ and (2) a copy of the affidavit certified by the court affirming the materiality of the witness.²⁹

Many law enforcement bodies have already approved the witness compensation proposal. Federal crime administrators have approved the principle of witness compensation as well. In its summary report, *Courts*, The National Advisory Commission on Criminal Justice Standards and Goals recommended a plan of witness compensation in federal courts not unlike the Illinois proposal. In essence, witnesses in criminal trials would be compensated for the time spent in court at a minimum hourly rate of twice the prevailing federal minimum wage.³⁰

22. H.B. 2126, ch. 53, § 47(c). In the case of a felony prosecution or a grand jury hearing, the witness must swear to the number of hours in attendance.

23. *Id.* Also, the affidavit must state that the route taken was the usually travelled and most direct one.

24. *Id.*

25. H.B. 2126, ch. 53, § 47(c).

26. *Id.* A Class B misdemeanor is an offense which provides a term of imprisonment of 6 months or less, but in excess of 30 days. ILL. REV. STAT. ch. 38, § 1005-5-2 (1973).

27. H.B. 2126, ch. 53, § 47(d).

28. H.B. 2126, ch. 53, § 47(d)(1).

29. H.B. 2126, ch. 53, § 47(d)(2).

30. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, LEAA Summary Report *Courts* 213-14 (1974). The Commission's report was recognized by the Law Enforcement Assistance Administration (LEAA) of the United States Department of Justice as the product of intensive study and delibera-

The major obstacle to the passage of the Bills—the same obstacle facing any bill that would establish a new administrative program—is the reluctance of the legislature to allocate the funds necessary for the operation of the program. The proposal requires Illinois to expend \$500,000 the first year³¹—no small change even for a state whose budget approaches \$8 billion. However, a solution to these problems might be found in assistance from the federal government, particularly the Law Enforcement Assistance Administration (LEAA), a branch of the United States Department of Justice. The LEAA was created to make grants to assist in the reduction and prevention of crime and the improvement of the criminal justice system.³²

LEAA funds are mainly allocated in block grants to planning agencies of the state. In Illinois, the agency is the Illinois Law Enforcement Commission (ILEC) which in administering the block grant program makes final decisions on the funding of programs applying for such grants. The LEAA, however, retains a discretionary fund which it uses to assist programs of a national scope or to provide an impetus for innovative and experimental projects. Applications for these discretionary funds, like block fund applications, are made to the state agency but are then forwarded to the LEAA with its recommendation.

If Illinois is to acquire federal aid, the first step, once the proposal is passed, would be for the Comptroller of the State to apply to ILEC, stating the amount of money the state itself plans to contribute in order to qualify for the federal matching funds.³³ The Bills' sponsor envisions a \$100,000 contribution to the program, which operates on a ten to ninety percent ratio; thus, the LEAA would add \$900,000 to the state's donation, netting \$1,000,000 toward the first year operation of the witness compensation plan.³⁴ The federal funds could be provided through either the block grants administered by the ILEC or the discretionary funds retained by the LEAA.

As with any program that administers systematic payments of this nature, the adequacy of the payments must be insured. Herein lies one

tion by outstanding members of state and local law enforcement and criminal justice agencies.

31. H.B. 2127, § 1.

32. 42 U.S.C. §§ 3701 *et seq.* (1971).

33. The Comptroller is the appropriate party to make the application because H.B. 2127 appropriates the proposed \$500,000 to him.

34. The \$900,000 figure represents *maximum* federal participation. These funds are not permanent annual stipends, but would exist for the first few years of the program, ensuring the establishment of the program until the state could examine its relative worth and continue it exclusively from its own funds.

of the greatest strengths of the proposed plan. Had the plan stated the hourly rate of compensation in specific figures, the adequacy of the payments would be subject to erosion by inflation and a proportionately higher cost of living; continuous re-legislation would be required to adjust the fees to a changing economy. Instead, the Bills propose that the fees equal the prevailing Illinois minimum wage rate.³⁵ This operates as a type of escalator clause. Whenever the minimum wage rate is altered to reflect changing economic conditions, the witness compensation plan would automatically upgrade its fees according to its fixed guide—the minimum wage rate. This feature of H.B. 2126 avoids continual legislative attention to the operation of witness compensation.

CONCLUSION

The Bills reasonably reflect their stated goal of fair and efficient administration of criminal justice. First, the proposal would extend fair fee payments to both defense and prosecution witnesses.³⁶ Second, the state is protected from improper payments through the affidavit and certification requirements.³⁷

Authorities universally recognize that the non-appearance of witnesses in a criminal case is a serious obstacle toward a conviction. As Dr. David Fogel, executive director of the ILEC, has noted, "The purpose of the whole criminal justice system is public safety. Convictions depend on witnesses, so public safety ultimately depends on witnesses."³⁸ The witness compensation proposal speaks directly to a key cause of witness truancy. The balancing by witnesses of economic survival with civic duty would be significantly reduced by the passage of this proposal. It has yet to be seen whether witness compensation will actually limit the number of continuances granted at trial. Currently, as a trial strategy, some lawyers attempt to obtain as many continuances as possible in hopes of discouraging already beleaguered witnesses from testifying for the other side; thus, the search for justice has more often resembled a war of attrition. Once these Bills are passed, however, witnesses will have the incentive to attend numerous trial dates, thereby limiting such delaying trial tactics.

Pending House Bills 2126 and 2127 confront the Illinois legislature with an opportunity to take a significant step towards alleviating a flaw

35. H.B. 2126, ch. 53, § 47(a)(b).

36. H.B. 2126, ch. 53, § 47.

37. H.B. 2126, ch. 53, § 47(c).

38. Chicago Sun-Times, Apr. 1, 1974.

in the administration of criminal justice. The Bills provide such a complete and viable blueprint for witness compensation, that other states would do well to utilize them as a guide for their own legislation. By immediate passage of this witness compensation plan, Illinois can demonstrate its innovative spirit by taking a step toward a justice more swift and sure.

Kenneth G. Mason

