

Assessments and Payment of Costs for Assigned Public Defenders

Syllabus

To its other purposes SB 187, passed by the 2011 legislature, added that OPD “ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients’ financial ability to pay.” [¶1]

During FY 2012 OPD received \$191,890 from 1,181 of 4,109 clients who had an account receivable open with OPD. [¶2, ¶31]

There are impediments and constraints of law and fact inhibiting OPD from recovering more of the costs of representation from its clients. [¶3] Due process and equal protection remain as possible constraints on recouping costs. [¶¶11-12] The primary function of OPD is the representation of people within 133% of the poverty level or those who for various reasons do not have the financial ability to retain a lawyer. [¶30] M.C.A. §46-8-113(2) and the sentencing statutes, M.C.A. §46-18-201, et seq., impede OPD from recovering more from clients whose ability to pay for all of the costs of their representation is tenuous from the outset. [¶¶4-5] There are incentives for courts, particularly courts of limited jurisdiction, to levy fines and assess the payment of other costs on OPD clients before taxing the payment of the costs of their representation, the statutorily designated last priority. [¶¶5-6, ¶8] The sum of other assessments levied can be substantial. [¶6, ¶¶8-10]

The courts rather than OPD are tasked with determining who should pay for the cost of their representation and deciding how much those defendants should pay. Therefore OPD does not bill its clients for services rendered, rather the courts make assessments on a client’s ability to pay. [7] For quite some time there has been a well defined process in place for ensuring that public defender clients pay reasonable costs for services based on the clients financial ability to pay. [¶¶13-16] Already in place is the procedure for a defendant’s compliance when ordered to pay toward the costs of representation. [¶¶17-18] At the sentencing stage and during a contempt proceeding the public defender has a constitutional and ethical duty to develop and present any defenses the defendant may have to the payment of restitution, charges, fees, fines, and the assessment of costs, including the cost of representation; present those defenses at the hearing; and preserve those issues for appeal if necessary. [¶¶19-21] An OPD client can return to the sentencing court for a change in the amount of the payments ordered on the basis of manifest hardship. [¶21]

Many courts have consistently concluded that the vast majority if not all of the people represented by public defenders cannot or will not be able to pay the cost of representation. [¶22]

How the defendant’s ability or inability to pay is proven and what evidence is admissible, seemingly, is not settled in courts that do levy costs. [¶¶22-26]

While an increasing number of courts have been assessing greater amounts for the costs of representation, for a variety of reasons OPD has had and continues to have difficulty reconciling amounts received and determining who may be delinquent. [¶¶27-31] Payments for the costs of representation can be delayed significantly given those costs have the last statutory priority after restitution, mandatory charges, supervisory fees, other costs, and fines are paid and because in practice the courts or the court administration in charge of collecting payments usually create a schedule or allows the defendant to make the payments during the term of the sentence. [¶27 & ¶29] Lump sum payments received from courts frequently have not been accompanied with breakdowns and assistance on followup for client information has been mixed. [¶29 & ¶31] In some instances, OPD cannot identify the courts from which payments came or for whom credits are due from the county collection reports. [Id.] Identifying either from calls to the county treasurers and then the court administration has resulted in limited success. [Id.]

Efforts at recovering costs may be impractical under the circumstances of a particular case. Pursuing noncompliance can be more costly in time and resources than it is cost-effectively worth, especially when the OPD client has too few resources left after paying restitution, charges, fees, other costs, and fines. [¶¶32-35] But OPD has a duty to comply with State policy regarding collection of amounts due.

¶1 To its other purposes *M.C.A. §47-1-102*¹ Senate Bill 187 (2011) [SB 187] added that the Office of the State Public Defender [OPD] “ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients’ financial ability to pay.” The meaning of this purpose may range from a belief that the clients do not have the financial ability to pay if qualified for public defender services to an opinion that lifelong levies of the full cost of representation should be imposed on all convicted public defender clients without the protections other debtors have. How well the agency does in fulfilling this purpose will likely be measured differently by each observer somewhere along the line of divergence between these perspectives.

¶2 During FY2012 OPD received \$ \$191,890² from 1,181 of 4,109 clients who had an account receivable open with OPD. The clients ordered to pay have climbed steadily each year.

¶3 The amount received may not seem like much given the number of clients served as the average for FY2012 is only \$162. However, the impediments and constraints of law and fact should provide insight into a better evaluation of how well the agency has done and how well it may do under current circumstances.

¶4 The priorities set for the allocation of payments of restitution, charges, fees, costs, and fines in *§46-18-251(2)* are an impediment in the way of OPD recovering more of the costs of representation:

(2) Except as otherwise provided in *46-18-236(7)(b)* and this section, if a defendant is subject to payment of restitution and any combination of fines, costs, charges under the provisions of *46-18-236*, or other payments, 50% of all money collected from the defendant must be applied to payment of restitution and the balance must be applied to other payments in the following order:

- (a) payment of charges imposed pursuant to *46-18-236*;
- (b) payment of supervisory fees imposed pursuant to *46-23-1031*;
- (c) payment of costs imposed pursuant to *46-18-232* or *46-18-233*;
- (d) payment of fines imposed pursuant to *46-18-231* or *46-18-233*; and
- (e) any other payments ordered by the court.

¶5 Arguably, the priority for recouping the costs of representation was on the *§46-18-251(2)(c)* level before July 1, 2011, although there is no indication any court designated that level or that anyone collecting charges, fees, costs or fines for the courts gave the cost of legal assistance that middle priority as payments were made.³ Nonetheless, while SB 187 was working its way through the legislature an amendment was drafted for making the cost of public defender representation the highest priority ahead of charge payments only to have the bill on passage expressly make those costs the last priority.⁴ The *§46-18-251(2)(c)* priority argument was dashed by the enactment of SB 187 since a particular statutory provision, *§46-8-113(2)*, is paramount to the more general sentencing provisions in chapter 18.⁵ It is now guaranteed that OPD will be the last paid after a defendant has paid all of the other charges, fees, costs and fines taxed.

¶6 The sum of other assessments levied can be substantial. A sentence must require payment of full restitution to the victim if the sentencing judge finds that a victim has sustained a pecuniary loss.⁶ The costs of supervising the payment of restitution are charged at a rate of 10%

of the restitution ordered, but not less than \$5.⁷ All courts of original jurisdiction must tax upon conviction or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines of (a) \$15 for each misdemeanor charge; (b) the greater of \$20 or 10% of the fine levied for each felony charge; and (c) an additional \$50 for each misdemeanor and felony charge under title 45, §61-8-401, or §61-8-406.⁸ Other financial obligations put on indigent defendants can further impede the recovery of the costs of OPD representation. §46-18-201(4)(d), (e), and (f) allow the sentencing judge to impose conditions for the payment of the costs of confinement, payment of a fine as provided in §46-18-231, and payment of costs as provided in §46-18-232. §46-18-232(1) costs include the costs of jury service, the costs of prosecution, and the costs of pretrial, probation, or community service supervision in misdemeanor or felony cases. These costs must be limited to expenses specifically incurred by the prosecution or other agency in connection with the proceedings against the defendant, or \$100 per felony case or \$50 per misdemeanor case, whichever is greater. A maximum fine allowed in felony cases is usually set at \$50,000. The maximum fine for most misdemeanors is \$500 although it can be higher for some offenses.

¶7 It is within the foregoing context that the courts are tasked with deciding who should pay for the cost of their representation and the courts are charged with the duty of determining how much those defendants should pay.⁹ OPD has never had the responsibility for doing either.

¶8 First, there are incentives for assessing fines and other costs before ordering defendants to pay for the costs of their representation. Courts are encouraged to assess a fine or costs because a court is required to waive payment of the §46-18-236(1) mandatory charges if it determines under §46-18-231(3) and §46-18-232(2) that the person is not able to pay a fine and costs or make payment within a reasonable time.¹⁰ With a possible exception in drug cases, the clerks of the district courts pay fines and costs collected into the state general fund.¹¹ However, 50% of the fines and costs collected in justice courts are distributed into the county general fund with the remainder going into the state general fund.¹² M.C.A. §46-18-236(1)(a) (\$15) and (1)(b) (\$20 or 10%) charges collected are earmarked for paying the salaries of deputy county attorneys, other salaries in the office of the county attorney, or the salaries of city and town attorneys and deputies.¹³

¶9 Of course, payments for the costs of representation are deposited into a state special revenue account which may be used only for the operation of OPD without the counties receiving any share of those funds.¹⁴ Moreover, OPD is a state agency funded from the state general fund. A visit to county websites produces some information for comparison with the assessments of the costs of representation although one difficulty lies in being certain of the sources deposited into accounts designated differently from “fines” or “fines and forfeitures.” It must also be kept in mind that “forfeitures” suggest the persons charged did not have any legal representation and that all “fines” were not levied against OPD clients. Cascade County reported fines on a modified accrual basis of accounting in the amount of \$503,103, \$1,411,362, \$476,136, and \$399,334 for fiscal years 2007 through 2010, respectively. During the same period the Cascade County district and justice courts assessed \$2,235 in FY2009, and \$5,965 in FY2010 to pay into the OPD special revenue account. Also on a modified accrual basis of accounting, Butte-Silver Bow County reported fines and forfeitures on page 199 of its “Comprehensive Annual Financial Report for Fiscal Year Ended 2010” totaling \$582,229, \$643,978, \$632,353 (or \$436,261 on page 30), and \$675,297 (or \$520,570 on page 30) for fiscal years 2007 through 2010, respectively, *i.e.*, a total ranging between \$2,183,038 and \$2,533,857,

while the courts assessed \$2,678 (FY2008), \$1,636 (FY2009) and \$15,280 (FY2010), *i.e.*, \$19,594 for the cost of representation, during the same four years. In Gallatin County \$748,252 in fines and forfeitures were reported during FY2008 while the district and justice courts assessed \$574 for the costs of representation; \$1,064,206 compared to assessing \$3,118 during FY2009; and \$324,847 in fines and forfeitures while \$5,934 was ordered for payment into the OPD special revenue account in FY2010.

¶10 The “Financial and Compliance” reports indicate Ravalli County reported fines and forfeitures in the amounts of \$254,836 (FY2007), \$140,299 (FY2008), \$237,331 (FY2009) and \$150,750 (FY2010), *i.e.*, \$783,216 for the county general fund. During those same fiscal years the district and justice courts ordered OPD clients to pay \$4,545, \$213, \$66,911 and \$13,239 respectively, *i.e.*, \$84,908 for their cost of representation. \$57,127 of the \$66,911 assessed in FY2009 for the OPD special revenue account was imposed in the sentence of Anne Marie Stout who is serving life in prison for the murder of her husband Bill.

¶11 In some cases, due process and equal protection remain possible constraints on recovering the costs of representation. In the past, the amount assessed had to be limited to the cost incurred by OPD for providing the defendant with counsel.¹⁵ Thus, the client should not have been charged a mandatory amount if the public defender devoted less than \$150 or \$500 worth of time on the defense. There was an example where a court of limited jurisdiction assessed less than \$150 on a defendant when the public defender reported the two tenths of an hour spent in the office with the client and the few minutes in court as about 15 minutes. The attorney could have been held in contempt if more or less time than that spent had been reported. Fraud would have been committed on the defendant if the time spent on the case had been inflated or the public defender had recommended the statutory \$150 be assessed. \$150 for 15 minutes equaled \$600 an hour, an exorbitant rate by any measure, and many times in excess of the §46-8-113(2) (2009) prohibition against assessing costs greater than those incurred by OPD.

¶12 Even though SB 187 removed the limitation on the amount assessed to be no greater than the cost OPD incurred, an assessment of some amount, including \$250 or \$800, might take on unconstitutional “elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.”¹⁶ Provisions similar to those in §46-8-113(4) and (5) are permissible under constitutional principles regarding the availability of legal counsel.¹⁷ *State v. Ellis*¹⁸ affirms the constitutionality of §46-8-113(4) and (5). *State v. Farrell* involved the pronouncement of a maximum sentence based on the length of time the court thought it would take the defendant to make restitution and pay for the costs of his representation. The Supreme Court went through an extensive review of U.S. Supreme Court decisions about the appropriateness of a due process or equal protection analysis¹⁹ before concluding “[d]ue process requires only that indigency or poverty not be used as the touchstone for imposing the maximum allowable punishment” and the admonishment that “[u]pon remand, the trial court is free to reconsider the possibility of a ten year suspended sentence, but only upon grounds which give fair consideration to Farrell’s financial condition.” Much can be drawn from a review of *Farrell* but helpful here is a quote taken from *Bearden v. Georgia*, 461 U.S. 660, 666, fn. 8 (1983):

A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant’s financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant’s level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context

is a relative term rather than a classification, fitting “the problem of his case into an equal protection framework is a task too Procrustean to be rationally accomplished,” *North Carolina v. Pearce*, 395 U.S. 711, 723, ... (1969). The more appropriate question is whether consideration of a defendant’s financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

A situation like the one cited earlier can happen again. Qualifying for OPD services means a \$250 or \$800 assessment on a plea can have such a significant impact on the defendant’s financial resources that the imposition will take on unconstitutional elements of punitiveness and discrimination. A levy of \$250 for 15 minutes of legal assistance would equal \$1,000 per hour, an hourly rate arguably so arbitrary and unfair as to be a denial of due process.

¶13 Historically, before the statewide public defender system went into effect on July 1, 2006, a court could impose the cost of reasonable compensation and costs incurred by the court-appointed counsel as part of or as a condition under the sentence.²⁰ These subsections were amended to provide that the costs assessed would be within those incurred by OPD after the statewide system began operations.²¹ SB 263 amended §46-8-113(1) (2009) to require the courts to levy an assessment of \$150 for misdemeanors and \$500 for felonies as a part of or a condition under a sentence of a convicted defendant who was represented by a public defender. SB 187 made some significant changes to §46-8-113(1). The SB 263 requirement for the courts to make an assessment of \$150 or \$500 as a part of or a condition under a sentence was replaced with a provision that “... the court shall determine whether a convicted defendant should pay the costs of counsel assigned ...”²² The assessment structure changed from \$150 to \$250 for misdemeanors and \$500 to \$800 for felonies if an OPD client pleads guilty prior to trial.²³ Additionally, there is now a statutory presumption that the entire cost incurred by OPD is to be levied if the case goes to trial.²⁴

¶14 Nevertheless, each court has long had the obligation under §46-8-113 to determine whether the defendant has or will have the ability to pay and, if so in cases now, how much of \$250, \$800, or the entire cost of representation can the defendant pay. Each court is now expressly required to determine “whether a convicted defendant should pay the costs of counsel assigned” before imposing any payment requirement.²⁵ During that proceeding the court must question the defendant about the ability to pay after informing the defendant “that purposely false or misleading statements may result in criminal charges against the defendant.”²⁶ “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.”²⁷ 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).”²⁸ Further, “[t]he court may find that the defendant is able to pay only a portion of the costs assessed.”²⁹ Finally, “[a]ny costs imposed under this section must be included in the court’s judgment.”³⁰

¶15 In many respects the SB 187 amendments only codified existing case law. A court could not and cannot reserve the right to change a sentence or add conditions later and, absent statutory authority, lacks the jurisdiction to modify the sentence later.³¹ Before sentencing a defendant to pay for the cost of representation, courts were and are supposed to conduct a §46-8-113 inquiry into the ability of the defendant to pay and, upon consideration of the available evidence, make a determination of the extent to which the defendant was or would be able to pay.³² A full-fledged adversarial inquiry was and is not required but any defenses to payment

asserted by the defendant should be fully considered.³³ An order for the payment of the cost of representation could not and cannot stand without a meaningful inquiry into the defendant's financial status and findings on the record that there are sufficient resources to repay the costs.³⁴ A sentence was and will still be illegal if the court does not make an affirmative finding that the defendant can afford to pay the amount ordered.³⁵

¶16 For quite some time there has been a well-defined process in place for ensuring that public defender clients pay reasonable costs for services based on the clients financial ability to pay. At sentencing the court supposedly conducts a meaningful inquiry into the ability of the defendant to pay. Presented through the appointed public defender, any defenses to payment the defendant can assert should be fully considered by the court. In determining the amount and method of payment of costs, the court should take into account the financial resources of the defendant and the nature of the burden the payment of costs will impose on the defendant and those who are dependent upon the OPD client. Upon consideration of the available evidence, the court presumptively determines the extent to which the defendant is or will be able to pay, makes findings on the record, and expresses the extent to which there are resources for paying some, all, or none of the costs of the services provided by OPD in the sentencing judgment. Of course, how much of the costs of representation a court can order paid is limited by the remaining financial ability of the defendant after paying the restitution, charges, fees, other costs, and fines ordered.

¶17 Already in place is the procedure for a defendant's compliance when ordered to pay toward the costs of representation. §46-8-115 provides for penalties that can be imposed by the sentencing court if a person ordered to pay the costs of defense is in default. This statute appears to be modeled after the recoupment statute approved by the United States Supreme Court in *Fuller v. Oregon*.³⁶ A person in default on the payment of the cost of representation ordered can be brought into court by the prosecutor or the court on a show cause citation or an arrest warrant to show why the default should not be treated as a contempt of court.³⁷ The court may modify the terms of payment or revoke the payment of any unpaid portion in whole or in part if the court determines the default is not contempt.³⁸ Conversely, §46-8-115(2) permits the court to find the default constitutes civil contempt if the accused fails to show a good faith effort to make the payment or that the default was not attributable to an intentional refusal to obey the court's order to pay the cost. §46-8-115(3) sets the imprisonment penalty for a finding of contempt:

The term of imprisonment for contempt for nonpayment of the costs of assigned counsel must be set forth in the judgment and may not exceed 1 day for each \$25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

¶18 Further, §46-8-115(5) establishes the procedure for the collection of payments on which there has been a default:

A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to

imprisonment for contempt until the amount of the payment for costs has actually been collected.

¶19 A financially eligible person cited to show cause should be entitled to representation by a public defender since there is a potential for incarceration upon a finding the person is in civil contempt for not paying the cost of representation by a public defender in an earlier proceeding. A role of the public defender at the sentencing stage and during a contempt proceeding is to develop and present any defenses the defendant may have to the payment of restitution, charges, fees, fines, and the assessment of costs, including the cost of representation, and present those defenses at the hearing. Those issues are thereby preserved for appeal if there is something illegal about an order for payment.

¶20 The failure of a public defender in fulfilling this role raises the issue of ineffective assistance of counsel perhaps because there would be no record on which a reviewing court could determine there was a meritorious defense. Further, an appellate court generally will not review sentencing issues on appeal that were not raised in the lower court by an objection.³⁹ The *Lenihan*⁴⁰ case provides an exception to the general rule but only allows appellate review of a sentence that is alleged to be illegal or in excess of statutory mandates.⁴¹ A sparingly used common law plain error review might be available but that review is discretionarily determined on the basis of the particular facts and circumstances of each case compelling a finding that (a) not reviewing the claimed error may result in a manifest miscarriage of justice, (b) may leave unsettled the question of the fundamental fairness of the trial or proceedings, or (c) may compromise the integrity of the judicial process.⁴²

¶21 Absent an appellate review, the defendant could return to the sentencing court for a change in the amount of the payments ordered on the basis of manifest hardship.⁴³ Similar provisions have been in §46-8-113 since 1981. Even later the defendant could argue a good faith effort to pay the cost of representation was made or that the default was not attributable to an intentional refusal to obey the court's order at a §46-8-115 civil contempt hearing. The opportunity to show at any time that recovery of the costs of legal defense will impose "manifest hardship" is one of the reasons Montana's procedure passes constitutional muster.⁴⁴ There are similar provisions for relief from charges, fees, costs, and fines.⁴⁵ Obviously, it is important for public defenders to advocate the defenses against sentences ordering the payment of the cost of representation so lawful assessments are entered and so burdensome, unnecessary, costly, time consuming appeals and post-sentence hearings are reduced, if not avoided.

¶22 46 judges preside over 56 district courts in 22 judicial districts and 112 judges serve 61 justice courts, 84 city courts and 6 municipal courts of limited jurisdiction in Montana. These courts have long displayed disparity in how the cost of representation issues are decided.⁴⁶ Many courts have consistently concluded that the vast majority if not all of the people represented by public defenders cannot or will not be able to pay the cost of representation. Only 41 district courts and 62 courts of limited jurisdiction have assessed costs since July 1, 2006. How the defendant's ability or inability to pay is proven and what evidence is admissible, seemingly, is not settled in courts that do levy costs. For instance, in at least one jurisdiction the prosecutors are reluctant at having plea agreements allow for a §46-8-113 determination, instead insisting the defendant promise to pay \$250 or \$800. "As set by the legislature" is a position taken by judges in that jurisdiction if there is no agreement between the prosecutor and the defendant. These prosecutorial and judicial positions are abrogations of §46-8-113 and case law

rights and responsibilities. So is a preconceived conclusion that indigent defendants cannot or will not be able to pay any costs.

¶23 As evidence of ability or inability, the judges in the preceding illustration have suggested filing under seal the indigency questionnaire [IQ] form “Application for Court-appointed Counsel” used by OPD in determining eligibility for services at the outset. Some prosecutors want the completed questionnaire as proof of the ability or inability to pay the costs of representation. Concerns about OPD doing either arise out of §47-1-111(2)(c) (2005): “Information disclosed in the application, financial statement, or affidavit is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing.”

¶24 Too vast to recount here, many stories have circulated about the impropriety of political, judicial and prosecutorial interference with the delivery of the assistance of counsel for indigent defendants. One of the purposes for creating OPD was to “ensure that the system is free from undue political interference and conflicts of interest.”⁴⁷ The enabling act of OPD instructed the Public Defender Commission [PDC] to establish procedures and adopt rules for determining the eligibility for public defender services on the basis of indigency.⁴⁸ Among those instructions the PDC was charged with ensuring that the eligibility determination process is fair and consistent statewide and required it to prohibit individual public defenders from performing eligibility screening.⁴⁹

¶25 In what looks like a circumvention of *Rios v. Justice Court*,⁵⁰ a court in eastern Montana reportedly is now making eligibility determinations by examining the financial resources information on the IQ forms defendants are submitting when applying for the appointment of a public defender. This is being done by the judge acting as the witness called for on the IQ form. *Rios*⁵¹ examined §47-1-111(1) (2005) and concluded that OPD has the duty of making the initial determination of eligibility subject to the court’s review and approval. Since *Rios* the third sentence in subsection (2)(b) and the second sentence in subsection (1)(d)⁵² have been added so courts can inquire into the truth of the information contained in the defendant’s affidavit and the propriety of the eligibility determination by OPD. However, the scope of inquiry remains statutorily in the context of the defendant’s eligibility for OPD services. Beyond eligibility, §47-1-111(2)(c) restricts the admissibility of information in the eligibility documents for purposes of impeachment or in a subsequent prosecution for perjury or false swearing. In this atmosphere OPD has been reluctant at sharing information gathered during eligibility determination even though it has been noted by the Supreme Court that §47-1-111 does not provide that the information on a defendant’s application for counsel is confidential.⁵³

¶26 Yet, §46-8-113 and the *Starr*, *Hirt*, and *Farrell* cases cited in the endnotes clearly require courts to determine the extent of a defendant’s ability to pay. Prosecutors shouldn’t have to take the word of a defendant during plea agreement negotiations any more than prosecutorial representations must be taken as true by the defense without production of the evidence. While information on the IQ documents may not be admissible, the evidence underlying that information should not be rendered inadmissible merely because of its reflection on the eligibility documents. Pay stubs, tax returns, divorce decrees, mortgages and loan documents, bills, receipts, and so on are best evidence a public defender may need in proving a client’s inability to pay \$250, \$800, or the full costs of representation as much as the prosecution may need such evidence when trying to prove some ability to pay. The costs incurred by OPD cannot be determined without knowing the time devoted by the public defender in presenting the

defense. The court cannot make sustainable findings on the record without this combination of evidence.⁵⁴

¶27 During the existence of OPD, the courts have been able to order payment of the OPD cost assessed “... to be made within a specified period of time or in specified installments.”⁵⁵ When a court defers imposition of a sentence or suspends all or a portion of execution of the sentence the judge may impose the payment of the cost of a public defender as a condition during the deferred imposition or suspension of the sentence.⁵⁶ In most instances a sentence can be deferred for a period not exceeding 1 year for a misdemeanor or for a period not exceeding 3 years for a felony.⁵⁷ However the period of deferment can be doubled if a financial obligation is imposed as a condition of the sentence.⁵⁸ Suspended sentences falling outside of these ranges should undergo a *Farrell* analysis.⁵⁹ Paying the costs of representation can be delayed significantly given those costs have the last statutory priority after restitution, mandatory charges, supervisory fees, other costs, and fines.⁶⁰

¶28 While an increasing number of courts have been assessing greater amounts for the costs of representation, for a variety of reasons OPD has had and continues to have difficulty reconciling amounts received and determining who may be delinquent. At pages 59 - 61 of the benchbook⁶¹ presumably used by the courts of limited jurisdiction there are alternative forms for sentences that the judges may use when sentencing; however, the courts have not and are not now sending sentences in either of those forms to the OPD central office for tracking payments. Rather, various different forms have been developed by courts that notify OPD about the cost assessments. Most of those forms merely indicate whether assessments have or have not been imposed without telling OPD what amounts, if any, have been assessed for fines or other payments before OPD becomes eligible for payment or if a schedule had been set for any of those payments. OPD has not known when other payments were made or if schedules changed unless the court notified OPD. Rarely, if ever have either happened. Before July 1, 2011, OPD clients were frequently told to send payments for their representation directly to OPD. At the same time some clerks of other courts of limited jurisdiction have forwarded payments from assessed clients with breakdowns of who paid. Sometimes lump sums have been sent without the breakdowns. Assistance on follow-up for the client information has been mixed.

¶29 From the district courts, OPD has received the names of those ordered to pay some amount of the costs of representation. Most of the sentencing judgments have not provided a schedule for the payment of any of the charges, fees, costs, or fines. While §46-18-234 provides payment is due immediately if permission by the court is not granted for payment within a specified time or on a schedule, in practice court administration in charge of collecting payments usually creates a schedule or allows the defendant to make the payments during the term of the sentence. As with the courts of limited jurisdiction, before July 1, 2011, there was a mixture of court administrators collecting payments and OPD clients paying OPD directly. However, payments on judgments assessed since July 1, 2011 are collected through the district or justice courts and sent to the county treasurers rather than to OPD and in turn have been deposited with the department of revenue using the code for the OPD special revenue account on the “county collection report.” The clerks have 10 days within which to deposit the funds with the treasurers who in turn have 20 more days in which to transfer funds to the department of revenue. OPD cannot identify the courts from which payments came or for whom credits are due from the county collection reports. Identifying either from calls to the treasurers and then the court administration has resulted in limited success.

¶30 The SB 187 amendment of §46-8-114 again has the clerks of the sentencing courts collecting and allocating §46-8-113 payments in accordance with §46-18-251(2). At least now the court clerks, parole/probation officers, or others collecting payments can inform the courts or prosecutors if OPD clients are delinquent in their payments.

¶31 However, problems remain. The first technical note on the SB 187 fiscal note said:

1. Section 4 of this legislation requires the clerk of the sentencing court to collect fees from OPD clients and forward the funds to the Department of Revenue for deposit in OPD state special revenue fund. OPD will need information from each clerk for each fee assessed to its clients as well as any cash paid by a client so that it may do proper accounting and reporting. If this information is not provided to OPD, it will not be able to comply with required legislative reporting.

How the clerks of the municipal, city and town courts are making deposits is not clear. The clerks of the district and justice courts make deposits into the OPD special revenue account through the county treasurers. The county treasurers do not have the information about which clients paid how much. It is problematic in finding out which court made a deposit during any given period when OPD doesn't necessarily learn clients made payments until up to 30 days or more later. Getting the information from some clerks is as difficult as it was before July 1, 2011.

¶32 There are other significant impediments to cost recovery. The Anne Marie Stout case provides an example. The \$57,127 she was ordered to pay in 2009 makes up 6% of the \$900,298 of accounts receivables owed at the end of FY2011. Collecting \$57,000 from her is fraught with difficulty. Anne Marie Stout is serving life in prison for the murder of her husband Bill with whom she had jointly owned a home. The same sentence ordering her to pay OPD also orders the reimbursement of Ravalli County in the amounts of \$2,794.47 for the cost of prosecution and \$11,776.52 for the costs of jury service. §46-18-251(2)(c) gives payment to Ravalli County priority over deposits into the OPD special revenue account. The court found the jointly owned home had been sale listed for \$795,000 with about \$204,300 owed against it. Since sentencing on February 5, 2009, OPD has received \$35.28 toward the \$57,127 assessed against her. OPD has not executed against the property because it doesn't have the financial ability to retire the remainder of the \$204,300 and the balance due, if any, on the \$14,571 owed Ravalli County at a sheriff's sale before beginning to recover the balance it is owed. Moreover, Bill Stout's heirs, presumably his surviving children, are entitled to \$125,000 of the \$250,000 homestead exemption while, arguably, Anne Marie is entitled to the other half that is exempt from execution. OPD would have to bid somewhere in the neighborhood of \$500,000 or more to buy the property for resale. The hope would be someone bid more at the first sale so OPD could receive \$57,094. Incidentally, this scenario also pretty much explains why Stout was represented by OPD rather than by a lawyer she retained.

¶33 OPD clients can be ordered to show cause why they are not paying for the costs of their representation or any of the other assessments ordered. Doing that takes OPD, judicial, prosecutorial, parole/probation, and/or law enforcement time and resources. Revocation of suspended or deferred sentences or jail time for contempt are the severest penalties that can be exacted for noncompliance. Courts are very reluctant to do so, and rarely if ever do, because of the jail time cost to the state, county or city. In the final analysis, OPD represents indigents, people within 133% of the poverty level or those who for various reasons do not have the financial ability to retain a lawyer in private practice.

¶34 Sentencing judges obviously have frequently determined within the foregoing framework of law and fact that the vast majority of the people represented by public defenders cannot or will not be able to pay the cost of representation. An OPD client may have precious few resources left if too much was ordered paid in restitution, charges, fees, other costs, and fines. Since the inception of the statewide system more than 160,000 clients have been represented by the end of fiscal year 2012 and the courts have imposed the payment of some amount of the cost on 5,294 defendants in criminal cases. The report accounting for the payment of costs demonstrates that amounts assessed have grown.

¶35 While greater assessments are being ordered on more defendants and more of them are paying more each year, more people (4,109) owed more (\$1,274,121) at the end of FY2012 than at any other time. This trend is consistent with the situation in other public defender programs. Multiple studies have been done but in 2010 the Brennan Center for Justice at the New York University School of Law published a study entitled “Criminal Justice Debt: A Barrier to Reentry” that can be accessed at http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf. Charges used by fifteen states other than Montana were studied and conclusions were drawn about the consequences of imposing those charges on the indigent as well as the negative impact the efforts at collecting those charges have on the justice system as a whole including the courts, court staff, prosecutors and defenders, law enforcement, prisons and jails. Plenty can be found in the report to distinguish the situation in Montana from the findings in the report. However, careful study and consideration must continue to be given to whether the same negative consequences the report found will emerge in Montana before more emphasis is put on charging more indigent defendants for more of the cost of their representation and collection efforts are ramped up. An additional consideration in Montana is whether write-offs by OPD conflict with a court’s order.

1. **47-1-102. Purpose.** The purposes of this chapter are to:

- (1) establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense;
- (2) ensure that the system is free from undue political interference and conflicts of interest;
- (3) provide that public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state;
- (4) establish a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respectful of regional and community needs and interests;
- (5) ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner; and
- (6) ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients’ financial ability to pay.

2. Included is the accounting report for the collection of the costs of representation assessed by courts on convicted criminal defendants as a part of or a condition under a sentence imposed. Segregating SB 263 (2009) by fiscal year, the report details the number of people upon whom the courts assessed a payment of costs, the total amounts assessed in a fiscal year, the amounts collected by year, the number of people who paid in full their accounts receivable during a year, the number of people who had accounts receivable open at the end of a year, and the accounts receivable balances owed at the end of a year.

3. Before July 1, 2011, §46-18-201(3)(a)(ii) and §46-18-201(4)(g) provided, and still provide, the judge could

impose the “payment of the costs of assigned counsel as provided in 46-8-113.” §46-18-232(1) then provided, and still provides, that “[a] court may require a convicted defendant in a felony or misdemeanor case to pay costs, as defined in 25-10-201, plus” As it remains, §46-18-251(2)(c) then provided the middle priority level for the “payment of costs imposed pursuant to 46-18-232 or 46-18-233” ahead of fines and “other payments” ordered. Relying on this statutory structure, §46-18-251(2)(c) could have been amended for clarity to provide “payment of costs imposed pursuant to 46-8-113, 46-18-232 or 46-18-233.” Deposit of the 46-8-113 cost payments into the OPD special revenue account would have been assured by §47-1-110(2)(a).

4. *M.C.A. §46-8-113(2)* (2011).
5. *M.C.A. §1-2-102* (2011); *State v. Brown*, 354 Mont. 329, 333, ¶12 (2009).
6. *M.C.A. §46-18-201(5)* (2011).
7. *M.C.A. §46-18-241(2)* (2011).
8. *M.C.A. §46-18-236(1)* (2011).
9. *M.C.A. §46-8-113* (2011).
10. *M.C.A. §46-18-236(2)* (2011).
11. *M.C.A. §46-18-235(1)* (2011).
12. *M.C.A. §3-10-601(2)* and (3) (2011); *M.C.A. §46-18-235(2)* (2011).
13. *M.C.A. §46-18-236(6)* (2011).
14. *M.C.A. §46-8-114* (2011) and *§47-1-110* (2011). The Montana Public Defender Act of 2005 established a public defender account in the state special revenue fund which can receive deposits from several sources including “payments for the cost of a public defender ordered by the court pursuant to §46-8-113 as part of a sentence in a criminal case.” *M.C.A. §47-1-110*. Before the system went into effect payments were made to the clerks of the district courts who, in turn, forwarded the payments to the department of revenue for deposit into the state general fund. *M.C.A. §46-8-114* (2005). If ordered in justice courts, 50% should have been paid into the county general fund and the other half deposited into the state general fund. *M.C.A. §3-10-601(3)* and *§46-18-235(2)* (2005). After the system became operational most of the payments came directly from the clients, although some payments were collected by clerks of court and forwarded to OPD, for deposit into the special revenue account. SB 187 amended *M.C.A. §46-8-114* (2011) to require the payments be made to the clerk of the sentencing court for allocation according to *M.C.A. §46-18-251(2)(e)* (2011) and deposit in the special revenue account. *M.C.A. §46-8-113(2)* (2011). The SB 187 amendments guarantee that the money deposited into the special revenue account will be collected by the court clerks from the last money OPD clients pay after making restitution and paying mandatory charges, supervisory fees, other costs assessed, and fines. The money deposited can be used only for the operation of the statewide public defender system. *M.C.A. §47-1-110*. One use will be for public defender commission [PDC] staff positions “only when the public defender account established pursuant to 47-1-110 has received sufficient revenue pursuant to 46-18-113(1)(a) and (1)(b) to maintain a balance in the account that would sustain any staff position approved by the commission for at least 1 year.” *M.C.A. §2-15-1028(6)(b)* (2011).
15. *M.C.A. §46-8-113(2)* (2009).
16. *State v. Ellis*, 339 Mont. 14, 18, ¶14 (2007), quoting from *James v. Strange*, 407 U.S. 128, 142 (1972).
17. *State v. Farrell*, 207 Mont. 483, 492 (1984), citing *Fuller*, 417 U.S. 40.
18. *Ellis*, 339 Mont. at 18-19, ¶¶16-17.
19. *Farrell* 207 Mont. at 494-99.
20. *M.C.A. §46-8-113(1)* and (2) (2005).

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21. *Id.*
 22. *M.C.A. §46-8-113(1)* (2011).
 23. *Id.*
 24. *Id.*
 25. *Id.*
 26. *M.C.A. §46-8-113(3)* (2011).
 27. *M.C.A. §46-8-113(4)* (2011).
 28. *Id.*
 29. *Id.*
 30. *M.C.A. §46-8-113(6)* (2011).
 31. *State v. Hirt*, 329 Mont. 267, 271, ¶¶19-20 (2005).
 32. *Hirt*, 329 Mont. at 271, ¶20; *State v. Hubbel*, 304 Mont. 184, 192-93, ¶37 (2001).
 33. *State v. Farrell*, 207 Mont. 483, 492 (1984), quoting from *United States v. Bracewell*, 569 F.2d 1194, 1200 (2nd Cir. 1978).
 34. *Hirt*, 329 Mont. at 271, ¶22, citing *Farrell*.
 35. *State v. Starr*, 339 Mont. 208, 210, ¶10 (2007).
 36. *State v. Lenihan*, 184 Mont. 338, 344-45 (1979).
 37. *M.C.A. §46-8-115(1)* (2005).
 38. *M.C.A. §46-8-115(4)* (2005).
 39. *State v. Kotwicki*, 335 Mont. 344, 347, ¶8 (2007).
 40. *Lenihan*, 184 Mont. at 343.
 41. *Kotwicki*, 335 Mont. at 347, ¶8.
 42. *State v. Upshaw*, 335 Mont. 162, 165, ¶12 (2006).
 43. *M.C.A. §46-8-113(5); §46-18-232(2); §46-18-246* (2011).
 44. *Farrell*, 207 Mont. at 492, citing *Fuller v. Oregon*, 417 U.S. 40, 47 (1974).
 45. The court is required to waive payment of the *§46-18-236(1)* charges if it determines under *§46-18-231(3)* and *§46-18-232(2)* that the person is not able to pay the fine and costs or make payment within a reasonable time. *M.C.A. §46-18-236(2)* (2011). A court may not sentence a defendant to pay a fine or costs unless it is determined the person is or will be able to pay. *M.C.A. §46-18-231(3)* and *§46-18-232(2)* (2011). A defendant may seek remission for the payment of *§46-18-232(1)* costs. *M.C.A. §46-18-232(3)* (2011). *§46-18-233(2)* prohibits the revocation of a deferred or suspended sentence upon default if the default is not attributable to an intentional refusal to obey the court's order or a failure to make a good faith effort to make the payment. The payment of restitution may be modified or waived. *M.C.A. §46-18-246* (2011). If the person ordered to pay restitution is not able to pay any restitution due to circumstances beyond his or her control the court may order the performance of community service for which the person must be given credit. *M.C.A. §46-18-241(3)* (2011).
 46. Included is a chart showing the amounts each of 103 courts have ordered paid and the amounts received.

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47. *M.C.A. §47-1-102(2)* (2005).
48. *M.C.A. §47-1-111(6)* (2005).
49. *Id.*
50. *Rios v. Justice Court*, 334 Mont. 111 (2006).
51. *Rios*, 334 Mont. at 114, ¶9.
52. **47-1-111. Eligibility--determination of indigence--rules.** (1)(a) When a court orders the office to assign counsel, the office shall immediately assign counsel prior to a determination under this section.
- (b) If the person for whom counsel has been assigned is later determined pursuant to this section to be ineligible for public defender services, the office shall immediately notify the court so that the court's order may be rescinded.
- (c) A person for whom counsel is assigned is entitled to the full benefit of public defender services until the court's order requiring the assignment is rescinded.
- (d) Any determination pursuant to this section is subject to the review and approval of the court. The propriety of an assignment of counsel by the office is subject to inquiry by the court, and the court may deny an assignment.
- (2)(a) An applicant who is eligible for a public defender because the applicant is indigent shall also provide a detailed financial statement and sign an affidavit. The court shall advise the defendant that the defendant is subject to criminal charges for any false statement made on the financial statement.
- (b) The application, financial statement, and affidavit must be on a form prescribed by the commission. The affidavit must clearly state that it is signed under the penalty of perjury and that a false statement may be prosecuted. The judge may inquire into the truth of the information contained in the affidavit.
- (c) Information disclosed in the application, financial statement, or affidavit is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing.
53. *Office of State Public Defender v. Whitefish City Court*, 342 Mont. 141, 146, ¶19 (2008).
54. *Starr*, ¶10.
55. *M.C.A. §46-8-114* (2005).
56. *M.C.A. §46-18-201(4)(g)* (2011).
57. *M.C.A. §46-18-201(1)(a)(i)* (2011).
58. *M.C.A. §46-18-201(1)(a)(ii)* (2011).
59. *State v. Pritchett*, 302 Mont. 1 (2000).
60. *M.C.A. §46-18-251(2)* (2011).
61. 2004 is the latest version of the benchbook found on the Montana Supreme Court website at <http://courts.mt.gov/lcourt/default.mcp.x>.

Office of the State Public Defender
Judgments, Assessments and
Collections of Legal Fees

	FY 2007	FY 2008	FY 2009	FY 2010	FY2011	FY2012
JUDGMENTS, COLLECTIONS AND OPD ASSESSMENTS PRE SB 263 / 187						
Balance of A/R @ Beg of Year	\$ -	\$ 41,211	\$ 138,207	\$ 358,925	\$ 333,840	\$ 323,469
Assessments by Year	49,229	131,814	253,292	14,371	20,475	11,725
Total Collections by Year	(8,018)	(34,818)	(32,574)	(39,456)	(30,845)	(5,300)
# of Clients represented by Collections Total	20	81	228	242	202	4
Total Balance of A/R @ End of Year **	\$ 41,211	\$ 138,207	\$ 358,925	\$ 333,840	\$ 323,469	\$ 329,894
Total # of Clients with open A/R @ Beg of Year	-	73	318	744	756	769
# of Clients Assessments by Year	81	285	488	14	18	7
Total # of Clients paid in full during fiscal year	(8)	(40)	(62)	(2)	(5)	(2)
Total # of Clients with open A/R @ End of Year	73	318	744	756	769	774
JUDGMENTS, COLLECTIONS AND ASSESSMENTS POST SENATE BILL 263 / 187						
Balance of A/R @ Beg of Year	\$ -	\$ -	\$ -	\$ -	308,299	716,632
Assessments by Year	-	-	-	329,516	501,483	414,185
Total Collections by Year	-	-	-	(21,218)	(93,149)	(186,479)
# of Clients represented by Collections Total	-	-	-	224	886	1,177
Total Balance of A/R @ End of Year **	\$ -	\$ -	\$ -	\$ 308,299	\$ 716,632	\$ 944,338
Total # of Clients with open A/R @ Beg of Year	-	-	-	-	1,014	2,477
# of Clients Assessments by Year	-	-	-	1,175	1,904	1,322
Total # of Clients paid in full during fiscal year	-	-	-	(161)	(441)	(464)
Total # of Clients with open A/R @ End of Year	-	-	-	1,014	2,477	3,335
TOTAL ALL JUDGMENTS, COLLECTIONS AND ASSESSMENTS INCLUDING SENATE BILL 263 / 187						
Balance of A/R @ Beg of Year	\$ -	\$ 41,211	\$ 138,207	\$ 358,925	\$ 642,139	\$ 1,040,102
Assessments by Year	49,229	131,814	253,292	343,887	521,957	425,910
Total Collections by Year **	(8,018)	(34,818)	(32,574)	(60,674)	(123,994)	(191,890)
# of Clients represented by Collections Total	20	81	228	466	1,088	1,181
Total Balance of A/R for Reporting Year **	\$ 41,211	\$ 138,207	\$ 358,925	\$ 642,139	\$ 1,040,102	\$ 1,274,121
Total # of Clients with open A/R @ Beg of Year	-	73	318	744	1,770	3,246
# of Clients Assessments by Year	81	285	488	1,189	1,922	1,329
Total # of Clients paid in full during fiscal year	(8)	(40)	(62)	(163)	(446)	(466)
Total # of Clients with open A/R @ End of Year	73	318	744	1,770	3,246	4,109

** Financial Statement Reporting as follows \$ - \$ 66,637 \$ 213,181 \$ 481,939 \$ 900,298 \$ 1,274,121

There exists a variance between A/R Reported here, and A/R reported on Financial Statements. This is created out of a time lag between dated court orders and signature of those orders, and a secondary lag for that information to make its way to the OPD Central Office for reporting here.