

The Surety & Fidelity Association of America

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Via U.S. Mail and Electronic Mail

Letters to the Editor
ABA Journal
321 N. Clark St.
Chicago, IL 60654

Re: “Justice for All . . . Who Can Afford It”, March 2016, p. 8

Dear Editors:

The Surety & Fidelity Association of America ("SFAA") is a non-profit corporation whose member companies collectively write the majority of surety and fidelity bonds in the United States. SFAA's members are sureties on the vast majority of bonds in the United States, and include a number of companies active in providing surety bail bonds.

Much of the law involves balancing the interests of the parties and stakeholders. In her President's Message, Paulette Brown identifies key issues with respect to the use of bail. However, the balancing as presented in her Message is incomplete. Her Message fails to acknowledge the societal benefit of bail and the societal harm and cost caused by a defendant's failure to appear.

The use of bail has been contemplated and accepted since the Nation's founding. Notably, because the Eighth Amendment of the U.S. Constitution prohibits the use of excessive bail, the clear implication is that the use of bail is an accepted practice. Bail secures the critical public policy interest of having the defendant appear. A defendant's appearance advances the interests of justice and is a critical condition of due process (*See e.g. People v. Isby*, 30 Cal.2d 879, 894 (1947)). The Maryland Court of Special Appeals described the public policy objective of bail succinctly:

The purpose of the bond or security is to secure a trial, its object being to combine the administration of justice with the convenience of a person accused, but not proved, to be guilty. If the accused does not appear the bail may be forfeited, not as a punishment to the surety or to enrich the Treasury of the State, but as an incentive to have the accused return or be returned to the jurisdiction of the court.

Irwin v. State, 17 Md.App. 518, 524 (1973). Unfortunately, the President's Message failed to acknowledge the key role of bail in the administration of justice.

Surety bail is the most efficient and effective means of furthering this public policy interest. Experience in other jurisdictions has shown that cash bail for only a portion of the bond or other measures are not an effective means to secure a defendant's appearance. For example, according to a June 26, 2010, article from the Philadelphia Inquirer¹, over \$1 Billion was owed to the City by defendants who were released after depositing 10% cash bail and then failed to appear. That is, under a partial cash bail system, the defendant pays 10% of the bond and promises that if he or she fails to appear, the balance will be paid. With only 10% at stake, a high number of defendants failed to appear and, not surprisingly, failed to pay the balance of the bond. A surety bail bond takes measures to assure that the defendant appears and will pay 100% of the bond if there is a failure to appear.

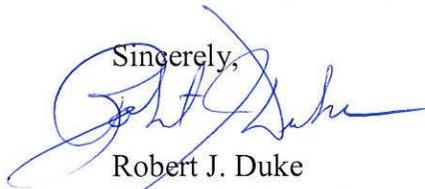
A failure to appear thwarts the administration of justice. It is important to remember that the defendant is in jail primarily because there was probable cause that he or she committed a crime. Bail secures the objective of the defendant's appearance so that proceedings can ensue to determine his or her guilt.

The bail bond agent, and ultimately the surety, do much more than collect the bond premium. The agent often obtains collateral or indemnity to guarantee that if the defendant fails to appear and the bond is forfeited, the agent and surety will have indemnity for the loss. This gives the defendant's friends or family members who provided the collateral or indemnity, as well as the defendant, a powerful financial incentive to see that the defendant appears in court or is recovered promptly in the event of a default. The agent also monitors the defendant to avoid a default and attempts to recover a defendant who failed to appear. Finally, the agent or surety pays any forfeiture.

The President's Message did not acknowledge that the source of funds to pay for bail or monitoring devices typically is not the defendant but the defendant's family and friends. Courts examine these other sources to determine if the defendant is truly indigent. In the vast majority of cases, such sources are available to pay bail.

We hope that when the ABA Journal addresses the public policy surrounding bail in the future, it will balance and account for all interests. Thank you for your consideration.

Sincerely,



Robert J. Duke
Corporate Counsel

¹ See http://articles.philly.com/2010-06-26/news/24966289_1_court-leaders-debt-court-officials