



Montana Legislative Services Division
Legal Services Office

TO: Task Force on State Public Defender Operations

FROM: Julie Johnson, Legal Services Office

RE: Administrative Fees (28, D)

DATE: May 12, 2016

At the February 2016 meeting, I was asked to look at options for charging and collecting an administrative fee to a person seeking services from OPD.

Currently, a court may order a convicted defendant to pay the costs of counsel assigned to represent the defendant as follows:

- (a) If the defendant pleads guilty prior to trial:
 - (i) to one or more misdemeanor charges and no felony charges, the cost of counsel is \$250; or
 - (ii) to one or more felony charges, the cost of counsel is \$800. § 46-8-113(1)(a), MCA¹

However, if the case goes to trial, a defendant can be ordered to pay the "costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial." § 46-18-113(1)(b), MCA. The court must consider the defendant's ability to pay the costs and whether payment of costs will result in a "substantial hardship" on the defendant or the defendant's immediate family. § 47-1-111(3)(b), MCA.

One proposal is to assess a person seeking assistance from the OPD a filing fee at the time he or she submits an "Application for Court-Appointed Counsel". One suggestion is to assess a filing fee sliding scale based on the person's income or assets with a maximum filing fee of \$100.

A number of states allow the public defender's office to assess a filing fee. According to a survey by the Spangenberg group, a number of states have opted to assess and collect an administrative fee. Opponents to charging administrative fees argue that charging fees produces a chilling effect to the right to counsel, while proponents counter that as long as there is a waiver provision there will be no chilling effect.

OPD is not opposed to having its clients pay a fee for their constitutional right of representation so long as it is reasonable and within their ability to pay and that a court has the ability to waive fee at the judge's discretion. However, OPD does not want to be charged with collecting the fee and has suggested that another entity collect the fee and keep a percentage of the fee collected for administration.

¹ The full text of § 46-8-113(1)(a), MCA, regarding payment of costs is attached at the end of this memo.

Recently, the U.S. Department of Justice issued a letter dated March 14, 2016, to court leaders regarding key principles relevant to the enforcement of fines and fees. The letter was in response to those seeking clarification to state and local courts regarding their legal obligations with respect to fines and fees, but would similarly apply to mandated fees for court-appointed services. The outlined principles are as follows:

- Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful
- Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees
- Courts must not condition access to a judicial hearing on the prepayment of fines or fees
- Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees
- Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections
- Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release
- Courts must safeguard against unconstitutional practices by court staff and private contractors

Another consideration in adopting a filing fee is what to do if a client does not pay the fee. Currently, Montana law requires that OPD not withhold its services for delay or failure to fill out an "Application for Court Appointed Counsel". Section 47-1-111(2)(d), MCA, provides:

The office may not withhold the timely provision of public defender services for delay or failure to fill out an application. However, a court may find a person in civil contempt of court for a person's unreasonable delay or failure to comply with the provisions of this subsection (2).

One would assume that this provision would similarly apply to the payment of an application fee, and that the failure to submit the fee would not permit OPD to "withhold the timely provision of public defender services".

46-8-113. Payment by defendant for assigned counsel -- costs to be filed with court. (1) Subject to the provisions of subsections (2) and (3), as part of or as a condition of a sentence that is imposed under the provisions of this title, the court shall determine whether a convicted defendant should pay the costs of counsel assigned to represent the defendant as follows:

(a) If the defendant pleads guilty prior to trial:

(i) to one or more misdemeanor charges and no felony charges, the cost of counsel is \$250; or

(ii) to one or more felony charges, the cost of counsel is \$800.

(b) If the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial. The office of state public defender shall file with the court a statement of the hours spent on the case and the costs and expenses incurred for the trial.

(2) Any costs imposed pursuant to this section must be paid in accordance with 46-18-251(2)(e).

(3) In any proceeding for the determination of whether a defendant is or will be able to pay the costs of counsel, the court shall question the defendant as to the defendant's ability to pay those costs and shall inform the defendant that purposely false or misleading statements by the defendant may result in criminal charges against the defendant.

(4) The court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay the costs imposed by subsection (1). The court may find that the defendant is able to pay only a portion of the costs assessed. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(5) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

(6) A defendant's obligation to make payments for the cost of counsel is suspended during periods of incarceration.

(7) Any costs imposed under this section must be included in the court's judgment.