



AT WHAT COST?

Findings from an Examination into the Imposition of Public Defense System Fees



PREPARED BY
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NLADA is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. We provide advocacy, guidance, information, training and technical assistance for members of the equal justice community, especially those working in public defense and civil legal aid. For more than a century, we have connected and supported people across the country committed to justice for all.

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EXECUTIVE SUMMARY

In the United States of America, individuals accused of crime who cannot afford to hire a lawyer have a constitutional right to have one appointed to represent them at government expense. In 2021, the National Legal Aid & Defender Association (NLADA) set out to investigate the national landscape of laws and local practices relating to fees that are assessed upon individuals when they exercise their constitutional right to counsel.

Findings from the resulting eighteen-month investigation show that in the overwhelming majority of states, the Sixth Amendment right to counsel does not mean that counsel for those who cannot afford it is provided free of charge. In 42 states, plus the District of Columbia, laws authorize courts to impose public defense system fees – both upfront application or administrative fees, and fees recouping the cost of counsel – on people who are represented by court-appointed attorneys.

NLADA's review finds that these fees do more harm than good. For instance, in no state with available data does collection of public defense recoupment fees amount to more than five percent of assessed recoupment costs. Yet individuals assessed these fees who cannot pay them down are essentially sentenced to years of court entanglement and consequences that can sharply limit efforts to move forward in life. Unpaid court debt, including public defense system fees, can result in years of, among other things, inability to secure reliable housing and employment, tarnished credit, and risk of arrest or incarceration for failure to pay.

When consequences for poor people differ from those with financial means, courts are effectively operating a two-tiered justice system. People do not receive equal protection under the law when one's financial resources drive outcomes. An individual who retains private counsel and fails to pay that lawyer will possibly face a civil suit from that lawyer. However, they will not be arrested, taken to jail, and brought before a court, only to face additional punitive sanctions.

The following report documents the statutory authorization for public defense system fees in use across the United States. It identifies those states that receive direct revenue from these fees to help fund their public defense systems. And it identifies states where payment of the fees can be a condition of probation, a key factor that can lead individuals who cannot afford these fees to further entanglement with the criminal legal system. Interactive maps detailing these provisions are accessible from the report's accompanying webpage: www.nlada.org/public-defense-system-fees.

In 42 states, plus the District of Columbia, laws authorize courts to impose public defense system fees – both upfront application or administrative fees, and fees recouping the cost of counsel – on people who are represented by court-appointed attorneys.

The report goes beyond mere statutory compilation. NLADA took “deep dive” examinations into the nuances of how these fees operate in several states. The Supreme Court of the United States has ruled that states have a legitimate interest in recouping the costs of operating an indigent defense system from those who receive its services, so long as imposition of those costs does not restrict access to an attorney and costs are only extracted from people determined to have the ability to pay. Courts avoid violating the Constitution by assessing costs of appointed counsel at case disposition, after representation has been provided. Unsurprisingly, most people charged these fees are unable to pay them off immediately. So many are subjected to a years-long cycle of payment plans, warrants for failure to pay or failure to appear at a hearing about non-payment, possible arrest, and more court fees added to the existing debt. Nonpayment can and does result in incarceration, only under the guise of other explanations, such as failure to appear in court, or a discretionary determination that there was willful neglect or refusal to pay. These nuances are described in detail in the report, as is the alarming lack of government accounting for public defense system fees. Scant financial information is publicly available about the assessment, collection, and cost of administering these fees.

Two fees associated with public defense are the subject of this report: upfront application fees for the appointment of counsel and recoupment fees to recover the cost of representation. It is hoped that findings in this report provide a basis from which efforts can be taken to eliminate or reform practices around imposition of these public defense system fees. NLADA wishes to thank the participants of this study who generously gave their time to help inform report findings. Furthermore, NLADA is very appreciative of the support from the Charles and Lynn Schusterman Philanthropies, and of the partnership with the Fines and Fees Justice Center.

CHAPTER 1

INTRODUCTION

The Issue

The Sixth Amendment to the U.S. Constitution guarantees individuals accused of crime the right to counsel. The Supreme Court unanimously upheld in *Gideon v. Wainwright* that if an accused individual cannot afford to hire a lawyer, states have the responsibility of providing counsel for that person. Yet in more than 40 states, people who are too poor to pay for a lawyer can still be assessed fees for invoking their right to court-appointed counsel. In some states, fees assessed to recoup the state's or locality's expense of providing court-appointed counsel, including public defenders, private-practice assigned lawyers, and contract attorneys, can total tens of thousands of dollars. The reach of these fees is extensive. In the United States, a conservative estimate is that approximately 80 percent of criminal case defendants in state courts qualify for indigent defense, and therefore will be subject to imposition of public defense system fees.¹

In recent years, advocates, courts, governments, impacted communities, and other stakeholders have worked to reform the practice of punishing poverty through an overreliance on fines and user fees in both criminal and civil matters.² The harshly negative impact of the assessment and enforcement of court fines and fees on low-income communities and communities of color is gaining recognition by many as a significant factor leading to over-incarceration, job and/or housing loss, family instability, and a host of other related social problems. These monetary sanctions often serve to perpetuate poverty and marginalization among people who are entangled with the justice system.

Consequences of fines and fees are disproportionately inflicted on Black and Brown communities, who are overrepresented in all stages of the criminal legal system. For instance, one report analyzing data reported to the FBI by cities and counties documented that Black people were arrested at a rate five times higher than white people in 2018, and in some communities, up to ten times higher.³ People of color comprise 52% of America's jail population but just 28% of the general population, and Black people are jailed at a rate four times higher than white people.⁴

This report does not examine fines. Fines and fees have different purposes. The purpose of fines, which are imposed upon conviction, is both deterrence and punishment. The purpose of fees is to raise revenue. Often fees are automatically imposed and bear no relation to the offense charged or case outcome. In most cases, fees are intended to shift the costs of the criminal justice system from taxpayers to defendants, who are seen as the “users” of the courts.⁵

The practice of imposing public defense system fees in criminal matters, when there is a constitutional right to counsel expressly because one cannot afford to hire a private lawyer, has received little attention. The fact is that people who lack the means to hire a lawyer in the first place are not likely to be able to pay fees imposed for receipt of appointed counsel services. And the nonpayment, or irregular repayment, of court debt, including public defense system fees, can tether one to the justice system far longer than any other punishment.

Because public defense system fees are authorized in 42 states and the District of Columbia, a national project is needed to provide information, resources, tools, and technical assistance to help impacted communities and state and local jurisdictions understand these fees and be equipped to eliminate them, where appropriate. This report caps the efforts of the first of an eventual three-phase effort undertaken by the National Legal Aid & Defender Association (NLADA), in partnership with the Fines and Fees Justice Center (FFJC). The three phases are as follows:

- **Phase 1:** National Research
- **Phase 2:** Pilots, Tools and Advocacy Materials
- **Phase 3:** National Strategy to Eliminate Public Defense Counsel Fees

The purpose of this report is to compile information that identifies the use and effects of these fees in the United States. The work will inform efforts to reform public defense system fees, and support efforts to eliminate them, where appropriate, in the second and third phases of the project. Support for the project is provided by the Charles and Lynn Schusterman Family Philanthropies.

NLADA is the nation's oldest and largest membership organization dedicated to excellence in the delivery of legal services to people who cannot afford to hire counsel. FFJC is the nation's expert on court fines and fees.

Two Types of Public Defense System Fees

Individuals seeking appointed counsel can be assessed one of two types of public defense system counsel fees, or both. The first is a fee assessed at the outset of a case, when an individual requests the assistance of counsel and in response, a court assesses a fee that is typically called an **application fee** or an **appointment fee**. These fees are typically standard amounts, ranging from \$10 to \$400, that are imposed whether an individual is adjudicated guilty or not. (North Carolina only assesses its \$75 appointment fee from convicted individuals.) **Eighteen states** have some form of statutory upfront public defense system fee.⁶

The second type of fee seeks to recover some or all of the costs of supplying legal counsel and is typically imposed at the conclusion of a case. Often called a **recoupment** or **reimbursement fee**, in some states this cost of counsel fee is only assessed if an individual is adjudicated as guilty, whether through a plea or trial. Cost of counsel fees can be flat amounts charged for particular case types, the full cost of counsel services that an attorney is paid, or some other figure determined by the judge, based on what he or she feels the individual can afford. The wide variability in imposition of counsel costs, from judge to judge, or court to court, is one of the chief findings of research into different states, and it raises concerns of fairness and predictability. **Forty-two states, plus the District of Columbia**, have a statutory cost of counsel fee,⁷ although, as is discussed in Chapter 2, in a couple of states with a statutorily authorized fee, courts never or very rarely actually impose these costs.

Seventeen states impose both upfront application/appointment fees and cost of counsel recoupment/reimbursement fees.⁸

Just **seven states** have no statutory authorization for either upfront application/administrative fees or for counsel recoupment.⁹ In one of these states, Mississippi, an informal survey of defense attorneys found that in several counties, defenders see cost of counsel fees routinely assessed, despite there being no statutory authority for them. These fees are assessed in both adult criminal and juvenile delinquency cases. However, this report focuses only on practices in trial-level, adult criminal cases.

There is no requirement in the U.S. federal criminal system for indigent defendants to pay an upfront administrative fee or a cost of counsel reimbursement fee.

OVERALL FINDINGS

Adult Criminal Case Public Defense System Fee Assessments

18

states have statutory upfront application/appointment fees

42

states and DC have statutory recoupment fees

17

states have statutes authorizing both types of fees

7

states have no statutory public defense system fees*

* Note: One of these states, Mississippi, has no statute authorizing imposition of an upfront fee or recoupment, but defense attorneys report recoupment is indeed imposed in some counties.

Why Examine Defender System Fees When There Are SO MANY Fees?

People accused of crime, whether or not they are indigent, face an array of fees, not to mention victim restitution and fines if convicted. Fees include daily jail costs; warrant fees; DNA or forensic fees; prosecution fees; litigation costs, such as for experts and investigators; jury fees; electronic ankle monitor and probation supervision costs; and more. Most fees, but not all, have some connection to the justice system. User fees have been enacted to help offset spiraling criminal legal system costs. But the assessment of fees on poor people for services to which they are entitled because they are poor feels different, at once strikingly cruel and fiscally misguided.

NLADA represents the interests of public defenders, contract defenders, private-court appointed counsel, and defender clients. In some jurisdictions, public defense system fee revenue specifically funds indigent defense programs. One may argue that seems more appropriate than directing this revenue to fund completely unrelated services. The flip side to that argument is that use of public defense system fees has the potential to undermine trust in the criminal legal system. Application fees and cost of counsel fees can be perceived as part of an overall unfair system, and chill a client's willingness to engage in a trusting attorney-client relationship, which is essential to effective representation. The actual revenue collected from these fees falls far below what is assessed, calling further into question the wisdom of the fees. A chief goal of this report is to raise awareness about public defense system fees, and lay a foundation for reconsidering their utility.

The legality of imposing fines and restitution has been tested, and upheld by the U.S. Supreme Court as constitutional, for reasons that are summarized in Chapter 3. That analysis has been extended by state supreme courts to apply to fees, including public defense system fees. Despite being deemed legal, these fees saddle people with debts that many cannot get out from under. Until paid off, court fees can limit the ability to move on with life productively and secure the basics of life, including housing, a driver's license, or certain forms of employment. And failure to pay court debt can result in arrest, detention, and yet more court costs.

What Was Studied, and What Is in This Report

NLADA's Phase 1 investigation consisted of two core components: first, a national scan of state laws governing use of public defense system fees assessments, and second, a series of "deeper dive" explorations into how these fees actually operate in several jurisdictions.

Chapter 2 of this report contains the findings of the national scan of public defense system fees used in all 50 states plus the District of Columbia. Primarily that work centered on a statutory scan, but in states where statutory authority was unclear, NLADA spoke extensively with defenders, advocates, and others to seek clarity. We also compared our findings about upfront fees and cost of counsel fees with prior tracking efforts to understand what change has occurred in the past 20 years. Our collected data, along with the corresponding statutory authorization, all appear in a series of interactive maps at www.nlada.org/public-defense-system-fees. The maps offer rich detail on the data points examined in an easy-to-use, state-by-state format. In addition, Appendix A contains a compilation of all researched data points with statutory authority in table format.

Chapter 3 contains an analysis of the caselaw that has considered and so far upheld the legality of assessing fees for appointed counsel onto people who are not able to hire private counsel.

In Iowa, Clark County (Nevada), and Oklahoma, NLADA conducted "deep dive" research to better understand how upfront and recoupment fees operate in practice, and to begin to identify possible paths to reform. In these jurisdictions, semi-structured, qualitative interviews were conducted with judges, court clerks, defenders, advocates, impacted individuals, and others to understand how these fees are administered and how they affect both people and systems. In all three sites, NLADA also sought to "follow the money," to collect data on how much is assessed and how much is collected in public defense system fees. Chapter 4 includes findings from those investigations. It also includes findings from a targeted investigation looking at data tracking costs of administering counsel fees in New Hampshire.

Finally, Chapter 5 offers recommendations for next steps in this work, with an objective of helping inform the approaches that FFJC and others take to reform public defense system fees.

Preview of Findings

While later chapters contain detailed findings and recommendations, the following points emerged in the research and recur throughout the report.

- A constitutional right to appointed counsel exists for those who are accused of crime and cannot afford to hire a lawyer. Yet, people who invoke that right face costs assessed by the government.
 - Many people are charged not just once but twice: both an upfront fee and a backend fee.
 - Fees are not just for the convicted. They are sometimes imposed upon dismissal or after wrongful arrest.
- Actual collections of assessed public defense system fees are low, calling into question the motivation for their creation: is the purpose revenue generation or punishment of the poor?
 - Data from Iowa, for example, show that in recent years, no more than 3.2 percent of assessed cost of counsel fees have been collected annually.
- Unpaid public defense counsel fees, like other court debt, can have lasting, disruptive effects on people's ability to get ahead. Unpaid court debt affects creditworthiness, ability to drive legally, eligibility for certain types of employment, and more.
- Some people face further criminal legal system re-entanglement for failure to pay debt, such as prolonged incarceration or probation, or arrest. Such consequences contradict the goal of disentangling people from the cycle of involvement in the criminal legal system.
- Very little reform of these fees has occurred over 20 years. One major exception is California, which repealed its application and recoupment fees in 2020.
- Wide variability in the imposition of fees, whether from county to county, or judge to judge, within a state, further underscores the unfairness of imposing public defense system fees on the poor. There is wide discretion and little standardization in approach taken to determine individual ability to pay fees.
- It is difficult to track what is assessed, what is collected, and to what purposes collected public defense system fee revenue is directed, suggesting state and local governments themselves are ill-informed about these fees.
- Even after protracted, demonstrated inability to pay down public defense system fees, along with other court costs, these fees can sometimes never be extinguished. They will continue to be enforced, and carry all of the accompanying consequences, until the debt is paid down or the individual dies.
- The fees are at their very essence a poverty penalty, and a contributor to a criminal legal system that perpetuates inequity between those with and without means. People accused of crime who retain counsel and fail to pay their legal bills will not experience the types of consequences unpaid appointed counsel fees can result in, such as lengthier probation terms, summons to a weekly show cause docket, or ineligibility for driver's license renewal.

The balance of this report delves into these and additional issues.

A Word on Language

The language used in discussing people who have been judicially determined to be entitled to legal counsel at state expense can be demeaning. People accused of violating the law are very often referred to as “defendants” in statutory language, court orders, caselaw, and across all forms of media. The vast majority of people entangled in the criminal legal system are also experiencing poverty, and are commonly called “indigent” in these same sources. “Indigent defendants” is the collective term long used to refer to people who have been judicially determined to be entitled to legal counsel at state expense. The precise meaning of “indigent defendant” can vary somewhat from state to state, because states apply different approaches to characterize someone as an indigent defendant. The use of the term “indigent defendant” is increasingly viewed as dehumanizing, and part of the historic and systemic marginalization of poor people who are entangled with the criminal legal system, often directly because of underlying issues directly related to being poor. NLADA uses the term as sparingly as possible in this report but with the understanding it is unavoidable to some extent when discussing the topic of public defense system fee imposition.

Definitions

Finally, the following definitions are provided as an aid for reading through the report, as different jurisdictions use differing language to describe public defense system characteristics.

- **Public Defense Delivery System:** Refers generally to any and all delivery systems used to provide constitutionally mandated right to counsel services, including public defender office, institutional provider, contract system, or private court-appointed attorney system.
- **Public Defender Office:** Government (local, state, federal) or not-for-profit office that employs criminal defense attorneys who get paid a salary to represent clients who cannot afford a lawyer. Also sometimes called an “**Institutional Provider.**”
- **Contract System:** Individual lawyers, a group of lawyers, or a law firm enter into a contract with the government and agree to represent indigent clients brought before the court in that jurisdiction.
- **Private Court-Appointed Attorney System:** Made up of lawyers who work in private practice and get paid by the government to represent clients who cannot afford a lawyer on a case-by-case basis. Assigned counsel systems can be overseen by county or state government or bar associations.
- **Public Defense System Fees:** Umbrella term referring to any fee assessed for those exercising their right to counsel, whether an upfront fee or a recoupment/counsel reimbursement fee.
- **Upfront Fee:** Assessed at the outset of a case as an administrative or application fee for those seeking to be represented by a public defense system provider.
- **Recoupment or Counsel Reimbursement Fee:** Assessed on those represented by a public defense system provider at the conclusion of a case to recover some or all of the cost of their representation.

CHAPTER 2

50-STATE OVERVIEW

NLADA conducted research into the laws in all 50 states and the District of Columbia to determine what fees are assessed onto very poor defendants as they exercise their right to counsel. In order to develop a cohesive overview of public defense system fees, this research focused analysis on the state statutes dictating these fees.

This methodology carries some limitations for understanding actual practice. Most laws give courts wide discretion on choosing to impose these fees, and in determining how much to impose. Thus the analysis should be considered a starting point for understanding what is permitted, which should be supplemented with additional examination into actual practice.

Also, there are additional fees levied onto impoverished defendants relating to the costs of representation that we did not track in this study. Many states will assess the costs of case-related defense services such as transcripts, expert witnesses, and investigators onto the indigent defendant.

And another area not included in this analysis is fees assessed on those determined to be “indigent but able to contribute.” That is a provision seen in some statutes that applies to individuals who are found to be unable to pay the full anticipated cost of counsel, but have ability to pay something toward that cost.

Finally, of course, in addition to counsel costs, most states have enacted multiple other fees that are assessed in all criminal cases as well as user fees, such as for jail stays or probation supervision, and indigent defendants are routinely assessed these fees. Extensive national evidence shows that people of color are disproportionately subjected to fines and fees, particularly those related to the criminal justice system.¹⁰ This is due to both the increased likelihood of being arrested or incarcerated (and therefore of having to pay any associated court fees and, if convicted, penalties), and the racial inequities in income and wealth that make it harder to pay these financial obligations. It can be difficult to disentangle practices pertaining specifically to public defense system fees from all of these other fees.

The main data points tracked in the statutory analysis of each jurisdiction include the following:

- who determines whether a defendant qualifies for appointed counsel,
- whether a statute authorizes the assessment of an upfront fee (see Table 1),
- whether a statute authorizes the assessment of cost of counsel fees (see Table 1),
- where revenue from these fees is distributed (see Table 2), and
- whether a statute instructs payment of these fees to become a condition of probation.

Key Data Points

Who Determines Whether a Defendant Qualifies for Appointed Counsel

In order to be eligible for court-appointed counsel,¹¹ a defendant must be facing a charge that, if convicted, carries a potential for loss of liberty. They must also demonstrate that they are unable to afford to hire a lawyer. The vast majority of people facing criminal charges in the U.S. who are prosecuted in state courts are represented by court-appointed counsel.¹² Reports by the federal government and other organizations show that approximately 80 percent qualify for the appointment of counsel at state expense.¹³ Research has shown that, by and large, the determination of whether a person is eligible for appointed counsel is made by the court, typically at or before their first appearance before a judge. There are also a handful of jurisdictions that allow for the public defender office to make the initial determination of indigency.

Defendants are generally required to submit an application for counsel, sometimes called an affidavit of indigency, in order to have their request for counsel processed. The process is often quick and reliant on judicial discretion, although some jurisdictions conduct income and asset verification, which can take longer. Interviews with judges across a few states show that some judges routinely assign counsel to the majority of poor defendants who are requesting it, but due to judicial discretion, rates of appointment of counsel can vary greatly among different counties and courtrooms.

Eligibility screening is the gateway step in the process of appointing counsel for indigent defendants. It is at that time, or shortly after eligibility is established, that the first type of counsel fees – the upfront application or appointment fee – is imposed.

Whether Statute Authorizes the Assessment of an Upfront Fee and the Amount of the Fee

NLADA found that 18 states authorize the assessment of an upfront fee onto indigent defendants that is triggered as soon as they exercise their right to counsel (see Table 1). These fees go by different names, but are usually called administrative fees, application fees, or appointment fees. While these fees are generally set at lower rates than the cost of counsel fees, which are assessed at case disposition, any amount can be cost prohibitive to people with little to no economic resources. Notably, these fees are also typically assessed before the defendant's ability to pay has been considered. Statute in Oklahoma, for example, dictates that a defendant's application for counsel will not be processed until they have paid a \$40 nonrefundable application fee. However, interviews there revealed that, in practice, counsel in Oklahoma can be appointed if a person cannot immediately produce \$40, but the fee will be deferred and imposed at the conclusion of the case. In Arkansas, courts are allowed to assess a fee ranging between \$10 and \$400 at the beginning of a case, and as in Oklahoma, this money is expected to be collected at the beginning of the case or it is deferred. States like North Carolina and Florida make clear that these application fees cannot be

waived, even if the person is too poor to pay the fee. In North Carolina, this \$75 fee is only assessed onto defendants who are convicted. Federal law permits fees to be assessed only onto people who have reasonable ability to pay them, regardless of conviction status.¹⁴ Many state statutes allow for the reduction or waiver of these upfront fees but do not outline a standard by which the court should decide to waive or reduce these fees, and it is not clear how often these fees are waived. Additional research into court practices and interviews among impacted clients is warranted to determine how often in practice these upfront fees prohibit individuals from exercising their Sixth Amendment right to counsel or lead to prolonged justice system involvement.

Whether Statute Authorizes a Recoupment Fee and the Amount of the Fee

NLADA found that 42 states and the District of Columbia have a law authorizing the assessment of fees onto defendants for the cost of their legal counsel (see Table 1), something often called “recoupment.” The word “recoupment” refers to the process of requiring a person to pay back funds that were previously paid out. In this context, recoupment fees are the fees that indigent defendants are assessed in order to reimburse the state or locality for the costs of their legal representation. The assessment process for recoupment fees varies by jurisdiction. Some jurisdictions assess fees based on a fee schedule, differentiated by case type, while others rely on an hourly rate for attorney services provided to determine the amount to be assessed. In some places, state statute allows for the judge to determine what a reasonable amount for the fee would be without offering guidance as to what constitutes a reasonable amount. The amount of these fees also varies greatly depending on the particular court that is assessing them, and many state statutes allow for indigent defendants to be charged for up to the full cost of counsel. Importantly, these fees are necessarily assessed onto a defendant after they have already been declared too poor to hire counsel.

Federal caselaw¹⁵ and most state statutes dictate that courts take into consideration a person’s ability to pay these fees, yet the national review that NLADA undertook did not find an ability-to-pay standard that effectively prevents courts from levying these fees onto clients who are unable to pay them. Some statutes outline criteria to apply to determining a person’s ability to pay, such as living below the federal poverty level or being a recipient of government assistance, but as discussed below, those are widely considered to be insufficient measures. More research is warranted to observe how ability to pay is determined in practice. Interviews with advocates and judges revealed that in some instances, ability to pay determinations can be as short and subjective as a judge making assumptions about a person’s financial situation based on the brand of shoes they are wearing. Some states only assess counsel recoupment fees on individuals who are adjudicated as guilty of the charged offenses. Others also assess recoupment fees on individuals who are acquitted, or whose cases are dismissed.

One other note is warranted on methodology. For the purposes of being able to develop meaningful categories through which to discuss and present the data, public defense fees are divided between two categories. The first category is fees assessed at the outset of a case, generally with the express purpose of covering administrative court costs related to processing an indigent defendant’s application for counsel. The second category is fees assessed at disposition, generally with the express purpose of reimbursing the governmental entity (i.e., city, county, or state) for the cost of appointed counsel. In reality, the fee schemes vary greatly among states, and sometimes collected data does not fit neatly into these two categories. In Massachusetts, for example, state law authorizes assessment of a \$150 fee at the outset of a case. Despite this upfront timing, statutory language calls this a “counsel fee,” and Massachusetts defense practitioners report the fee is best characterized as a counsel fee, not an appointment or application fee. In Arizona, statute authorizes a cost of counsel fee and an administrative fee. Though the statute does not dictate when in the case the administrative fee is assessed, NLADA categorized it as an upfront fee given that it serves a similar function to other upfront fees (covering the costs of operating the justice system) seen across the country. In practice, the point at which this administrative fee is assessed in Arizona may vary greatly depending on the county and the courtroom where a case is filed.

Where Revenue from Collected Public Defense System Fees Is Directed

Over the past three decades, states have increasingly been authorizing courts to assess “user fees” onto people who come into contact with the justice system in order to offset spiraling criminal legal system expenses. U.S. justice system expenditures rapidly expanded during this time, yet state and local governments were hesitant to place the burden of supporting the system onto taxpayers, instead opting to create court fees and increase the amount of existing fees. Upfront fees and counsel recoupment fees are a part of this broader trend of shifting the costs of funding the justice system onto the people who have become ensnared in the system, though the efficacy of relying on very poor defendants to supplement justice system budgets has repeatedly been called into question. Not every state shares data on the amount of public defense counsel fees that are assessed and actually collected. Iowa does, however, and data available for 2015-2018 show that no more than 3.2 percent of assessed counsel fees were collected in that four-year period.¹⁶ In fact, in some jurisdictions, researchers have demonstrated that governments in some locations spend more money trying to enforce these fees than they successfully collect.¹⁷

Collected public defense system fees are typically sent to a state or county general fund, with no specifications on their use. But 24 states direct revenue from the fees to accounts created specifically to help fund the public defense delivery system (see Table 2). In states that do not earmark these funds for public defense delivery systems, it is not made clear in statute where revenue generated from fees is ultimately distributed. For example, in October 2018, the Berkeley Law Policy and Advocacy Clinic identified over 100 different court administrative fees, penalties, and assessments in California that went to over thirty different budgets or funds.¹⁸ While the majority of revenue from these sources goes to county or state general funds, money generated from court fines and fees is often not earmarked to a specific budget and so is lumped into the jurisdiction’s general fund for indeterminate use. In these situations, it is unclear what justification exists for assessing these fees onto people who have interacted with the justice system.

Assessing public defender system fees can create awkward moments, if not actual conflicts of interest, for attorneys and their clients. In North Carolina, for example, it is not uncommon in determining counsel cost assessments for a judge to ask the attorney, who is standing alongside their client in open court, how much time they spent on the client’s case, and base assessment on the information provided by the attorney. Attorneys can feel uncomfortable being the source of what they know will be burdensome costs assessed on people who are in no position to afford them. An instinct may be to “lowball” the time they devoted. Still, attorneys owe a duty of candor to the court to report truthfully. And if they are paid according to vouchers that require exact time records to substantiate payment requests, they would undermine their own pay if they tried to mitigate financial burden on their client. Public defenders who – unlike private court-appointed attorneys – receive a salary may be in an easier position to report a lower amount of time devoted. That, too, poses a hazard as a client may be concerned that inadequate time was devoted to their case. In a worst-case scenario, an on-the-record underestimate of hours worked could factor into a claim for ineffective assistance of counsel. North Carolina is not a state where recoupment revenue funds the indigent defense system (although application fee revenue does). The awkwardness can be more of an actual conflict in states where recoupment does flow to the indigent defense system, and attorneys must play a part in setting the recoupment amount a judge imposes. These conflicts – whether real or perceived – threaten to undermine the attorney-client relationship and perceived legitimacy of the system.

In its national scan of public defense system fees, NLADA attempted to collect information on how much money is assessed in fees and how much is actually collected in individual states. Unfortunately, this data is not easy to find, as it is not collected and publicly reported in the vast majority of states. Without this data, it is impossible to perform precise cost-benefit analysis on these fees. In jurisdictions that could confirm their annual rates of collections, we know that very little revenue is being generated from fees assessed onto people who do not have money to pay them. Iowa, for example, had an outstanding counsel reimbursement fee debt of \$172,887,091 in 2018. Just \$3,429,272 of that amount was ever collected, representing only 1.9 percent of the total debt.¹⁹ In Vermont, the approximately \$350,000 in annually collected fees represents only about 1.6 percent of the Office of Defender General's \$22 million budget. In Wyoming, in FY 2021, the Public Defender collected \$741,084 in court ordered reimbursement fees, representing 6.7 percent of total agency expenditures, which were \$11,078,119.²⁰ Similar patterns show in data reported in the Wyoming Public Defender's 2019 Annual Report. That report states that in FY 2019, the Public Defender collected \$580,719 in court ordered reimbursement fees, representing 5.1 percent of total agency expenditures of \$11,313,510.²¹

Whether Payment of These Fees Can Become a Condition of Probation

Numerous studies have documented that lack of payment of criminal justice fines and fees can lead to incarceration for people who are too poor to pay them,²² effectively creating modern day debtors' prisons in the United States. In 30 states, courts are authorized to make the payment of counsel fees a condition of a defendant's probation. In such a state, when a person cannot make required payments on court debt and does not satisfactorily communicate that to a court or probation official, a bench warrant can be issued for their arrest which, if executed, will result in incarceration before being brought before a court to review the alleged probation violation. A similar outcome can occur when a person who has a regularly scheduled court appearance to check in on compliance with probation conditions fails to show up because they know they cannot pay court debt and fear consequence. Most judges and attorneys questioned about whether individuals are jailed merely for non-willful failure to pay court costs, including counsel fees, said that they thought it did not happen. However, a missed court appearance or debt payment can trigger issuance of an arrest warrant, and only after the person has been arrested, booked, and jailed for sometimes more than one or two days will they have an opportunity to go before a judge and explain that non-payment was not willful. This problem has been clearly documented in at least one state.

In 2018, Washington State passed legislation banning the practice of incarcerating people for inability to pay their court debts. NLADA learned from discussions with advocates in Washington, however, that defendants are routinely jailed for multiple days as they await appearance before a judge to determine that they are too poor to pay their court costs and therefore should not be jailed due to nonpayment of their debt. Detention for non-willful failure to pay can result in serious consequences, such as lack of child care coverage, or loss of a job for failure to show up.

Key Findings Summary

- **Eighteen states have statutory upfront application/appointment fees** (see Table 1).
Utah is the only state with a statute that prohibits the assessment of upfront fees onto applicants for court-appointed counsel. Three states, California, Kentucky, and New Jersey, have repealed authorization of an upfront fee assessment.
- **Forty-two states and the District of Columbia have a law authorizing the assessment of fees onto defendants for the cost of their legal counsel** (see Table 1).
California, Hawaii, Mississippi, Nebraska, New York, Pennsylvania, and Rhode Island do not have state statutes that allow for these fees. In the majority of these jurisdictions, these fees were never created. In California, these fees were repealed. While Mississippi has no statute authorizing imposition of counsel fees, defense attorneys report that these fees are indeed imposed in some counties.
- **Thirty states have statutes allowing for unpaid fees to become a condition of probation.**
Eleven states and the District of Columbia do not address this practice in their statutes. Of the nine remaining states, seven of them do not assess any fees onto low-income defendants for the cost of court-appointed counsel. The remaining two states, Indiana and Minnesota, have statutes that prohibit unpaid fees from becoming a condition of probation.
- **In 37 states and the District of Columbia, the court determines whether an individual qualifies for a public defender or other court-appointed counsel. In nine states the determination is made by the public defender, and in four states the process varies.**
- **Twenty-four states allow for some or all of the revenue generated from public defense system fees to be distributed back into the public defense delivery system** (see Table 2).

The above data, along with the corresponding statutory authorization, all appear in a series of maps at www.nlada.org/public-defense-system-fees. The maps offer richer detail on the data points examined in an easy to use, state-by-state format. In addition, Appendix A contains a compilation of all researched data points with statutory authority in table format.

TABLE 1

Statutory Authorization of Public Defense System Fees

- Statute authorizes this fee
- Statute does not authorize this fee
- Statute does not authorize either fee

STATE	UPFRONT FEE	COST OF COUNSEL FEE
Alabama	○	●
Alaska	○	●
Arizona	●	●
Arkansas	●	●
California	○	○
Colorado	●	●
Connecticut	○	●
Delaware	●	○
D.C.	○	●
Florida	●	●
Georgia	●	●
Hawaii	○	○
Idaho	○	●
Illinois	○	●
Indiana	●	●
Iowa	○	●
Kansas	●	●
Kentucky	○	●
Louisiana	●	●
Maine	○	●
Maryland	○	●
Massachusetts	○	●
Michigan	○	●
Minnesota	○	●
Mississippi*	○	○
Missouri	○	●
Montana	○	●
Nebraska	○	○
Nevada	○	●
New Hampshire	○	●
New Jersey	○	●
New Mexico	●	●
New York	○	○
North Carolina	●	●
North Dakota	●	●
Ohio	●	●
Oklahoma	●	●
Oregon	●	●
Pennsylvania	○	○
Rhode Island	○	○
South Carolina	●	●
South Dakota	○	●
Tennessee	●	●
Texas	○	●
Utah	○	●
Vermont	●	●
Virginia	○	●
Washington	○	●
West Virginia	○	●
Wisconsin	○	●
Wyoming	○	●

* In Mississippi, state law does not authorize or disallow either fee. However, NLADA conducted a survey of defense attorneys in the state to discern if these fees exist in any of the counties of Mississippi. Across locales surveyed, attorneys reported that there are no upfront fees assessed in Mississippi, but that in at least some counties cost of counsel fees are routinely assessed.

TABLE 2

States Where At Least Some Fee Revenue Goes to Fund the Public Defense Delivery System

STATE	USE OF FEES
Alabama	All collected fees go to the Fair Trial Tax Fund.
Arizona	All collected fees are reserved for use by the public defender.
Arkansas	All collected fees go to the Public Defender User Fees Fund.
Connecticut	All collected fees go to the Public Defender Services Commission.
Florida	All collected fees go to the Indigent Criminal Defense Trust Fund
Georgia	All collected fees go to “whichever agency provided legal services” or the state general fund.
Indiana	All collected fees go to the County Supplemental Public Defender Fund.
Kansas	Application fees go to the Indigents’ Defense Services Fund.
Kentucky	All collected fees go to the Public Advocate Fund in Louisville-Jefferson County, and to the state Department of Public Advocacy in all other counties.
Louisiana	All collected fees go to the Indigent Defense Fund.
Maine	All collected fees go to the Maine Commission on Indigent Legal Services.
Minnesota	Recoupment fees go to “the governmental unit that provided counsel.”
Missouri	All collected fees go to the Legal Defense and Defender Fund.
Nevada	All collected fees go to the city, county, or public defender’s office that initially bore the cost of provided counsel.
New Mexico	Application fees go to the Public Defender Automation Fund.
North Carolina	Appointment fees go to the Indigent Defense Fund and the Court Information Technology Fund.
North Dakota	Application fees go to the Indigent Defense Administration Fund.
Ohio	A partial amount of the All collected fees go to the Public Defenders Client Payment Fund.
Oklahoma	Recoupment fees go to the Indigent Defense Revolving Fund.
Oregon	All collected fees go to the Public Defense Services Account.
South Carolina	Application fees go to the Public Defender Application Fund.
South Dakota	All collected fees go to the county general fund, municipal general fund, or to the public defender fund.
Vermont	All collected fees go to the Public Defender Special Fund.
Wisconsin	All collected fees are reserved for use by private court-appointed attorneys and investigators.

Supplemental Survey

In Mississippi and Washington, where court operations and indigent defense services are operated locally, there was not enough information available from state statute review to discern statewide indigent defense counsel fee schemes. Practices differ from county to county and centralized data is not available. Therefore, to supplement statutory review, NLADA fielded a survey to attorneys who represent indigent defendants in each state. The survey sought information on the five metrics that were tracked in the national statutory analysis.²³ In both states, responses were received from attorneys who practice in multiple counties. And in Washington, the Washington State Office of the Public Defender (OPD) shared data from its own research about recoupment practices that reinforced understanding of practice in that state.

Survey in Mississippi

In Mississippi, NLADA was told by the State Public Defender that although there is no specific statutory authority to assess an indigent defense counsel fee, many courts do it. Practices vary county by county and there is no centralized reporting. “It is essentially part of the fine and goes to the local government general fund. Some locals may track the proceeds and tie it to the annual appropriation but I have never heard of this happening.” To help us get a better idea of what was happening across the state, the state public defender fielded a survey prepared by NLADA to members of the public defender association listserv. We received 17 responses, a small sample, but one that nevertheless offered insight into practices around imposition of counsel costs onto individuals who are represented by appointed counsel in Mississippi.

For example, responses validated that no application fee is imposed, but 71 percent of respondents (12 of 17) report that recoupment of counsel costs is assessed from indigent clients whose cases end in conviction. The amount recouped varies, with judges determining a flat fee noted as ranging from \$250 to \$1,000. In response to the question *who collects these fees*, the predominant response was court staff or, specifically, the circuit clerk. Of all respondents who answered whether payment of counsel fees can become a condition of probation, more than half (61 percent) replied yes. Finally, it is interesting to note that the effect of these fees was not fully understood by attorneys who see them imposed. Two-thirds of respondents to the question *if the fee is not paid within the time ordered by the court, what remedies does the court pursue?* answered that they did not know.

Survey in Washington

State statute in Washington permits courts to assess cost of counsel fees, but offers little guidance into when and how these fees ought to be implemented. As a result, the mechanism for assessing these fees varies significantly among Washington’s 39 counties and there is no central government entity responsible for tracking data. To learn more, the executive defender of the Washington Defenders Association (WDA) sent NLADA’s survey out to attorneys via the WDA network. Twenty-two attorneys across 15 of Washington’s 39 counties responded to the survey.²⁴ All respondents reported that there are no application fees levied onto indigent defendants in their jurisdictions. This research was cross-referenced with the Washington State Office of Public Defense’s (OPD) research on the same fees. OPD’s survey yielded results from all 39 counties in Washington State. Generally speaking, the results from both surveys were aligned with one another. The exceptions were that NLADA survey respondents reported Franklin and Skagit Counties as having counsel fees, whereas the OPD survey respondents did not, and NLADA respondents reported Iowa County as not having counsel fees, whereas the OPD survey respondents reported having cost of counsel fees

in this county. These discrepancies could be due to several different factors and may or may not exist in practice. After receiving the survey results, further research was conducted in the counties with discrepancies and a local resolution²⁵ was found establishing these fees for Skagit County as of March 7, 2022. This resolution contains a fee schedule for the assessment of costs onto individuals determined “indigent but able to contribute,” which, as mentioned earlier, is a separate category that fell outside the scope of NLADA’s research.

At the conclusion of its statutory analysis, the NLADA team conducted interviews with members of the defender community and other key stakeholders in 15 states to identify a handful of states into which we could take “deeper dive” looks at how these fees actually operate in practice. These 15 states were selected for various reasons, including the severity of their indigent defense fees, the potential for reform, and the availability of data surrounding the fees in question. These preliminary interviews informed the selection of several states – Iowa, Oklahoma, and Nevada – for additional investigation. It also led to a targeted investigation looking at data tracking of administering cost of counsel fees in New Hampshire.

Discussion

While much attention has been brought to fines and fees within the criminal justice system in recent years, little progress has been made in eliminating public defense system fees in the past 20 years. In 2001, The Spangenberg Group published a report addressing upfront fees and found that 22 states utilized upfront fees at the time. NLADA’s numbers vary slightly from that 2001 report, but that is largely due to differences in the categorization of fees rather than systemic improvements.²⁶ The fees that The Spangenberg Group reported in Connecticut, Massachusetts, and Wisconsin were still in effect at the time of NLADA’s research, but we did not categorize them as upfront fees; we categorized them as recoupment. And since The Spangenberg Group research, three states have repealed their upfront fees (California, Kentucky, and New Jersey), and three states have introduced upfront fees (Kansas, Louisiana, and North Carolina). The Spangenberg Group reported use of upfront fees in the state of Washington, but the existence of these fees was not confirmed by NLADA’s research.

In 2015, the Brennan Center and NPR released data²⁷ on criminal justice system fees, which found upfront application fees and/or cost of counsel fees imposed in 43 states and the District of Columbia. NLADA’s research confirms this statistic, with 42 states and the District of Columbia still having statutes in effect allowing fees for the cost of counsel to be assessed onto very poor defendants. Just one state, California, has made notable, sweeping reform in this area in the last five years. In five states – Hawaii, Nebraska, New York, Pennsylvania, and Rhode Island – it appears that there is no history of assessing upfront fees or counsel fees, though reliance on other criminal justice fees exists to various degrees in each of these jurisdictions.

A few states, including Vermont and New Mexico, have statutes that authorize public defense system fees yet, in practice, they are rarely enforced. Advocates in these jurisdictions objected to being categorized as a state that assesses fees due to the fact that the fees are very often waived or never assessed. NLADA has included both Vermont and New Mexico as states that assess fees because the statutes remain on the books. However, these states may be ripe candidates for successful repeal efforts, which would better ensure that indigent defendants are not subjected to inconsistent, unequal treatment.

Spotlight on California

California's reform efforts began at the local level for juvenile delinquency systems before garnering broader support across the state for the adult criminal system. In January 2018, California became the first state to repeal all administrative fees in the juvenile justice system.²⁸ Around this same time, San Francisco eliminated multiple discretionary criminal justice fees in the adult legal system, and lifted \$32 million in debt off of 21,000 residents.²⁹ Alameda County (which includes the city of Oakland) followed suit and repealed and discharged over \$26 million in adult criminal fees, including fees for legal representation later that same year.³⁰ Contra Costa County issued a moratorium on all administrative fees in 2019, effectively halting the assessment of upfront fees and cost of counsel fees, among other fees that disproportionately harm very poor communities.³¹ In early 2020, Los Angeles County eliminated all administrative fees in the adult legal system, including cost of counsel fees. This ordinance also made the \$1.8 billion dollars in outstanding debt uncollectible.³² Finally, in 2020, through AB 1869, California repealed the authority of all counties to charge defendants for 23 fees imposed in the criminal legal system, including fees for administering probation and mandatory supervision, processing arrests and citations, and administering home detention programs, continuous electronic monitoring programs, work furlough programs, and work release programs. The bill also repealed counties' authority to impose upfront application fees and fees for the cost of public defense representation. The reform, which went into effect July 1, 2021, required counties to end collection on outstanding fees totaling more than \$16 billion and included an appropriation of \$65,000,000 to counties to backfill revenues lost from the repeal of these fees.

The California work was the result of multiple campaigns led by Debt Free Justice California, a coalition of advocates and government agencies from across the state that aligned to influence policy and legislative changes on behalf of low-income Californians. Among other key factors, advocates relied on government data and interviews with directly impacted communities in order to inform their recommendations for reform. For example, the reforms in San Francisco were driven by a coalition of community groups and government entities, including the Public Defender, District Attorney, Adult Probation Chief, Sheriff, and Mayor working with the San Francisco Financial Justice Project. Housed in the San Francisco Office of the Treasurer and Tax Collector, the Project was formed to assess and reform how fees and fines impact San Francisco's low-income residents and communities of color. The work in California serves as a model for states that are similarly situated to be able to make sweeping reforms.

Ability to Pay

Even in the absence of total fee elimination, we are due for a national conversation on what it means for an impoverished defendant to have the ability to pay criminal justice fines and fees. If the purpose of public defense system fees is to generate revenue to offset government expenditure on indigent defense, one must conclude from the data that are publicly available that this goal is not being met. Very poor individuals lack the means to pay these fees, thus they will never be collected, yet many courts impose them with seeming little regard for the burden that places on people. Burdens come from the consequences of inability to pay assessed fees and fines.

Research conducted for this project did not identify any courts using fair methods to decide what a defendant can realistically pay. Some state laws and case precedent contain examples of the kind of information courts should consider in making a determination about someone's ability to pay a fee. For example, in the state of Iowa, courts "must consider income, physical and mental health, age, education, employment, inheritance, other debts, other amounts of restitution owed, family circumstances, and any assets subject to execution, including but not limited to cash, accounts at financial institutions, stocks, bonds, and any other property which may be applied to the satisfaction of judgments."³³ But guidance for judges on precisely how to consider those factors remains lacking, thus determinations are largely left to discretion of the judge.

Many states set an individual's presumptive eligibility for court appointed counsel as either receiving a form of federal public assistance or having an income at or below 125 percent, or 150 percent, of the federal poverty level (FPL).³⁴ The FPL is widely criticized as being a vastly outdated metric of identifying who is in poverty. Developed in 1965, the FPL was set at three times the cost of an "economy food plan" for "emergency use" that "relied heavily on dry beans and peas, potatoes, and grain products."³⁵ While it receives updates for the basic cost of living, it began at such a low starting threshold that those updates are largely meaningless when one considers true costs of the basic necessities of life.

Far more accurate measures of poverty exist than the Federal Poverty Line and should be used by courts to determine eligibility for counsel as well as to determine ability to pay fines and fees. Tools such as the Self-Sufficiency Standard³⁶ or the Living Wage Calculator (LWC)³⁷ offer a local estimate of the true costs of living. The LWC's assessment of costs includes an individual's or family's "likely minimum food, childcare, health insurance, housing, transportation, and other basic necessities (e.g., clothing, personal care items, etc.)."³⁸ Using those costs, the LWC provides estimates of how much income a person needs to live. Income needs, even in jurisdictions with the lowest average cost of living, far exceed levels set by the FPL.

Two other federal models used to determine ability to pay are worth reviewing, the federal student loan Revised Pay As You Earn Program (REPAYE), and the Internal Revenue Service (IRS) Necessary Expense Test. Under REPAYE, students who borrow money for education are obligated to repay it based on a mathematical formula that determines a monthly repayment amount. The amount is 10% of the adjusted gross income that exceeds 150 percent of the federal poverty guideline, divided by 12.34.³⁹ The IRS Necessary Expense Test is used for determining ability to pay for tax collection. Categories of necessary expenses considered include food, housing, utilities, transportation, clothing and supplies. Some expenses are uniform across the country and others vary based on region. Every year the IRS updates the allowances for each category, known as "collection financial standards." The necessary expenses are determined based on household size, number of vehicles and county of residence. That data is then applied to the financial standards to determine the amount of allowances the IRS uses to determine how much a taxpayer will be required to pay. If the analysis shows the taxpayer has nothing left over to pay, the IRS will place that taxpayer in "Currently Not Collectible" (CNC) status. These individuals are not required to pay anything and the IRS takes no action to collect.⁴⁰

Finally, a key issue not addressed by many schemes to assess ability to pay court debt obligations, is that poor people typically cannot pay off all assessed fees and fines at once, and so must go onto payment plans. Those plans can continue for many years until debt is finally all paid off. People living with limited resources can easily cycle into periods where, even with assistance of government benefits, resources can plunge to almost nothing, making payment of court debt nearly impossible. Nonpayment can result in multiple consequences, as discussed throughout this report. A determination made at year one of ability to pay may need to be revised at year two, but that process is not always transparent.

CHAPTER 3

CHARGING

PUBLIC DEFENSE

SYSTEM FEES

Caselaw Analysis

The Sixth Amendment to the U.S. Constitution guarantees the right to be represented by an attorney in all criminal prosecutions. For decades this right has been interpreted and applied by state governments in varying degrees of acquiescence.

Despite the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*⁴¹ declaring states are obligated to provide counsel if a person cannot afford to hire one, legislation and court practices supplement this obligation with the imposition of public defense fees. People who are represented by attorneys provided at state expense are being charged for their representation. Those charges have been the subject of constitutional challenges and courts, including the U.S. Supreme Court, have ruled that state expense does not mean that people who qualify to be represented by an attorney provided by the state cannot be required to pay for the service.

Currently 42 states, plus the District of Columbia, have laws that authorize courts to seek the reimbursement of attorney fees from people who qualify for the appointment of counsel. Statutory provisions and local practice differ in every state. Some state legislation caps the amount that can be charged, while others allow courts to impose the total amount expended for the representation. The statutory authority to collect the fees also differs in every state. Collection methods can take the form of criminal sanctions, including incarceration for non-payment, or civil sanctions, including property seizure, wage garnishment, collection agency referrals and income tax intercept.

State statutes and local practices that impose public defense system fees do so, in part, based on what the U.S. Supreme Court has said about the right to counsel and the obligation of states to provide defense attorneys to those who cannot afford to hire their own lawyers. The seminal cases that address the constitutionality of requiring reimbursement for attorney expenses are explained in this section, including arguments on both sides of the issues and Court analysis based on the specific facts in each case.

Fuller v. Oregon

*Fuller v. Oregon*⁴² was a 1974 U.S. Supreme Court case that challenged an Oregon statute permitting the collection of costs incurred in both the prosecution and defense of a case through sentences of probation. Prince Eric Fuller had entered a plea and was placed on five years of probation conditioned on his attendance at a county work release program and the reimbursement of expenses incurred by the county in supplying him with a defense attorney. The main arguments raised on appeal in opposition to the order of the court were threefold:

1. Mr. Fuller was not given notice that he would be required to repay costs when he requested a court-appointed attorney; a violation of the constitutional right to due process.
2. Mr. Fuller was denied equal protection under the law because defendants who could afford to hire their own counsel were treated differently from people represented by court-appointed attorneys. People who owed hired attorneys could not go to jail for non-payment, but people ordered to reimburse the state for counsel costs could go to jail if payment was not made.
3. The statute permitting courts to impose counsel fees is an impermissible burden upon exercising the Sixth Amendment right to counsel. The appellate attorney argued that in practice, people who are told they may have to reimburse for counsel costs might not choose to exercise their constitutional right to counsel because they know they cannot afford to pay for the services.

In response, the attorneys representing the State argued that seeking reimbursement was not a violation of the right to counsel, due process or equal protection for two primary reasons. The first was that the statute included provisions that only required people to pay if they were able or became able to pay, excluding anyone who did not have the ability to pay. The second argument was that being ordered to reimburse after receiving defense counsel services did not violate the right to be represented by an attorney because representation was not contingent upon payment.

The Supreme Court ruled that the State had a legitimate interest in recouping the cost of providing counsel and that the statute was constitutional, stating:

The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work manifest hardship are forever exempt from any obligation to repay.⁴³

On its face, the *Fuller* decision declares that the expenses incurred by states in complying with the right to counsel can be charged back to the people who received defense services, if they have the current or future ability to pay. And, if repayment would create a “manifest hardship,” people in this category would never be required to pay. However, the lack of specificity regarding what the court meant by “manifest hardship” opened the door for state and local governments to define it and for defense counsel and equal justice practitioners to continue challenging the constitutionality of charging poor people for their representation, as well as the practices used to collect that money.

Bearden v. Georgia

Almost ten years after the decision in *Fuller*, the Supreme Court rendered another seminal decision in *Bearden v. Georgia*.⁴⁴ Danny Bearden entered a plea in a Georgia trial court. He was sentenced to five years on probation, ordered to pay a fine of \$500, and restitution in the amount of \$250.

It is important to note this case was not related to fees associated with representation by a court appointed attorney. The facts in *Bearden* specifically dealt with a fine imposed as punishment for an offense and the trial courts’ authority to jail Mr. Bearden for failing to pay. However, the decision has had far-reaching implications, and has been extended to apply to assessed public defense system costs by at least one state appellate court.⁴⁵ *Bearden* has been relied on by attorneys arguing in appellate courts that it is unconstitutional to put someone in jail who has not paid court ordered fines, restitution, or fees.⁴⁶

Mr. Bearden was ordered to make the first payment toward his fine and restitution in the amount of \$100 on the day he was sentenced, another \$100 the day after sentencing, and the remainder within four months. He paid the first two installments on time, but thereafter was laid off his job. He notified his probation office that his third payment was going to be late and when full payment had not been made by the due date, the probation office petitioned the court to revoke the probation. During the revocation hearing the evidence established that Mr. Bearden had in fact been laid off his job and had attempted but could not find new employment. The record also established that Mr. Bearden had no other assets or other source of income from which to pay. Regardless of this evidence, the trial court revoked the probation and sentenced Mr. Bearden to prison. On appeal, the Georgia Court of Appeals acknowledged the evidence of inability to pay but nonetheless upheld the trial court’s decision. The brief written opinion relied on a prior decision to explain why the decision was being upheld:

Appellant testified during the course of his revocation hearing that he was unemployed and could not pay any portion of the \$ 550.00 balance of the fine and restitution. “This testimony provided an adequate basis for the trial court’s order revoking appellant’s probation. ‘Only slight evidence is required to authorize revocation, and where there is even slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of discretion.’”⁴⁷

This decision was appealed at the U.S. Supreme Court, which granted the petition to hear the appeal because other states had ruled in similar fact patterns that revoking probation and incarcerating people who had not been shown to have willfully failed to pay was, in fact, a violation of the Equal Protection Clause. The Supreme Court articulated the issue to be decided, stating:

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate.⁴⁸

The Supreme Court reversed the decision, holding the trial court could not revoke probation without determining whether the failure to pay the fine and restitution was willful. Without determining whether someone had the ability to pay and willfully neglected or refused to pay the obligation, imprisonment is unconstitutional. To rule otherwise would punish people who are not culpable.

Expansion of the *Bearden* Analysis

The same *Bearden* arguments have been advanced in defense of people who do not pay other categories of fees imposed, including reimbursement for the cost of probation supervision and reimbursement for court-appointed counsel costs. For example, the Alabama Court of Criminal Appeals found the same principles in *Bearden* applied to probation revocations for failing to pay court costs and supervision fees.⁴⁹ The Texas Court of Appeals also applied *Bearden* to probation supervision and attorney fees.⁵⁰ Likewise, the Supreme Court of Idaho extended the *Bearden* willfulness requirement to courts in Idaho that were issuing warrants against people for unpaid fines, fees and restitution. Those warrants were resulting in the arrest and detention of people prior to a court hearing to determine whether non-payment was willful. A public defender filed a Writ of Prohibition to stop courts from jailing people prior to a determination about whether a failure to pay was willful. Without first having evidence of willful failure to pay, the implication of the *Bearden* analysis renders this practice unconstitutional in Idaho.

Summation

Attorneys in local jurisdictions and equal justice organizations across the U.S. continue to work toward the elimination of court ordered public defense system fees. Despite the decision in *Fuller* allowing states to recoup the costs incurred in providing counsel, state and local practices continue to threaten the right to counsel, the right to due process, and the right to equal protection.

The *Fuller* and *Bearden* decisions still guide the evaluation of current practices, as well as the development of new laws and local practices. However, these decisions do not address the host of problems that discretionary decisions about indigency and ability to pay foster. There is no uniformity in factors used to determine eligibility for the appointment of counsel, no formula for determining ability to pay, and little statutory protection that guards against arbitrary findings of willful non-payment of court-ordered attorney fees. Outcomes for individuals are not rooted in objective methods of decision-making and where liberty is at stake, unfettered use of discretion is resulting in the diminishment of constitutional rights and statutory provisions intended to guard against abuses of discretion.

Attempts outside of the appellate process to bring awareness to the issues and improve current practices include research to examine the impact of fees, training for practitioners, and advocacy throughout local and state legislatures urging reforms. The American Bar Association Working Group on Building Public Trust developed fines and fees guidelines that were approved by the House of Delegates in 2018.⁵¹ The guidelines are intended to provide direction to court stakeholders developing, administering, or working to reform fines and fees programs. They are further intended to “ensure that fines and fees are fairly imposed and administered and that the justice system does not punish people for the ‘crime’ of being poor.”⁵² Most importantly, these guidelines provide a concise list of factors that courts should include, at minimum, when evaluating ability to pay.

The ABA has also recently undertaken the development of guidelines to reduce mass incarceration. Included in those proposed guidelines is strict limit on “incarceration for failure to pay fines/fees until after an ability-to-pay hearing and a finding of willfulness.”⁵³ Complementing ABA guidelines are resources from the National Center for State Courts: *At-a-Glance Checklist for Ability to Pay Determination Hearings*⁵⁴ and *Ability to Pay Hearings: A Primer for Judicial Officers*.⁵⁵ Until appellate courts revisit fines and fees practices and rule on the unresolved issues discussed in this chapter, court stakeholders can be guided by tools developed to ensure the fair and just administration of fines and fees sanctions.

CHAPTER 4

DEEP DIVE

EXAMINATION SITES

As discussed in Chapter 1, NLADA supplemented its national scan of laws governing use of public defense system fees with several in-depth examinations into practices and effects of the laws. This chapter contains NLADA’s “deep dive” findings and analysis of the use and impact of public defense system fees in three jurisdictions: Oklahoma, Iowa, and Clark County, Nevada. It also contains a targeted examination in New Hampshire that focuses on that state’s transparent reporting about the collection of defense counsel reimbursement fees, which stands out from other states.

Site Selection

Deep dive sites were identified and selected based on several factors after consultation with individuals from the defender and/or advocate communities in 15 states. Factors included the perceived severity of public defense system fees, the potential for reform, the availability of data surrounding the fees, and access to state-level experts/advocates on the issue.

Oklahoma was selected because it has not just one but two fees associated with the public defense system. Oklahoma has also had recent legislative attempts to amend or abolish user fees in its criminal legal system, which may signal receptivity to additional reform. Iowa was selected because it reportedly assesses some of the highest amounts of public defense system fees in the nation. Iowa also has advocates who have long been actively engaged in efforts to track the issue and press for systemic change. Nevada was selected because it was suspected to have problematic practices, but little was known by state advocates about the issue. As part of a state where courts and defender systems are administered on a county-by-county basis, Clark County was selected as the focus of the Nevada inquiry due to an assumption that beginning to understand the extent of the problem should begin with the state's largest county.

Research Methodology

Although each selected state has nuanced variations in approaches to its public defense system fees, due to its respective laws and policies, the overall approach taken to research each state was fairly standard. Research methodology for the deep dive examinations in Iowa, Oklahoma, and Clark County (Nevada) included semi-structured, qualitative interviews, plus collection, review and synthesis of key documents, reports, and other materials, including court forms, media accounts, data, government websites, and statutes.

Research in each site began by consulting with core, in-state stakeholders to help NLADA develop a basic understanding of the local practices and procedures related to the assessment and collection of application and cost of counsel fees. This preliminary investigation helped inform development of the sampling approach to use in each site, to identify categories of stakeholders to interview, and to identify community members and organizations believed to be important to include in the sampling frame, due to their work or interest in the issue.

Both Iowa and Oklahoma have statewide indigent defense systems, yet practices in imposing and collecting public defense system fees vary from court to court and even judge to judge. Examination of practices in every county was not possible. Therefore, in those states, NLADA used purposive cluster sampling to identify regions for review that would represent both rural and more populous areas, as well as both more “conservative” and more “progressive” community cultures.

Stakeholder categories included roles that entail direct interaction with, or knowledge of, public defense system fees. This included, as one category, all types of defenders: attorneys employed by public defender programs, attorneys working under contract to represent indigent defendants, and private attorneys who accept court-appointments to represent indigent defendants. Other stakeholder categories included trial judges, court clerks, court administrators, community stakeholders, as well as individuals with lived experience navigating the public defense system in each state. Quota sampling was used in selecting interviewees, in an effort to ensure we heard from representative perspectives within the criminal legal system. Additionally, convenience sampling was employed to recruit participants and thematic sampling was used to provide data and clarify missing gaps in knowledge.

Individualized, semi-structured interview protocols were developed for stakeholders in each site. Questions probed perspectives on practices relating to public defense application fees and cost of counsel fees, thoughts on implications and consequences of the fees, and ideas for their possible reform. See Appendix B for an example of questions used for stakeholder interviews.

A large sample of participants was invited to speak with the research team in each site. Multiple emails and phone calls were made to request interviews, often with no reply. Those who agreed to be interviewed were assured of confidentiality. The research team is deeply grateful to all who agreed to speak with us for their time, candor, and suggestions for system changes. Interviews were digitally recorded, and recordings were transcribed verbatim, and coded into themes. Where information appeared unclear, follow-up attempts were undertaken to seek clarification and fill knowledge gaps.

A final area of research was an attempt to “follow the money,” in order to understand in each site how much money is assessed and collected in upfront and cost of counsel recoupment fees, where the revenue flows, and what is the net “return on investment,” subtracting out known costs to administer collections. Attempts were made to contact individuals in various court and government positions to get this data. Unfortunately, this avenue of analysis proved to be largely impossible to complete in Oklahoma, Iowa, and Clark County due to lack of responsiveness and/or data availability.

Due to COVID-related travel restrictions at the time of research, all data collection and interviews were conducted remotely. Typically NLADA would conduct research of this nature using in-person interviews and court observation in addition to remote data collection.

The following sections of this chapter discuss specific results of each of the deep dive jurisdictions.



Section 1: Oklahoma

Oklahoma is one of 17 states with statutory authorization to impose both upfront application fees and cost of counsel recoupment fees. This section discusses examination of the application and cost of counsel fees used in counties that are part of the state-funded Oklahoma Indigent Defense System. Oklahoma was selected for review because it has not just one, but two fees associated with its public defense system. And Oklahoma has had recent legislative attempts to amend or abolish user fees in its criminal legal system, which may signal receptivity to reform of public defense system fees.

Criminal Defense System Demographics

Oklahoma ranks third in overall U.S. prison incarceration rates, with more than 21,000 incarcerated individuals and 26,000 people under some form of supervision. Black Oklahomans represent about seven percent of the state's overall population, yet more than one in four of those incarcerated are Black. Additionally, Oklahoma is among the nation's leading incarcerator of women, with Indigenous women being incarcerated at a rate three times higher than the rate of white women.⁵⁶ According to the Oklahoma Policy Institute, Oklahoma's poverty rate is higher than the national average, with 15.8 percent of Oklahoma's population, or about one out of every six, Oklahomans in poverty in 2017.⁵⁷

Indigent Defense Delivery System

The Oklahoma Indigent Defense System (OIDS) was created in 1991 through enactment of the Indigent Defense Act.⁵⁸ OIDS provides state-funded trial, appellate and post-conviction representation in adult criminal and juvenile delinquency cases in 75 of the state's 77 counties. The state's two largest counties, Tulsa and Oklahoma, have county-administered systems led by county public defender offices that operated prior to passage of the Oklahoma Indigent Defense Act. OIDS is overseen by a five-person Board of Directors whose members are appointed by the governor and serve five-year terms. The Board establishes overall policies for the system, while day-to-day administration is carried out by an Executive Director, who is selected by the Board. The majority of OIDS trial-level services are provided by attorneys working under contract with OIDS. Additionally, OIDS has nine staffed public defender offices, a figure that has been steadily increasing. In 2021, OIDS handled 56,658 appointments, the majority of which were felonies. Including carryover money, the agency had a budget of \$21,224,964, which included general fund appropriation and \$1,190,827 derived from collection of the cost of counsel fee assessed on individuals receiving representation through OIDS. The Oklahoma Indigent Defense Act codifies procedures for OIDS counties, including imposition of public defense system application and cost of counsel fees.

Administration of public defense system fees is largely the responsibility of district court judges and court clerks. There are 77 district courts and 77 elected court clerks, one apiece in each Oklahoma county. The court clerk is an officer of the court and is statutorily responsible under Oklahoma Statutes title 28, section 151 for the collection of all fees, costs, and assessments that are associated with district court cases. There are also Municipal Courts in some Oklahoma cities that handle ordinance issues, such as traffic violations. OIDS does not appear in Municipal Courts.

Research Overview

NLADA gathered information from 24 interview participants in Oklahoma, including: one OIDS executive, four OIDS contract attorneys, two non-OIDS (Tulsa and Oklahoma counties) public defenders, three judges, six court clerks, six community stakeholders/advocates (several of whom are attorneys), and two people with lived experience.

The non-response rate to requests for interviews was approximately 50 percent. The study in Oklahoma concentrated on review of court practices and inquiries in nine counties, including Seminole, McCurtain, Jackson, Grady, Cleveland, Wagoner, Pushmataha, Tulsa, and Oklahoma.

The research team acknowledges limitations stemming from being restricted to conducting only virtual interviews and from inability to observe court proceedings due to the COVID pandemic. Also, although we attempted to collaborate with multiple community organizations to help us recruit impacted individuals to interview, many organizations were not operating at full capacity due to COVID limitations. This contributed to capturing just two interviews with individuals who have lived experience with Oklahoma's criminal legal system.

Navigating the Oklahoma Section

NLADA's Oklahoma examination is organized into three parts. In the first part, an overview is provided on the operation of public defense system fees. Brief discussion of other court-imposed fees is included to provide context for the full impact of being ordered to pay for court appointed attorney representation. The second part contains discussion of findings from NLADA's qualitative research and is divided into three sub-parts addressing: 1) the process of applying for counsel; 2) the imposition and collection of counsel costs and other criminal court debt; and 3) the fiscal futility of public defense system fees. The third and final part summarizes key findings and suggests next steps forward for reform in Oklahoma.

Part 1: Overview of Application and Counsel Fees in Oklahoma

INDIGENCY DETERMINATION

In Oklahoma, judges determine eligibility of individuals to receive court-appointed counsel provided at government expense. Individuals seeking court-appointed counsel in the 75 OIDS counties are statutorily required to complete an application, also known as a pauper's affidavit.⁵⁹ Courts create their own application forms, which must be signed under oath and penalty of perjury if determined to contain untruthful information. The pauper's affidavit indicates whether the applicant has been released on bond. If so, they must provide a written statement that they have contacted three named attorneys who are licensed to practice law in Oklahoma and were unable to obtain legal representation by them. There are no statutory guidelines or rules to aid in review of the information supplied; judges have broad discretion to decide whether to appoint counsel. There used to be a statutory, rebuttable presumption that a person who posts bond is not indigent; that is now just one factor judges may consider. The net result is that people with similar financial circumstances can be granted counsel in one courtroom and denied counsel in another.⁶⁰

APPLICATION FEE

Individuals seeking court-appointed counsel in the 75 OIDS counties are statutorily required to submit a nonrefundable, \$40 application fee at the time their application is submitted.⁶¹ All or part of the application fee can be deferred by the judge until the end of the case and attached as a court fee upon conviction. Even if the request for court-appointed counsel is denied, the fee can still be imposed. All application fees are collected by the court clerk and deposited in the Court Clerk's Revolving Fund and reported quarterly to the Administrative Office of the Courts.⁶² Revenue is used for court operations.

COST OF COUNSEL FEE

At the time of pronouncing the judgment and sentence or other final order, Oklahoma law authorizes the court to order any person represented by an attorney working through the Oklahoma Indigent Defense System to pay for the costs of their representation.⁶³ Known as the "OIDS fee," payment may be made in full or according to an installment plan. Payment is made to the clerk of court, who then directs it to the Oklahoma Indigent Defense System for deposit to the Indigent Defense System Revolving Fund. Collected revenue is used for operation of OIDS.⁶⁴ Oklahoma state law permits indigent defense services fees to be charged in cases that end in conviction or dismissal. Payment of the fee, along with other court fees, can be made a condition of probation.

The Indigent Defense Act sets out the amounts that may be assessed, which vary according to case type:

1. For any misdemeanor case in which a plea of guilty or stipulation to revocation or imposition of sentence has been entered . . . \$150.00
2. For any felony case in which a plea of guilty or stipulation to revocation or imposition of sentence has been entered . . . \$250.00
3. For any misdemeanor case tried to a jury . . . \$500.00
4. For any felony case tried to a jury . . . \$1,000.00
5. For any merit hearing on an application to revoke a suspended sentence or accelerate a deferred sentence in a misdemeanor case . . . \$200.00
6. For any merit hearing on an application to revoke a suspended sentence or accelerate a deferred sentence in a felony case . . . \$300.00

These fees may be exceeded upon a showing by counsel of actual time spent representing a client.

The options available for collection of counsel fees and deferred application fees are a full panoply of sanctions, both civil and criminal. Title 22, Section 1355.14 of the Oklahoma Statutes states:

Costs of representation shall be a debt against the person represented until paid and shall be subject to any method provided by law for the collection of debts.

And

Any order directing the defendant to pay costs of representation shall be a lien against all real and personal property of the defendant and may be filed against such property and foreclosed as provided by law for civil liens.

Section 983 of Title 22 also provides⁶⁵:

Any defendant found guilty of an offense in any court of this state may be imprisoned for nonpayment of the fine, cost, fee, or assessment when the trial court finds after notice and hearing that the defendant is financially able but refuses or neglects to pay the fine, cost, fee, or assessment. A sentence to pay a fine, cost, fee, or assessment may be converted into a jail sentence only after a hearing and a judicial determination, memorialized of record, that the defendant is able to satisfy the fine, cost, fee, or assessment by payment, but refuses or neglects so to do.

OTHER COURT FEES

In addition to application and OIDS counsel fees, Oklahoma courts assess dozens of other fees in criminal cases, whether individuals are represented by OIDS or not, that, when evaluated together, illustrate the depth and breadth of burden on people, particularly those of limited means. While the focus of this study is on public defense system fees, it is impossible to isolate just their effect given the extent of user fees imposed, which all get lumped together in court debt payment obligations. Most people who owe counsel fees are placed on payment plans that are fulfilled by making one monthly payment that goes toward paying off obligations toward multiple costs and fees.

For example, fees are charged every time a warrant is issued or cancelled. People are charged for the costs of incarceration in city or county jail facilities, both before and after conviction, at amounts set by the individual detention facilities.⁶⁶ Jail fees cannot be waived entirely, despite the fact many people are held in jail pretrial solely because they are too poor to afford to post bond.⁶⁷ The only exception to jail fees is for individuals with a documented mental illness under Title 43.⁶⁸

Among multiple other possible fees, people can be assessed a \$300 monthly fee for electronic monitoring by the Department of Corrections.⁶⁹ People can be required to pay assessments for being on supervised probation, commonly referred to as 991 fees.⁷⁰ People sentenced by the court to supervised probation or who are under supervised probation provided by the Department of Corrections pursuant to a deferred prosecution agreement have to pay a \$40 monthly probation supervision fee to the Department of Corrections. When the court imposes a suspended or deferred sentence for any offense and does not order supervision by the Department of Corrections, the individual may be required to pay the district attorney a supervision fee of \$40.⁷¹

Finally, individuals can be subject to multiple \$40 application fees for determination of eligibility for court-appointed counsel. This can happen when someone fails to appear in court and enough time has passed since their last court date that the judge wants to reassess ability to pay for an attorney.

ENFORCEMENT/CONSEQUENCES OF FAILURE TO PAY

Enforcement efforts to collect court costs, including public defense system fees, can remain in place until the arrears are paid in full. Courts are legislatively granted the authority to enforce payments through both civil and criminal consequences. Civil sanctions include liens against real estate and personal property, including forfeitures. Other civil consequences include wage garnishment, tax intercept and driver's license suspensions.

Criminal consequences for non-payment can include supervision through probation, issuance of arrest warrants and detention following arrest, increased court supervision through cost dockets, probation revocation and incarceration if willful non-payment is found, and assessment of additional fees.

Rule 8 Hearings

For court debt obligations being paid off in installments, collection is accomplished primarily through some form of court supervision and criminal sanction rather than through civil action, such as wage garnishment. Missed payments, including failure to pay all together, trigger court review. When installment payments are not made on time, state law requires a hearing to determine ability-to-pay before a court can incarcerate someone for non-payment. The Oklahoma Court of Criminal Appeals (OCCA) sets out rules governing this process. OCCA Rules Section VIII⁷² seemingly complies with constitutional prohibitions against debtors' prisons⁷³ by including options for adjusting payment plans, and allowing deferrals and even dismissal of all costs. The rule also authorizes incarceration "to satisfy the fine and/or costs" if the debtor fails to appear in court for a Rule 8 hearing or is found to have willfully failed to pay, as Rule 8.6, shown below, demonstrates⁷⁴:

Rule 8.6 Change of Conditions; Incarceration for Failure to Appear or Satisfy Fine and/or Costs. At any time so fixed by the court for the defendant to appear on due date of installment or to appear for examination to determine change of condition set out in Rule 8.5, and the defendant fails to appear, ***he/she may be incarcerated to satisfy the fine and/or costs.*** In addition, if the defendant fails to pay fine and/or costs in accordance with the court's order, and the court determines the failure to pay was willful in accordance with Rules 8.1, 8.2, 8.3 and 8.4, the defendant may be incarcerated to satisfy the fine and/or costs.

Cost Dockets

The majority of indigent defendants in Oklahoma criminal courts are unable to pay the entirety of assessed fines and fees all at once and so are placed on monthly payment plans. It is reportedly common for individuals who have repeat entanglement with the criminal legal system to be placed on multiple payment plans in several different counties, each with monthly payments due. Quite likely, then, people will be expected to appear at multiple "cost dockets," which are a means for Oklahoma courts to monitor and enforce payment obligations. There is reportedly no mechanism used by judges to know what defendants may owe in other courts, and no way to consolidate or coordinate payment of debt obligations among courts.

If fees are not paid by the time specified by the court, individuals will be placed on the monthly cost docket. In some counties, once placed on that docket, if individuals are able to make payment prior to the court date, they are not required to appear in court. If they are unable to pay the monthly obligation, they must appear to provide employment status and details about their inability to pay. At that time, the judge has the discretion of lowering the monthly amount or temporarily suspending payments until a future date. In most counties, people remain on the cost docket and report to court as ordered until they have completed all payments. But in some counties, cost dockets are so overloaded with cases that judges only place people who have been arrested for non-payment or failure to appear in court on the docket. That means if a person has a change in financial circumstances which prevents them from making a payment, it is difficult to preemptively get before the court to request a modification in the amount owed or in the monthly payment obligation before a warrant is issued for failure to pay.

Part 2: Research Findings

The following section shares findings about Oklahoma's public defense system fees drawn from NLADA's interviews; its review of materials, including court forms, docket histories, reports, and analysis done by others; and its analysis of available data. Findings address three overall areas: 1) the process of applying for court-appointed counsel, which includes assessment of the application fee; 2) the imposition and collection of counsel costs and other criminal court debt; and 3) the fiscal futility of public defense system fees.

THE APPLICATION PROCESS

The process of applying for court-appointed counsel in Oklahoma can cause significant delay in accessing a defense attorney. No determination of eligibility can be made – and thus no lawyer can be appointed – until the application form has been deemed fully completed. Full completion relies on the ability of applicants to secure necessary affidavits and verification of inability to hire private counsel.

Qualitative findings related to the application process and gaining access to defense counsel relate to:

- Delays in appointing counsel
- Inequitable, non-formula based, discretionary determinations of eligibility
- Lack of data transparency and insufficient record-keeping
- Conflict between duty owed to the client and the court
- Weak defense counsel fee waiver advocacy.

Delays in Appointing Counsel

Delayed access to counsel is arguably a violation of the constitutional right to counsel.⁷⁵ The most alarming finding about Oklahoma's process of determining eligibility to receive appointed counsel is that it causes what can amount to significant delays in appointment of counsel. Delay in appointment of counsel can be extremely damaging to a client's defense. Upon engagement, defense counsel convey critical information a client needs to know about their rights and about the case process. And the earlier that defense counsel meets with a client, the greater the chance that critical, temporal evidence, such as video surveillance, can be secured; that witnesses can be located for interview; that incident scenes can be visited, reviewed and photographed; and that the accuracy of the police report can be reviewed, among other things. A person who can afford to hire counsel would not be subject to delay waiting to consult with counsel and initiate their legal defense.

While court processes vary from county to county, Oklahoma's overall approach to apply for appointed counsel often requires the applicant to make multiple court appearances before an attorney is appointed. Typically, an individual who is out on bond will be given a pauper's affidavit to complete at their initial court appearance. In many counties, the affidavit requests names of three private practice lawyers who were contacted and refused to represent the individual due to inability to afford their services.⁷⁶ Tracking down those lawyers requires time, necessitating a return court date, which can be up to a month or more later, to submit the completed application for review. Of the requirement to first contact three attorneys, one OIDS attorney confirmed, "It's definitely a burdensome extra step."

In addition, applicants who have posted bond will often be required to collect affidavits from family or friends who have contributed to the bond payment, attesting that they are not able to pay for retained counsel. If an application is not completed correctly, some judges return it and will not appoint counsel until the applicant can get it right.

These requirements can impose significant challenges to poor individuals who are seeking appointed counsel. Employment can be lost if an applicant has to take off work multiple times to attend court. And some people lack ready access to transportation to reach the court, or even to a telephone to contact private lawyers.

At the subsequent appearance when the completed application is reviewed, if OIDS is appointed, people are given an “attorney date” and the office address and phone number of their appointed attorney. They are told to make contact with the attorney before their next court date, the Conference Date, which can involve discussion of offers from the district attorney.

The transcript of an interview with a person who sought court-appointed counsel illustrates the consequences of Oklahoma court processes for appointing counsel.

Applicant: Okay. Say, say you in there and you go up for an arraignment and the judge; say you got an \$8,000 bond and you post that bond. You post that bond the next day and your court hearing is two weeks out. Then you go in and the judge asks you, okay. “Uh, where’s your lawyer? Why you haven’t obtained the lawyer?” And then they give you say additional two more weeks or so and call you back to court. And if you don’t arrive with a lawyer, then your bond is revoked, and you’re placed back in the county jail.

Interviewer: Simply because you couldn’t find an attorney to take your case?

Applicant: Exactly. Because you post your bond, but you didn’t go out and get an attorney. So basically, the mentality is if you post bond, then you can go to an attorney.

Interviewer: How long did it take you once you filled out that application? How long were you in jail before your hearing and before you were assigned to counsel?

Applicant: Approximately 45 days.

Interviewer: So then forty-five days later, you are appointed an attorney. And then how long until you meet that actual attorney?

Applicant: That person could be there, because it’s like a set court date, so that person could be there. If not, someone from that office might be there and they will visit with you and tell you, “Well, your attorney should meet with you whenever.”

Interviewer: So it might be a representative from the public defender’s office, but it might not necessarily be your attorney that is assigned to your case?

Applicant: That’s correct.

The strict requirement of accurately completing the pauper’s affidavit can apply to those detained pre-trial, who supposedly are presumed to be eligible for appointed counsel. One attorney said a judge they appear before will return a submitted application form to a detained individual if it is not filled out completely. “She’ll give it back to them and reschedule their case while they’re sitting in jail to make sure they turn it properly. . . . She’s pretty brutal on that.”

Overall, though, appointment of counsel for those detained pre-trial reportedly occurs more promptly than for those out on bond.

Inequitable, Non-Formula Based, Discretionary Determinations of Eligibility for Appointed Counsel

Interviews with judges and other stakeholders confirmed that Oklahoma’s lack of a formula-based assessment of eligibility promotes inconsistent and inequitable decisions on who qualifies for appointed counsel.⁷⁷ Similarly situated applicants can be granted counsel in one courtroom and not in another. Every judge is left to make decisions based on what they prioritize as important factors to consider. Section 55 of Title 20 of the Oklahoma Statutes places responsibility of promulgating rules governing the determination of indigency on the Court of Criminal Appeals.⁷⁸ But no one NLADA interviewed made mention of any such rules. Since there are apparently no guidelines that can steer decision-making away from inherent bias, there is no guarantee that a judge will appropriately consider ability to pay factors before making their decision.

Defense attorneys reported some judges take the position that if an applicant is able to post a bond, regardless of who paid for it, that person does not qualify for a court-appointed attorney. One attorney reportedly advises people on bond not to bother paying the application fee because the judge will not appoint counsel:

Half the time they'll say, "Nope you don't qualify" so the guy just burned 40 bucks. I just tell anybody who is out on bond – depending on what their bond is or what county – I tell them don't waste your 40 bucks they're not gonna appoint somebody if you're out on \$10,000 or something like that. They are gonna look at you and say – "You aren't indigent."

Another attorney reported frustration with judges making decisions based on a client's appearance:

Literally, I have seen a judge ask people, "Well, how did you afford to dress today? Like, How did you afford to wear that pair of shoes?" So, if you even have anything . . . anything, then you have enough money to hire a lawyer. It's just stupid.

Another mentioned witnessing a judge speculate that because an applicant reported having a high truck payment that they did not need counsel appointed, without asking any follow up questions about why the vehicle payment was so high. A high truck payment, for example, could be imposed on someone who struggles to pay bills and does not have a good credit rating.

The bias evident in the experiences shared does not delay access to an attorney, but instead, denies access; adding another layer of concern about the lack of boundaries for the exercise of judicial discretion.

A red flag raised from the OIDS caseload data is the fact that the agency handles far more felonies than misdemeanors (33,279 felony appointments and 18,762 misdemeanors appointments were reported for 2021).⁷⁹ Typically a criminal legal system will have many more misdemeanors than felonies, causing concern that judges in Oklahoma simply are not appointing counsel for all who qualify for it. Several stakeholders reported that judges offer quick resolution to defendants in misdemeanor cases by indicating at initial appearance they can handle their matter that day without an attorney.

Lack of Data Transparency and Insufficient Record-Keeping

No public data is reported about revenue generated by the application fee. NLADA requested data from the Administrative Office of the Courts about how much is assessed and how much is collected in application fees. No reply was received. NLADA's review of records available on the Oklahoma State Courts Network (OSCN) docket system showed that the \$40 application fee is regularly assessed on public defense applicants across the state. The judge can defer or waive the fee, and NLADA was told the fee is frequently deferred, but docket histories and sentencing orders do not consistently show that. OSCN records do not report total fees imposed, what has been collected, or what remains outstanding. All application fee revenue collected is deposited into the Court Clerk's Revolving Fund and used to support court operations.

Conflict Between Duty Owed to the Client and the Court

Compounding the hurdles involved with accessing a court-appointed attorney is the possibility that some OIDS attorneys will challenge their assignment of a client. Done when they see a client has posted a substantial amount of bail, some attorneys seek to file a "reconsideration of finding indigent status" motion. All of these must go to the OIDS Executive Director for review. Approximately 100 motions are submitted for review each year. One contract attorney described his decision to challenge a case appointment in the following manner:

I just feel like it's more of an obligation . . . [t]o make sure – because there is a thought if you can pay a bondsman *you* can pay an attorney as well. And so – I think we just kinda – we just feel obligated to do that as contractors. And we have a fiduciary duty – I think as well- to the taxpayers.

Weak Defense Counsel Fee Waiver Advocacy

OIDs attorneys can request a fee waiver for clients who are ordered to pay the application fee, but reportedly most do not. Explanations offered for this can be summarized as a belief that advocating to waive only the application fee doesn't seem all that important, given that it is a relatively small amount of all costs imposed. Another key factor is that because OIDs counsel are not involved in a case until after an application fee has been assessed, they are simply not available to argue for its waiver when it is imposed. Application fees are often imposed and deferred until case disposition, with no advocacy on an individual's ability to afford them.

IMPOSITION AND COLLECTION OF THE OIDS FEE AND OTHER CRIMINAL CASE COSTS

As noted above, the Oklahoma Indigent Defense Act authorizes imposition of a fee in cases where a defendant is represented by an OIDs attorney to recoup the government's cost of providing counsel. That fee, typically \$150 in a misdemeanor plea of guilt and \$250 in a felony plea of guilt, is one of multiple other executive fees and costs, plus fines and restitution, imposed at case disposition. Defendants are typically placed on payment plans and make one monthly payment to the court that goes toward paying down all of these assessed costs and fines. Oklahoma is one of 24 states where assessed public defense system fees go toward supporting the public defense system. A portion of collected payments corresponding to OIDs fee assessments is directed to the budget of the agency. Court debt payment plans can become part of a lifetime of debt that is impossible for individuals to pay down, affecting opportunities to advance in life and leading to perpetual involvement with the criminal legal system. In Oklahoma, nonpayment of counsel costs can also result in incarceration.

Consequences and barriers identified with the process of charging and collecting public defense system fees, along with other legal financial obligations, from poor Oklahomans include:

- Burdensome and punitive payment processes for clients and the court
- Insufficient or non-existent ability-to-pay hearings
- Uneven defense counsel advocacy regarding imposition of fees
- Interference with the independence of defense counsel
- Bench warrants issued for failure to pay
- Inability or delayed ability to petition the court for modification of pay orders
- Consequences of court debt: "It's a Lifetime Thing"
- Futility of trying to collect from people who cannot afford to pay
- Inability to raise taxes as an alternative to fees
- Climate for possible reform.

Burdensome and Punitive Payment Processes for Clients and the Court

The potential for punitive effects from the payment process begins with decision-making about how much a person can afford to pay. Judges are required to determine if people have the ability to pay amounts imposed, and in Oklahoma there are two points during case processing where ability to pay is typically considered: first, at the time of sentencing, and second, after a payment plan is in place and it becomes apparent the person cannot afford to make the payments. Like determining eligibility for the appointment of counsel, judges have broad discretion in making ability to pay decisions. The absence of tools to guide that discretion and ensure it is applied in a non-biased and data-informed fashion promotes inequitable outcomes that are largely dependent on which judge is making the decision.⁸⁰

At the time of sentencing, judges do not typically know the totality of how much will be assessed in fees when they decide the amount of a fine. Individuals are provided with a “Rule 8” form that contains their fine amount, but not the fees owed. People are reportedly sometimes asked to sign that document, certifying ability to pay the amounts ordered, prior to being made aware of the total amount due. They are instructed to take the form to the court’s “cost administrator” clerk, who supplies the total fees and costs assessed. If they are unable to immediately pay the entire amount due, they are placed on a payment plan.

Multiple people commented on the inexactitude of making predictions about an individual’s future ability to pay. One defense attorney sarcastically summarized the futility of judges making future predictions:

You are indigent now – you don’t have a dime to your name – you have zero assets. But you’re going to get out [of jail] and you’re going to get a job (because jobs are easy to get, especially when you just get out of jail with felony convictions) – and you’re gonna be fine in six months and you’re going to have all kinds of money and you’re going to be able to pay me \$50 a month.

As noted, clients are frequently placed on payment plans in several different counties, without consideration of total amounts due across all counties where debt is owed. One attorney said:

One county doesn’t care what you’re paying in another county. I’ve never even heard of that being a consideration.

Naturally, multiple court debt obligations with no coordination can affect an individual’s ability to pay any one of them.

When people are placed on payment plans, cost administrators who work for the Court Clerk’s office are the primary monitors of cost payment compliance, but courts, probation, and district attorneys all play a part in the monitoring and enforcement of payment. For those individuals on supervised probation, failure to make payments puts them at risk of having their probation revoked and/or being subject to sanctions for willful failure to pay costs under the Oklahoma Court of Criminal Appeals Rule 8. Unsupervised probationers who are making court cost and other legal financial obligation payments are also subject to the payment enforcement mechanism of Rule 8. Because they are not supervised by a probation officer, the District Attorney’s office must be notified by the Court Clerk that an unsupervised probationer is in arrears on their payments, and the prosecutor can consider using the matter as a basis to revoke a suspended sentence or accelerate a deferred sentence. Some District Attorneys have staff dedicated to monitoring the payment compliance of all probationers as well. When the sole issue is cost compliance, the usual practice is for the Court to use the Rule 8 mechanism. This includes the option of issuing bench warrants for willful failure to pay or a failure to appear at a cost docket. Most warrants that get issued are for failure to appear.

While judges, prosecutors, court clerks, and probation officers all have a potential role in seeing to it that individuals comply with their cost payments, their interests and their respective roles vary depending on how they prioritize their responsibilities. Judges and court clerks, it was said, are focused on cost and fees collections and use the carrot and stick tools provided by Rule 8 to encourage payment compliance. Prosecutors will be part of this process at cost dockets and encourage the use of Rule 8 mechanisms, but they are often most concerned about substantive probation rules compliance and the payment of restitution, not mere compliance with fee obligations. For most probation officers, cost compliance is important but not as important as the individual’s compliance with the more substantive rules of probation.

Appearance at cost dockets can be burdensome to individuals. Cost dockets are essentially ongoing show cause dockets that require repeated court appearances to monitor and assess compliance with orders to pay. If a person misses monthly payments, they can be placed on a cost docket and required to appear in court to explain why. Judges can increase or decrease the frequency of required court appearances, but the requirement to appear when ordered lasts until the debt is paid in full, regardless of employment, childcare obligations, or other obstacles to repeatedly appearing in court.

Some participants said that some courts apply scare tactics and inappropriate efforts to collect court debt. For example, during the COVID pandemic, court staff in some jurisdictions reportedly called debtors demanding accelerated payment after stimulus checks were issued by the federal government to help those struggling to meet basic needs.

Insufficient or Non-Existent Ability to Pay Hearings

Some study participants reported that some courts do not conduct ability to pay hearings as required by statute. Such judges reportedly feel that having an individual sign the Rule 8 form, which certifies the signatory can pay the assessed amount, satisfies the requirement to have a hearing. As with determining eligibility for appointed counsel, Oklahoma judges seem to have no guidelines to help them make fair ability to pay determinations. Where hearings are occurring, attorneys report that they can be cursory, for example:

And some judges will ask, “What’s your employment? What do you make?” But there is no rigorous income/expense analysis. I’ve seen a judge say [to one of our clients], “Okay, so you’ve given me your income and you’ve given me your expenses and well, there’s like \$12 a month left over – so what’s that going to?” . . . That’s the closest I’ve seen it come to actual accounting but I don’t think it’s usually that rigorous.

In contrast, some attorneys were complimentary of judges in their jurisdictions. Some judges, they said, are sympathetic and routinely work with people by delaying, reducing or forgiving amounts due.

[T]here was a guy who showed up wearing his chef’s outfit and talking about how he had gotten out of prison, gotten his GED, went to culinary school, and he was working downtown, – and the judge said, “Oh did you just get off work?” and he was like, “No judge I’m two hours late for work.” And this – it just hit the judge like a ton of bricks and the judge waived every penny that he owed.

And

[T]he judge around here is pretty good with court costs. We’ve got one of the most forgiving judges that you can imagine because he’s been poor. It’s not unusual at all for him to waive court costs.

Uneven Defense Counsel Advocacy Regarding Imposition of Fees

The level of advocacy defending against imposition of fees for clients appears to be dependent on what jurisdiction lawyers appear in, and the culture of those particular courts. Like so much in Oklahoma’s criminal legal system, outcomes seem to depend heavily on judicial discretion. One attorney reported asking for an ability to pay hearing at every court appearance, while others reported to not press the issue at all. One attorney reiterated the concern noted earlier for application fees, that there is a perception that OIDS fees are an insignificant part of the overall cost burden clients face (“a blip on the radar”), thus not worth singling out for advocacy efforts.

In some instances, pushing for waiver comes down to overall case strategy. One attorney said,

There is no hearing, no. And, I guess I could file something and push . . .
But like I said, I'll do it – where I know I have a better chance of winning.
Our judges just flat will not do it down here. So I'm not gonna waste a bunch
of my time filing motions that I know I'm not gonna win.

Interference with the Independence of Counsel

The American Bar Association's Ten Principles of a Public Defense Delivery System were developed to function as a guide for stakeholders, including policymakers, to understand what is required in public defense to ensure access to effective assistance of counsel.⁸¹ The introduction explains, "The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."

The first principle requires that, "**The public defense function, including the selection, funding, and payment of defense counsel, is independent.**" This means defense counsel must be free to make decisions that are in the best interests of their client, and not be subjected to control or influence by any outside source that could inappropriately influence decision-making and threaten the ethical duty owed to the client. Interviews with defense practitioners raise alarms about their independence to advocate for waiver of court fees on behalf of their clients.

Our legislators – they get mad at us for waiving a lot in [redacted] County.
I remember when I was in [redacted] County – our judge, that judge just never
waived anything. And I think a lot of that is, "Well, we just have never done
that here." You know what I mean. And so it's just not a thing.

And

Judge [redacted] has told us over and over again – throughout the years –
you know there was lot of pressure – on people saying, "you guys are collecting
the money that runs the court system. Don't be cutting people slack –
you know don't be letting people slide.

Bench Warrants Issued for Failure to Pay

Some interviewees indicated that bench warrants are not issued solely for failure to make court debt payments, but evidence to the contrary was found in OSCN docket histories that NLADA reviewed. Warrants found in some jurisdictions included this language: "bench warrant issued for failure to pay." (See Appendix C for a report on NLADA's OSCN Docket System review.)

Inability or Delayed Ability to Petition the Court for Modification of Pay Orders

If a person's circumstances change after a payment plan is in place, it can be difficult, and reportedly impossible in one jurisdiction, to get on the cost docket to ask for a modification. There the volume of cases is so great that the docket is reserved for only those cases with active bench warrants. This means that if someone needs to ask that a payment plan be modified, they cannot get in front of the judge unless they find out about an arrest warrant and appear in court prior to it being executed, or until they are arrested and haled into court. In other jurisdictions, however, it is easy to appear at court without a scheduled court date and simply request a modification.

Consequences of Court Debt: "It's a Lifetime Thing"

Participants repeatedly commented about the long-term effect of court debt in Oklahoma, including the application fee and OIDS fee assessments, that can indefinitely require indigent clients to make monthly payments to courts. One said,

Because it's a lifetime thing . . . you will have people who will be on this docket for years and years and years . . . to see if they are paying \$25 a month. Their interaction with the legal system just never ends. They're just always on that docket – you have a perpetual court date.

Multiple study participants commented that perpetual court dates and never-ending court debt prevent people from rebuilding their lives. Credit ratings are affected by outstanding court debt, and bad credit ratings affect access to certain types of employment, to housing, and to other necessities for moving forward with one's life. And susceptibility to arrest for failure to appear at a cost docket, or failure to pay on time, keeps people squarely in the cycle of criminal legal system entanglement.

While Tulsa County was not a focus of our study, as it is not part of the state Oklahoma Indigent Defense System, Tulsans are subject to criminal court debt obligations and a 2019, five-day *Tulsa World* series looking at how the application of court fines and fees was crippling many Oklahomans reported stark findings. Court costs were the fourth most common reason for admission to the Tulsa County jail in 2016, with five days being the average length of stay, according to a Vera Institute of Justice study in 2017. Vera found there were 1,163 admissions for court costs and, on any given day, there were 16 inmates being held for court debt.⁸²

One study participant touched on one of the most consequential effects, loss of parental rights:

Well I think that it's a – it becomes a real issue, when you can't pay and the warrants keep issuing, because you lose your job, you lose your children- and so if we are dealing with a custody case on top of the fact that you have all these warrants out because you couldn't pay – you're gonna lose your kids. We certainly see child protective services come in and take children because someone has warrants out for their arrest. And many times, those are failure to pay warrants. It makes absolutely no sense to me. And I think employers also will not hire you – it's almost – it's very difficult to get a job when you have all of this hanging over your head.

Other participants expressed concern for clients who make bad decisions to satisfy their debt obligations.

Yeah, I have certainly heard that they will, that people will sell things, things that they probably should not be selling. And sometimes that's criminal activity, sometimes it's, you know that they don't buy food that week, or they don't buy their... one that we hear regularly is that they don't buy medication.

Futility of Trying to Collect from People Who Cannot Afford to Pay

All people who are represented by court-appointed counsel are already in financially precarious positions before court debt is added onto their struggle to pay for basics, including rent, food, childcare and healthcare. The court debt contributes to further destabilization for debtors and their families. Many participants spoke about the futility of trying to collect money from people who cannot afford to pay. Evidence of futility was also reflected in the data NLADA was able to secure for review.

Court docket histories show active cases that have been open in the system for years due to outstanding debt. These histories document endless cycles of issuing bench warrants, making arrests, and probation revocations. All of these events trigger more court appearances, new applications for the appointment of counsel, along with new application fees, reestablishment of payment plans, and still more petitions to modify payment plans.⁸³

A hypothetical baseline analysis, looking at what should be paid to OIDS if every person they represent is assessed the OIDS fee, demonstrates how little is actually collected. The Executive Director of the Oklahoma Indigent Defense System reports receipt of roughly \$1.2 million yearly in OIDS fees. While the total amount of counsel fees imposed by the courts is unknown, the annual number of new case appointments to OIDS provides a starting point from which to analyze potential revenue. In 2021, there were 33,279 felonies and 18,762 misdemeanor cases assigned to OIDS. Statutory cost of counsel fees are set at \$150 for misdemeanor pleas and \$250 for felony pleas (fees are higher for trial cases). Hypothetically assuming that every case resulted in a guilty plea (i.e., there no were assessments for the higher cost of trial) and every client was assessed and paid these fees in full, the amount assessed dwarfs the actual revenue received of \$1.2 million by ten times:

33,279 felonies x \$250 =	\$8,319,750
18,762 misdemeanors x \$150 =	\$2,814,300
TOTAL	\$11,134,050

OIDS fee revenue would amount to roughly 11 percent of the OIDS budget, rather than the 5.6 percent it represented in FY 2021. Extrapolating further, if the total number of cases, 52,041, is divided by \$1.2 million, the system is actually collecting roughly \$23 per person. This spurs a question: does the cost of tracking down payments exceed what is being collected? The answer under this scenario must be yes. The cost in personnel time for just one court appearance alone likely exceeds \$23. At minimum, the judge, prosecutor, public defender, and court clerk are being paid for the time spent on each case, and most people on payment plans make multiple court appearances, often for many years, to answer for that debt.

By way of example, many cases NLADA examined in the Oklahoma State Courts Network database have been open since 2016, with docket histories showing numerous court events every year since then. One case that was still open showed 55 separate court events since 2016. The docket history shows all of the activity is related to collecting money owed, including bench warrants for “failure to pay,” tax intercept, and “case sent to collections” entries.

Work activities involved in the machinery of Oklahoma’s court cost administration, including managing cost dockets, issuing warrants for non-payment, arresting and booking individuals for non-payment, and administering payment disbursements for the multiple fees that are assessed, exert demand on limited court, law enforcement and jail personnel. While NLADA could not obtain data on exact costs of collection efforts, others have studied the issue. The Brennan Center for Justice at New York University School of Law conducted a fiscal analysis of the cost of collecting fines and fees in three states. The report was published in 2019 and the study found that most jurisdictions spent, on average, more than \$0.41 for every \$1.00 collected in fines and fees.⁸⁴ This calculation included court and jail costs related to collections, but not other associated costs, such as law enforcement activities in serving warrants and making arrests, or probation officer supervision.⁸⁵ The report suggested that the average amount spent to collect would be a substantially higher if all other associated costs were included in the calculation.

During the course of NLADA’s review in Oklahoma, one exasperated attorney characterized the professional effort expended for cost dockets in comparison to extracting small payments from people who can barely afford to make them.

If you go into a courtroom you’ve got a judge on a judge’s salary, a DA on a DA’s salary, me as an attorney on a professional salary, and many times you’ve got a court reporter on a salary. You’re paying all of those people for several hours to collect \$25!

Inability to Raise Taxes Without a Constitutional Amendment

Oklahoma has a strict system of constitutional taxation and spending limits which requires a constitutional amendment if a tax increase is sought. Tax increases must be approved by a three-fourths vote of the state legislature or a vote of the people. Without tax increases, the ability of Oklahoma legislators to raise sufficient revenue to fund government obligations, such as providing appointed counsel to those who qualify for it, is sharply limited. Court system user fees, such as public defense system fees, have been enacted as an attempted end-run around general fund revenue restrictions.

Court fees play a critical role in the budgets of the agencies for which they are collected, including the court system itself. Reports from the Oklahoma Policy Institute in 2017 and 2019 reflect that 95 percent of all district court funding came from court fees, and just five percent came from the state general fund.⁸⁶ The primary source of court fee revenue, however, is reportedly from collections in civil cases, not criminal cases. In fact, the Oklahoma Policy Institute reported that collections from criminal fees remained flat from as far back as 2006. The approach of funding obligations on the backs of poverty-stricken individuals has proven to be largely ineffective.

The majority of study participants raised the need for the state to amend its constitution in order to allow for additional revenue generation. One community stakeholder said,

Change Oklahoma's constitution so that they can raise taxes at the state level. . . . Every once and a while there will be a gas and oil tax that they will assess but for very obvious political reasons those don't last very long. And every time there is a hole in the budget they look to what fines and fees they can add to the criminal legal system.

Another explained,

[T]he problem is, these court clerk offices, they count on these fees from clients to pay their employees. And the DA's office budgets these fees to pay their employees, and so I mean – the problem is you are keeping these systems afloat much – you know – on the backs of people who don't have any money.

Interviews with many participants, including attorneys, court staff and impacted individuals, expressed frustration with the system of imposing public defense system fees. Multiple people felt collections policy was enacted without a clear understanding of its full impact. Part of that comes from not fully understanding the work involved in administering the laws. And part of it comes from not understanding the burden placed on people who have to pay. One participant shared a story of a client who had been ordered to pay a fine and was instructed by the judge to go to the court clerk, who would advise him of the total amount of fees due. When the clerk added up the fees and announced a total sum due, it was greater than the fine by several thousand dollars. The client asked to go back in front of the judge who, when advised of the total due, was reportedly shocked himself.

The Oklahoma Policy Institute has found that legislators rarely pay adequate attention to how new fees will impact people who are paying them, or to the cumulative effect of the fees that have already been put into place. It reported that during a 2014 interim study meeting, one Representative asked how the list of fees had been brought about, unsure or unaware that the Legislature itself had passed every one of them at some point.⁸⁷

Several people who were interviewed also characterized the system as cruel. One attorney said:

[P]utting it on the backs of the people who are the poorest and the least able to pay it – it’s cruel – it doesn’t work, it helps the recidivism because they are just never able to get out. . . . And there just isn’t a clear indicator of what indigent means. I mean, it means you can’t bond out, basically, at the beginning. But then afterwards, I’ve got – there’s a judge . . . [who] is like, even if you are on social security, and you’re making \$700 a month and your expenses are \$300 a month then I get \$400 a month! I mean, Jesus Christ – the barriers.

Climate for Possible Reform

All study participants were asked to reflect on the current climate for abolition or reform of public defense system fees in Oklahoma. Unfortunately, no participant expressed optimism due to three systemic barriers to reform:

- insufficient funding for the criminal legal system;
- inability to raise taxes, and generate revenue, without a constitutional amendment; and
- lack of political will.

Interestingly, despite skepticism over political will for change, one court cost bill, HB 3925, passed and was signed into law by the Governor. Among other things, it requires reforms in assessing ability to pay at sentencing, and sets a cap on the length of time that an individual can be on a payment plan at 72 months, unless the court extends it.⁸⁸ Another bill, Senate Bill 1458, introduced during the 2022 legislative session aimed to reduce reliance on justice system funding through imposition of fees.⁸⁹ And another, Senate Bill 1532, sought to waive all outstanding fines, court costs, and fees in a criminal case for any person who has made installment payments on a timely basis for 48 months in the previous 60 months.⁹⁰ Senate Bill 1458, introduced by Senator Roger Thompson and Representative Kyle Hilbert, sought to shift some district court funding provided by revenue generated through fees to general fund appropriations instead. The fees earmarked for elimination did not include public defense system fees, however the bill’s approach is the same that OIDS leadership has suggested to the legislature. OIDS has suggested that the OIDS fee be eliminated and that the revenue the fee generates, and on which OIDS is reliant for operations, be provided through general fund appropriation.⁹¹ Despite disappointing outcomes for Senate Bills 1532 and 1458⁹² in the 2022 session, along with passage of HB 3925, they form a basis of momentum on which subsequent efforts can be built.

FISCAL EXAMINATION OF THE OIDS AND APPLICATION FEES

NLADA sought information on both assessment and collection of public defense system fees, as well as information about costs to administer the fee systems. Unfortunately, efforts to fully understand the fiscal effect of imposition of public defense system fees in Oklahoma were hindered due to a lack of data. The following section discusses results of those efforts.

Limitations on Available Data

Requests for data on assessments and collections of public defense system fees made to the Office of Court Administration, the State Treasurer, and various Clerks of Court were unsuccessful. Stakeholders explained that they would have to separate the public defense system fees from other fees to track revenue collections, a process that NLADA was told could be done, but not without substantial effort.

There does not appear to be a standard operating procedure for documenting fees imposed, or a centralized system that produces an accounting of the collections status for assessed public defense system fees. Without access to information on how much is owed, how much is collected, and how much it costs to administer collections processes, it is impossible to analyze the full impact, or utility, of these fees.

In 2019 the Court Clerk's Records Management and Preservation Fund was created to assist court clerks in tracking monthly collections and expenditures, and producing necessary reports. Indeed, a portion of public defense application fee collections is earmarked to go to the preservation fund. The system became operational in January, 2022 but NLADA was unable to locate anyone who could verify whether separate data for public defense system fees is going to be available from the new system.

Accounting and disbursement of court debt collections to multiple recipient agencies is no small administrative undertaking. Clerks must cut monthly checks to each of the recipient agencies, of which OIDS is just one, for their corresponding portions of the revenue collected. A court clerk told NLADA there are more than 50 state programs that receive a portion of the fees collected. With many court costs being paid on installment plans, rather than lump sums, participants said there is a "hierarchy" or pecking order of agencies to guide disbursement of payment installments received by courts. NLADA was unable to obtain that hierarchy. However, a sentencing document from Grady County, included as Appendix D, is illustrative. It lists 30 costs and fees that can be assessed (the OIDS fee is listed as number 29 out of 30).

OSCN Docket System Review

With no aggregate data available on public defense system fees, NLADA undertook an analysis of individual case data by reviewing entries in the Oklahoma State Court Network (OSCN) docket system.⁹³ The online, publicly accessible system contains court records on district court cases. Docket histories provide information about defense fees imposed by the court.

NLADA reviewed a random sampling of 500 case docket histories across seven counties. Of the 500 cases, 95 involving assignment to court-appointed counsel were selected for comprehensive docket review.⁹⁴ The docket history for each case is set up as a calendar of events. Court case activities are entered in chronological order of occurrence. Users can see scheduling of a court date, receipt of a filed motion, issuance of an application for the appointment of counsel, issuance of a warrant, and other court orders. Additionally, court clerks enter fees associated with each case by listing the fee and indicating what the fee is for. And for some cases, there are associated documents that are accessible through links embedded in the docket history. For example, users can review completed applications for the appointment of counsel, motions, and sentencing orders, if the documents are scanned into the docket history and not blocked from public view.

The docket history review confirmed that jurisdictions do not follow uniform methods for recording public defense system fees imposed or for recording related court events, including adjudication and sentencing. Interestingly, application fees assessed for appointment of counsel, for which revenue flows to the Court Clerk Revolving Fund, were consistently recorded on the docket history in 95 percent of the cases reviewed. However, the OIDS indigent defense services fee was not as consistently recorded, with only 44 percent of the docket histories in the same cases reflecting this fee. While the majority of docket histories reviewed did not list the OIDS fee, some of the embedded sentencing orders and court minute notes in those same cases did reflect it, but not with any consistency. Docket histories did not consistently reflect whether the accused party was actually ordered to pay the application fee or the OIDS fee. Sentencing orders did not always specify amounts of individual fees or the fine imposed, but merely provided one figure encompassing any fines or fees imposed. Some docket histories and sentencing orders clearly showed fees were waived, others clearly itemized the fees the defendant was being ordered to pay, and others did not reflect any of this information.

Regarding debt collections, entries related to how courts collect fees and enforce payment include evidence of probation revocation, payment plans and cost dockets requiring people to appear in court for review of debts owed. Other collection-related information notated included issuance of bench warrants, referral to collection agencies, and tax intercept.

OIDS Fee

OIDS has two sources of revenue: 1) appropriated funds, and 2) OIDS fee revenue disbursements. Data from OIDS show that between 2014-2019 the average amount collected from OIDS fee assessments was \$1,361,983. The collected amount has been declining since then, perhaps in part due to court operation disruptions caused by the COVID pandemic. In FY 2021, \$1,190,827 was collected and in FY 2022, it was projected that \$1,114,707 would be collected. For FY 2021, OIDS fee revenue of \$1,190,827 represented 5.6 percent of the total budget of \$21,224,964 for the Oklahoma Indigent Defense System.

OIDS receives monthly checks from court clerks in each county for portions of their collections that get directed toward the OIDS fee obligation. OIDS is not provided insight into what portion of a person's overall costs is dedicated to indigent defense fees. Nor is it provided information regarding the priority of distribution to the various entities for whom costs and assessments are collected. Disbursements received are deposited by OIDS into the Indigent Defense Revolving Fund. The agency shared four representative examples of what it receives from three counties. There is no uniform format used and, indeed, there is wide variation in what OIDS is provided. What is received reportedly more or less breaks down as:

1. Some counties send little more than a check.
2. Some counties send a check and a document referencing the OIDS fee statute.
3. Some counties send a breakdown by case name and case number indicating how much money each person is paying into the overall disbursement.

Monthly payments from the three sample counties amounted to \$16.26, \$218.64, \$322.38, and \$546.75.

Part 3: Conclusion

NLADA's findings indicate that reform of Oklahoma's public defense system fees is sorely needed. The following discussion summarizes the key findings and suggests approaches that can be taken to improve the system in Oklahoma.

A fundamental principle in any justice system is equity. Unfortunately, findings about court processes relating to public defense system fees in Oklahoma suggest that practices result in unfairness and inequity for poor people. If you cannot afford to hire a lawyer, the process of applying for a court appointed attorney is burdensome, punitive, and slow. People who can easily afford to pay assessed fines and fees do so and move on with their lives, while people who cannot are burdened with high personal and financial costs. Oklahoma law authorizes imprisonment to satisfy criminal court debt obligations, a sanction that is never a threat to someone who can afford to hire a lawyer and pay court debt. Even if someone retains an attorney and fails to pay them, the remedy available to the unpaid attorney is to attempt to collect through civil lawsuit. Poor people can be arrested and booked into jail if they don't pay court debt. And even if they faithfully chip away at paying down court debt, it can be deeply limiting to perpetually have to appear at cost dockets and answer for debts they may never be able to fully retire. This two-tiered system is the exact opposite of what due process and equal protection mean.

Although the Supreme Court has ruled that states can seek reimbursement for appointed counsel and assess fines and restitution, such assessments are only permissible to the extent that a person is able to pay them. And imprisonment for failure to pay fees and fines may only be done if that nonpayment is willful. Examination of court processes in Oklahoma point to practices, including virtually unbounded judicial discretion, that can land debtors in jail for non-willful failure to pay.

Oklahoma's attempt to generate revenue from indigent defendants to help support the cost of meeting its constitutional mandate to provide counsel at state expense has proven ineffective. Administrative recordkeeping to track the system is utterly lacking; no stakeholder contacted was able to produce records that accurately show how much courts assess in public defense system fees, or how much is collected. The Oklahoma Indigent Defense System knows how much court clerks forward to the agency in monthly OIDS fees. The money received is relied on by the agency yet represents a small fraction of what would be received if all individuals represented by OIDS were able to pay the fee. It is no surprise that those who cannot afford to hire a lawyer cannot afford to pay the cost of an appointed lawyer. The one partial source of publicly documented data about defense system fees found was review of court docket histories. Although riddled with inconsistencies in data tracking, still the database shows some orders to pay, and many attempts to collect court fees. The attempts include payment plans, probation revocation, cost docket appearances, tax intercept, and bench warrants. Often case records show years of entries all related to collections activity. The cost of collecting fees remains unknown. Without such an analysis, the attempt to generate revenue through criminal court fees must be measured by what appears from available records to be unsuccessful.

For all the reasons outlined above, it is important to work toward reforms that are in the best interests of all stakeholders: people who owe court fees, the courts, the Oklahoma Indigent Defense System, law enforcement, and the government. Not one of these stakeholder categories is achieving goals under the current system. Debtors cannot satisfy obligations and move on with their lives; courts, law enforcement and probation must expend numerous hours focused on collections enforcement; OIDS is funded through inconsistent fee collection; and legislators rely on criminal court fees as a method of generating revenue, seemingly without fully understanding the fiscal futility or the impact on the poor citizens of the state.

In sum, to pursue rational reform, Oklahoma lawmakers and stakeholders must undertake cost-benefit analysis and collect information from individuals who are directly impacted by practices relating to imposition of public defense system fees in order to develop informed solutions. Likewise, a closer look at what is actually happening across district courts, which can differ from what statutory language seems to proscribe, can inform thinking about how to ensure a fair and just court system in Oklahoma. The following concerns should be addressed through a process of stakeholder and lawmaker collaboration:

1. The delays caused by the current process to apply for court-appointed counsel can approach denial, or result in actual denial, of the right to effective assistance of counsel. For individuals who are in custody, eligibility for appointment of counsel is typically presumed, although an application form must still be completed. Individuals who do not submit an application form completed to the satisfaction of the judge can be instructed to re-submit the form, and must await a decision until the next court date, which may be weeks away. Meanwhile out-of-custody individuals appear at their initial appearance only to be told they must contact three private attorneys and provide the court with evidence that those attorneys will not take their case before the court will review their application for appointed counsel. They can also have to secure affidavits from anyone who helped them post bond attesting to their inability to hire counsel for the individual. Attendance at multiple court appearances is required before courts make their determination and appoint counsel.
2. The nonrefundable assessment of a \$40 application fee is a hurdle. However, since the fee is very often deferred until the end of case, the larger concern is the delay resulting from hurdles imposed by courts in determining eligibility for appointed counsel. Individuals who can retain counsel do not face weeks of damaging delay in engaging counsel. People should not be denied early access to counsel because they are too poor to hire a lawyer. Changes to the current appointment process that provide for prompt appointment of counsel should be made to reduce concerns about violation of constitutional rights, including the right to counsel, due process, and equal protection.

3. Fully discretionary assessments of financial eligibility for court-appointed counsel threaten to deny the right to counsel for unknown numbers of people who cannot afford to hire a lawyer. The lack of decision-making guidance to help judges in evaluating applications results in similarly situated people being granted counsel in one courtroom and denied counsel in another. Similarly, court determinations about defendants' ability to pay assessed costs and fines are not uniformly undertaken and follow no specific guidelines. Decision-making methods, such as those discussed in Chapter 2 of this report, that minimize the use of discretion should be implemented in Oklahoma. Use of uniform indigency determination and ability to pay guidelines should be required in all courts in the state, whether through legislation or court rule.
4. Appellate courts have ruled that states have a legitimate interest in promoting accountability and improving public safety through exacting fines and fees. This assumption begs for comparative review of rates of recidivism between people who pay their court debt and people who do not, to know whether public safety indicators improve, remain the same, or worsen among those in each group. Without such an analysis, it is difficult to assess whether or how imposition of fines and fees affects public safety.
5. Until the 2022 legislative session, there has been no sunset to the period in which individuals assessed criminal case costs and fines in Oklahoma must continue to try to pay them off. Oklahoma courts' efforts to collect legal financial obligations are formidable. The fact that courts have a "cost administrator" position and operate "cost dockets" underscores this dedication. But obligation to make payment toward court debt should not be a lifetime sentence, as that affects opportunities to advance in life and can lead to perpetual involvement with the criminal legal system. Legislation enacted in 2022 caps the length of time that an individual can be on a payment plan at 72 months, unless the court extends it. Another bill that did not pass would have waived all outstanding fines, court costs, and fees in a criminal case for any person who has made installment payments on a timely basis for 48 months in the previous 60 months. The Fines and Fees Justice Center recommends that fees should be deemed uncollectible two years after they are imposed.⁹⁵
6. To make informed public policy, the public and lawmakers need information about the true costs and effects of public defense system fees and other court costs. Policymakers should conduct analysis into multiple factors, including:
 - how much is assessed and how much is collected through these fees;
 - how much it costs to administer collection, including personnel time across courts, law enforcement, jails, and collection entities;
 - duration of time individuals on payment plans remain paying off debt obligations;
 - effects of remaining under long-term court scrutiny for debt obligations, e.g., the costs of being unable to seek adequate housing, hold particular forms of employment, and meet childcare obligations;
 - recidivism rates among those who pay debt obligations and those who do not;
 - understanding of whether further criminal legal system entanglement for debtors derives from failure to pay versus other alleged offenses; and
 - disparate effects among poor people and people who can afford to promptly pay assessed court costs, disaggregated by race and gender.
7. People accused of crimes who cannot afford a lawyer have a constitutional right to be represented by counsel at public expense. Assessing fees on those who exercise that right is not only foolish, as it has already been determined that they lack means to pay for legal representation, but it is cruel. Forcing people who lack means to hire counsel to then pay for appointed counsel, with no fair consideration of ability to pay, or risk government penalty, amounts to punishment of poverty. NLADA believes that the state legislature should eliminate the OIDS fee and appropriate general funds to offset reduction in funding for the Oklahoma Indigent Defense System resulting from the fee's repeal. Community and advocacy organizations should seek to educate the public about the effects of public defense system fees. Seven states have no public defense system fees, and one recently abolished 23 fees, including public defense system fees (see Chapter 2). Those states should be consulted for insight into successful reform process.



Section 2: Iowa

This section highlights findings from NLADA's inquiry into practices around the imposition of cost of counsel fees on people who seek and receive legal representation by court-appointed attorneys in Iowa. NLADA selected Iowa as one of the states in which it took a closer look for several reasons. First, Iowa's recoupment scheme carries the potential to burden indigent defendants with some of the highest fees in the nation, amounts unlikely to be able to be repaid by poor people. Second, Iowa has an advocate community that has closely tracked the issue for years, making information and data to help study the issue more readily available. Further, Iowa lawmakers recently enacted changes to the system for assessing cost of counsel fees, which prompted interest in whether changes mitigated effects on clients.

Incarceration in Iowa

Iowa ranks fifth in overall U.S. incarceration rates with 53,000 of its residents (582 per 100,000) under some form of criminal supervision. Iowa ranks fourth in U.S. jail admission rates and sixth in prison admission rates, with more than 4,000 individuals in jails and 18,000 Iowans in prisons. Although Black Iowans represent only about 3.6 percent of the state's overall population, more than 20% of those in jail and 24% of those in prison are Black.⁹⁶ In 2018, Black Iowans were disproportionately convicted of serious misdemeanors (16%) and felonies (21%) when compared to other demographic groups.⁹⁷ Additionally, Iowa has more than 800 women currently incarcerated.⁹⁸

Indigent Defense Delivery System

The Iowa State Public Defender Office is a statewide, state-funded executive branch agency that oversees indigent defense representation services for the state's 99 counties. The State Public Defender has 19 offices in 13 cities located around Iowa: Des Moines, Burlington, Cedar Rapids, Council Bluffs, Davenport, Dubuque, Iowa City, Marshalltown, Mason City, Nevada, Ottumwa, Sioux City, and Waterloo. Three of the offices have different divisions for adult and juvenile cases (Des Moines, Sioux City, and Waterloo). The centralized appellate defender office and special defense unit are also located in Des Moines.

The primary indigent defense delivery system is Iowa's 19 public defender branch offices, but for conflict of interest cases and in counties without public defender offices, the State Public Defender contracts with private attorneys and nonprofit legal organizations to provide court-appointed representation. If a public defender is unable to take a case, the judge appoints an attorney who is under contract with the State Public Defender. If the court determines that no contract attorney is available, the court may then appoint a private attorney to represent the indigent defendant. The State Public Defender's Office sets contract terms and standard procedures for payment of all non-public defender appointed counsel and administers payments.

Indigent defense in Iowa is paid for by funds appropriated by the General Assembly to the Office of the State Public Defender in the Department of Inspections and Appeals and deposited in an account called the Indigent Defense Fund. The Indigent Defense Fund is used to compensate private attorneys who work under contract with the State Public Defender or accept appointments to represent indigent defendants on a case-by-case basis. The fund also pays for expert witnesses, court reporters of depositions, private investigators, interpreters, and other service providers for the benefit of indigent defendants. The State is also required to pay for the costs incurred by a privately retained attorney who represents a client that a judge determines is indigent after the attorney has been retained.

In FY 2019, appropriations to the State Public Defender totaled approximately \$64.2 million. In Fiscal Year 2018, public defender offices closed 82,117 charges, at an average cost per charge of \$303.75. Additionally, 82,501 claims were paid for 750 contract attorneys, at an average cost per claim of \$447.42.⁹⁹ Since FY 2016, the Indigent Defense Fund has annually required a supplemental appropriation to cover the claims against the Fund for the fiscal year. Factors contributing to this budget overage include an increase in caseloads and in the complexity of cases.

Study Sample

NLADA gathered information from a total of 14 participants in Iowa, including: one contract attorney, three public defender attorneys, four judges, and six community stakeholders/advocates, several of whom are attorneys. We experienced a high non-response rate, as we reached out to nearly 50 individuals throughout Iowa. However, the findings and analysis from interviews were supplemented greatly by material shared by Iowa Legal Aid, including data extracted from a survey of 135 indigent defense providers conducted in 2021.

Determining Indigency

Eligibility for appointed counsel is determined by the court using a financial affidavit submitted by the defendant signed and submitted under oath and under the penalty of perjury, at initial appearance or at the time court-appointed counsel is requested. Iowa law sets out three categories for which individuals can qualify for appointed counsel: 1) defendant's income is **at or below 125%** of the federal poverty guidelines; 2) defendant's income is **between 125% and 200%** of the federal poverty guidelines if the court finds that not appointing counsel would cause defendant substantial financial hardship; or 3) defendant has income **over 200%** of the poverty guidelines, yet is charged with a felony and the court finds that not appointing counsel would cause substantial financial hardship. In determining whether substantial hardship would result, the court shall consider "not only the person's income, but also the availability of any assets subject to execution, including but not limited to cash, stocks, bonds, and any other property which may be applied to the satisfaction of judgments, and the seriousness of the charge or nature of the case."¹⁰⁰ Judges always have discretion to make individual determinations that differ from these guidelines, and participants told NLADA that requests for appointed counsel are rarely denied.

Public Defense System Costs in Iowa: *Total Cost of Legal Assistance*

Iowa law does not permit courts to assess an application or appointment fee from individuals seeking representation by appointed counsel. It does, however, seek to recoup the "total cost" of legal assistance provided by court-appointed counsel. "Legal assistance" includes not only the expense of the public defender or an appointed attorney, but also transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person entitled to an appointed attorney. The totality of these costs and fees comprise what is sometimes called the "Indigent Defense Fee Recoupment" (IDFR).

Responsibility to pay the total cost of legal assistance can become particularly burdensome for clients represented by private court-appointed attorneys, who are compensated for the hours they bill in individual cases, as opposed to clients who are represented by public defenders, who are paid a salary. Because public defenders are concentrated in urban areas, the net effect for clients is something of an urban / rural divide based on how attorneys are paid for providing indigent defense.

Basis for Defense Attorney Cost Recoupment

To determine the amount that clients owe in IDFR, public defenders and contract defense counsel are required to submit a report to the court itemizing expenses and total hours worked.¹⁰¹ For contract defense counsel, there is an additional step: the State Public Defender determines what part of their claims they will pay, and then reports back to the court.¹⁰² In reality, an attorney working at a salaried public defender position is going to be paid in full regardless of the amount of time that they “bill” for a client. NLADA was told that public defenders often underestimate their reports of hours worked to avoid burdening clients with debt that is often unpayable without significant hardship. But private practice attorneys working at hourly rates face different circumstances. A contract attorney may feel just as conflicted at the prospect of inflicting IDFR on their struggling clients as does a public defender. Inevitably, though, they must accurately bill for their time as their very livelihood depends on reporting the amount of time worked, as a contract attorney noted:

We bill to the nearest tenth of an hour. I keep track of my time on that case. When we go to the sentencing hearing, we’re supposed to have an estimate of how much you’ve spent in your criminal defense – in the past you didn’t have to know – and that estimate you have to give to the judge and the client, and they’re always stunned about how quickly it gets up there. I feel badly charging, at the same time, Iowa’s reimbursement rate is pretty low.

A judge acknowledged the differing results that clients of public defenders and court-appointed counsel can experience:

The farce of it is, we can have codefendants in a case and the public defenders will certify one hour. Whereas the contract attorney we had to appoint to represent the codefendant, might be submitting a claim for \$2,000.

Private attorneys who are not under contract with the State Public Defender are entitled to reasonable compensation and expenses. Reasonable compensation is set out by Iowa Code §815.7 as specified hourly rates paid for work on particular categories of cases. Fee limitations, expressed in hours, are established by the State Public Defender for various case types, as per Iowa Code Section 13B.4. The fee limitations must be reviewed, with public input, every three years. Since 2021, the fee schedule and case limitations have been as follows: in Class A felonies, the hourly rate is \$76 with a cap of 258 hours; the Class B felony rate is \$71 an hour with a cap of 56 hours; and for all other cases an hourly rate of \$66 applies, with caps of 30 hours in a Class C felony, 20 hours in a Class D or aggravated misdemeanor, 10 hours for a serious misdemeanor, and five hours for a simple misdemeanor. Attorneys must obtain court approval prior to exceeding the fee limitations, and requests are reportedly routinely granted.

In the most serious of charges, a Class A felony, defendants are entitled to be represented by two attorneys. In such a case, the court may assess costs for both attorneys, an amount that can reach into the tens of thousands of dollars. For example, in a Class A felony, with two attorneys each billing \$76 an hour for the authorized maximum of 258 hours, the total amount of counsel costs would be \$19,608 apiece, or \$39,216 total. And as noted, a judge would have discretion to exceed that cap if warranted. Compare that to Oklahoma, where a defendant who enters a guilty plea in a felony case faces a \$500 OIDS fee, or, if the case goes to trial, a \$1,000 fee. In reality, counsel fee assessments in Iowa were found to typically range from several hundred dollars to a thousand dollars.¹⁰³ Even those amounts, however, can be burdensome to pay off.

Other Indigent Defense Reimbursement Costs

In addition to attorney hours worked, cost of counsel fees include other court costs related to adequately defending individuals, such as use of expert witnesses. Before securing expert witnesses, a defender must submit an application including a statement attesting to the court that they have informed their client of the expected expense and their potential responsibility for reimbursement. The court then must approve the expert witness before any expenses are incurred, including setting a maximum limit on spending. Expert witnesses can then file a claim for reimbursement with the public defender's office.

Category B Restitution / Cost of Counsel Recoupment

Iowa's scheme of assessing costs for appointed counsel services in criminal convictions falls under the "restitution" chapter of the Iowa Code, as part of an overall category of court debt referred to as "Category B restitution." Typically, in the context of criminal cases in the U.S., restitution refers to court orders that seek to make victims whole, such as ordering payment to an individual victim or even a government or business entity that suffered loss or damage by acts of the defendant. But in Iowa, the term "restitution" encompasses not only typical forms of pecuniary punishment intended to benefit victims, plus fines and surcharges, but also other court costs designed to recover government expenses associated with a defendant's case. The "typical" restitution costs are known as Category A restitution, while the other court costs, which include the cost of court-appointed attorney fees, are Category B restitution costs.¹⁰⁴

The current Category A/Category B restitution scheme reflects changes that went into effect on July 15, 2020 through the enacted Senate File 457 (SF457).¹⁰⁵ Part of what NLADA sought to understand was what effect, if any, changes to the law are having on low-income individuals who are subject to recoupment assessments.

Prior to passage of SF457, there was no presumption an individual had ability to pay the ordered amounts; the court needed to affirmatively find ability to pay before court debt could be assessed on defendants. Courts needed to provide a final total of debt to be assessed before finding ability to pay, as well as provide a rationale for their finding of ability to pay. All of these served as protections for indigent defendants, and all have changed. It is also now much harder to appeal an ability to pay determination.

Under the current law, Category A restitution, which includes fines, penalties, and surcharges, cannot be waived or reduced. The court is required to order Category A restitution regardless of an individual's reasonable ability to pay. Category B restitution, which includes cost of counsel assessments, can be waived or reduced if a court determines the defendant does not have a reasonable ability to pay. Research showed that many practitioners question the fairness and effectiveness of determinations of reasonable ability to pay Category B restitution.

Reasonable Ability-to-Pay (RAP) Hearings

The determination of the Category B "restitution plan" – i.e., the amount of potentially waivable debt that will or will not be assessed – will typically, but not always, be made at the sentencing hearing. The defendant must make the request for a Reasonable Ability-to-Pay (RAP) determination at sentencing or within 30 days of the court's entry of a permanent restitution order. Failure to request a RAP determination within this window waives the defendant's right to challenge a Category B restitution plan, except in the form of an appeal filed pursuant to Iowa law.¹⁰⁶ Therefore, it is critical that the defendant is adequately informed and aware that they must make this request within the time restraints.

Iowa Code Section 910.3 requires the court clerk to prepare a statement of costs, including cost of counsel, and provide it to the presentence investigator, if there is one, or submit it to the court at the time of sentencing. Despite this requirement, it is not possible for the clerk to know the full potential IDFR debt at sentencing because the case is still active at sentencing. Work is still being done by the attorney, thus “the meter is still running.” Further, the SPD has not yet decided how much of the claim to pay. In general, the SPD cannot pay a claim until the case is over (i.e. after the “date of service”).¹⁰⁷ With the totality of Category B restitution costs not usually known at the time of sentencing, a RAP determination made at that time is an incomplete analysis. At least in reference to determining the IDFR, Iowa Code section 910.3 asks the clerk to do something that is basically impossible. Most courts reportedly use an estimate.

As previously stated, one concerning aspect of the revised scheme is that the court begins with the presumption that the defendant has reasonable ability to pay the full amount of Category B restitution, unless proven differently. Defendants now have the burden of showing, by preponderance of the evidence, that they lack the reasonable ability to pay the full amount of Category B restitution.

Also as noted, the final amount of the IDFR is not known at the time of sentencing, as attorney work is still being done then and the SPD has not made its determination of attorney pay. Not knowing the full debt can complicate determining RAP. Reportedly one way some judges handle that is to say, “We don’t know how much IDFR there will be, but the defendant can pay no more than X.”

To make the case they are unable to pay the full amount of Category B restitution, an individual must first complete a financial affidavit. This is a separate, much more detailed affidavit than is required at the time eligibility for court-appointed counsel is considered. It requests a person’s “income, physical and mental health, age, education, employment, inheritance, other debts, other amounts of restitution owed, family circumstances, and any assets subject to execution, including but not limited to cash, accounts at financial institutions, stocks, bonds, and any other property which may be applied to the satisfaction of judgements.”¹⁰⁸ If a court determines that an individual cannot reasonably pay all or part of the Category B restitution, it may order the performance of community service in lieu of payments.¹⁰⁹

What is missing, according to attorneys interviewed, is a fair framework for courts to analyze the information and determine what is, essentially, future continuing ability to pay court debt. This issue, among others, was studied by a committee of judges and clerks in conjunction with Iowa Legal Aid and with the Criminal Justice Policy Program at Harvard Law School acting as consultants. A proposed rule reforming the process was drafted, but then SF457 was passed and the study effort was set aside. At any rate, the current court rule addressing court debt collection was written in 2012, and given multiple statutory changes over the last decade – SF457 was but the most recent – advocates feel the rule stands to be revisited.

Collection of Court Debt

“Court debt” is a term that encompasses conviction and non-conviction assessments in Iowa. Restitution, including IDFR, is conviction debt. State law allows courts to order payment of assessed costs to be made in reasonable installments, and payment may be a condition of probation. Otherwise payment is due within 30 days of issuance. Conviction-related IDFR becomes enforceable as a civil judgment once ordered and past due.¹¹⁰ If the person is employed, the law provides that the person shall execute an assignment of wages for collection of the costs. Assignment of wages, it was said, is a structure that passes constitutional muster in part because of its assumed voluntary nature. For non-conviction IDFR, the law provides that if any costs and fees are not paid by the time specified in the order of the court, a judgment shall be entered against the person for any unpaid amount and may be enforced by the state as a civil judgment.¹¹¹

Delinquent payments fall under responsibility of the Iowa Department of Revenue to collect, and it may hire outside contractors to assist in collection efforts. Alternately, a County Attorney may opt to collect delinquent court debt for their county, including court-appointed attorney fees or expenses of a public defender. In that case, 35 percent of the amounts collected by the County Attorney is deposited in the general fund of the county. Repayment of court debt is a condition of community supervision, and payment is monitored as part of community supervision.

Delinquent court debt can be collected through garnishment of wages and bank accounts. Garnishments can be filed through the court by a county attorney, or through the same out-of-court administrative agency process used to garnish wages and accounts for unpaid taxes. Other methods of collection include offset of state tax refunds and benefits; suspension of professional and driver's licenses; denial of vehicle registrations and expungements; revocation of supervised release; and threatened or sometimes actual incarceration.

Payments toward Category B restitution and other court costs are made to the District Court Clerk and collected counsel costs are directed to the General Fund, with the exception of any portion of the collected fees diverted to pay a prosecutor or revenue agency acting as defaulted court debt collector.¹¹²

Research Findings

NLADA's investigation found that Iowa's initial process to determine eligibility for appointed counsel is more standardized and fairer than in some other states, such as Oklahoma. However, the RAP determination process in establishing Category B restitution amounts owed was characterized as not being sufficiently standardized, and overly burdensome to clients. Considered with analysis of Iowa's low collection of indigent defense fee recoupment (IDFR) assessments, it seems the assessments will never generate meaningful revenue for the state, yet they carry consequences that perpetuate lasting harm to individuals who continue to carry unpaid IDFR obligations.

The balance of this section discusses observations stemming from NLADA's research on IDFR in Iowa, supplemented with information and analysis shared by Iowa Legal Aid about the topic. Iowa Legal Aid is a statewide, not-for-profit law firm that provides free civil legal services to low-income Iowans, seniors, veterans, new Iowans, and members of other vulnerable groups. Through its work, it has developed deep expertise on the stress that IDFR obligations exert on individuals and families. And they have documented the fiscal folly of government efforts to collect the assessments.

Analysis by Iowa Legal Aid raises several concerns with the current indigent defense fee recoupment scheme, including the possibility that it is unconstitutional. It finds that SF457 has raised new hurdles in receiving meaningful consideration of ability to pay determinations. For one, the burden is now entirely on the individual to request an ability to pay hearing, something that is not always clear to defendants. Despite being found unable to afford counsel without substantial hardship at the outset of a case, at disposition defendants are presumed to have the reasonable ability to pay. They must prove otherwise or be assessed the full, or partial, cost of appointed counsel. As noted, the defendant must request a hearing on ability to pay at sentencing or within 30 days of the court's entry of a permanent restitution order or the matter is deemed waived. Under *Fuller v. Oregon*, 417 U.S. 40 (1974), the right to later modify debt based on changed circumstances is a critical element of a constitutional indigent defense fee recoupment statute.

Advocates in Iowa argue that an individual's ability to later modify IDFR is constitutionally necessary for at least two reasons. First, the circumstances of a defendant can change over time—hopefully for the better, but frequently for the worse. Second, in the absence of objective guidelines for what constitutes the reasonable ability to pay, the reality in Iowa is that these assessments are often

based on guesswork about what someone's future earning capacity might be. Without the ability to correct course when initial assumptions prove incorrect, or when the underlying premises about earning capacity change, Iowa's recoupment scheme arguably is not constitutional.

Iowa law provides a limited right to seek modification of an IDFR balance.¹¹³ Only people who are both convicted and remain under the supervision of the state are eligible. If a case is dismissed and fees are still assessed, there is no statutory right to a modification. And for those who are eligible to appeal, the statute gives the court complete discretion whether to schedule a hearing or not, without setting a standard that would require ability to pay be reassessed upon a showing of changed circumstances.

Disturbingly, RAP hearings are required but not generally conducted for defendants who are not convicted, despite the fact such individuals can still be assessed IDFR. Without a conviction, there is no triggering opportunity of a sentencing hearing for someone who was adjudicated not guilty, or whose case was dismissed, to present information to the court about inability to pay assessed costs of appointed counsel.

Iowa attorneys are critical of the RAP process. Responses by defense practitioners to a survey fielded by Legal Aid about court debt indicated concerns about the lengthy and complicated financial affidavit that poor people are required to complete. One survey respondent wrote:

It is such a waste of time requiring hearings on this, and making defendants complete this massive and unreasonably complicated form under penalty of perjury. . . . [M]ost judges have found that they have no ability to pay.

If the form is not filled out correctly, that can lead to delay. Other survey responses suggested that the time the process takes can't be justified by the amount of money it generates.

As frustrating as these process concerns can be, even more pernicious is the problem reported that prosecutors sometimes make waiver of the right to request an ability to pay determination part of a plea deal, so clients are never given the chance to contest their ability to pay ordered fees.

It is not just attorneys who express frustration with the new RAP scheme. Several judges interviewed felt it is more burdensome to have to hold hearings contesting a defendant's reasonable ability to pay Category B restitution, which was necessitated by the rebuttable presumption in SF457 that defendants have ability to pay.

Legal Aid Survey of Practitioners

In 2021, Iowa Legal Aid conducted a survey of indigent defense counsel regarding court debt, including counsel fee debt. Data was collected from 135 respondents who self-identified as public defenders (34), contract counsel (98), private practitioners (2) and one magistrate. NLADA is grateful to Legal Aid for allowing us to share some of the results here, as a number of questions directly probed practices around cost of counsel fees.

A majority of respondents (n=69) disagreed that ability to pay (ATP) hearings actually resulted in clients only being assessed what they could afford without resulting in hardship. When asked to identify barriers to advocating for reduction in court debt for clients, more than 65 percent (n=88) reported that lack of information regarding total amount owed was either a major or significant barrier. And a majority (52%) reported that judges were not reasonable in assessments for ATP or lacked an understanding of poverty implications for clients. Illustrative survey responses include the following:

Some judges are known to find that everyone has the reasonable ability to pay. This demonstrates that they are not conducting any analysis of the issue and have no understanding or empathy of what it means to live in poverty.

And

Every judge views ability to pay differently. And too many of them never did indigent work and have no concept of what it means to not be able to come up with \$10 dollars. They think clients are lazy or lying.

As emerged in NLADA's interviews, practices vary from county to county, and even judge to judge in Iowa. Most survey respondents' impressions of the RAP process characterize it as inconsistently applied and unreasonable. Some, though, felt it correctly resulted in fee waivers or reductions for their clients who are unable to pay full assessments.

Respondents were also asked about adequacy of notice provided by courts to their clients about charges they would incur and their ability to pay rights. Sentiments focused on clients who did not know they would be charged or did not understand their right to an ability to pay hearing.

My biggest frustration is that people don't realize they will [have] all of these costs until it's too late. We tell people that they're "entitled" to court-appointed counsel and then bill them in the end.

And

A separate notice that is in layman's terms would be beneficial so that clients actually knew that they were likely going to be required to repay something. Generally my clients have no idea when I have that conversation at the beginning of my representation.

Clients typically experience consequences of unpaid court debt post-conviction, when counsel is no longer actively working with clients. Nevertheless, attorneys see the consequences their clients experience. For example, one survey respondent wrote:

Clients are REALLY hampered in fully rehabilitating b/c they can't drive - so they can't get a job - or they can't go to the doctors or grocery store without committing the crime of driving.

When asked **How often do you see your clients face the following consequences in connection with their court debt?**, survey respondents reported the occurrence of the following as either **very often** or **somewhat often**:

- Garnishment of wages by either county attorney (54%, n=69) or Department of Revenue (57%, n=72)
- Revocation of supervised release - 32% (n=41)
- Inability to register vehicle - 80% (n=103)
- Suspension of driver's license - 91% (n=116)
- Threats or prosecution of contempt (no actual incarceration) - 55% (n=71)
- Incarceration under contempt - 34% (n=44)
- Tax refunds intercept - 77% (n=99).

When asked how important they believed it to be that clients avoid court debt, 70% (n=95) reported it to be extremely and/or very important. Perhaps the most alarming consequence for poor clients is the likelihood that court debt will impact their ability to receive the full amount of state assistance they would otherwise qualify for, due to offset of benefits to pay court debt. More than half, 52% (n=65), of respondents reported seeing that result very often or somewhat often.

Consequences of Unpaid Court Debt

Judges NLADA interviewed said that they will often put people on a payment plan if it is clear they cannot pay all financial obligations within thirty days of issuance. One judge noted:

My understanding is that the payment plan (I think) is typically \$50 a month. But my recollection is that the entire amount is supposed to be paid within two years of the time that it is done. So obviously for someone who owes a significant amount of money – even \$50 a month isn’t going to get them to the entire amount within two years.

Attorney responses to the Legal Aid survey catalog the types of consequences that clients face when they have unpaid court debt. The same judge quoted above about payment plans explained:

My understanding is that if you miss a payment or it isn’t completed within the two years, then it can get turned over to a collections agency that the state has (I guess) on retainer. They can also seize your income tax refunds or lottery winnings or any other type of money that you have coming in that can go through the state.

Very often the consequences, such as suspension of a driver’s license, which can be done for non-payment in a vehicle-related conviction, or inability to register a vehicle, which can happen for non-payment of court debt relating to any type of offense, directly interfere with an individual’s capacity to hold a steady job, secure reliable housing, and move forward through life with no further entanglement with the criminal legal system. Inability to pursue expungement is yet another consequence of unpaid debt, even if that lack of payment is in no way willful.

In Iowa, two people facing the exact same criminal charges, differentiated only by their economic means, can face wildly different court expenses from entanglement with the criminal legal system. According to Iowa Legal Aid, the two most expensive costs for low-income people in Iowa’s criminal legal system are repayment of indigent defense counsel fees and pretrial jail fees – the latter often owed because a defendant cannot afford to pay for bail or bond. Table 3 illustrates how consequences for the same crime can vary based not on culpability, but on a defendant’s financial condition.

TABLE 3
Comparison of Consequences for Two Iowans Accused of Theft¹¹⁴

PERSON #1 - NOT INDIGENT - THEFT 3 ¹¹⁵		PERSON #2 - INDIGENT - THEFT 3	
Fine	\$625	Fine	\$625
Restitution	\$30	Restitution	\$30
Court costs	\$100	Court costs	\$100
		Indigent defense fee	\$1,200
		Jail fees	\$2,100 (\$70 per day)
TOTAL	\$755	TOTAL	\$4,050 (>500% HIGHER)

The individual facing the \$755 in court-imposed expenses may very well also have a bill from retaining an attorney. But the burden of \$755 owed in court debt pales in comparison to the \$4,050 in court debt owed by the poor individual, and the consequences of non-payment are likely to have a very different effect on a person of means than they do on a person lacking means.

Because it can be difficult for someone with a criminal record to find employment or housing, expungement of records is a critical path forward. Iowa denies this path to poor individuals who lack the means to pay off court debt related to their charges. Iowa law requires full payment of all court costs, fees and financial obligations to pursue expungement.¹¹⁶ Advocates have raised this concern as a violation of the equal protection clause. However, the Iowa Supreme Court denied this claim, finding that expungement is a legislative “grace” and not constitutionally granted, even for someone, like the plaintiff, who had not been convicted of any offense.¹¹⁷

Consequences of court debt obligations are best explained by individuals who experience them. Due to the COVID pandemic’s disruption to travel and to court operations, all of the interviews NLADA conducted for the Iowa examination were done remotely, and no court observation was conducted. Ideally, NLADA would have liked to conduct court observations and interviews in person. One benefit to in-person court observations would have been the opportunity to speak with individuals in courts who are directly impacted by court-assessed fees, such as following sentencing hearings, or who were there making payments. Such input will be important to ongoing efforts to understand the effect of these fees and to reform them.

Variability in Practice

One factor that arose in NLADA’s investigation was conflicting information over the extent of counties, or courts, where IDFR practices are notably disadvantageous to clients. Conversations with advocates and survey responses clearly point to experiences where RAP hearings are not held or are held but not considered meaningful. However, the four judges who accepted NLADA’s request to be interviewed each reported they routinely waive Category B restitution. Representative quotes from judges interviewed include:

So generally, I would say for most court-appointed attorneys, they – the Category B Restitution is generally waived for them. And that includes reimbursement for the public defenders.

And

Well – I mean most of the affidavits we get are – again – I mean for example if you’re sending someone to prison a lengthy prison sentence, and they fill out an affidavit that they have no assets, obviously they aren’t going to have any significant income. And perhaps there are other significant court costs – because this doesn’t cover everything, right? Because there may be victim restitution, or things like that – we can’t waive those. So – yeah – I would say it [the judge waiving costs] happens quite a bit.

And

If I send somebody to prison, boom, I’m finding they’re not reasonably able to pay. I’m not asking questions, I’m just saying, “You’re going to prison, you had a court-appointed counsel, I know damn well you can’t pay for this.” So personally, I wipe those off. Other judges may not do it that way.

This discrepancy in responses raises suspicion that the self-selecting group of judges who volunteered to be interviewed did not fully represent the spread of practices and views across the state. More information is needed to understand how common it is to see RAP determinations result in waiver or reduction of Category B costs.

Variability in IDFR practice is also driven somewhat by county attorneys. Some county attorneys, as noted earlier, make waiver of RAP determinations a part of their plea bargaining, or part of their negotiations for a complete dismissal of criminal charges. And some have willingly taken on the optional role to act as collector of delinquent IDFR payments, instead of leaving the task to the Department of Revenue, prompting some interviewees to speculate that some county attorneys are more interested in making indigent defendants pay Category B restitution than judges are. One judge said:

That varies. But yes – there are several counties where they do that. They enter into payment plans, wage assignments etc. for – with defendants and they take that role on themselves.

Further investigation into the extent of unfair or heavy-handed practices by judges or county attorneys in assessing and collecting IDFR is warranted.

Iowa Legal Aid Analysis: Massive Amounts of Court Debt, Especially Counsel Fee Debt, Assessed Against Those Who Cannot Pay It

The inability of poor Iowans to pay down court debt, including IDFR, is well documented and raises key concerns about the wisdom of continuing to impose court fees, including cost of court-appointed counsel assessments. Unpaid court debt can be collected through garnishment of wages and bank accounts. Garnishments can be filed through the court by a county attorney, or through the same out-of-court administrative agency process used to garnish wages and accounts for unpaid taxes. Because of this, back in 2009, Legal Aid found that clients were receiving as little as 19% of their gross earnings as take-home pay. They also found garnishment “stacking,” which included administrative garnishment in addition to garnishment for something else, such as child support.

Since 1977, Iowa law has provided that court debt other than fines, surcharges, and victim restitution can only be assessed to the extent that a defendant has ability to pay.¹¹⁸ This protection is needed to “insure that only those who actually become capable of repaying the State will ever be obliged to do so.”¹¹⁹ However, proof that RAP determinations are falling short of the mark is reflected in data collected by Iowa Legal Aid. That data show that debt from indigent defense fees assessed on individuals who are represented by public defenders, contract attorneys, and private court-appointed attorneys, constitutes a sizable portion of all uncollected debt, even following recent changes to the law on ability to pay determinations.

Table 4 shows the history of negligible collection rates in Iowa for indigent defense fee recoupment between fiscal years 2012 and 2021. Outstanding indigent defense debt has grown over this period, and collection rates have declined overall, down to just 2.1% in FY 2021. A judge NLADA interviewed affirmed this downward trend:

I can assure you that the receivables for the state have gone down dramatically. . . . There was a ton of uncollectable debt on the books, and it just looked bad.

TABLE 4

Iowa Legal Aid Compilation of Indigent Defense Debt Owed and Collected, FY 2012-FY2021¹²⁰

FISCAL YEAR	OUTSTANDING INDIGENT DEFENSE DEBT	INDIGENT DEFENSE DEBT COLLECTED	COLL. RATE	OUTSTANDING FINES	FINES COLLECTED	COLL. RATE
2012	\$136,108,218 ¹²¹	\$5,764,811 ¹²²	4.2%	\$270,060,943 ¹²³	\$56,155,868 ¹²⁴	21%
2013	\$147,884,549 ¹²⁵	\$4,981,250 ¹²⁶	3.4%	\$280,664,807	\$53,851,425	19%
2014	\$155,878,980 ¹²⁷	\$5,323,917 ¹²⁸	3.4%	\$189,927,347	\$53,719,852	28%
2015	\$157,048,534 ¹²⁹	\$5,000,235 ¹³⁰	3.2%	\$200,259,873	\$51,250, 473	26%
2016	\$161,664,137 ¹³¹	\$4,709,153 ¹³²	2.9%	\$302,099,758	\$48,646,612	16%
2017	\$167,598,811 ¹³³	\$3,983,668 ¹³⁴	2.4%	\$315,532,760	\$50,513,830	16%
2018	\$172,887,091 ¹³⁵	\$3,439,272 ¹³⁶	1.9%	\$327,813,205	\$51,029,181	16%
2019	\$177,555,301 ¹³⁷	\$3,386,888 ¹³⁸	1.9%	\$257,117,408	\$50,257,421	20%
2020	\$177,934,445 ¹³⁹	\$3,545,155 ¹⁴⁰	2.0%	\$264,643,905	\$48,335,409	18%
2021	\$178,160,208.86	\$3,727,955	2.1%	\$278,392,328.93	\$55,121,473	19.9%

Table 4 also shows fine collection amounts as a comparison, since fines are owed by a wider socioeconomic swath of people, not just low-income people.

The amount of IDFR money collected represents a small fraction of what is spent overall on indigent defense services in the state. In FY2020, the \$3,545,155 collected in IDFR represented 5.2 percent of the State Public Defender’s \$67.8 million appropriation.

Conclusion

Iowa is one of 42 states, plus the District of Columbia, that authorize assessment of fees for exercise of a Constitutional right to which one is entitled precisely because they are poor. Iowa Legal Aid has found that low-income people owe far more simply for the costs of being in the criminal legal system than they do for actual punishments, including victim restitution and fines. Leading the burden of system costs to low-income people in the criminal legal system are payment of the indigent defense fee recoupment and pre-trial jail fees. Many advocates have raised serious questions about the utility of criminal legal case fees as generators of state revenue. As discussed, it has been well documented that low-income individuals can never be a source of significant revenue to offset indigent defense system costs.

NLADA concludes that the most sensible and fair remedy in Iowa would be to eliminate the indigent defense fee recoupment. Work that has been done by advocates to litigate unfair aspects of the system, or to inform the state legislature about its shortcomings, is exemplary. However, it is possible that messaging could be crafted to be more broadly accessible to all Iowans in order to spread awareness about the depth of the problem, and the unfairness it poses to low-income citizens. Community-based organizations could be enlisted in the education and outreach efforts.

The research team asked all participants to reflect on the current climate for abolition of IDFR. Participants expressed skepticism that the current state legislature would be receptive to eliminating indigent defense fee recoupment. Participants were also asked for suggestions to reform the current IDFR system, even if they were short of abolition. The following are suggested reforms made to NLADA in interviews, and by respondents to the Legal Aid survey.

Suggestions for Reform

1. The presumption that people have the ability to pay Category B Restitution should be rescinded. If someone qualifies for court-appointed counsel, the *inability* to pay should be presumed and the prosecutor should be required to prove the person is able to pay.
2. The second financial affidavit now required of defendants for RAP determinations should be scrapped or simplified, given that people have already completed an affidavit used to establish eligibility for court-appointed counsel.
3. Iowa should mandate use of guidelines for all judges and court clerks to apply in determining reasonable ability to pay. Chapter 2 of this report supplies existing models that Iowa can adapt.
4. County attorneys should not be allowed to make Category B restitution a factor in plea negotiations, such as requiring agreement to forgo a RAP determination.



Section 3: Clark County, Nevada

When researching possible “deep dive” sites, NLADA was preliminarily told by contacts in Nevada that practices vary by county, and that there was no central repository of data about practices. It was speculated that most courts assess a flat appointed attorney reimbursement fee of \$500 for felony charges and \$250 for misdemeanor charges, with no ability to pay determined. Because practices play out differently among the counties, even though it is state statute that authorizes the assessment of counsel reimbursement fees, it was suggested that the best way to understand the issue was to begin by looking at practices in Clark County. Clark County encompasses the economic engine of the Las Vegas strip and is, by far, the largest and wealthiest county in Nevada. If reform efforts were found to be in order, it was suggested, it would be best to launch efforts in Clark County. Results of research into Clark County practices appear in the following section, beginning with explanation of the courts and indigent defense system and continuing into findings about indigent defense counsel recoupment.

Incarceration in Nevada

According to a 2019 report by the Vera Institute, in 2018, there were nearly 14,000 people locked in Nevada’s prison system, including nearly 4,000 who were pre-trial detainees.¹⁴¹ In 2018, the prison population in Nevada has increased 329% since 1983.¹⁴² Since 1980, the number of women in jail had increased 1,088%, and the number of women in prison had increased 1,166%.¹⁴³ Black people constituted 9% of the state residents, however they made up 24% of those in jail and 31% of the prison population.¹⁴⁴ Clark County had the state’s largest jail population with 104,362 annual admissions.¹⁴⁵ Clark County also had the largest prison population with 4,246 annual admissions.¹⁴⁶

Since 2018, there has been a fairly significant decrease in Nevada’s prison population, down to 10,554 during the quarter on July to September 2021.¹⁴⁷ Part of this is due to the COVID-19 pandemic, so is suspected to be temporary, but part of the decline is also due to reforms, such as AB 236, which was enacted in 2019. As of February 2021, Nevada’s Department of Public Safety reported 21,921 individuals on community supervision through Probation and Parole (P&P).

Indigent Defense Delivery System

Nevada’s indigent defense system is primarily county-administered and county-funded, with some state oversight. The state Board of Indigent Defense Services develops minimum standards for the delivery of indigent defense services, which are carried out through the state Department of Indigent Defense Services, both of which were established in 2019.

By statute, Nevada counties with a population of 100,000 or more must have a county-funded public defender office. Two of the state’s 17 counties, Clark (Las Vegas) and Washoe (Reno), fall under this requirement. Counties whose population is under 100,000 may choose the method of providing indigent defense services. In these counties, indigent defense services may be provided through contracting with the Nevada State Public Defender, the creation of a county public defender’s office, or through contracts-for-service with attorneys. Currently four of the 15 so-called “rural” counties have opted to establish public defender offices (Churchill, Elko, Humboldt and Pershing counties), two utilize the services of the State Public Defender (Carson City and Storey County), and nine contract with private attorneys to provide indigent defense services (Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties).

Clark County has a primary defender office, the Office of the Clark County Public Defender (Las Vegas). The Clark County Special Public Defender handles conflicts in death penalty cases, other murder cases, and representation of parents in termination of parental rights proceedings. An independent, coordinated assigned counsel system handles all other conflict matters in Clark County. In Washoe County, the primary office is the Washoe County Public Defender's Office, and the Alternate Public Defender's Office provides conflict representation in all types of trial level cases.

Trial Courts Overview

There are 16 counties in Nevada plus one independent city that is essentially a county equivalent. The state's adult criminal trial courts are Justice Courts and District Courts. The county-funded justice courts handle misdemeanor trials, misdemeanor sentencing, preliminary hearings, and appointment of counsel. There are 42 Justice Courts in the state, 11 of them in Clark County. District Courts have general jurisdiction over all legal disputes, and handle jury trials, felonies, and gross misdemeanor sentencing.

Funding for District Courts is shared by the state and counties; District Court judges' salaries are paid by the state while the county pays for support staff and court facilities. There are 11 district courts. Nevada also has 17 Municipal Courts, five of which fall within Clark County's borders, that hear cases involving violations of traffic and misdemeanor ordinances that occur within the city limits of incorporated municipalities.

Study Sample

NLADA gathered information from a total of 18 interview participants in Nevada, including: two judges, four public defenders, one private practitioner, one court administrator, two county fiscal administrators, two Probation and Parole employees, two state stakeholders, three community stakeholders/advocates, and one person with lived experience. The non-response rate to requests for interviews was approximately 47 percent.

Indigency Determination

In Clark County, indigency determination and court-appointment of counsel is handled by the Justice Court. If a defendant is in custody, there is a presumption of indigency and counsel is promptly appointed. If a defendant is out-of-custody, they complete a financial affidavit and submit it to the court.

People appearing at their initial appearance in Justice Court are asked if they can afford their own attorney. NLADA was told that if someone indicates they would like to try to hire an attorney, they will be given a return court date in 30 days. Most people say they cannot afford a lawyer and so one will be appointed at the initial appearance. One judge said she does not like to give the option of time to investigate ability to hire a lawyer to people who are in custody and are going to stay there; the public defender is appointed right away for those individuals.

Recoupment of Appointed Counsel Costs

There is no upfront application or appointment fee assessed for individuals seeking court-appointed counsel in Nevada, however, Nevada Revised Statutes Section 178.3975 authorizes a court to order a defendant to pay all or any part of the expenses incurred by the county, city or state in providing the defendant with an attorney. The order may be made at the time of or after the appointment of an attorney and may direct the defendant to pay the expenses in installments. “The court shall not order a defendant to make such a payment unless the defendant is or will be able to do so,” and a defendant may request to perform supervised community service in place of making some or all of the ordered payment.

Collection/Enforcement of Court Debt

NLADA had difficulty identifying the entity where a defendant would go to remit payment on a counsel fee assessment while under court supervision. Funds eventually go to the County.

Nevada Revised Statutes Section 178.398 provides:

If a defendant for whom an attorney is appointed at public expense on account of indigency has property subject to execution or acquires such property within 6 years after the termination of the attorney’s representation, the court shall determine the value of the legal services provided and shall render judgment for that amount in favor of the state, county or city which furnished the public defender or otherwise paid for the defense.¹⁴⁸

The district court entering the judgment shall forward to the county treasurer or other office assigned by the county to make collections the information necessary to collect the fee. The county treasurer or other office assigned by the county to make collections is responsible for such collection efforts and has the authority to collect the fee.

Research Findings: Assessment Practices Vary by Judge

In interviews with participants who hold a variety of roles in Clark County, NLADA received largely inconclusive information about practices connected to imposition of cost of appointed counsel fees, partly because centralized data on the topic was not accessible. The Appointed Counsel Administrator for Clark County was not aware of any court imposing such a fee or of attempts to recover payment. Two public defenders and two judges reported that they were personally unaware of such fees being assessed on indigent defendants, but thought that there may be some judges who do so. Most public defenders in Clark County do not appear before multiple judges; they are assigned to cases in just one judge’s courtroom. It is feasible that they are only knowledgeable about the practices of that judge.

A Justice Court judge said, “I would never think we should charge poor people for counsel.” That judge also felt that because of the large volume of cases, there is not much attention paid to figuring out people who might be able to afford to pay something toward counsel costs.

But a District Court judge affirmed that if counsel is appointed, all judges have discretion whether to assess a counsel fee, and it varies widely by judge. This judge would reportedly “never, never, never” order counsel fees, but acknowledged that some do, typically \$150 for a misdemeanor and \$250 for a felony, less than the amount NLADA was initially told that Nevada courts assess. Some judges

reportedly tell the client upfront in Justice Court that they are assessing a counsel fee. If the case is resolved in Justice Court, public defenders can ask the judge to waive the fee (some reportedly announce “we’re waiving ‘our fee’”). For a case that is bound over to District Court, an assessed fee travels with the client from Justice Court to District Court. In cases that are resolved and plead out, at sentencing the judge can opt to order the fee. It is the responsibility of the Parole and Probation (P&P) department to prepare the Pre-Sentence Investigation, which can include a counsel fee plus all other fees and fines.

A public defender who daily sees the practices of three District Court judges, and has appeared before four others in recent years, said the practices of judges are very different. Some never assess an indigent defense fee. Two always assess a \$250 fee. And some defendants who have been told by a Justice Court judge that no fee will be assessed because of their poverty will be assessed a fee by the District Court who presides over the case after it exits Justice Court. The public defender who shared these observations routinely requests waiver of the fee; one judge never waives the fee. One public defender said there is no formal ability to pay determination made. Another said that requesting an ability to pay hearing was fairly standard: “I’m not going to send anybody to jail on my watch without having that done.”

A former public defender reported that almost every District Court judge assessed a \$250 indigent defense fee for felony convictions. Indeed, a search of judgments of conviction (JOCs) in the 8th Judicial District Court’s case database for April and May 2022 turned up cases presided over by several District Court judges who ordered defendants represented by court-appointed lawyers to pay a \$250 “Indigent Defense Civil Assessment fee,” in addition to a \$25 Administrative Assessment Fee, \$3 DNA Collection fee, and \$150 DNA Analysis fee.

The conclusion is that Clark County is a county where imposition of public defense system fees occurs, at least in District Court, but completely at the discretion of individual judges, raising concerns of inequity for similarly situated individuals facing criminal charges.

Lack of Assessment and Collections Data

NLADA attempted to get information on the amount of indigent defense fee assessments and collections in Clark County from multiple sources. Most individuals reached politely said they had no information on the topic and suggested calling other agencies. Calls and/or emails were made to the county treasurer’s office, county assessor’s office, county comptroller, county finance officer, Justice Court Administration, District Court Administration, and Probation and Parole. As a result, NLADA was unable to piece together a complete understanding of the amount of indigent defense fees assessed or collected in Clark County courts.

Individuals come under the jurisdiction of the Department of Public Safety, Division of Parole and Probation (P&P) through the District Courts. Therefore, P&P supervises probation for individuals convicted of felonies and gross misdemeanors but has no role in supervision of individuals convicted of misdemeanors through Justice Court. P&P is involved with setting up payment plans for ordered restitution, fines and fees that an individual is able to pay. A P&P representative reported that P&P is responsible for collecting probation supervision fees and restitution payments, but does not get involved with collecting counsel recoupment. P&P staff will remind individuals of court fees that must be paid, including the counsel fee, but that the District Court actually collects those payments. Unfortunately, NLADA was not able to obtain any data on counsel fee assessments and collections from District Court.

Individuals who have been convicted of misdemeanors can be required to appear periodically at a Justice Court status check docket that monitors compliance with attendance at any ordered programs as well as payment of restitution and fees. There is no supervised probation program for misdemeanors.

Individuals subject to court oversight for convictions in Clark County reportedly do not get arrested merely for failure to pay court debt. However, they need to attend their status check or communicate in advance with the public defender's office, which staffs the docket, to have them explain why they are not current on payments, or risk arrest and detention. If an individual misses just one payment without clear communication with the court, they can end up in warrant status.

NLADA received one definitive response about counsel fees in Justice Court to an email query that was sent to a general information address at the Las Vegas Justice Court. It read:

When defendants are appointed court appointed counsel (public defender) they have already been determined that they cannot hire counsel on their own thus there are no fees assessed by our court for the representation.

NLADA was unable to locate information on assessment and collection of indigent defense fees from other Justice Courts in Clark County.

One Justice Court judge interviewed thought cost of counsel fees were not widely imposed, however, does not think Clark County deserves “a gold star” simply for not charging poor people for their appointed lawyer, as there are other harms the system inflicts on poor people that need to be corrected. For example, public defenders juggle large caseloads, which can affect quality. With so many jobs connected to the gaming industry, perhaps to an extent unlike than seen other counties, even low level offenses can be barriers to employment. Pleading to a misdemeanor can be a big obstacle to getting employment in the hospitality industry. And until only very recently, when an Initial Appearance Court was created, arrested individuals would sit in jail for two to five days before seeing a judge and receiving appointed counsel, something that cost people jobs and housing.

Interestingly, multiple people interviewed offered that it is quite likely that the most serious problems are occurring in Municipal Courts, which do not fall under the same administrative superintendence that Justice and District courts do. There are many suspected irregularities in Municipal Courts, however the worst problem is likely not assessment of cost of counsel fees. NLADA asked attorneys who appear in Municipal Courts if cost of counsel fees were assessed, and no one we spoke to had seen that practice. Further investigation into Municipal Court practice fell outside the scope of this review.

Poor People Face Prolonged Probationary Oversight

Individuals who comply with all conditions of P&P, which include paying all fees, earn “good time,” which can shorten the length of their time on probation and/or parole by six or more months. However, earned good time credits can be taken away by judges, even when all other conditions have been successfully completed, when payment of court debt is not yet complete. Poor clients can spend more time on community supervision than their more affluent peers, until their debt is discharged or waived by the court. An attorney explained:

They may have you remain on probation for the full three years to give you the maximum amount of time possible to pay those fees and restitution, and then they will turn the remaining balance into a civil judgment.

A P&P employee and a public defender confirmed that poor people who are paying off fees and other costs miss out on the benefit of early release which, but for payment of all costs, they would qualify for.

Other long-term consequence of unpaid court debt, which may include indigent counsel fee, is ineligibility for record sealing and expungement.

Attitudes Toward Reform

NLADA asked people their opinion about the climate for reform of indigent defense counsel fees. Individuals agreed the fix needed would be legislative but opinions differed on current receptivity to reform. One person felt that Nevada's legislature has some appetite for reform of criminal justice related things, as witnessed by sweeping criminal justice reform, tied to justice reinvestment changes, passed in the 2019 legislative session.¹⁴⁹ Another felt that appetite for change was diminishing, and that as a state with no income tax, it would likely come down to how dependent counties' are on fee collections:

The question is going to come up about “Who’s it being taken away from?” and “Who’s not benefiting?” because those sources of funding are super important in Nevada because we don’t have that state income tax.

In any event, it was agreed that education and awareness would be essential to legislative change, and clearly data are lacking. One state stakeholder stressed the importance of tracing the money and understanding the effect of assessing funds from poor people.

Data from Other Counties on Cost of Appointed Counsel Recoupment

NLADA's research into counsel fees in Clark County turned up broad variability among judges in imposition of Indigent Defense Civil Assessment fees but did not turn up aggregate fiscal data on how much is assessed and collected. Some partial data, though, were available for other counties. The Washoe County Collections Division tracks information on counsel fees that are collected after they have become due, so, for instance, after a period of probation supervision has passed and fees remain outstanding. For the period ending June 30, 2020, the Division collected \$57,922 in delinquent counsel fees. That year was aberrant, due to the disruption caused by the COVID pandemic. For the period ending June 30, 2021, \$126,071 was collected in delinquent counsel fees. And for the first nine months of fiscal year 2022, the office collected \$105,573.

In addition, the Department of Indigent Defense Services (DIDS) is beginning to collect information on the 15 rural counties that will make it easier to analyze the issue there. DIDS is a state-funded agency that provides Nevada counties with assistance in delivering constitutionally protected defense services to indigent defendants. It seeks to help counties develop quality, equitable, and sustainable indigent defense systems that strengthen local communities and meet or exceed the state and federal constitutional guarantees. Emphasis is on assisting the 15 rural counties, whose populations range from 1,011 residents (Esmeralda County) to 62,601 residents (Carson City). In comparison, the population of the state's two non-rural counties are 493,014 residents (Washoe County) and 2,388,515 residents (Clark County).¹⁵⁰

DIDS requested information from the 15 rural counties on what they collect in cost of appointed attorney reimbursement fees. Just five of the 10 counties reported collecting anything in the first two quarters of FY 2022. Figures from those five counties, along with their reported overall indigent defense system expenditure appear in Table 5.

TABLE 5

Nevada Rural County Indigent Defense Counsel Reimbursement and System Expenditure, FY 2022

COUNTY	POPULATION	Q1			Q2		
		REIMBURSEMENT	IND. DEF. EXPEND.	%	REIMBURSEMENT	IND. DEF. EXPEND.	%
Lyon	62,601	\$6,109.00	\$324,052.45	1.9	\$4,618.00	\$319,556.64	1.4
Carson City	58,058	\$7,294.00	\$450,899.67	1.6	\$5,947.00	\$436,929.15	1.4
Douglas	50,153	\$786.00	\$252,948.00	0.3	\$855.40	\$187,147.49	1.4
Churchill	26,118	\$3,783.00	\$98,064.13	3.9	\$4,299.00	\$103,776.71	4.1
Humboldt	16,990	\$2,122.00	\$106,058.50	2.0	\$60.00	\$149,412.23	.04

A couple of interesting things stand out from the data points. First, the amount of funds collected represent a fraction of the counties' overall expenditure on indigent defense, ranging from a low of .04 percent to a high of 4.1 percent. That pattern follows the trend seen in other jurisdictions where this data is available, reaffirming conclusions that efforts to support indigent defense funding obligations through assessments from poor people who exercise their right to counsel is a losing business proposition.

Second, the indigent defense expenditure for two of the five counties varied substantially in the two quarters. Expenditure decreased from \$252,948 in the first quarter of FY 2022 to \$187,148 in the second quarter in Douglas County, a 26 percent decline. Attorney reimbursement collections remained fairly consistent in those quarters in Douglas County. In Humboldt County, indigent defense system expenditure increased 41 percent from the first to second quarter of FY 2022, from \$106,059 to \$149,412. But contrary to Douglas County, the attorney reimbursements collected reportedly dipped 97 percent in that period in Humboldt County, from \$2,122 collected in the first quarter to \$60 in the second quarter.

This is not to suggest that there is a correlation between indigent system expenditure fluctuation and recoupment fluctuation. The two occurrences are not generally directly correlated. And certainly, with just six months of data, it is impossible to say whether these patterns speak to any larger trends. But they do illustrate the value of collecting baseline data on what is happening. Over time, after a full year or two of reported data, trends will become more discernable. And the absence of reported data can be as interesting as reported data.

DIDS now has a starting point to look into the 10 counties that reported no appointed attorney reimbursement collections. With the exception of two, these counties are the smallest of the 15 rural counties. Are judges in those counties foregoing assessing reimbursement fees? Is there simply no mechanism to enforce them? Or no mechanism to track collections? What can be learned from the smaller counties that might be educational for larger counties, and vice versa? The sizeable group of counties that did not report data echoes the data scarcity issue found in Clark County. NLADA contacted multiple sources there – at courts and in county government – to try to locate appointed attorney reimbursement assessment and collection data and turned up very little.

Next Steps

NLADA's examination into the extent of Clark County, Nevada's imposition of indigent defense counsel fees was inconclusive due to a lack of available data. Little more can be concluded than that assessment of indigent defense attorney fees occurs, certainly in District Court, where court records show a \$250 "Indigent Defense Civil Assessment fee," but that it varies depending on individual judges' discretion. Advocacy for fee reduction appears to happen but waiver of assessed fees appears to depend on the judge. If Clark County courts and county agencies were able to trace assessment and collection, as well as costs of efforts to do that work, it would be in a much better position to understand the efficacy of that effort. Understanding is also needed of disparate effects, for instance of denying early release from probation supervision to people simply to increase odds they will be able to pay down more of their court debt obligations.

Efforts to track collections data among rural counties by the Department of Indigent Defense Services are a good first start from which to build. Because Clark and Washoe counties process the overwhelming majority of criminal cases charged in Nevada, it is crucial to get accurate data on practices in those counties, too. Nevada was described as a "purple" state that offers opportunity for reasonable criminal justice system reform. With its limited revenue base, though, no legislative reform initiative that might reduce even a relatively small revenue source for counties will advance without a more informed understanding. NLADA urges government agencies, courts, advocates and defenders to cooperate in efforts to track fiscal data and information about the consequences these fees impose on Nevadans who are subject to them.



Section 4: New Hampshire

NLADA initially thought that it would investigate the effect of public defense system fees in New Hampshire using the same qualitative interviewing and data review methodology used for its examinations into practices in Oklahoma, Iowa, and Clark County (Nevada). Early research, however, directed us to undertake a more targeted inquiry in New Hampshire, looking at the surprising availability of publicly accessible data on public defense system cost of counsel fee collections, and on the cost to administer those collections. New Hampshire is believed to be the only state in the country with a state office, the Office of Cost Containment, that is solely dedicated to administering collection of counsel fees. New Hampshire also has a “Right to Know” law that requires governmental agencies to promptly provide access to, or reply to requests for, governmental records. These factors contribute to making the state a model of transparency into understanding, through analysis of agency data, the net effect of efforts to extract cost of counsel assessments from individuals who receive court-appointed counsel. This chapter’s final section details what sets New Hampshire apart in data transparency on public defense system fees administration. It also briefly discusses data reporting approaches used in several other states: Massachusetts, Tennessee, and Wyoming.

Indigent Defense System Overview

New Hampshire has a state-funded, state-administered indigent defense system. Services are provided by staff working with the state public defender office, private court-appointed counsel, and attorneys working under contract with the Judicial Council. Oversight for the entire system is provided by the Judicial Council.

Cost of Counsel Fee Scheme

New Hampshire does not have a statutorily prescribed application or appointment fee for indigent defense counsel. However, courts may impose a fee for the cost of assigned counsel or a public defender in adult criminal and juvenile delinquency cases that end in conviction.¹⁵¹ It is required that all petitions for court-appointed attorneys have the following words in capital letters:

I UNDERSTAND THAT I MAY BE REQUIRED TO REPAY THE SERVICES PROVIDED TO ME BY COURT APPOINTED COUNSEL IF I AM CONVICTED UNLESS THE COURT FINDS THAT I AM OR WILL BE FINANCIALLY UNABLE TO PAY.

New Hampshire’s Office of Cost Containment (OCC) is a state debt-collection agency dedicated solely to collecting costs for legal representation provided to people who are too poor to pay for their own lawyer. The OCC is believed to be the only such office in the country. While at first blush, an office devoted exclusively to extracting payment for services defendants receive precisely because they are determined to be unable to afford them appears perverse or perhaps misguided, given the low collection rates of counsel fees across the country. However, the use of a dedicated office lends a level of standardization and transparency that counsel collection efforts generally lack, making it possible to assess the cost benefit of the office’s efforts.

Situated in state government under the Office of the Commissioner’s Department of Administrative Services, the OCC’s mission is to “effectively contain costs of representation for indigent defendants [sic] service and to recover all such costs that can be recovered.”¹⁵² The OCC establishes repayment

schedules, determines individual ability and plans to repay the state for the costs of court appointed counsel, and seeks legal enforcement of court orders for repayment in adult criminal and juvenile delinquency cases. Payments are made to the OCC unless the defendant or juvenile is placed on probation or sentenced to a period of conditional discharge, in which case repayment is made to the state through the Department of Corrections. If a defendant is placed on probation or sentenced to a period of conditional discharge, reimbursing the state for all fees and expenses can become a required condition of probation or conditional discharge. If defendants are incarcerated, orders for repayment are suspended until they are released, however it is possible for Parole Boards to make repayment of fees a condition of parole or early release.

Counsel reimbursement fees are set by the Office of Cost Containment and approved by administrative justices of the courts. If a client is determined by the court to be unable to repay fines and fees, these obligations may be waived. Ability-to-pay hearings may be conducted at the discretion of the court. If the defendant has not been ordered to repay the state for expenses incurred on their behalf, at any time within six years the state may petition the superior court for repayment. If costs incur when an individual is a juvenile, their payment obligation terminates when they reach the age of majority, unless charged as an adult.

Individuals may be offered an option to perform community services in order to pay off the debt. This will incur an additional \$25 deferral fee. If the individual engages in community service, a rate of \$15 an hour will be applied to every hour completed.

Overdue or Uncollected Fees

New Hampshire state law requires that an ability-to-pay hearing be held before incarceration for nonpayment of fees and requires that individuals be notified of a right to counsel for an ability-to-pay hearing. If any repayment ordered becomes overdue, the court may order the employer of the former defendant to deduct from that person's wages or salary the appropriate amount due and to pay such amount to the appropriate department. Courts may contract with collection agencies.

All counsel fees collected are returned to the state general fund. In 2020, legislative change was enacted that restricts assessments of counsel costs only to individuals who are convicted. An individual who is acquitted is no longer subject to the fees.

Model Data Transparency Permits Reliable ROI Analysis

New Hampshire has a *Right to Know* law that requires governmental agencies to promptly provide access to, or reply to requests for, governmental records. Such a request for records is known as a "91A request," after the state law governing the practice.

NLADA submitted inquiries by email to both the Office of Cost Containment (OCC) and the Department of Corrections (DOC) seeking reports or data available from recent years about the assessment and collection of cost of counsel fees that are assessed on people who receive representation by appointed counsel as set out by RSA 604-A:9. Both offices promptly replied.

As noted above, counsel reimbursement payments are made to the OCC unless the defendant or juvenile is placed on probation or sentenced to a period of conditional discharge, in which case repayment is made to the state through the Department of Corrections. The OCC provided data shown in Table 6.

TABLE 6

New Hampshire Office of Cost Containment Revenue FY 2018-FY 2022

MONTHS	FY 2018	FY 2019	FY 2020	FY 2021	FY2022
JULY	\$166,959.35	\$176,902.22	\$172,723.67	\$142,206.84	\$70,904.81
AUGUST	\$195,517.84	\$196,595.76	\$159,756.13	\$126,697.04	\$75,518.35
SEPTEMBER	\$178,534.58	\$167,981.57	\$166,640.03	\$128,987.92	\$67,946.70
OCTOBER	\$186,077.35	\$210,519.97	\$178,854.08	\$103,677.61	\$59,505.91
NOVEMBER	\$170,128.47	\$148,374.14	\$144,810.77	\$95,310.64	\$58,909.24
DECEMBER	\$136,400.93	\$155,480.51	\$149,908.03	\$88,635.06	\$57,317.97
JANUARY	\$178,756.37	\$203,328.51	\$142,327.24	\$105,258.46	\$54,449.00
FEBRUARY	\$169,870.18	\$177,153.00	\$149,247.46	\$82,723.81	\$49,814.78
MARCH	\$216,607.27	\$211,482.68	\$168,879.35	\$129,689.54	\$56,960.22
APRIL	\$186,871.67	\$183,798.73	\$124,792.71	\$94,980.58	N/A
MAY	\$192,326.24	\$194,959.73	\$156,246.49	\$79,747.41	N/A
JUNE	\$182,654.57	\$167,286.04	\$179,109.08	\$84,880.47	N/A
TOTAL	2,160,704.82	2,193,862.86	1,893,295.04	\$1,262,795.38	\$551,326.98

The data show collections trending downward in 2020 and 2021. That is due in part, perhaps, to the effect of COVID on court functioning in 2020 and 2021, but also perhaps due to the 2020 change in law allowing counsel cost assessments to be made only from individuals who are adjudicated guilty.


The DOC Public Information Office did not supply collection figures, but did provide helpful information in its reply email:

The court orders the collection of court appointed attorney fees through DOC when the defendant is being supervised on probation. We add a 10% collection fee to the amount ordered by the court and collect during the term of probation. Any balances owing at the termination of probation is motioned to be payable through OCC at that point. Please note that by law restitution & supervision fees are the priority so if these are owed as well as lawyer fees the restitution & supervision fees are paid first often leaving DOC collecting nothing in lawyer fees.¹⁵³


Table 7 below shows an analysis of all indigent defense costs, the cost of the OCC and, for two years, collections by the OCC. The data show that, in 2020, the net recovery of indigent defense counsel fees collected by the OCC amounted to 4.4 percent of the total expenditure for indigent defense services, after one deducts the cost of operating the OCC. In 2021, the net collection of indigent defense counsel fees declined, and amounted to just 2.2 percent of indigent defense system costs.

TABLE 7**New Hampshire Indigent Defense Services Costs and Office of Cost of Containment Collections¹⁵⁴**

FUNCTION	ACTUAL 2020	AUTHORIZED 2021	REQUEST 2022
Assigned Counsel	\$1,469,831	\$1,480,000	\$1,480,000
GAL	\$754,812	\$508,050	\$750,000
Contract Counsel	\$1,761,125	\$2,033,000	\$2,033,000
Public Defender	\$23,119,355	\$23,751,832	\$23,751,832
Non-counsel services	\$1,879,899	\$1,030,000	\$1,513,129
TOTAL INDIGENT DEFENSE COSTS	\$28,985,022	\$28,802,882	\$29,527,961
Office of Cost Containment	\$608,962	\$624,579	\$633,140
OCC Collections	\$1,893,295	\$1,262,795	
NET RECOVERY	\$1,284,333	\$638,216	



\$1,284,333
is 4.4% of
\$28,985,022



\$638,216
is 2.2% of
\$28,802,882

Such transparency is not typical. It is highly unusual to be able to isolate what it costs a state to administer cost of counsel assessment and collection efforts. New Hampshire's unusual use of an office dedicated to indigent defense counsel cost recoupment, coupled with its ease of data compilation through the state's *Right to Know* law, makes the state an interesting model of accountability and transparency.

Additional Models

NLADA found no other state that reports as extensively on administration of public defense system fees as New Hampshire does. The majority of states do not mandate that counsel fee revenue is tracked and publicly reported at all. But several states, including Massachusetts, New Hampshire, Tennessee and Wyoming, offer models also worth examining for possible replication.

Massachusetts law requires robust data tracking and reporting to the legislature on its counsel fee and indigent but able to contribute fee:

The office of the commissioner of probation shall submit quarterly reports to the house and senate committees on ways and means that shall include, but not be limited to:

- (a) the number of individuals claiming indigency who are determined to be indigent;
- (b) the number of individuals claiming indigency who are determined not to be indigent;
- (c) the number of individuals found to have misrepresented wage, tax or asset information;
- (d) the number of individuals found to no longer qualify for appointment of counsel upon any re-assessment of indigency required by this section;
- (e) the total number of times an indigent misrepresentation fee was collected and the aggregate amount of indigent misrepresentation fees collected;
- (f) the total number of times indigent counsel fees were collected and waived and the aggregate amount of indigent counsel fees collected and waived;
- (g) the average indigent counsel fee that each court division collects;
- (h) the total number of times an indigent but able to contribute fee was collected and waived and the aggregate amount of indigent but able to contribute fees collected and waived;
- (i) the highest and lowest indigent but able to contribute fee collected in each court division;
- (j) the number of cases in which community service in lieu of indigent counsel fees was performed; and
- (k) other pertinent information to ascertain the effectiveness of indigency verification procedures. The information within such reports shall be delineated by court division and delineated further by month.¹⁵⁵

The requirements in Tennessee for tracking and reporting on the upfront administrative fee assessed on those seeking appointed counsel are explicit and simple:

As part of the clerk's regular monthly report, each clerk of court, who is responsible for collecting administrative fees pursuant to this section, shall file a report with the court and with the administrative director of the courts. The report shall indicate the following:

- (A) Number of defendants for whom the court appointed counsel;
- (B) Number of defendants for whom the court waived the administrative fee;
- (C) Number of defendants from whom the clerk collected administrative fees;
- (D) Total amount of commissions retained by the clerk from the administrative fees; and
- (E) Total amount of administrative fees forwarded by the clerk to the state treasurer.¹⁵⁶

Interestingly, there is no similar accounting measure in Tennessee for assessments to recoup the cost of counsel.

Finally, another good data reporting model is seen in Wyoming, where there is no upfront fee assessed, but the court has discretion to order reimbursement of the cost of counsel at the time of sentencing. By statute, the Wyoming Public Defender is required to report in its annual report on the number of new cases, plus the number of cases in which reimbursement was ordered, and the number of cases in which a finding was made of no ability to pay. The information in Table 8 is what was reported for FY 2021 in adult and juvenile cases:

TABLE 8

Wyoming State Public Defender FY 2021 Counsel Reimbursement Orders

	NO. OF NEW CASE APPOINTMENTS	REIMBURSEMENT ORDERED	FINDING OF NO ABILITY TO PAY
CIRCUIT COURT	8,878	2,934	3,496
DISTRICT COURT	967	1,481	1,312
JUVENILE COURT	397	39	498
TOTALS	10,242	4,454	5,306

The table shows that there were more cases in which a finding of no ability to pay was entered than there were cases in which reimbursement was ordered. District Court cases, which include misdemeanors, was the one category in which more orders for reimbursement were issued than findings were made of no ability to pay. In Juvenile and Circuit Courts, findings of no ability to pay outstripped cases in which reimbursement was ordered. In FY21, the Public Defender collected \$741,084 in court ordered reimbursement fees, representing 6.7 percent of total agency expenditures, which were \$11,078,119.¹⁵⁷

Similar patterns show in data reported in the Public Defender's 2019 Annual Report. That report states that in FY19, the Public Defender collected \$580,719 in court ordered reimbursement fees, representing 5.1 percent of total agency expenditures of \$11,313,510.62.¹⁵⁸

CHAPTER 5

RECOMMENDATIONS FOR REFORM

Public defender system fees are part of a larger criminal legal system machinery that treats those who have financial means to hire counsel differently from those who do not. The fees are assessed on individuals who exercise their constitutional right to have counsel provided at government expense precisely because they are too poor to hire a lawyer.

It seems obvious that one who is unable to hire a lawyer would have difficulty repaying the state for a court-appointed lawyer. And when one understands the negative consequences these fees can impose on individuals when they cannot be paid down, including possible loss of liberty and formidable obstacles to getting one's life on track, it becomes difficult to conceive of the fees as a mere revenue generator. They seem to be an intentional poverty penalty.

It is possible that lawmakers created these fee systems without understanding their effects. But decades have passed since they were created, which is plenty of time to collect and analyze data about them. Research findings show that few states attempt to perform that basic analysis. Practices that land people in jail for non-payment of public defender system and other court fees are legislatively authorized under the guise of accountability and punishment for willful non-payment. In practice, the determination of willfulness is a discretionary power granted to judges that typically goes unchecked unless challenged through the appellate process. Abuse of discretion, where there is no evidence the defendant willfully ignored the obligation or refused to pay, can easily occur, putting debtors' prison systems back in business.

When consequences for poor people differ from those with financial means, courts are effectively operating a two-tiered justice system where people do not receive equal protection under the law, and where one's financial resources drive outcomes. An individual who retains counsel and fails to pay that lawyer will possibly face a civil suit from that lawyer. However, they will not be arrested, taken to jail, and brought before a court, only to face additional punitive sanctions.

When individuals with a demonstrated financial need for free legal assistance exercise their constitutional right to counsel, they should not be forced to pay for it. As discussed in this report, research on government attempts to generate revenue from economically disadvantaged individuals who are entangled in the criminal legal system consistently demonstrates that they are not a reliable revenue source.¹⁵⁹ People who qualify for representation live close to or at the federal poverty level, and are often too poor to produce payments in amounts set as low as \$10, \$25, or \$50 per month. It is simply a waste of government time and resources to assess fees and then attempt to collect money from people who do not have it.

NLADA offers ten recommendations for reform of public defense system fees that are directed to courts, defenders, lawmakers, advocacy organizations and others.

1. Eliminate Public Defense System Fees.

Efforts to reform fines and fees in the criminal justice system have gained momentum in recent years due to ineffective and harmful policies. Upfront fees and recoupment fees are no exception and, in some states, counsel reimbursement fees are the single largest fee assessed onto individuals. These fees serve as a primary reason why many very poor defendants are trapped in the justice system long after their initial case has concluded, and far longer and at greater expense than a person with ability to pay faces.

Elimination of public defense system fees will lead to more equal treatment of defendants and minimize risk of constitutional violations. Repeal will eliminate the conflicts of interest inherent in imposing fees that benefit the judicial, prosecutorial and public defense functions. And elimination of public defense system fees will reduce administrative burdens and staff time devoted to fee enforcement and collection efforts, particularly among court personnel, law enforcement and jails.

2. Short of Elimination, Enact Legislation that Safeguards Justice for Very Poor Defendants.

Where total elimination of public defense system fees is not feasible as a first step, protecting the poor against punitive practices that can resemble unconstitutional imprisonment of debtors should be implemented. This will mitigate harmful consequences of non-payment while lawmakers work through financing the public defense system through alternative means. Few states have statutory protections preventing harsh punishment for failure to pay public defense system fees. Utah stands alone as the only state with a statute that disallows the assessment of upfront fees. Its prohibition of an upfront fee assessment is something that the 18 states with these fees should be encouraged to emulate. Similarly, Indiana and Minnesota have statutes that disallow unpaid fines and fees to be considered as a violation of probation. Given that nonpayment of fees, including public defense system fees, is widely considered to be a probation violation, it triggers a process that lands many individuals in jail, even before a determination is made of whether nonpayment was willful. This is an effect that can be forbidden by law in the 30 states that now allow it.

3. Repeal Public Defense System Fee Statutes that Do Not Align with Practices of the State.

A few states, such as Vermont and New Mexico, have statutes that authorize public defense system fees yet, in practice, they are rarely enforced. Advocates in these jurisdictions objected to being categorized as a state that assesses fees due to the fact that the fees are very often waived, never assessed, or rarely collected if assessed. This signals opportunity in those states to cultivate momentum toward repeal, beginning with an understanding about why some judges still impose the fees while others do not. As long as the laws authorizing the fees remain on the books, the likelihood of unequal treatment among similarly situated individuals will exist, where individuals are subjected to fees depending who is in charge of either imposition or enforcement.

4. Implement Uniform Data Collection and Reporting Requirements for All Public Defense System Fees Assessed.

It is widely accepted that policy should be data-informed. Lawmakers, courts and the public deserve to understand whether public defense system fees meet their intended purpose of raising revenue to offset government expenditure or if they do more harm by subjecting individuals to years of consequences from court debt they are in no position to pay. Data on public defense system fees must be accurately tracked and publicly reported. The data should not be comingled with that for other fees. Basic data to track about each fee (upfront and recoupment fees) include: how many people were determined to be eligible for appointed counsel, how many had public defense system fees assessed, how many had fees waived, how much money was assessed, and how much money was collected. Data should be tracked by race and gender. Information is needed on where collected revenue flows, and how much it costs to administer collections. Additional data on consequences should be tracked, such as length of time individuals are subject to paying down fees. Such information is essential to understand efficacy of public defense system fees. Several states, including Massachusetts, New Hampshire, Tennessee, and Wyoming, offer data tracking and reporting models that are worth examining.

5. Ensure that Defender Attorney Training Includes Strategies to Advocate for Reduced Imposition of Monetary Sanctions, Including Public Defense System Fees, and to Inform Clients of Their Consequences.

All clients should be advised about the potential costs of counsel and assured that the defense strategy will include guarding against such sanctions. Counsel should be expected to develop strategies to seek full fee waivers or, at minimum, fee reductions. Client engagement, beginning at initial intake, should ensure that all possible financial obligations are understood by the client and that counsel understands the clients' financial and personal circumstances that can support requested waivers or reductions. For any imposed fees, counsel should fully explain the importance of ability-to-pay hearings, and the consequences of both nonpayment of assessed fees and of failure to attend court dates to answer for inability to pay. Attorney training should include strategies for practicing before judges who are known to frown upon ability to pay advocacy, including strategies to combat implicit bias. Curricula should cover how to influence comprehensive and meaningful ability-to-pay hearings, how to develop proposed alternatives to monetary sanctions, and how to guard against wrongful interpretation and application of controlling statutes and caselaw. These skills can weaken the stronghold of practices that unflinchingly charge fees on people who qualify for public defense and also build strong records for appeal.

6. Implement Programs that Target Reductions of Failing to Appear in Court.

Nonpayment of debt can trigger summons to appear in court. Failing to appear, whether due to fear, forgetfulness, or difficulty making it to a scheduled appearance, can drive protracted entanglement in the system and inability to dig out from the weight of court debt. It can also burden courts and law enforcement with work that has nothing to do with ensuring public safety. System actors, including courts, prosecutors, and defense practitioners, should work to adopt practices that minimize defendant skepticism about attending court, that encourage attendance, such as through automated reminders, and that minimize arrest and detention for failure to make payments.

7. Build Broad-Based Alliances to Advocate for Public Defense System Fee Elimination.

Defenders see the effects of public defense system fees on their clients firsthand, and former clients and their family members experience those effects daily. Defenders and impacted people should be involved in broad-based alliances consisting of community and government stakeholder partners to educate the public and lawmakers about these effects and to build momentum for removal of public defense system fees. This type of coalition building and messaging may fall outside of a typical defender's skillset, but defender leaders and practitioners can work with allied partners, such as advocacy organizations, to receive training, and together seed formation of coalitions that press for needed reforms.

8. Develop Pathways Out of Debt for Low-Income Individuals.

People with outstanding court debt, including public defense system fees, need a reasonable pathway out from these financial burdens, and debt relief is a critical component of fee elimination reforms. Although some states have recently passed laws providing a path for individuals to clear criminal records, this path is closed to many due to outstanding court debt. Outstanding court debt disqualifies people for record clearing in almost every state. For indigent individuals, qualification for record clearing, or expungement, should not be rigidly contingent on full payment of court debt. Consistent payment toward debt matters, and ability to pay analysis is needed. It has been recommended by the Fines and Fees Justice Center that all fees be deemed uncollectable two years from when they were imposed.¹⁶⁰ This extends to include abolishment of outstanding warrants, liens, tax refund offsets, offsets of unemployment benefits and other public benefits, plus termination of private collection agency efforts and the reinstatement of drivers' licenses that were suspended over court debt.

An additional recommendation for debt relief would be the allowance of criminal justice debt to be dischargeable in bankruptcy relief.¹⁶¹ The limitations on court debt forgiveness within the Bankruptcy Code are hindrances for individuals working to disentangle themselves from the criminal legal system and start fresh.

9. Preserve Public Defense System Funding When Fees Are Eliminated.

Some public defense system fees are structured to direct collected fee revenue to be part of a public defense system's funding. Even though the amounts of revenue are relatively small, defender agencies operate at very slim margins and typically struggle with underfunding, so they cannot risk losing any amount of funding. Any elimination of a public defense system fee that funds defender services must be accompanied by a general fund appropriation to make up for that lost revenue. The choice should not be: either harm defender clients by imposing life-altering fees for exercising their right to constitutionally mandated representation or harm the defender programs that deliver that service.

10. Mandate Court Use of Guidelines that Promote Fairness and Reduce Discretion in Determining Both Indigency and Ability to Pay.

Whether through court rule or legislation, all courts should be required to follow guidelines when determining eligibility for appointed counsel and when determining ability to pay fees and fines to minimize judicial discretion. The lack of decision-making guidance to help judges in evaluating applications for counsel results in similarly situated people being granted counsel in one courtroom and denied counsel in another. Similarly, inadequately informed court determinations about defendants' ability to pay costs and fines can result in payment obligations that are unmanageable, or that need to be revisited when circumstances change. Models, such as the Internal Revenue Service (IRS) Necessary Expense Test and the Living Wage Calculator, and resources from the American Bar Association,¹⁶² New York,¹⁶³ and Texas,¹⁶⁴ offer assistance in establishing such guidance.

APPENDIX A

State Laws Authorizing the Assessment of Public Defense System Fees

The information in this table compiles results of a national review of state laws that authorize public defense system fees, plus several key related factors of: who determines eligibility of court-appointed counsel, whether payment of public defense system fees can be a condition of probation, and whether any revenue collected from public defense system fees is directed to support a state's public defense delivery system. The data also appear in five maps at www.nlada.org/public-defense-system-fees.

Research Questions

QUESTION 1 Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?	Answer Options <div>YesNo</div>
QUESTION 2 Does state law authorize cost of counsel reimbursement fees (recoupment) for people represented by appointed counsel?	Answer Options <div>YesNo</div>
QUESTION 3 Can unpaid fees become a condition of probation?	Answer Options <div>YesNoUncertain</div>
QUESTION 4 Who determines whether a person is eligible for public defense services?	Answer Options <div>The Court</div> <div>The Public Defense Delivery System</div> <div>Varies</div>
QUESTION 5 Does revenue from collected fees go to the public defense delivery system?	Answer Options <div>YesNoUncertain</div>

Q1	Q2	Q3	Q4	Q5
ALABAMA				
<div>No</div> <p>State statute in Alabama does not address these fees.</p>	<div>Yes</div> <p>In Alabama, the amount of the counsel fee is ordered by the court or, if no amount is stated in the court’s order, the following amounts are assessed:</p> <ul style="list-style-type: none">Class A Felony: \$1,000.00Class B Felony: \$750.00Class C Felony: \$500.00Misdemeanor/Probation revocation: \$250.00 <p><u>Ala. Admin. Code r. 355-9-1-09</u></p>	<div>Yes</div> <p><u>Ala. Code § 15-12-25 (b)(2)</u></p>	<div>The Court</div> <p><u>Ala. Code § 15-12-5(a)</u></p>	<div>Yes</div> <p>Collected fees are remitted to the Fair Trial Tax Fund.</p> <p><u>Ala. Code §§ 12-19-252, 15-12-25(c)(4)(d)</u></p>

- Q1.** Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?
- Q2.** Does state law authorize cost of counsel reimbursement fees (recoupment) for people represented by appointed counsel?
- Q3.** Can unpaid fees become a condition of probation?
- Q4.** Who determines whether a person is eligible for public defense services?
- Q5.** Does revenue from collected fees go to the public defense delivery system?

Q1	Q2	Q3	Q4	Q5
ALASKA				
No State statute in Alaska does not address these fees.	Yes In Alaska, fees are assessed based on a schedule of costs. Misdemeanors <ul style="list-style-type: none"> • Trial: \$500.00 • Change of plea: \$200.00 • Post-conviction relief or contested probation revocation proceedings in the trial court: \$250.00 Felonies <ul style="list-style-type: none"> • Trial: \$1,500.00 (Class B & C); \$2,500.00 (Class A and Unclassified (Except Murder)); \$5,000.00 (Murder in the 1st and 2nd Degrees) • Change of plea after substantive motion work and hearing and before trial commences: \$1,000.00 (Class B & C); \$1,500.00 (Class A and Unclassified (Except Murder)); \$2,500.00 (Murder in the 1st and 2nd Degrees) • Change of plea post-indictment but prior to substantive motion work and hearing \$500.00 (Class B & C); \$1,000.00 (Class A and Unclassified (Except Murder)); \$2,000.00 (Murder in the 1st and 2nd Degrees) • Change of plea prior to indictment \$250.00 (Class B & C); \$500.00 (Class A and Unclassified (Except Murder)); \$750.00 (Murder in the 1st and 2nd Degrees) • Post-conviction relief or probation revocation proceeding in trial court \$250.00 (Class B & C); \$500.00 (Class A and Unclassified (Except Murder)); \$750.00 (Murder in the 1st and 2nd Degrees) <u>Alaska R. Crim. Proc. 39(d)</u>	No State statute in Alaska does not address this practice.	The Court <u>Alaska Stat. § 18.85.120(a)</u>	No Collected fees are remitted to the state general fund. <u>Alaska Stat. § 18.85.120(c)</u>

- Q1.** Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?
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- Q3.** Can unpaid fees become a condition of probation?
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- Q5.** Does revenue from collected fees go to the public defense delivery system?

Q1	Q2	Q3	Q4	Q5
ARIZONA				
Yes Arizona authorizes an administrative fee of up to \$25. <u>Ariz. Rev. Stat. Ann. § 11-584(C)(1)</u>	Yes In Arizona, the court determines a “reasonable amount” to assess, taking into account “the financial resources of the defendant and the nature of the burden that the payment will impose.” <u>Ariz. Rev. Stat. Ann. § 11-584(C)(3), (D)</u>	Yes <u>Ariz. Rev. Stat. Ann. § 13-808(B)</u>	The Court <u>Ariz. Rev. Stat. Ann. § 11-584(A)</u>	Yes Collected fees are remitted to the county general fund for use to defray costs of the public defender and court appointed counsel. <u>Ariz. Rev. Stat. Ann. § 11-584(E)</u>
ARKANSAS				
Yes Arkansas authorizes a user fee ranging from \$10-\$400. <u>Ark. Code Ann. § 16-87-213 (b)(1)</u>	Yes In Arkansas, at disposition, the court may assess defender services fees according to a nonbinding fee schedule: Capital murder in which the death penalty was given, including any appeal and post-conviction remedy: \$12,500 Capital murder in which the death penalty was not given, murder in the first degree or Class Y felony: <ul style="list-style-type: none"> • Early disposition: \$500 • Negotiated plea or disposition before trial: \$2,500 • Trial or an extended matter: \$7,500 Any other felony homicide, Class A felony, or Class B felony: <ul style="list-style-type: none"> • Early disposition: \$250 • Negotiated plea or disposition before trial: \$1,250 • Trial or an extended matter: \$5,000 Class C felony, Class D felony, unclassified felony: <ul style="list-style-type: none"> • Early disposition: \$125 • Negotiated plea or disposition before trial: \$625 • Trial or an extended matter: \$2,500 Any other misdemeanor: <ul style="list-style-type: none"> • Early disposition: \$65.00 • Negotiated plea or disposition before trial: \$125 • Trial or an extended matter: \$500 Any post-conviction relief that is not a direct appeal of the conviction: <ul style="list-style-type: none"> • Early disposition: \$200 • Negotiated plea or disposition before trial or hearing: \$400 • Trial or hearing or an extended matter: \$625 <u>Ark. Code Ann. § 16-87-218(c)</u>	No State statute in Arkansas does not address this practice.	The Court <u>Ark. Code Ann. § 16-87-213</u>	Yes Appointment fee revenue is distributed into the Public Defender User Fees Fund. There is no statute on point for recoupment fee revenue, but these fees are also remitted to the Public Defender User Fees Fund, as was confirmed with the Arkansas Public Defender Commission. <u>Ark. Code Ann. § 16-87-213(b)(4)(A)</u>

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Q1	Q2	Q3	Q4	Q5
CALIFORNIA				
No State law authorizing a \$50 registration fee was repealed, effective as of July 1, 2021.	No Recoupment fees for public defender and assigned counsel services were repealed with the enactment of <u>A.B. 1869, 2019-20 Reg. Sess. (Cal. 2020)</u> , effective as of July 1, 2021.	No Not Applicable. California does not assess upfront fees or cost of counsel fees. These fees were repealed, effective as of July 1, 2021.	The Court <u>Cal. Penal Code § 987(c).</u>	No Not Applicable. California does not assess upfront fees or cost of counsel fees. These fees were repealed in 2019.
COLORADO				
Yes Colorado authorizes a \$25 application fee. <u>Colo. Rev. Stat. 21-1-103(3)</u>	Yes Colorado authorizes fees for up to the full cost of counsel, depending on ability to pay. Court determines whether defendant can pay all or part of the cost of counsel. <u>Colo. Rev. Stat. § 21-1-106</u>	Yes <u>Colo. Rev. Stat. § 16-11-206(3)</u>	The Public Defense Delivery System <u>Colo. Rev. Stat. § 21-1-103(3)</u>	No Processing fee revenue is remitted into the state general fund. There is no statute on point for where recoupment fee goes, as was confirmed with the State Public Defender. <u>Colo. Rev. Stat. § 21-1-103(3)</u>
CONNECTICUT				
No State statute in Connecticut does not address these fees.	Yes Connecticut authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>Conn. Gen. Stat. § 51-298(a)</u>	No State statute in Connecticut does not address this practice.	The Public Defense Delivery System <u>Conn. Gen. Stat. § 51-297</u>	Yes Collected fees are remitted to the Public Defender Services Commission. <u>Conn. Gen. Stat. § 51-298(a)</u>
DELAWARE				
Yes Delaware authorizes a \$100 administrative fee. <u>29 Del. Code § 4607</u>	No State statute in Delaware does not address counsel fees.	Yes <u>29 Del. Code § 4607(e)</u>	Varies The determination is made by the public defender before arraignment, and by the Court after arraignment. <u>29 Del. Code § 4602(b)</u>	No Administrative fee revenue is remitted to the state general fund. <u>29 Del. Code § 4104(e)</u>
DISTRICT OF COLUMBIA				
No State statute in District of Columbia does not address these fees.	Yes The District of Columbia authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court. <u>D.C. Code § 11-2606(a)</u>	No State statute in District of Columbia does not address this practice.	The Court <u>D.C. Code § 11-2602</u>	No Collected fees are remitted to the U.S. Treasury. <u>D.C. Code § 11-2606(a)</u>

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Q1	Q2	Q3	Q4	Q5
FLORIDA				
Yes Florida authorizes a \$50 application fee. <u>Fla. Stat. § 27.52(1)(b)</u>	Yes Florida authorizes fees for up to the full cost of counsel, but no less than \$50 per case when a misdemeanor or criminal traffic offense is charged, and no less than \$100 per case when a felony offense is charged. The defendant's ability to pay is not considered. <u>Fla. Stat. § 938.29(1)(a)</u>	Yes <u>Fla. Stat. § 938.29(1)(c)</u>	The Court <u>Fla. Stat. § 27.52(1)</u>	Yes Collected fees are remitted to the Indigent Criminal Defense Trust Fund <u>Fla. Stat. §§ 27.562, 27.52(1)(d)</u>
GEORGIA				
Yes Georgia authorizes a \$50 application fee. <u>Ga. Code Ann. § 15-21A-6(c)</u>	Yes Georgia authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court. <u>Ga. Code Ann. §§ 17-12-52, 17-14-10</u>	Yes <u>Ga. Code Ann. § 17-12-51</u>	The Public Defense Delivery System <u>Ga. Code Ann. § 17-12-24(a)</u>	Yes Collected fees are remitted to whichever agency provided legal services or the state general fund. <u>Ga. Code Ann. §§ 15-21A-6(c); 17-12-51</u>
HAWAII				
No State statute in Hawaii does not address these fees.	No State statute in Hawaii does not address cost of counsel fees.	No Not Applicable. Hawaii does not assess upfront fees or cost of counsel fees.	The Public Defense Delivery System <u>Haw. Rev. Stat. § 802-4</u>	No Not Applicable. Hawaii does not assess upfront fees or cost of counsel fees.
IDAHO				
No State statute in Idaho does not address these fees.	Yes Idaho authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court, unless payment "would impose a manifest hardship" on the defendant, although current inability to pay, by itself, cannot restrict the court from ordering repayment. <u>Idaho Code § 19-854(6)-(7)</u>	Yes <u>Idaho Crim. R. 33(g)(1)</u>	The Court <u>Idaho Code § 19-854(1)</u>	No Collected fees are remitted to the county general fund. <u>Idaho Code § 19-858(3)</u>
ILLINOIS				
No State statute in Illinois does not address these fees.	Yes Illinois authorizes a sum that may not exceed \$500 for a misdemeanor charge, or \$5,000 for a felony charge. <u>725 Ill. Comp. Stat. 5/113-3.1</u>	Yes <u>725 Ill. Comp. Stat. 5/113-3.1(d)</u>	The Court <u>725 Ill. Comp. Stat. 5/113-3(b)</u>	No Collected fees are remitted to the county general fund. <u>725 Ill. Comp. Stat. 5/113-3.1(f)</u>

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Q1	Q2	Q3	Q4	Q5
INDIANA				
Yes Indiana authorizes a fee of \$50 in misdemeanor cases and \$100 in felony cases. <u>Ind. Code Ann. § 35-33-7-6(c)</u>	Yes Indiana authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court. <u>Ind. Code Ann. § 33-40-3-6</u>	No Notably, state statute in Indiana disallows this practice. <u>Ind. Code Ann. § 35-38-2-3(n)</u>	The Court <u>Ind. Code Ann. § 35-33-7-6(a)</u>	Yes Collected fees are remitted to the County Supplemental Public Defender Fund. <u>Ind. Code Ann. §§ 33-40-3-1, 33-40-3-6(b)</u>
IOWA				
No State statute in Iowa does not address these fees.	Yes Iowa authorizes fees for up to the full cost of counsel. <u>Iowa Code §§ 815.9(3), (5), 910.2A</u>	Yes <u>Iowa Code § 910.4(1)</u>	The Court <u>Iowa Code § 815.9(1)(a)</u>	No Collected fees are remitted to the state general fund. <u>Iowa Code § 815.9(7)</u>
KANSAS				
Yes Kansas authorizes a \$100 application fee. <u>Kan. Stat. Ann. § 22-4529</u>	Yes Kansas authorizes counsel fees based on a fee table. <u>Kan. Stat. Ann. § 22-4513(a)</u>	Yes <u>Kan. Stat. Ann. § 21-6607(c)(4)</u>	The Court <u>Kan. Stat. Ann. § 22-4504</u>	Yes Application fee revenue is remitted into the Indigents' Defense Services Fund. Cost of counsel fee revenue is remitted to the state general fund. <u>Kan. Stat. Ann. §§ 22-4529, 22-4513(c)</u>
KENTUCKY				
No State statute in Kentucky does not address these fees.	Yes At arraignment, the court conducts a hearing to determine a partial fee amount for the defendant. This process takes place again at each step in the proceedings. <u>Ky. Rev. Stat. § 31.211(1)</u>	No State statute in Kentucky does not address this practice.	The Court <u>Ky. Rev. Stat. § 31.120(1)(b)</u>	Yes Collected fees are remitted to the Public Advocate Fund in Louisville-Jefferson County, and to the state Department of Public Advocacy in other counties. <u>Ky. Rev. Stat. § 31.211(3)-(4)</u>
LOUISIANA				
Yes Louisiana authorizes a \$40 application fee. <u>La. Stat. Ann. § 15.175(A)(1)(f)</u>	Yes Louisiana authorizes counsel fees in an amount the court believes is reasonable, depending on ability to pay. <u>La. Stat. Ann. §§ 15.176(A), 15.168(B)(1)</u>	Yes <u>La. Code Crim. Proc. Ann. art. 895.1(B)(1)</u>	The Court <u>La. Stat. Ann. § 15.175(A)(1)(a)</u>	Yes Collected fees are remitted to the Indigent Defense Fund. <u>La. Stat. Ann. §§ 15.175(A)(1)(g), 15.176(A)</u>

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Q1	Q2	Q3	Q4	Q5
MAINE				
No State statute in Maine does not address these fees.	Yes Maine authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>Me. Stat. tit. 4, § 1805-A(3)(A)</u>	No State statute in Maine does not address this practice.	The Court <u>Me. R. Unified Crim. P. Rule 44(b)</u>	Yes Collected fees are remitted to the Maine Commission on Indigent Legal Services. <u>Me. Stat. tit. 4, § 1805-A(3)(A)</u>
MARYLAND				
No State statute in Maryland does not address these fees.	Yes Maryland authorizes counsel fees in an “amount that the client can reasonably be expected to pay.” <u>Md. Code Ann. Crim. Proc. § 16-211(a)</u>	Yes <u>Md. Code Ann. Crim. Proc. § 16-211(c)(1)-(2)</u>	The Court <u>Md. Code Ann. Crim. Proc. § 16-210</u>	No Collected fees are remitted to the state treasury. <u>Md. Code Ann. Crim. Proc. § 16-211(b)</u>
MASSACHUSETTS				
No State statute in Massachusetts does not address these fees.	Yes Massachusetts authorizes a \$150 counsel fee. <u>Mass. Gen. Laws ch. 211D, § 2A(f)</u>	Yes <u>Mass. Gen. Laws ch. 279, sec. 1, 1A</u>	The Court <u>Mass. Gen. Laws ch. 211D, § 2A(b)</u>	No Collected fees are remitted to the state treasury. <u>Mass. Gen. Laws ch. 280, § 8</u>
MICHIGAN				
No State statute in Michigan does not address these fees.	Yes Local systems may assess reimbursement in line with Michigan Indigent Defense Commission’s <u>Minimum Standards for Indigent Criminal Defense Services</u> , which sets formulas for determining recoupment amount (not to exceed actual cost of counsel), based on client’s available funds.	Yes <u>MIDC’s Minimum Standards for Indigent Criminal Defense Services</u>	Varies The determination is made by the local designated appointing authority. MIDC’s <u>Minimum Standards for Indigent Criminal Defense Services</u>	No Collected fees are remitted to the “Local Funding Agency.” MIDC’s <u>Minimum Standards for Indigent Criminal Defense Services</u>
MINNESOTA				
No State statute in Minnesota does not address these fees.	Yes A \$75 co-payment fee is assessed for representation by a public defender. <u>Minn. Stat. § 611.17(c)</u> A person who is represented by appointed counsel can be assessed the actual costs of appointed counsel. <u>Minn. Stat. § 611.35</u>	No Notably, state statute in Minnesota disallows this practice. <u>Minn. Stat. §§ 611.17(c), 611.35</u>	The Court <u>Minn. Stat. § 611.17(a)</u>	Yes The co-payment fee is remitted to the state general fund. The recoupment fee is remitted to the governmental unit that provided counsel. <u>Minn. Stat. §§ 611.17(c), 611.35</u>

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Q1	Q2	Q3	Q4	Q5
MISSISSIPPI				
No State statute in Mississippi does not address these fees.	No State statute in Mississippi does not address cost of counsel fees. However, NLADA conducted a survey of indigent defense counsel in Mississippi. Respondents reported that in at least some counties, cost of counsel fees are routinely assessed.	Uncertain State statute in Mississippi does not address this practice. However, NLADA conducted a survey of indigent defense counsel in Mississippi. Respondents reported that in at least some jurisdictions, cost of counsel fees do become a condition of probation.	The Court <u>Miss. Code Ann. § 25-32-9</u>	Uncertain State statute in Mississippi does not address cost of counsel fees. However, NLADA conducted a survey of indigent defense counsel in Mississippi and respondents across different counties reported that recouped counsel fees can be remitted to the state, county, or to the public defender.
MISSOURI				
No State statute in Missouri does not address these fees.	Yes The amount assessed in Missouri varies based on charge type, according to a fee schedule. <ul style="list-style-type: none"> • Entry with Early Withdrawal: \$25 • Misdemeanors and Probation Violation Cases: \$125 • Felonies, Appeals and Post-Conviction Relief: \$375 • Felony Sex Cases: \$500 • Murder Non-Capital and Civil Commitment Cases: \$750 • Capital Murder Case: \$1500 <u>Mo. Rev. Stat. § 600.090(1)</u>	Yes <u>Mo. Rev. Stat. § 600.093</u>	The Public Defense Delivery System <u>Mo. Rev. Stat. § 600.086(3)</u>	Yes Collected fees are remitted to the Legal Defense and Defender Fund. <u>Mo. Rev. Stat. § 600.090(5)</u>
MONTANA				
No State statute in Montana does not address these fees.	Yes Montana authorizes set fees for defendants who plead guilty and authorizes fees at an hourly rate for defendants whose cases go to trial. Misdemeanor guilty plea \$250. Felony guilty plea \$800. Trial: Cost of hours spent by counsel. <u>Mont. Code Ann. § 46-8-113</u>	No State statute in Montana does not address this practice.	The Court <u>Mont. Code Ann. § 47-1-111</u>	No Collected fees are remitted to the state general fund. <u>Mont. Code Ann. § 46-8-13(2)(c)</u>
NEBRASKA				
No State statute in Nebraska does not address these fees.	No State statute in Nebraska does not address cost of counsel fees.	No Not Applicable. Nebraska does not assess upfront fees or cost of counsel fees.	The Court <u>Neb. Rev. Stat. § 29-3903</u>	No Nebraska does not assess upfront fees or cost of counsel fees.

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Q1	Q2	Q3	Q4	Q5
NEVADA				
No State statute in Nevada does not address these fees.	Yes Nevada authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court. <u>Nev. Rev. Stat. § 178.3975</u>	Yes <u>Nev. Rev. Stat. § 176A.400(1)(a)</u> The Supreme Court of Nevada affirmed that cost of counsel fees fall under this statute. <u>Taylor v. State, 111 Nev. 1253, 1258-59 (1995), overruled on other grounds, Gama v. State, 112 Nev. 833 (1996).</u>	The Court <u>Nev. Rev. Stat. § 171.188</u>	Yes Collected fees are remitted to the city, county, or public defender's office that initially bore the cost of provided counsel. <u>Nev. Rev. Stat. § 178.3975(4)</u>
NEW HAMPSHIRE				
No State statute in New Hampshire does not address these fees.	Yes New Hampshire authorizes fees for up to the full cost of counsel, depending on ability to pay as determined by the court, plus an administrative service assessment that is capped at 10% of the counsel fees and expenses. The Office of Cost Containment establishes minimum costs by offense type: <ul style="list-style-type: none"> • Circuit Court Misdemeanor: \$300 • Superior Court Misdemeanor/Complaint: \$450 • Felony: \$825 • Negligent Homicide (630:3): \$825 • Felony 1 (AFSA, FSA, FDA): \$2,490 • Homicide: \$20,000 <u>N.H. Rev. Stat. Ann. § 604-A:9(I)</u>	Yes <u>N.H. Rev. Stat. Ann. § 604-A:9</u>	The Court <u>N.H. Rev. Stat. Ann. § 604-A:2</u>	No Collected fees are remitted to the state Department of Administrative Services' Office of Cost Containment. <u>N.H. Rev. Stat. Ann. § 604-A:9(I)(f), (IV)</u>

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Q1	Q2	Q3	Q4	Q5
NEW JERSEY				
No State statute in New Jersey does not address these fees.	Yes New Jersey authorizes counsel fees based on a schedule of costs. 1. Criminal Court (Adult): <ol style="list-style-type: none"> Clients charged with 1st and 2nd degree crimes: <ol style="list-style-type: none"> Pre-indictment disposition: \$250.00; Post-indictment disposition: \$500.00; Trial (up to five days): \$750.00; Trial (every three days beyond initial five): \$500.00; Clients charged with 3rd and 4th degree crimes: <ol style="list-style-type: none"> Pre-indictment disposition: \$150.00; Post-indictment disposition: \$250.00; Trial (up to five days): \$500.00; Trial (every three days beyond initial five): \$500.00 2. Drug Court: <ol style="list-style-type: none"> Disposition: \$250.00; Program completion: \$250.00 Intensive supervision program: \$100.00 Special hearings unit: \$200.00 <u>N.J. Admin. Code § 17:39-3.1;</u> <u>N.J. Stat. Ann. §§ 2A:158A-16, 2A:158A-19</u>	No State statute in New Jersey does not address this practice.	The Court <u>N.J. Stat. Ann. §2A:158A-15.1</u>	No Collected fees are remitted to the state. <u>N.J. Stat. Ann. § 2A:158A-19</u>
NEW MEXICO				
Yes New Mexico authorizes a \$10 application fee. <u>N.M. Stat. Ann. § 31-15-12(C)</u>	Yes New Mexico authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>N.M. Stat. Ann. § 31-16-5(C)</u>	No State statute in New Mexico does not address this practice.	The Court <u>N.M. Stat. Ann. § 31-16-5(B)</u>	Yes Application fee revenue is remitted to the Public Defender Automation Fund. Recoupment fee revenue is remitted to the state general fund. <u>N.M. Stat. Ann. §§ 31-15-12(C), 31-16-7(C)</u>

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Q1	Q2	Q3	Q4	Q5
NEW YORK				
No State statute in New York does not address these fees.	No State statute in New York does not address cost of counsel fees.	No Not Applicable. New York does not assess upfront fees or cost of counsel fees.	The Public Defense Delivery System In most counties, the courts delegate the screening process to the local defense provider. This was confirmed with the Office of Indigent Legal Services. There is no statute on point.	No Not Applicable. New York does not assess upfront fees or cost of counsel fees.
NORTH CAROLINA				
Yes North Carolina authorizes a \$75 application fee. <u>N.C. Gen. Stat. § 7A-455.1(a)</u>	Yes North Carolina authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>N.C. Gen. Stat. § 7A-455(a)</u>	Yes <u>N.C. Gen. Stat. § 7A-455(c)</u>	The Court <u>N.C. Gen. Stat. § 7A-450(c)</u>	Yes Appointment fee revenue is distributed into the Indigent Defense Fund and the Court Information Technology Fund. Recoupment fee revenue is remitted to the state treasury. <u>N.C. Gen. Stat. §§ 7A-455(a), 7A-455.1(f)</u>
NORTH DAKOTA				
Yes North Dakota authorizes a \$35 application fee. <u>N.D. Cent. Code § 29-07-01.1(1)</u>	Yes North Dakota authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>N.D. Cent. Code § 29-07-01.1(2)</u>	Yes <u>N.D. Cent. Code § 12.1-32-07(4)(p)</u>	The Court <u>N.D. Cent. Code § 54-61-01.1</u>	Yes Application fee revenue is distributed into the Indigent Defense Administration Fund. Recoupment fee revenue is remitted to the state or county. <u>N.D. Cent. Code §§ 29-07-01.1(2), (4)</u>

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Q1	Q2	Q3	Q4	Q5
OHIO				
Yes Ohio authorizes a \$25 application fee. <u>Ohio Rev. Code Ann. § 120.36(A)</u>	Yes Ohio authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>Ohio Rev. Code Ann. § 120.05(D)</u>	No State statute in Ohio does not address this practice.	Varies The determination is made by the public defender in counties that have an established public defender office. In counties that rely solely on an assigned counsel system, the determination is made by the court. <u>Ohio Rev. Code Ann. § 120.05</u>	Yes Collected fees are remitted to the Public Defenders Client Payment Fund and the county general fund. <u>Ohio Rev. Code Ann. §§ 120.15(B)(3), 120.25(B)(3), 120.33(A)(4)</u>
OKLAHOMA				
Yes In the 75 of 77 counties that are part of the Oklahoma Indigent Defense System, Oklahoma authorizes a \$40 application fee. <u>Okla. Stat. tit. 22, § 1355A(A)</u>	Yes In the 75 of 77 counties that are part of the Oklahoma Indigent Defense System, cost of counsel fees are assessed based on a set rate. Misdemeanor <ul style="list-style-type: none"> • guilty plea \$150 • jury trial \$500 Felony <ul style="list-style-type: none"> • guilty plea: \$250 • jury trial: \$1,000 <u>Okla. Stat. tit. 22, § 1355.14(E)</u>	Yes <u>Okla. Stat. tit. 22, § 991a(A)(1)(k)</u>	The Court <u>Okla. Stat. tit. 22, § 1355A</u>	Yes Application fee revenue is remitted to the Court Clerk Revolving Fund. <u>Okla. Stat. tit. 22, § 1355A(A)</u> Cost of counsel fee revenue is remitted to the Indigent Defense Revolving Fund. <u>Okla. Stat. tit. 22, § 1355.14(B)</u>
OREGON				
Yes Oregon authorizes a \$20 application fee for appointed counsel. <u>Oregon Judicial Branch Advice of Rights (2020)</u>	Yes Oregon authorizes fees for up to the full cost of counsel, depending on ability to pay. <u>Or. Rev. Stat. § 151.487</u>	Yes <u>Or. Rev. Stat. § 137.540(1)(a)</u>	The Court <u>Or. Rev. Stat. § 135.050(1)-(4)</u>	Yes Collected fees are remitted to the Public Defense Services Account. <u>Or. Rev. Stat. §§ 135.050(8), 151.487(1)</u>
PENNSYLVANIA				
No State statute in Pennsylvania does not address these fees.	No State statute in Pennsylvania does not address cost of counsel fees.	No Not Applicable. Pennsylvania does not assess upfront fees or cost of counsel fees.	The Public Defense Delivery System <u>Public Defender Act, § 6(b), 1968 Pa. Laws 1144, 1145</u>	No Not Applicable. Pennsylvania does not assess upfront fees or cost of counsel fees.

- Q1.** Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?
- Q2.** Does state law authorize cost of counsel reimbursement fees (recoupment) for people represented by appointed counsel?
- Q3.** Can unpaid fees become a condition of probation?
- Q4.** Who determines whether a person is eligible for public defense services?
- Q5.** Does revenue from collected fees go to the public defense delivery system?

Q1	Q2	Q3	Q4	Q5
RHODE ISLAND				
No State statute in Rhode Island does not address these fees.	No State statute in Rhode Island does not address cost of counsel fees.	No Not Applicable. Rhode Island does not assess upfront fees or cost of counsel fees.	The Public Defense Delivery System <u>R.I. Gen. Laws § 12-15-9</u>	No Not Applicable. Rhode Island does not assess upfront fees or cost of counsel fees.
SOUTH CAROLINA				
Yes South Carolina authorizes a \$40 application fee. <u>S.C. Code Ann. § 17-3-30(B)</u>	Yes South Carolina authorizes fees for up to \$3,500 if one or more felonies are charged, and up to \$1,000 if only misdemeanors are charged. <u>S.C. Code Ann. §§ 17-3-30(A), 17-3-50</u>	Yes <u>S.C. Code Ann. §§ 17-3-30(B), 17-3-45(B)</u>	The Court <u>S.C. Code Ann. § 17-3-10</u>	Yes Application fee revenue is remitted to the Public Defender Application Fund. Recoupment fee revenue is remitted to the state general fund. <u>S.C. Code Ann. §§ 17-3-30(A), 17-3-45(B)</u>
SOUTH DAKOTA				
No State statute in South Dakota does not address these fees.	Yes South Dakota authorizes a “reasonable amount” as determined by the circuit court judge or magistrate judge. <u>S.D. Codified Laws §§ 23A-40-10, 23A-40-12</u>	Yes <u>S.D. Codified Laws § 23A-40-10</u>	The Court <u>S.D. Codified Laws § 23A-40-6</u>	Yes Collected fees are remitted to the county general fund, municipal general fund, or to the public defender fund. <u>S.D. Codified Laws § 23A-40-10</u>
TENNESSEE				
Yes Tennessee authorizes an application fee ranging from \$50 to \$200. <u>Tenn. Code Ann. § 40-14-103</u>	Yes Tennessee authorizes fees for up to the actual cost of counsel, depending on ability to pay as determined by the court. <u>Tenn. Code Ann. § 40-14-202(e)</u>	Yes <u>Tenn. Code Ann. § 40-14-202(e)</u>	The Court <u>Tenn. Code Ann. § 40-14-202(a)</u>	No Administrative fee revenue is remitted to the state general fund and the court clerk. Recoupment fee revenue is remitted to the Administrative Office of the Court. <u>Tenn. Code Ann. § 40-14-202(f)</u>

- Q1.** Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?
- Q2.** Does state law authorize cost of counsel reimbursement fees (recoupment) for people represented by appointed counsel?
- Q3.** Can unpaid fees become a condition of probation?
- Q4.** Who determines whether a person is eligible for public defense services?
- Q5.** Does revenue from collected fees go to the public defense delivery system?

Q1	Q2	Q3	Q4	Q5
TEXAS				
No State statute in Texas does not address these fees.	Yes Texas authorizes fees for up to the actual cost of counsel, depending on ability to pay as determined by the court. <u>Tex. Code Crim. Proc. Ann. art. 26.05(g)</u>	Yes <u>Tex. Code Crim. Proc. Ann. art. 26.05(g)(5)</u>	The Court <u>Tex. Code Crim. Proc. Ann. art. 26.04</u>	No Collected fees are remitted to the county general fund. <u>Tex. Code Crim. Proc. Ann. arts. 26.05(f)-(g), 103.004; Tex. Loc. Gov't Code Ann. §§ 133.003, 133.051, 133.102</u>
UTAH				
No Notably, state statute in Utah disallows the practice of assessing upfront fees. <u>Utah Code Ann. § 77-1-6</u>	Yes Utah authorizes fees for up to the actual cost of counsel, depending on ability to pay as determined by the court. <u>Utah Code Ann. §§ 78B-22-1002, 77-32b-104</u>	No State statute in Utah does not address this practice.	The Court <u>Utah Code Ann. § 78B-22-202</u>	Uncertain There is no statute on point for where recoupment fee revenue is remitted to in Utah.
VERMONT				
Yes Vermont authorizes a minimum co-payment fee of \$50 at the time counsel is assigned. <u>13 Vt. Stat. Ann. § 5238(b)</u>	Yes Vermont authorizes a fixed amount based on the client's income and the average cost of counsel in the type of case in question. <u>13 Vt. Stat. Ann. § 5238(b)-(e)</u>	Yes <u>13 Vt. Stat. Ann. § 5240(d)</u>	The Court <u>13 Vt. Stat. Ann. § 5236</u>	Yes Collected fees are remitted to the Public Defender Special Fund <u>13 Vt. Stat. Ann. § 5239</u>
VIRGINIA				
No State statute in Virginia does not address these fees.	Yes Virginia authorizes fees for up to the full amount that the court sets as pay for defense counsel. The rate of pay for attorneys is set according to a Virginia Supreme Court schedule. <u>Va. Code Ann. § 19.2-163(2)</u>	Yes <u>Va. Code Ann. § 19.2-356</u>	The Court <u>Va. Code Ann. § 19.2-159</u>	No Collected fees are remitted to the commonwealth or county. <u>Va. Code Ann. § 19.2-163(2)</u>

- Q1.** Does state law authorize upfront application/appointment fees for people seeking court-appointed counsel?
- Q2.** Does state law authorize cost of counsel reimbursement fees (recoupment) for people represented by appointed counsel?
- Q3.** Can unpaid fees become a condition of probation?
- Q4.** Who determines whether a person is eligible for public defense services?
- Q5.** Does revenue from collected fees go to the public defense delivery system?

Q1	Q2	Q3	Q4	Q5
WASHINGTON				
No State statute in Washington does not address these fees.	Yes In Washington, defendants fill out a promissory note at the beginning of their case. Judges in some counties rarely or never assess cost of counsel fees, some assess fees based on set amounts, and some assess individual amounts in each case, as confirmed with the Washington State Office of Public Defense. <u>Rev. Code Wash. § 10.101.020(5), and for felonies, Rev. Code Wash. § 9.94A.030(31)</u>	No State statute in Washington does not address this practice.	The Court <u>Rev. Code Wash. 10.101.020</u>	No Collected fees are remitted to the county general fund. There is no statute on point. This practice was confirmed by the Washington State Office of Public Defense.
WEST VIRGINIA				
No State statute in West Virginia does not address these fees.	Yes West Virginia authorizes fees for up to the actual cost of counsel, depending on ability to pay as determined by the court. <u>W. Va. Code § 29-21-16(g)</u>	Yes <u>W. Va. Code § 29-21-16(5)</u>	Varies The determination can be made by the trial court administrator, public defender or judge. <u>W. Va. Code § 29-21-16(d)</u>	No Collected fees are remitted to the state general fund. <u>W. Va. Code § 29-21-16(h)</u>
WISCONSIN				
No State statute in Wisconsin does not address these fees.	Yes Wisconsin's cost of counsel fee is set at the average cost, determined by the state public defender board, of a given type of case. <u>Wis. Stat. § 977.075</u>	Yes <u>Wis. Stat. § 977.07(2m)</u>	The Public Defense Delivery System <u>Wis. Stat. § 977.06</u>	Yes Collected fees are remitted to the state and reserved for use by private court-appointed attorneys and investigators. <u>Wis. Stat. §§ 977.077, 20.550(1)(L)</u>
WYOMING				
No State statute in Wyoming does not address these fees.	Yes Wyoming authorizes fees for up to the actual cost of counsel, depending on ability to pay as determined by the court. <u>Wyo. Stat. § 7-6-106(c)</u>	Yes <u>Wyo. Stat. § 7-6-108(e)</u>	The Court <u>Wyo. Stat. § 7-6-106</u>	No Collected fees are remitted to the state general fund. <u>Wyo. Stat. § 7-6-108(b)</u>

APPENDIX B

Interview Questions for Oklahoma Community Stakeholders

EXPLAIN THE PROJECT.

Individuals accused of criminal charges who are unable to afford counsel are entitled to the appointment of counsel under the U.S. Constitution. Yet in most states, people who qualify for and receive appointed counsel are expected to pay fees for the service. NLADA is researching the myriad of ways counsel costs are imposed and assessed, and their impact on clients, defenders, and others. In addition to highlighting key practices in 50 states, we are conducting a more in-depth analysis in several states, including Oklahoma. My colleagues and I are interviewing stakeholders within OIDS (and outside) to better understand your experiences and insights regarding indigent defense fees in Oklahoma. We are also interested in hearing your ideas for reform, including the possible elimination of fees, or barriers for doing so in the future. At the end of this phase of the project, we will synthesize all of the information gathered from the states into a report that will be used to inform the final two phases of this project. We appreciate you sharing your experiences with us and want to reassure you that all shared information will be held in the strictest of confidence and will not be able to be traced back to you. (Ask if it's okay to record!)

INTERVIEW QUESTIONS FOR COMMUNITY STAKEHOLDERS:

- What is your role?
 - County
 - Type of agency (goal of agency)
 - Intersect with criminal legal system or experience with clients involved in criminal legal system
- How many years of experience do you have working with clients involved in the Oklahoma criminal legal system? (always same agency or type of work, or different?)
- Are there any fees associated with your agency or services?

In Oklahoma, clients incur two types of fees for indigent defense, a \$40 application fee assessed when applying to receive a public defender or court-appointed attorney and, at the end of their case, they are assessed a cost of indigent defense services fee (often called the OIDS fee). We understand that indigent defense system fees are not the only fees clients incur, but they are the focus of our work. We are hoping that you can tell us about these fees and/or financial obligations and your perspective or experience regarding how they affected the lives of your clientele.

APPLICATION FEE:

- Do you have any experience with, or stories you have heard from individuals about how the \$40 application fee may have impacted their experience with the court?
- Do you have any experiences with how clients have reacted to this application fee?
- Can you think of a particular client or case that you believe provides an example of how needing to pay this \$40 to have an attorney appointed affected them, or their decisions?
 - Not going to court
 - Refused public defender – choosing to represent themselves
 - Panhandling?
 - Illegal activity?
 - Borrowing or bartering?
 - Sex work?
- Have you heard any stories of clients having difficulty paying the \$40 application fee?
 - Heard of clients posting bond but then needing to seek representation from three attorneys (proving they couldn't get an attorney) before a judge will appoint a public defender or court appointed attorney?
- Do you have any ideas where the application fee money goes?

- Do you know who tracks how much was assessed and collected?
- Are you aware of any community agencies that provide financial support specifically for this application fee?
- What are your thoughts or beliefs about making individuals who have the right to counsel pay (regardless of ability) in order to obtain legal counsel?

COST OF COUNSEL FEES:

- Do you have any experiences with how clients have reacted to cost of counsel fees?
 - What are the amounts you've heard that individuals needed to pay the court?
 - Did these create financial hardships for individuals?
- Have you heard any stories of clients having difficulty paying cost of counsel fees?
 - Do you know of any incidents where this financial obligation may have contributed to individuals resorting to criminal activity to pay this debt? (share....)
 - What are some of the consequences (short-term and long-term) these financial obligations have on clients?
- Do you know of any clients who were unable to pay these counsel fees? What were the consequences of unpaid fees?
 - Required to report to court to explain?
 - referred to collection agencies?
 - suspension of license?
 - garnishment of wages?
 - Tax returns seized?
- Do you have any ideas where these cost of counsel fees go?
- Do you know how much money was assessed and how much collected for clients?
- Can you think of a particular client or case that you believe provides an example of how needing to pay back the court for legal services affected them, or their decisions?
 - Not going to court – FTA
 - Avoiding probation?
 - Panhandling?
 - Illegal activity?
 - Borrowing or bartering?
 - Sex work?
 - Inability to move forward with their lives?
- Are you aware of any community agencies that provide financial support specifically for these cost of counsel fees?

PERSONAL BELIEFS?

- What are your thoughts or beliefs about making individuals who qualify for appointed counsel pay for that legal representation?
- Can you think of or identify potential barriers to eliminating indigent defense fees in your county/state? What might that look like in your county/state? Solutions?
- Any other thoughts you would like to share – or things you think we need to know?
- Other individuals – clients or community individuals who might want to speak with us?

APPENDIX C

Oklahoma State Court Network Docket System Review of Data on Public Defense System Fees

The Oklahoma State Court Network (OSCN) Docket System is an online, publicly accessible database that contains, among other things, records of court activities undertaken in district courts in criminal cases, including imposition of fines and fees. NLADA examined a random sample of cases in the OSCN database where defendants were represented by court-appointed attorneys working through the Oklahoma Indigent Defense System (OIDS) in an effort to learn more about imposition and collection of application fees and counsel reimbursement fees (commonly referred to as the OIDS fee). Methodology and findings from this examination follow.



Methodology

Cases were pulled for review from seven counties:

- Choctaw
- Cleveland
- Hughes
- McCurtain
- Pushmataha
- Seminole
- Wagoner

Data were retrieved for review by inputting the following search criteria under the “court records” tab at OSCN.net:

- County: each county was individually examined
- Party type: Defendant
- Case type: Criminal Misdemeanor or Criminal Felony
- Date range: Cases filed after January 1, 2015 and before January 1, 2021

These search parameters yielded randomly selected docket histories of cases for people who were charged with criminal offenses in the selected counties during the five-year period of 2015-2020. A total of 500 randomly selected records were initially reviewed. Of those, 115 were cases involving OIDS appointed counsel, thus were appropriate for this review. Entries, or the absence of entries, for the following seven details were checked for each of the 115 cases:

- Application fees imposed
- OIDS fees imposed
- Fine and cost docket events
- Failure to appear and failure to pay bench warrants
- Referral to the state collections agency
- Tax intercept for fines and fees owed
- Contact information for individuals.

A comprehensive review was done on a minimum of 15 and maximum of 21 individual cases from each of the seven selected counties. Analysis of the data points consisted of a line-by-line review of docket entries plus review of any linked scanned documents, including applications for the appointment of counsel, sentencing orders, plea forms, payment plans, minute notes, bench warrants, motions and orders. Not one of the 20 cases pulled from one of the seven counties, Wagoner County, contained any entries for the above data points. To avoid skewing the analysis, these 20 cases from Wagoner were eliminated from the review, leaving a total sample of 95 cases from six counties that were scrutinized.

Findings

Findings for each of the seven data points examined are provided as follows:

1. **Application fees:** Docket histories consistently contain entry of the public defense system application fee: 95 percent of the 95 cases reviewed contained an application fee entry. Multiple individuals had more than one application fee entered. Seventeen individuals had multiple application fees docketed, amounting to a total of thirty-five fee docket entries. Dates when application fees were entered on the docket illustrate that when people fail to appear (FTA) in court and at later dates (usually months after the FTA), the court requires a new application, and thus, a new application fee.

Entering the application the fee on the docket does not mean the accused was ordered to pay it, because the dockets do not consistently reflect whether the fee was ordered or not, leading to the inability to verify. One concerning discovery in two counties was of linked applications containing full names, addresses, dates of birth and social security numbers that are available for public review.

2. **OIDS fee:** Unlike application fees, entry of the OIDS fee on docket histories is inconsistent. The OIDS fee was entered in 44 percent of cases reviewed (42 of 95). Not all dockets had OIDS fees listed as a docket event, but instead, evidence of the fee was discovered within sentencing orders scanned into the record. When sentencing orders are available for review, they do not consistently indicate whether payment of the OIDS fee or application fee was ordered by the court.
3. **Fine & Cost Docket events:** NLADA sought to examine records related to how courts manage collection of imposed public defense system fees. We found the collection of these fees is not treated separately on the docket from collection of all other fees and so cannot be analyzed in isolation. Docket entries that relate to collections in general include “F&C” (fine and cost) Docket entries and “Rule 8” entries, which include requests for modification of payment plans and determinations of willful non-payment, and finally, “failure to pay” entries. Other evidence of collections activities includes information contained in sentencing orders, published payment plans, motions to modify court orders and other nondescript entries with the word “fine” or “cost” included in a docket entry. Again, none of these entries relate exclusively to collections of public defense system fees.

Of the 95 records reviewed, there was no consistency in the way each county, or each courtroom within each county, records docket entries for collections activities, including whether parties sentenced to pay were required to appear in court periodically on a fine and cost docket to have their payment plans, or orders to pay that do not include a payment plan, reviewed.

Lastly, consistent across the six counties, when fees are recorded on the docket in an itemized fashion and judges waive or dismiss them, docket entries reflect a subtraction of each fee, except for the application fee and OIDS fee. This leaves the record unclear as to whether the fees associated with public defense have been waived or dismissed.

4. **Failure to Pay Warrants:** NLADA sought to understand whether non-payment of fees imposed was managed through the issuance of bench warrants for failure to pay. Interviews with court stakeholders indicated that bench warrants are not issued if the only reason for issuing the warrant is failure to pay. However, evidence to the contrary was indicated in the records reviewed.

It was not possible to restrict this review solely to the non-payment of an application fee or OIDS fee due to the inconsistent way that fees are accounted for within the docket histories available. Additionally, it was not always possible to discern whether warrants were issued for failure to appear, failure to pay, or both. However, 51 of the histories reviewed indicated warrants were issued. Some of those entries indicated “failure to appear,” but upon further review of docket notes, entries were discovered that indicated the warrant was issued for failure to pay. In other cases indicating a failure to appear warrant was issued, court notes show that on later dates warrants were cancelled due to a payment being made.

Each time a docket entry was made for a bench warrant, a \$50 fee was also entered. An additional fee of \$50 was entered for the sheriff’s return of service on the same warrant. Not all histories indicate consistency in imposing the return of service fee on the same warrant. A few records also contained duplicate charges for the same warrant.

When warrants are cancelled, some records evidence a \$30 charge to the accused for the processing of the cancellation. In those cases and in others, no warrants that were cancelled showed any evidence of the \$50 fee entered for having issued the warrant deleted from the record.

Lastly, the bench warrants discovered indicated a total of 122 warrants issued across 51 individuals. Most individuals were issued one warrant, with most others having between two and five warrants issued.

5. **Tax Intercept:** Docket histories were reviewed to determine whether courts made entries evidencing tax intercept attempts to collect debt owed to the court. Records available did not indicate which fees owed were the subject of tax intercept, nor did any records indicate whether monies owed were recovered through intercept. Just nine cases had tax intercept entries, with a total across those nine cases of forty-six separate entries, including an additional fee of \$10 for each of the forty-six entries.
6. **Collections:** Sanctions for failing to pay court debt owed in Oklahoma include referrals to collections agencies that charge 25 percent of whatever amount is collected. Docket histories were reviewed to determine whether referrals to collections agencies are evidenced on the record. Only two records contained an entry for referral to collections, despite several interviewees who indicated referrals to collections agencies were routine.
7. **Contact information for individuals:** Docket histories were reviewed for addresses and/or phone numbers of individuals who were ordered to pay fees. Three of the six counties had this information published via the application for appointment of counsel, and in a few instances, information was discovered in sentencing orders and minute notes. Only one county consistently posted applications for public viewing. Alarming, the information within viewable applications includes full names, addresses, dates of birth and social security numbers. No applications had any redactions of this information. Five counties indicate in the docket record that the application is “available in the clerk’s office.”

Summary

The review of court docket histories, while not measurable for any statistical significance, did confirm that fees for applications for the appointment of counsel and for the reimbursement of counsel costs are indeed reflected in some docket history records, so the OSCN docket offers a starting point for data mining on the topic of public defense system fees. Likewise, anecdotal evidence of the impact of fees in general on individuals is somewhat validated through OSCN docket documentation of the significant amount of effort taken by courts to record information about fees and to recover those fees.

Overall, however, reliable information about whether appointed counsel application and OIDS fees are imposed, how much is collected, how much is outstanding is not readily discoverable from docket histories.

The vast majority of the information available in the records reviewed is specifically related to fee entries. Each record begins with an entry of what offenses people are charged with, and what follows is entry of multiple fees that are assessed to be disbursed among a broad array of agencies, some of which are not related to the court case. Some examples of docket entries include “law library”, “child abuse”, and “forensic science improvements” fees, with no indication of which agency is a recipient. Examples of fees entered that are more directly related to costs associated with the individual case include fees for incarceration, warrants, district attorneys, sheriffs, transportation to and from county jails, and courthouse security. Of concern is that fees are entered as being assessed for each individual charge. For example, if a person has three charges, each fee is entered three times. Most alarming perhaps are fees charged for waiving the right to a preliminary hearing, exercising the right to a jury trial, and for the entry of pleas.

Absent from any records across five counties was evidence of fee amounts actually paid, including counsel application and OIDS fees. In contrast, one county had docket entries reflecting specific amounts paid and which agencies received the revenue.

Consistent across all counties reviewed was also a lack of evidence that ability to pay hearings were being scheduled on the docket. Some records include forms signed by the accused that state they have the ability to pay, but no indication of whether the court conducted an inquiry. In one county there was evidence of the counsel application and the OIDS fees being waived by the court due to indigency.

The key takeaway from this review is that the type of and amount of data recorded on docket histories varies widely, not just county by county, but also courtroom by courtroom within a county. Some counties' courts were found to record some needed details, but not consistently across all courtrooms. Just one court recorded details about specific fees the accused person was ordered to pay. None of the jurisdictions had comprehensive information recorded related to all seven of the data points sought. There appears to be no attempt to follow uniform tracking protocols; personnel responsible for data entry in each court seem to develop their own approaches. Differences in the level of details provided among judges sitting in the same jurisdiction were also seen.

One consistent docket entry that was noted in every record examined is the entry of incarceration fees. These fees are calculated based on the number of days incarcerated and represent the largest fees entered in every case.

Several judges and clerks of court interviewed indicated they receive financial reports from the State, but none were aware of whether or not details about public defense system fees were reported in the financial details received. Several were asked if an analysis was ever conducted comparing revenues to expenditures incurred as a result of collection efforts. None indicated they were aware of any such analysis but some said they thought it was a “good idea.”

APPENDIX D

Grady County, Oklahoma “Exhibit A” Form

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA
"EXHIBIT A"

STATE OF OKLAHOMA vs _____ CASE NO. CM-
CF-

THE COURT HEREBY SENTENCES THE DEFENDANT AS FOLLOWS PURSUANT TO:
() PLEA AGREEMENT () BLIND PLEA () COMMUNITY SENTENCING () TRIAL

CRIMINAL CHARGE

SENTENCE

Counts to Run () Concurrent or () Consecutive with _____; Credit for Time Served? ___ Yes ___ No
County Jail Incarceration In Lieu of DOC? ___ Yes ___ No (Applies from Date of Sentencing)
Defendant is Ordered to appear before the Court Collection Coordinator () Today () Prior to Release () Within 5 days of Release from D.O.C. custody

SCHEDULE OF REIMBURSEMENT

The Defendant is ordered to pay the following dollar amounts representing fines, costs and assessments resulting from his/her conviction. All fines, costs and assessments are due and owing on the date of Sentencing. Costs for appellate proceedings, transportation and etc. may continue to accrue after Judgment and Sentence. The Court Clerk will charge a 10% Collection Cost on all assessments.

*See Exhibit "B" for Rules of Probation.

1. COURT COST/LL/VOFS	\$ _____	24. FINE	\$ _____
2. MUNICIPAL	\$ _____	25. V.C.A.	\$ _____
3. COUNTY SHERIFF	\$ _____	26. CSPA	\$ _____
4. T.C.R.F.	\$ _____	27. INCARCERATION	\$ _____
5. D.P.S.	\$ _____	28. MEDICAL FEES	\$ _____
6. C.L.E.E.T.	\$ _____	29. ATTORNEY FEES	\$ _____
7. A.F.S.I.	\$ _____	30. R.V.	\$ _____
8. FORE	\$ _____		
9. MLRF	\$ _____	TOTAL DUE \$	_____
10. D.A. REVOLVING FUND	\$ _____		
11. O.C.I.S.	\$ _____		
12. CHS	\$ _____		
13. AG	\$ _____		
14. CAMA	\$ _____		
15. BOJ	\$ _____		
16. BNDE	\$ _____		
17. D.O.C.	\$ _____		
18. D.A. DRUG FUND	\$ _____		
19. D.A. WITNESS FEE	\$ _____		
20. OTHER	\$ _____		
21. OTHER	\$ _____		
22. OTHER	\$ _____		
23. OTHER	\$ _____		

DEFENDANT

DISTRICT ATTORNEY

DEFENDANT'S ATTORNEY (please print)

JUDGE OF DISTRICT COURT

I CERTIFY THAT THE FOREGOING FIGURES ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.
DATED THIS _____ DAY OF _____ 20____.

LISA HANNAH, COURT CLERK

BY:

DEPUTY

APPENDIX E

Sample Oklahoma Pauper's Affidavit

HOW TO APPLY FOR A COURT-APPOINTED ATTORNEY

1. Fill this out completely. Incomplete applications will be returned and the defendant will have to wait another week. **YOU MUST SPEAK WITH THREE (3) LAWYERS BEFORE TURNING IN YOUR APPLICATION**
2. Pay the forty (\$40) application fee, **CASH ONLY**, to the Court Clerk before you go to Judge [REDACTED]'s courtroom with your application.
3. Give your receipt and completed application to Judge [REDACTED] in [REDACTED] courtroom
4. **JUDGE [REDACTED] WILL HEAR YOUR APPLICATION FOR A COURT-APPOINTED ATTORNEY AT 8:30AM ON ANY TUESDAY IN HIS COURTROOM.** The courtroom is located on the 4th floor of the county building.
5. **YOU MUST APPEAR FOR ALL COURT DATES.** You may contact the Court Clerk at (405) [REDACTED] to get your court date if you do not know it.

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

PLAINTIFF

V.

Case numbers _____

DEFENDANT.

PAUPER'S AFFIDAVIT

(Application for Court Appointed Counsel in Criminal Cases)

I, (full name) _____ SSN _____

Address _____

Upon oath, do swear and state:

PERSONS IN HOUSEHOLD:

Spouse (name) _____ phone _____

Children (names & ages) _____

Others _____

Relatives (names) _____ phone _____

FINANCIAL STATUS:

Cash on hand _____

Bank Accounts _____

Bonds and Securities _____

Possessions of Value: (tax refunds, notes, accts. Receivable)

EMPLOYMENT:

Employer's name and address _____

Job description _____ Pay rate _____

Last employment (place and date) _____

Supplemental Income _____
(VA, Soc. Security, Disability, Child Support, etc...)

ASSETS:

Real Property (home, land) _____

Value _____ Amount owed _____ Monthly payment _____

Value _____ Amount owed _____ Monthly payment _____

Personal Property (furniture, appliances, tools, equipment)

LIABILITIES:

Credit Cards / Open Accounts

Creditor _____ Amount _____

Creditor _____ Amount _____

Creditor _____ Amount _____

Child support obligations _____ Amount _____

OTHER:

Have you transferred or sold any assets since charges were filed in this case? Y / N

Describe _____

Have you hired counsel in this case or in any other pending criminal case? Y/N

State case number, court, attorney and amount paid _____

If you posted bond, who provided the funds for the bond?

Do you have any friends or relatives who are able and willing to assist you in hiring counsel and paying for transcripts? Y / N

Have you asked them for help? Y / N

I further swear and affirm that I am without funds or other sources of income to pay an attorney or to pay for transcripts and costs associate with the case. I understand I am under a continuing duty to keep this Court informed of any changes in my financial status and this Court may conduct another hearing to determine my indigent status at any time.

Applicant's signature

Subscribed and sworn to before me this _____ day of

_____, 20 _____

COURT CLERK

By _____

APPENDIX F

Two Sample Iowa Financial Affidavits

In the Iowa District Court for Louisa County

State of Iowa, Plaintiff,)	
)	
	)	No.
vs.)	
	)	Financial Affidavit and
[REDACTED],	)	Verified Statement Pursuant to Iowa
Defendant.	)	Code 665.7
)	
	)	Clerk: Set document security at level # 1

In support of my request for a determination of my reasonable ability to pay Category B restitution ordered in this case, and under penalty of perjury, I provide as follows:

1. My date of birth is: [REDACTED]

2. Do you have prior convictions, in Iowa or elsewhere, that required you to pay any fines, penalties, victim restitution, or other monetary amounts that you have not paid in full? **Yes** No

If yes, what is the total amount that is unpaid? If you have a payment plan set up with the court, what are your monthly payments?

Currently, there is \$5,590 unpaid. I have been in a payment plan with the Louisa County Attorney since February 2021 at \$50 per month.

3. Total amount of restitution owed in this case, if any has been ordered:

Total: **\$383 in [REDACTED] \$157.75 in [REDACTED] for a total of \$540.75.**

An additional \$60 was ordered in case [REDACTED] but since the definition of "restitution" involves only debt assessed in criminal cases.

4. What is your highest level of education obtained (high school, GED, bachelor's degree, etc.)?

Honorary Associates Degree in Early Child Education, 2008.

5. Are you employed? **Yes** No

If yes, name of employer and date employment began:

[REDACTED] – September 2020

6. Do you work less than full-time, such as part-time or seasonal? **YES** No

If yes, hours per week or months per year you work:

I was averaging 30 hours per week, but due to COVID, my hours have been cut between 8 and 12 hours per week. I am hoping for full-time very soon.

7. How much is your current take-home pay? **\$11** per hour month year.

8. List all other money you have coming (social security, SSI, unemployment, etc.):

Child support – supposed to be \$268 per month, but it is rare that I actually receive this, except around tax time.

9. List amounts you owe monthly, including mortgages, rent, car loans, credit cards, utilities, child support, court debt, and any other debts:

Mortgage	\$197
Insurance	\$152
Property taxes	\$ 55
Child support	\$ 18 per week
Court debt	\$ 50

10. List your other monthly expenses, including child care, school expenses, medical expenses, food, clothing, transportation, etc.

Medical	Title XIX
Food	\$400
Household supplies	\$200
Transportation	\$ 40

11. How many dependents or family members are supported by or live with you?

0

12. Do you have any unpaid judgments against you? Yes **Not that I am aware of**

If yes, how much is owed?

n/a

13. Are your wages being garnished? Yes No

If yes, how much is garnished from each check and how often are you paid?

\$18 per week wage assignment for child support

14. List what you own, including cash, money in banks or other financial institutions, stocks, bonds, cars, trucks, other vehicles, land, houses, buildings, interests in a business, or anything else worth more than \$100:

2008 VW Jetta with 277K miles - \$3,164 Kelly Blue Book, private party value

House, [REDACTED] - 2020 property assessment value = \$38,790

15. List balance of all outstanding debts you have, identifying the amount of any liens on your property for the debt (for example, mortgage debt with lien on house, bank loan with lien on vehicle, etc.):

Mortgage \$44,000

16. Do you expect to receive any property or money in the near future, such as inheritance, gifts, etc? Yes No.

If so, identify the source and list its expected value.

N/A

17. Describe any other personal or family circumstances, including circumstances, including physical or mental health issues, that affect your ability to repay the restitution ordered in this case:

n/a

18. List any additional information you think is important for the court to know in determining your ability to pay the Category B restitution ordered in this case.

The debt assessed in [REDACTED] is not restitution, as the definition of restitution in Iowa Code 910.1 only covers court debt assessed after a conviction.

I am doing my best to make sure payments are being made according to the terms of my payment plan.

I believe that if I am jailed, I will lose my newly acquired job, which will make it more – not less – difficult to continue to make payments.

You may attach to this form any additional information to support your request.

By making this financial affidavit, I am asking the court to determine that I am not able to reasonably make payments toward the full amount of Category B restitution ordered in this case. I understand that if I fail to complete a financial affidavit, I waive any claim regarding my reasonable ability to pay.

Attorney Help

A. ☐ An attorney did not help me prepare or fill in this Financial Affidavit.

B. ☒ An attorney helped me prepare or fill in this Financial Affidavit.

If you check B, you must fill in the following information:

Name of attorney or organization, if any

Business address of attorney or organization

City

Iowa
State

ZIP code

Phone number

Fax number

Email address

Additional email address, if applicable

Oath and signature

I, _____, have read this financial affidavit, and I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the Information I have provided in this financial affidavit is complete, true, and correct to the best of my knowledge.

/S/ _____
Defendant's signature*

Mailing address

City

Iowa
State

ZIP code

Phone number

Fax number, if applicable

Email address Additional email address, if applicable

*Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution***In the Iowa District Court for Monona County**

State of Iowa,)	
Plaintiff,)	
	)	No.
)	
vs.)	
	)	Financial Affidavit and
	)	Request for Reasonable Ability
Defendant.	)	to Pay Determination for
	)	Category B Restitution
	)	Clerk: Set document security at level # 1

In support of my request for a determination of my reasonable ability to pay Category B restitution ordered in this case, and under penalty of perjury, I provide as follows:

1. My date of birth is: [REDACTED]

2. Do you have prior convictions, in Iowa or elsewhere, that required you to pay any fines, penalties, victim restitution, or other monetary amounts that you have not paid in full? Yes No

If yes, what is the total amount that is unpaid? If you have a payment plan set up with the court, what are your monthly payments?

N/A

3. Total amount of restitution owed in this case, if any has been ordered:

Total: \$5931.83

4. What is your highest level of education obtained (high school, GED, bachelor's degree, etc.)?

GED

5. Are you employed? Yes No

If yes, name of employer and date employment began:

N/A

Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution, cont.

6. Do you work less than full-time, such as part-time or seasonal? Yes No

If yes, hours per week or months per year you work:

N/A

7. How much is your current take-home pay? \$0 per hour month year.

8. List all other money you have coming (social security, SSI, unemployment, etc.):

SSI - \$684 per month

Alimony - \$750 per month

SNAP - \$15 per month

9. List amounts you owe monthly, including mortgages, rent, car loans, credit cards, utilities, child support, court debt, and any other debts:

- Mortgage payment	\$410
- Utils	\$200-electric
	\$140-gas
	\$40-water
	\$120-cell
- Internet / cable	\$180
- RE taxes	\$126 (\$756 twice a year)

10. List your other monthly expenses, including child care, school expenses, medical expenses, food, clothing, transportation, etc.

- Transportation costs	\$80-gas
	\$20-maintenance
- Food	\$150
- Co pay on prescriptions	\$20

11. How many dependents or family members are supported by or live with you?

0

12. Do you have any unpaid judgments against you? Yes No.

If yes, how much is owed?

N/A

Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution, cont.

13. Are your wages being garnished? Yes No.

If yes, how much is garnished from each check and how often are you paid?

N/A

14. List what you own, including cash, money in banks or other financial institutions, stocks, bonds, cars, trucks, other vehicles, land, houses, buildings, interests in a business, or anything else worth more than \$100:

- **Residence** ~\$80K in equity (probably)
- **2001 Ford F150, 230K miles** \$2,342 Kelly Bluebook
- **personal effects** \$1,000 or less

15. List balance of all outstanding debts you have, identifying the amount of any liens on your property for the debt (for example, mortgage debt with lien on house, bank loan with lien on vehicle, etc.):

\$48,000 – Second mortgage on home

16. Do you expect to receive any property or money in the near future, such as inheritance, gifts, etc? Yes No.

If so, identify the source and list its expected value.

N/A

17. Describe any other personal or family circumstances, including circumstances, including physical or mental health issues, that affect your ability to repay the restitution ordered in this case:

I am disabled and cannot work due to (1) two surgeries of my neck, which have affected my physical ability to work, and (2) I have been diagnosed with an anxiety disorder, which also affects my ability to work.

Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution, cont.

18. List any additional information you think is important for the court to know in determining your ability to pay the Category B restitution ordered in this case.

There was never a court order for me to pay appellate attorney fees.

I do not believe that the court has jurisdiction to order me to pay attorney fees in a dismissed case.

You may attach to this form any additional information to support your request.

By making this financial affidavit, I am asking the court to determine that I am not able to reasonably make payments toward the full amount of Category B restitution ordered in this case. I understand that if I fail to complete a financial affidavit, I waive any claim regarding my reasonable ability to pay.

*Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution, cont.***Attorney Help**

A. ☐ An attorney did not help me prepare or fill in this Financial Affidavit.

B. ☒ An attorney helped me prepare or fill in this Financial Affidavit.

If you check B, you must fill in the following information:

Name of attorney or organization, if any

Business address of attorney or organization

City State ZIP code

Phone number Fax number

Email address Additional email address, if applicable

Oath and signature

I, _____, have read this financial affidavit, and I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the Information I have provided in this financial affidavit is complete, true, and correct to the best of my knowledge.

/s/ _____
Defendant's signature*

Mailing address

City State ZIP code

Phone number Fax number, if applicable

Email address Additional email address, if applicable

* You must *handwrite* your signature on this form, scan it, and then file electronically.

ENDNOTES

- 1 The most recent national data on the rate of indigency among criminal case defendants in state courts dates to 2000. See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000), <http://www.bjs.gov/content/pub/pdf/dccc.pdf>. It is widely assumed that more than 80 percent of criminal case defendants qualify for appointed counsel today.
- 2 See, e.g., *The Clearinghouse*, FINES & FEES JUST. CTR. (last visited June 24, 2022), <https://finesandfeesjusticecenter.org/clearinghouse> (compiling information about efforts to reform fines and fees in the legal system).
- 3 The 2020 analysis, conducted by ABC News in collaboration with ABC-owned stations, covered a three-year period ending in 2018. See Pierre Thomas, John Kelly, and Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC News, June 11, 2020, <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546>.
- 4 JOSHUA AIKEN, PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH (2017), <https://www.prisonpolicy.org/reports/jailsovertime.html>.
- 5 See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST. AT N.Y. UNIV. SCH. OF LAW, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.
- 6 Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Vermont.
- 7 Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
- 8 Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Vermont.
- 9 California, Hawaii, Mississippi, Nebraska, New York, Pennsylvania, and Rhode Island.
- 10 See, e.g., ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create* (Harv. Kennedy Sch. & Nat'l Inst. of Just., New Thinking in Community Corrections No. 4, 2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf>; ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PUNISHMENT FOR THE POOR (2016); HARV. L. SCH., CRIM. JUST. POL'Y PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016), <https://cjdebtreform.org/sites/criminaldebt/themes/debtor/blob/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform.pdf>.
- 11 The term "court-appointed counsel" refers to attorneys working in all delivery systems: government public defender offices and non-profit institutional providers, attorneys who contract to take a portion of cases in particular jurisdiction, and private attorneys appointed on a case-by-case basis to represent indigent defendants.
- 12 Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Prejudice?*, 75 Mo. L. REV. 683, 685 (2010), <https://scholarship.law.missouri.edu/mlr/vol75/iss3/3>.
- 13 E.g., HARLOW, *supra* note 1.
- 14 See *infra*, Chapter 3, for the ability-to-pay case law analysis.
- 15 E.g., *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).
- 16 See June 15, 2020 Iowa Legal Aid briefing, *Analysis of SF457, as amended and passed June 13, 2020*.
- 17 See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST. AT N.Y. UNIV. SCH. OF LAW, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 9 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>. The report found that "[t]he Texas and New Mexico counties studied here effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone." *Id.* at 5. See also POL'Y ADVOCACY CLINIC, UNIV. OF CAL. BERKELEY SCH. OF LAW, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA (2017), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf>. This report found that many counties collect little net revenue from similar fees in the juvenile justice system, when taking into account the time and resources spent trying to collect these fees each year, such as the salary and time for the collections officers, clerks, probation officers, attorneys, and judges who will be involved in fee collection processes. *Id.* at 17-18.
- 18 This data comes from unpublished research done by the Berkeley Policy & Advocacy Clinic as part of their work in Debt Free Justice California. California subsequently repealed twenty-three criminal legal system fees, as discussed below.
- 19 IOWA JUD. BRANCH, JUNE 30, 2018 ACCOUNTS RECEIVABLE (2018), <https://www.legis.iowa.gov/docs/publications/DF/969685.pdf>.
- 20 See WYO. OFF. OF THE STATE PUB. DEF., ANNUAL REPORT FY21, https://drive.google.com/file/d/1_kqUH1Dch6YtLRsgyqn9TPkSygSU4YM/view.
- 21 See WYO. OFF. OF THE STATE PUB. DEF., ANNUAL REPORT FY19, <https://drive.google.com/file/d/1DOyKeleNw4s3kFi5qrh44nkt8ks3ml8/view>.

- 22 AM. CIV. LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons?redirect=prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>.
- 23 The Costs of Indigent Defense Representation Survey used is available at <https://www.surveymonkey.com/r/costsofindigentdefenserepresentation>.
- 24 Survey respondents in Washington reported practicing in the following counties: Benton, Clallam, Franklin, Grant, Island, King, Kitsap, Mason, Pierce, Skagit, Snohomish, Thurston, Walla Walla, Whatcom, and Yakima.
- 25 See Skagit County, Wash., Replacing Resolution # R20080547 - Establishing Indigent Defense Fees, Resol. R2022043 (Mar. 7, 2022), <http://www.skagitcounty.net/Common/Documents/LFDocs/COMMISSIONERS000022/00/00/00/00000001.pdf>.
- 26 NLADA data categorizes Arizona's administrative assessment fee as an upfront fee, whereas the Spangenberg report did not. The Spangenberg Group report categorized Wisconsin's fee scheme as including an upfront fee, whereas NLADA data defines this fee as a recoupment fee. Lastly, NLADA survey data did not confirm the existence of upfront fees in Washington State, as previously reported in the Spangenberg report.
- 27 *State-by-State Court Fees*, NAT'L PUB. RADIO (May 19, 2014, 4:02 PM ET), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.
- 28 S.B. 190, 2017-18 Reg. Sess. (Cal. 2017), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20170180SB190.
- 29 S.F., Cal., Ordinance 131-18 (June 14, 2018), <https://sfbos.org/sites/default/files/o0131-18.pdf>.
- 30 Press Release, East Bay Cmty. Law Ctr. et al., Alameda County Will Vote to End Assessment of and Discharge \$26 Million in Adult Fees (Nov. 19, 2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/11/Alameda-County-Press-Release-FINAL.pdf>.
- 31 Contra Costa County, Cal., Resol. 2019/522 (Sep. 17, 2019), http://64.166.146.245/docs/2019/BOS/20190917_1334/38924_BO_Criminal%20Justice%20Adult%20Fees.pdf.
- 32 Jackie Botts, *Los Angeles County Eliminates Criminal Fees. Will California Follow?*, CALMATTERS (Feb. 27, 2020), <https://calmatters.org/california-divide/2020/02/los-angeles-county-eliminates-criminal-fees>.
- 33 IOWA CODE § 815.9(1)(a), <https://www.legis.iowa.gov/docs/code/815.9.pdf>.
- 34 See Off. of the Assistant Sec'y for Plan. & Evaluation, *Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS. (last visited June 24, 2022), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>.
- 35 See ELOISE COFER, EVELYN GROSSMAN & FAITH CLARK, CONSUMER & FOOD ECON. RSCH. DIV., AGRIC. RSCH. SERV., U.S. DEP'T OF AGRIC., FAMILY FOOD PLANS AND FOOD COSTS (1962), <https://naldc.nal.usda.gov/download/7263439/PDF>.
- 36 See Ctr. for Women's Welfare, *Overview*, UNIV. OF WASH. SCH. OF SOC. WORK (last visited June 24, 2022), <https://selfsufficiencystandard.org/the-standard/overview>. The Self-Sufficiency Index was developed by the Center for Women's Welfare at the University of Washington's School of Social Work. It "defines the income working families need to meet their basic necessities without public or private assistance" and includes "housing, childcare, food, transportation, health care, miscellaneous expenses (clothing, telephone, household items), and taxes (minus federal and state tax credits) plus an additional calculation for emergency savings" in its calculations. *Id.*
- 37 See Living Wage Calculator, *About the Living Wage Calculator*, MASS. INST. OF TECH. (last visited June 24, 2022), <https://livingwage.mit.edu/pages/about>. The Living Wage Calculator was created in 2004 by Dr. Amy K. Glasmeier.
- 38 *Id.*
- 39 34 C.F.R. § 685.209(c)(2)(i) (2022), <https://www.govinfo.gov/app/details/CFR-2021-title34-vol4/CFR-2021-title34-vol4-sec685-209>.
- 40 The Necessary Expense Test is regulated via the following federal provisions: I.R.S. Allowable Expense Overview, IRM 5.15.1.8 (July 24, 2019), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304; I.R.S. National Standards, IRM 5.15.1.9 (Aug. 29, 2018), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108243392; and I.R.S. Local Standards, IRM 5.15.1.10 (Nov. 22, 2021), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862107676576.
- 41 *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- 42 417 U.S. 40 (1974).
- 43 *Id.* at 53.
- 44 461 U.S. 660 (1983).
- 45 See *Rusk v. State*, 440 S.W.3d 694 (Tex. App. 2013).
- 46 NLADA filed an amicus curiae brief with the Supreme Court urging reversal of the lower court decision in *Bearden*.
- 47 *Bearden v. Georgia*, 288 S.E.2d 662, 663 (Ga. Ct. App. 1982) (citations omitted) (quoting *Simmons v. State*, 274 S.E.2d 726 (1980)).
- 48 *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).
- 49 *Snipes v. State*, 521 So.2d 89 (Ala. Crim. App. 1986).
- 50 *Rusk v. State*, 440 S.W.3d 694 (Tex. App. 2013).
- 51 AM. BAR ASS'N PRESIDENTIAL TASK FORCE ON BUILDING PUB. TRUST IN THE AM. JUST. SYS., ABA TEN GUIDELINES ON COURT FINES AND FEES (2018), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf.
- 52 *Id.* at iv.
- 53 Newly proposed guidelines are scheduled for consideration by the House of Delegates in August 2022.
- 54 Nat'l Network on Fines, Fees, and Bail Practices, *At-a-Glance Checklist for Ability to Pay Determination Hearings*, NAT'L CTR. FOR STATE CTS. (last visited June 24, 2022), https://www.ncsc.org/_data/assets/pdf_file/0032/64499/At-A-Glance-Checklist-for-Ability-to-Pay-Determination-Hearings-5-11-2021-002.pdf.
- 55 NAT'L CTR. FOR STATE CTS., ABILITY TO PAY HEARINGS: A PRIMER FOR JUDICIAL OFFICERS (2001), https://www.ncsc.org/_data/assets/pdf_file/0030/56568/Accompanying-Materials-Ab-to-Pay.pdf.
- 56 Damion Shade, *Reducing Oklahoma's Court Fines and Fees Is Police Reform*, OKLA. POL'Y INST. (Dec. 10, 2020), <https://okpolicy.org/reducing-oklahomas-court-fines-and-fees-is-police-reform>.

- 57 Courtney Cullison, *Oklahoma Poverty Profile*, OKLA. POL'Y INST. (May 2, 2019), <https://okpolicy.org/2017-oklahoma-poverty-profile>.
- 58 OKLA. STAT. tit. 22, §§ 1355 et seq., <https://www.oscn.net/applications/oscn/index.asp?level=1&ftdb=STOKST22#IndigentDefenseAct>.
- 59 See example in Appendix E.
- 60 See Carrie Savage Phillips, Comment, *Oklahoma's Indigency Determination Scheme: A Call for Uniformity*, 66 OKLA. L. REV. 655 (2014), <https://digitalcommons.law.ou.edu/olr/vol66/iss3/5>.
- 61 OKLA. STAT. tit. 22, § 1355A(A), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=214842>.
- 62 OKLA. STAT. tit. 22, § 1355A, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=214842>.
- 63 OKLA. STAT. tit. 22, § 1355.14(E), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=439069>.
- 64 OKLA. STAT. tit. 22, § 1355.14, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=439069>.
- 65 OKLA. STAT. tit. 22, § 983, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=491541>.
- 66 OKLA. STAT. tit. 22, § 979a, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=440122>.
- 67 BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), <https://www.prisonpolicy.org/reports/incomejails.html>.
- 68 See generally OKLA. STAT. tit. 43A, <https://oksenate.gov/sites/default/files/2019-12/os43A.pdf>.
- 69 For other fee possibilities see OKLA. STAT. tit. 22, § 991a, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=70803> (regarding suspension of judgment and sentence).
- 70 OKLA. STAT. tit. 22, § 991d, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=70819>.
- 71 OKLA. STAT. tit. 22, § 991d, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=70819>.
- 72 OKLA. R. CT. CRIM. APP. 8.1-8.6, <http://okcca.net/rules>.
- 73 The U.S. Supreme Court has ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was "willful." *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).
- 74 OKLA. R. CT. CRIM. APP. 8.6, <http://okcca.net/rules/rule-8.6> (emphasis added).
- 75 For discussion of precisely when appointment of counsel is deemed constitutionally required, see THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 13 (2015).
- 76 See example in Appendix E.
- 77 See Chapter 2 for discussion of formula-based calculations of indigency, such as the Living Wage Calculator.
- 78 OKLA. STAT. tit. 20, § 55, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=68709>.
- 79 See OKLA. INDIGENT DEF. SYS., 2021 ANNUAL REPORT (2021), <https://www.ok.gov/OIDS/documents/2021%20Annual%20Report.pdf>.
- 80 See examples discussed in the "Ability to Pay" section of Chapter 2. See also examples in work developed for New York and Texas: N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., STANDARDS FOR DETERMINING FINANCIAL ELIGIBILITY FOR ASSIGNED COUNSEL (2021), <https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf>;
ANDREW L.B. DAVIES, BLANE SKILES, PAMELA R. METZGER, JANELLE GURSOY & ALEX ROMO, DEASON CRIM. JUST. REFORM CTR., SOUTHERN METHODIST UNIV. DEDMAN SCH. OF LAW, GETTING GIDEON RIGHT: ELIGIBILITY FOR APPOINTED COUNSEL IN TEXAS MISDEMEANOR CASES (2022), <https://doi.org/10.25172/dc.8>.
- 81 See AM. BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf.
- 82 Corey Jones, *Day 1: How One Woman's Story Depicts Oklahoma's Struggle with Fines, Fees and Costs in the Justice System*, TULSA WORLD, Dec. 2, 2019, https://tulsaworld.com/news/local/crime-and-courts/day-1-how-one-womans-story-depicts-oklahoma-s-struggle-with-fines-fees-and-costs/article_935c0fb6-25ee-5599-952d-99551641c9d9.html.
- 83 See "OSCN Docket System Review" below, plus a full report on results in Appendix C.
- 84 See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST. AT N.Y. UNIV. SCH. OF LAW, THE STEEP COSTS OF CRIMINAL JUSTICE FINES AND FEES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 9 (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf#page=9.
- 85 *Id.*
- 86 Gene Perry, *The Cost Trap: How Excessive Fees Lock Oklahomans into the Criminal Justice System Without Boosting State Revenue: Part III*, OKLA. POL'Y INST. (May 2, 2019), <https://okpolicy.org/cost-trap-excessive-fees-lock-oklahomans-criminal-justice-system-without-boosting-state-revenue-part-iii>.
- 87 *Id.*
- 88 H.B. 3925, 58th Leg., 1st Reg. Sess. (Okla. 2022), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB3925%20ENR.PDF.
- 89 S.B. 1458, 58th Leg., 1st Reg. Sess. (Okla. 2022), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/SB/SB1458%20ENR.PDF.
- 90 S.B. 1532, 58th Leg., 1st Reg. Sess. (Okla. 2022), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/SB/SB1532%20ENR.PDF.
- 91 For instance, as part of the agency's formal revised FY 2022 budget request submitted to the Oklahoma legislature, the Executive Director of OIDS included a letter dated April 7, 2021 requesting a \$1.3 million general fund appropriation "swap-out" for the annual average amount in indigent defense services fee disbursements it received for FY 2017-FY 2019, the years leading up to COVID. Letter on file with NLADA.
- 92 SB 1458 passed but in unrecognizable form from its initial contours.
- 93 See *Court Records*, OKLA. STATE CTS. NETWORK (last visited June 23, 2022), <https://www.oscn.net/dockets>.
- 94 A detailed report of the OSCN records review is available in Appendix C.
- 95 See FINES & FEES JUST. CTR., END FEES, DISCHARGE DEBT, FAIRLY FUND GOVERNMENT: FFJC POLICY GUIDANCE FOR ELIMINATING CRIMINAL LEGAL SYSTEM FEES AND DISCHARGING DEBT (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/01/FFJC-Policy-Guidance-Fee-Elimination-1.13.22.pdf>.

- 96 See VERA INST. OF JUST., INCARCERATION TRENDS IN IOWA (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-iowa.pdf>.
- 97 See LEGIS. SERVS. AGENCY, FISCAL NOTE: SF 457 – CRIMINAL SURCHARGE AND COURT FEE REFORM (LSB1922SZ.3) (2020), <https://www.legis.iowa.gov/docs/publications/FN/1138013.pdf>.
- 98 See *Iowa Profile*, PRISON POL’Y INITIATIVE (last visited June 23, 2022), <https://www.prisonpolicy.org/profiles/IA.html>.
- 99 See IOWA OFF. OF THE STATE PUB. DEF., FISCAL YEAR 2018 PERFORMANCE REPORT 3 (2018), <https://spd.iowa.gov/sites/default/files/FY18%20Performance%20Report%20DOM.pdf>.
- 100 IOWA CODE § 815.9(1), <https://www.legis.iowa.gov/docs/code/815.9.pdf>.
- 101 IOWA CODE § 815.9(4), <https://www.legis.iowa.gov/docs/code/2022/815.9.pdf>.
- 102 IOWA ADMIN. CODE r. 493-12.2, <https://www.legis.iowa.gov/docs/iac/rule/01-15-2020.493.12.2.pdf>; IOWA CODE § 815.9(4)(b), <https://www.legis.iowa.gov/docs/code/2022/815.9.pdf>.
- 103 Iowa Legal Aid reviewed IDFR debt of 840 of the roughly 2,000 clients it has served through its collateral consequences project and found:
- 54% of these clients owed IDFR
 - The median debt was \$567.40
 - The mean was \$915.39
 - The largest debt was \$9,439
 - 120 people owed \$1,000 or more.
- The amounts owed often included IDFR accumulated from multiple cases, not just one case.
- 104 See IOWA CODE §§ 910.1-910.15, <https://www.legis.iowa.gov/docs/code/910.pdf> (ch. 910, regarding restitution).
- 105 See S.F. 457, 88th Gen. Assemb., 1st Sess. (Iowa 2020), <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF457>.
- 106 See IOWA CODE § 910.7, <https://www.legis.iowa.gov/docs/code/2022/910.7.pdf>.
- 107 See IOWA ADMIN. CODE r. 493-12.2(3)(a), <https://www.legis.iowa.gov/docs/iac/rule/01-15-2020.493.12.2.pdf>.
- 108 IOWA CODE § 910.1(4), <https://www.legis.iowa.gov/docs/code/2022/910.1.pdf>.
- 109 See Appendix F for two completed examples of a Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution.
- 110 IOWA CODE § 910.7A, <https://www.legis.iowa.gov/docs/code/2022/910.7A.pdf>.
- 111 See IOWA CODE § 815.9, <https://www.legis.iowa.gov/docs/code/2022/815.9.pdf>.
- 112 See IOWA CODE §§ 602.8107(3)(b)(1), (4)(c)-(d), <https://www.legis.iowa.gov/docs/code/2022/602.8107.pdf>.
- 113 IOWA CODE § 910.7, <https://www.legis.iowa.gov/docs/code/2022/910.7.pdf>.
- 114 Taken from a June 15, 2020 Iowa Legal Aid briefing, *Analysis of SF457, as amended and passed June 13, 2020*. The original analysis included a 25% collection fee, which was abolished in 2021, thus that amount is not included here.
- 115 This example is based on a real-world shoplifting case involving an Iowa Legal Aid client. The assumptions were that: \$30 in merchandise was reported stolen; third theft offense; the minimum fine was imposed; the defendant could not bond out and therefore spent 30 days in jail; and, defendant took his case to trial, thereby increasing attorney fees and costs, yet the court-appointed attorney did not exceed the fee cap. In other words, the debt could be – and often is – more than shown in the example.
- 116 IOWA CODE § 901C.2(1), <https://www.legis.iowa.gov/docs/code/2022/901C.2.pdf>.
- 117 State v. Doe, 927 N.W.2d 656 (Iowa 2019).
- 118 State v. Rogers, 251 N.W.2d 239 (Iowa 1977) (citing Fuller v. Oregon, 417 U.S. 40 (1974)). This protection was later codified in 1982. See IOWA CODE § 910.2, <https://www.legis.iowa.gov/docs/code/2022/910.2.pdf>.
- 119 Fuller, 417 U.S. at 53.
- 120 Letter from Alex Kornya, Litigation Director & General Counsel, Iowa Legal Aid, to Nicholas Behlke, Iowa Dep’t of Revenue (Dec. 8, 2020) (on file with NLADA).
- 121 Iowa Judicial Branch.
- 122 Clerk of Court Collections, FY 2012 / 2013. <https://www.legis.iowa.gov/docs/publications/DF/661913.pdf>
- 123 Iowa Judicial Branch.
- 124 Clerk of Court Collections, FY 2012 / 2013. The “fines collected” number is actually an underestimation, as it is drawn only from state fines figures in this report, and doesn’t include city fines and certain traffic fines.
- 125 Iowa Judicial Branch.
- 126 Clerk of Court Collections, FY 2012 / 2013
- 127 Iowa Judicial Branch, 2014 AR Report <https://www.legis.iowa.gov/docs/publications/DF/662172.pdf>
- 128 Clerk of Court Collections, FY 2014 / 2015 <https://www.legis.iowa.gov/docs/publications/DF/661975.pdf>
- 129 Iowa Judicial Branch, 2015 AR Report <https://www.legis.iowa.gov/docs/publications/DF/711087.pdf>
- 130 Clerk of Court Collections, FY 2015 / 2016 <https://www.legis.iowa.gov/docs/publications/DF/798152.pdf>
- 131 Iowa Judicial Branch, 2016 AR Report <https://www.legis.iowa.gov/docs/publications/DF/799090.pdf>
- 132 Clerk of Court Collections, FY 2015 / 2016.
- 133 Iowa Judicial Branch, 2017 AR report. <https://www.legis.iowa.gov/docs/publications/DF/860848.pdf>
- 134 Clerk of Court Collections, FY 2017 / 2018 <https://www.legis.iowa.gov/docs/publications/DF/969686.pdf>
- 135 Iowa Judicial Branch, 2018 AR Report <https://www.legis.iowa.gov/docs/publications/DF/969685.pdf>
- 136 Clerk of Court Collections, FY 2017 / 2018.
- 137 Iowa Judicial Branch, AR Report <https://www.legis.iowa.gov/docs/publications/DF/1069863.pdf>
- 138 Clerk of Court Collections, FY 2018 / 2019 <https://www.legis.iowa.gov/docs/publications/DF/1062201.pdf>
- 139 Preliminary numbers from Iowa Judicial Branch, subject to change.
- 140 *Id.*
- 141 VERA INST. OF JUST., INCARCERATION TRENDS IN NEVADA (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf>.
- 142 *Id.*
- 143 *Id.*

- 144 *Id.*
- 145 *Id.*
- 146 *Id.*
- 147 NEV. DEP'T OF CORR. RSCH. & PLAN., FISCAL YEAR 2022 STATISTICAL SUMMARY 1, https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Statistics/Quarterly_Reports_by_Fiscal_Year/SS.Q1FY22.pdf.
- 148 NEV. REV. STAT. § 178.398, <https://www.leg.state.nv.us/nrs/nrs-178.html#NRS178Sec398>.
- 149 See NEV. ADVISORY COMM'N ON THE ADMIN. OF JUST. - JUST. REINVESTMENT INITIATIVE, PRACTITIONER GUIDE TO AB 236 (2020), <https://sentencing.nv.gov/uploadedFiles/sentencingnvgov/content/News/AB236%20Practitioner's%20Guide%204.20.pdf>.
- 150 See *Population of Counties in Nevada (2022)*, WORLD POPULATION REVIEW (last visited June 23, 2022), <https://worldpopulationreview.com/us-counties/states/nv>.
- 151 See N.H. REV. STAT. ANN. § 604-A:9, <https://www.gencourt.state.nh.us/rsa/html/LIX/604-A/604-A-9.htm>.
- 152 *Office of Cost Containment*, STATE OF N.H. (last visited June 23, 2022), <https://www.das.nh.gov/occ/index.aspx>.
- 153 Email from New Hampshire Department of Corrections Public Information Office to author (Apr. 25, 2022) (on file with NLADA) (emphasis added).
- 154 All figures in this table, except OCC Collections, are from: STATE OF NEW HAMPSHIRE 2022-2023 BIENNIUM BUDGET REQUEST 310, 870-874 (2022), https://www.das.nh.gov/budget/Budget2022-2023/2022B01_budget_book_Agency.pdf.
- 155 MASS. GEN. LAWS ch. 211D, § 2A(i), <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleI/Chapter211D/Section2A>.
- 156 TENN. CODE ANN. § 40-14-103(4), <https://advance.lexis.com/documentpage/?pdmfid=1000516&crd=9627537e-54e8-47d3-8bd0-4a4e5c873b45>.
- 157 See WYO. OFF. OF THE STATE PUB. DEF., ANNUAL REPORT FY21, https://drive.google.com/file/d/1_kqUH1Dch6YtLRsgyqn9TPkSgySU4YM/view.
- 158 See WYO. OFF. OF THE STATE PUB. DEF., ANNUAL REPORT FY19, <https://drive.google.com/file/d/1DOyKeleNw4s3kFi5qrh44nkt8ks3ml8/view>.
- 159 No state with available collections data reported collecting more than five percent of assessed recoupment; some reported far less. And, among the few states with available data, public defense system fee collections amounted to a high of 6.7 percent of overall indigent defense system funding and, again, in other states, amounted to much less.
- 160 FINES & FEES JUST. CTR., END FEES, DISCHARGE DEBT, FAIRLY FUND GOVERNMENT: FFJC POLICY GUIDANCE FOR ELIMINATING CRIMINAL LEGAL SYSTEM FEES AND DISCHARGING DEBT 12 (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/01/FFJC-Policy-Guidance-Fee-Elimination-1.13.22.pdf>.
- 161 See ANDREA BOPP STARK & GEOFFREY WALSH, NAT'L CONSUMER LAW CTR., CLEARING THE PATH TO A NEW BEGINNING: A GUIDE TO DISCHARGING CRIMINAL JUSTICE DEBT IN BANKRUPTCY 36 (2020), https://www.nclc.org/images/pdf/criminal-justice/Rpt_Bankruptcy_and_CJ_Debt.pdf.
- 162 See ABA PRESIDENTIAL TASK FORCE ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM, ABA TEN GUIDELINES ON FINES AND FEES (2018), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf.
- 163 See N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., STANDARDS FOR DETERMINING FINANCIAL ELIGIBILITY FOR ASSIGNED COUNSEL (2021), <https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf>.
- 164 See ANDREW L.B. DAVIES, BLANE SKILES, PAMELA R. METZGER, JANELLE GURSOY & ALEX ROMO, DEASON CRIM. JUST. REFORM CTR., SOUTHERN METHODIST UNIV. SCH. OF LAW, GETTING GIDEON RIGHT: ELIGIBILITY FOR APPOINTED COUNSEL IN TEXAS MISDEMEANOR COURTS (2022), <https://doi.org/10.25172/dc.8>.



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