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# MONTANA PUBLIC DEFENDER COMMISSION STATE OF MONTANA

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Chair

## PROCESSES AND PROCEDURES FOR COLLECTING COSTS OF ASSIGNED COUNSEL ASSESSMENTS

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¶1 *Title 46* lays out the statutory processes and procedures for the creation, management, and collection of court ordered assessments including the costs of counsel assigned by OPD.

¶2 *M.C.A. §46-8-113(1)* grants the 208 Montana courts the discretionary authority to order a convicted defendant to pay some or all the costs of assigned counsel.

¶3 Only after conducting a meaningful ability to pay hearing may a court order a convicted defendant to pay some or all the costs of assigned counsel. *M.C.A. §46-8-113(3)*; *State v. Moore*, 2012 Mont. 95, ¶11, 365 Mont. 13, 277 P.3d 1212; *State v. Ellis*, 2007 MT 210, ¶¶16-17, 339 Mont. 14, 167 P.3d 896, discussing and relying upon *Fuller v. Oregon*, 417 U.S. 40, 49-50, 94 S.Ct. 2116, 2123 (1974); *State v. Hubbel*, 2001 MT 31, ¶37, 304 Mont. 184, 20 P.3d 111; *State v. Hirt*, 2005 MT 285, ¶22, 329 Mont. 267, 124 P.3d 147; *State v. Farrell*, 207 Mont. 483, 492, 676 P.2d 168, 173 (1984).

¶4 A court may not order a convicted defendant to pay some or all the costs of assigned counsel "unless the defendant is or will be able to pay the costs imposed ...." *M.C.A. §46-8-113(4)*; *Ellis*, ¶17; *Hirt*, ¶21.

¶5 A court order to pay some or all the costs of assigned counsel should be no greater than an amount the convicted defendant is or will be able to pay. *M.C.A. §46-8-113(4)*; *Ellis*, ¶17; *Hirt*, ¶21.

¶6 An order to pay some or all the costs of counsel assigned by OPD is a part of the sentencing judgment. *M.C.A. §46-18-201(3)(a)(ii)* and *(4)(g)*.

¶7 "... [T]he court may order payment to be made within a specified period of time or in specified installments." *M.C.A. §46-8-114(1)*; also *M.C.A. §46-18-234*.

¶8 "A defendant's obligation to make payments for the cost of counsel is suspended during periods of incarceration." *M.C.A. §46-8-113(6)*; *M.C.A. §46-8-114(2)*. The reason is that the amounts received were less than the costs of collection.

¶9 Assessments for recoupment of the costs of assigned counsel are usually not collectible immediately for the reasons in ¶7 - ¶8, ¶12 - ¶13, ¶16 - ¶17, ¶19 - ¶20, and ¶23 - ¶24.

¶10 The sentencing court knows how much and on what schedule a convicted defendant has been ordered to pay in restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, costs other than the costs of assigned counsel, and the costs of assigned counsel.

¶11 OPD rarely is informed of how much or on what schedule a court orders a convicted defendant to pay restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, costs other than the costs of assigned counsel, or the costs of assigned counsel.

¶12 *M.C.A. §46-8-113(5)* provides:

“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.”

¶13 Even after sentencing, a court has latitude in adjusting original orders for payments by lowering the amount to be paid or extending the time for payment:

(1) “If the court finds that the circumstances upon which it based the imposition of restitution, amount of the victim's pecuniary loss, or method or time of payment no longer exist or that it otherwise would be unjust to require payment as imposed, the court may adjust or waive unpaid restitution or the amount to be paid pursuant to *46-18-241(2)(a)* or modify the time or method of making restitution.” *M.C.A. §46-18-246*.

(2) A court may also extend the restitution schedule. *M.C.A. §46-18-246*.

(3) A court must waive payment of the charge imposed by *M.C.A. §46-18-236(1)* if the court determines under *M.C.A. §46-18-231* and *M.C.A. §46-18-232* that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time. *M.C.A. §46-18-236(2)*.

(4) The court, department, or board may reduce, waive, or suspend the monthly payment of the supervisory fee if it determines that the payment would cause the person a significant financial hardship. *M.C.A. §46-23-1031(1)(c)*.

(5) Upon petition of a defendant not in default a court “... may remit all or part of the amount due in costs or modify the method of payment” at anytime after entry of a judgment to pay some or all of those costs such as the costs of a jury or the costs of prosecution. *M.C.A. §46-18-232(3)*.

(6) A court may extend the time for payment of a fine. *M.C.A. §46-18-234*.

(7) Apparently a court does not have the authority to reduce the amount or remit payment of a fine. *M.C.A. §46-18-231(3)*.

¶14 OPD is not informed of what adjustments a court has made concerning how much or what schedule changes were made regarding the payment of restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, costs other than the costs of assigned counsel, or the costs of assigned counsel.

¶15 In addition to collecting the costs of assigned counsel, the sentencing court, sometimes by the clerk of court or parole and probation or someone else under the court's control, collects payments by defendants for restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, and other costs.

¶16 *M.C.A. §46-18-251(1)* provides that money collected from convicted defendants "must be allocated" as provided in that section.

¶17 *M.C.A. §46-18-251(2)* provides:

"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."

¶18 *M.C.A. §46-8-113(2)* requires that, "Any costs imposed pursuant to this section must be paid in accordance with 46-18-251(2)(e)."

¶19 Payments for the cost of appointed counsel should not be collected and deposited with the Department of Revenue into the *M.C.A. §47-1-110* OPD special revenue account until the convicted defendant has paid the charges, supervisory fees, other costs, and fines in that order. *M.C.A. §46-8-113(2)*; *M.C.A. §46-8-114(1)*; *M.C.A. §46-18-251*.

¶20 Assessments for the costs of assigned counsel are not due, receivable, or collectible until the convicted defendant has paid the charges, supervisory fees, other costs, and fines.

¶21 The sentencing court knows when the convicted defendant has paid the *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, and costs other than the costs of assigned counsel from the ledger of payments the court maintains.

¶22 "Payments must be made to the clerk of the sentencing court for allocation as provided in 46-18-201, 46-18-232, and 46-18-251 and deposited in the account established in 47-1-110." *M.C.A. §46-8-114(3)*.

¶23 Montana statutes provide that the costs of assigned counsel do not become a judgment in the same manner as other civil judgments. *Ellis*, ¶17. At least not until the convicted defendant is in default of payment of those costs as provided in *M.C.A. §46-8-115*.

¶24 *M.C.A. §46-8-115* prescribes the process and procedure when a convicted defendant is in default on payments for the costs of assigned counsel:

“(1) When a defendant who is sentenced to pay the costs of assigned counsel defaults in payment of the costs or of any installment, the court on motion of the prosecutor or on its own motion may require the defendant to show cause why the default should not be treated as contempt of court and may issue a show cause citation or an arrest warrant requiring the defendant's appearance.” (*Emphasis supplied.*) *M.C.A. §46-8-115(1)*.

“(2) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant's part to make a good faith effort to make the payment, the court may find that the default constitutes civil contempt.” *M.C.A. §46-8-115(2)*.

“(3) 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. *M.C.A. §46-8-115(3)*.

“(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.” *M.C.A. §46-8-115(4)*.

“(5) 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.” *M.C.A. §46-8-115(5)*.

¶25 OPD agrees that regular billing of unpaid balances is a standard business practice for financial management and collection of accounts receivables.

¶26 However, OPD does not send bills to its former clients ordered to pay some or all of the costs of assigned counsel because:

(1) The bills would have to be in the same terms the court ordered and would merely duplicate what the court put in the judgment or as modified from time to time;

(2) Assessments for the costs of assigned counsel are not collectible until all other assessments are paid in full;

(3) Regular billing for payment before all other assessments are paid would not generate revenue;

(4) OPD does not know with any certainty when the assessment is due and payable; and

(5) Regular billing for payment before the assessment is due and payable would be a waste of postage and labor costs and would not be fiscally responsible. For example, without considering labor costs, the postage would be \$1,470 per month if bills were sent

to 3,000 convicted defendants assessed for some of the costs of assigned counsel. The postage cost would grow to \$2,450 per month if 5,000 bills were mailed; and

(6) OPD estimates \$500,000 or more of general fund per fiscal year and at least 6 full time employees will be needed to identify who has been ordered to pay some or all of the costs of assigned counsel and track adjustments the 208 courts have made concerning how much or what schedule changes were made regarding the payment of restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, costs other than the costs of assigned counsel, or the costs of assigned counsel, so bills can be sent when the costs of assigned counsel become due and payable.

¶27 Whether an amount owed for the costs of assigned counsel is a bad debt or collectible is a decision only for the sentencing court to make. *M.C.A. §46-8-113(5)* or *M.C.A. §46-8-115(4)*.

¶28 Collection of an amount owed for the costs of assigned counsel is a function of the sentencing court when the court or the prosecutor moves to require the defendant to show cause why a default in payment should not be treated as contempt of court. *M.C.A. §46-8-115(1)*.

¶29 Only when the court concludes a default is civil contempt can steps be taken for collection:

“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.” *M.C.A. §46-8-115(5)*.

¶30 *M.C.A. §25-13-101, et seq.*, provides for the enforcement of judgments.

¶31 *M.C.A. §25-13-301, et seq.*, covers the form and content of writs of execution, notably that the writ of execution must “be directed to the sheriff or levying office” by the sentencing court imposing the sentencing. *M.C.A. §25-13-301(1)(b)*; *M.C.A. §46-8-115(1)*.

¶32 The return of the writ by the sheriff or levying officer will determine whether the order for the payment of the costs of appointed counsel is collectible if the court has not already made the determination that some or all of the amount is not collectible. *M.C.A. §25-13-401, et seq.*; *M.C.A. §46-8-115(4)*.

¶33 OPD has no authority greater than the sentencing court to determine whether an assessment for some or all of the costs of assigned counsel is a bad debt.