Standing Committee on Legal Services to the Poor in Criminal Matters

ABILITY TO PAY GUIDANCE FOR TEXAS COURTS AND PRACTITIONERS

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Introduction

About this Guidance

The laws governing fines and fees in Texas have changed rapidly over the past five years. This Guidance will help you understand those changes and provide best practices for implementing those changes easily and efficiently.

In Texas, costs and fines are assessed along with a criminal charge, whether it be a Class C misdemeanor or a first degree felony. Costs and fines can easily run in the thousands, which can pose a significant strain on low-income and even middle class families. Failure to pay these amounts can result in a slew of consequences, such as a suspension of a driver's license, extension of probation, or incarceration. These penalties can be devastating for low-income people and the communities they live in, furthering cycles of poverty and limiting opportunities for growth.

Texas law requires courts to consider ability to pay when setting fines and fees so that low-income folks can disentangle themselves from the criminal legal system and avoid being punished for their poverty. In order to set people up for success at sentencing, it is crucial that courts follow the letter and the spirit of these laws. It may seem like a daunting task, but it can be done without overburdening courts or litigants.

This Guidance explains the current fines and fees statutory scheme in Texas. Additionally, it analyzes new legislation, including the requirement that courts conduct an ability to pay assessment on the record at judgment in a criminal case. Finally, this Guidance provides best practices for judges and practitioners that can be readily adopted by courts.

Brief Summary

At sentencing, courts are required to conduct ability to pay assessments on the record to determine a person's capacity to afford fines and costs associated with their sentence. The court can only assess an amount that the person is able to afford.

The law recognizes that a person's ability to pay is subject to change. Therefore, people have the right to have their fines and costs reassessed even after judgment. A person has the right to notify the court that they need reassessment of their fines and costs at any time, and the court must reconsider that person's fines and costs.

The topics highlighted in this guidance are not only legally required by courts to consider, they are also efficient practice. Addressing folks' costs and fines at the outset of a case can help ensure successful progression of a sentence, and prevents courts and attorneys from spending time on the backend to address delinquent balances.

What it Means to Be Poor

For those experiencing poverty, affording the basic necessities for life is a challenge. The cost of fines and fees in the criminal justice legal system compounds this difficulty, forcing folks to choose between providing for their families or satisfying court-ordered debts. There are several metrics to gauge the income folks need to care for themselves and their families, and these metrics can also be used to understand a person's inability to afford fines and fees.

- *HUD's Income Limits*. HUD sets income limits to determine eligibility for public housing assistance, and to determine income thresholds to afford

housing in a given area in the country.[1] These income limits are categorized as "low," "very low," and "extremely low." For example, a "low income" for a single-person household in Texas is $42,050. "Very low" income for a single person household is $26,300. With increasing costs of housing, HUD's guidelines prove very informative in understanding the amount of money folks need to survive.

    - A full-time employee making minimum wage in Texas earns $13,920 before any taxes— just 33% of the "low" HUD standard and 53% of the "very low" standard.

- *MIT's Living Wage Calculator.* The developers of this metric appreciate that folks "working in low-wage jobs make insufficient income to meet minimum standards given the local cost of living," and developed this calculator to help "individuals, communities, and employers determine a local wage that allows residents to meet minimum standards of living."[2]
    - For example, a living wage for a single adult is:
        - $14.33 in Harris County
        - $15.21 in Dallas County
        - $13.14 in McLennan County
- To put this in perspective, the minimum wage in Texas is still $7.25 an hour.

[1] These calculations can be broken down by county, and even by various metro areas within the state. The income limits can be found at https://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.
[2] The MIT Living Wage Calculator can be found at https://livingwage.mit.edu/. Calculations are broken down by county.

Before Ordering Costs, Fees, and Fines:

Before ordering costs, fees, and fines, courts must conduct specific inquiries into the defendant's ability to pay *on the record* to ensure that folks are not set up to fail. For those who are unable to afford costs and fees, waiver is appropriate. For those who are indigent and cannot complete additional community service without undue hardship, waivers of fines are also appropriate. For those who are low-income but still able to pay something, the court must only assess fines, costs, and fees in affordable amounts.

Ability to Pay Determinations - Mandatory, and must be on the record (Article 42.15(a-1)).

> "[D]uring or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs."[3]

Under Texas Code of Criminal Procedure Article 42.15(a-1), courts are required to conduct ability to pay assessments on the record at sentencing. This entails a specific finding of the defendant's current financial status and whether they will be able to afford financial conditions of a criminal judgment.

The Code does not outline how exactly this assessment must be done, but courts may reasonably conclude that a person is unable to pay assessments without undue hardship if the any of the following apply:

[3] Tex. Code Crim. Pro. Ann. art. 42.15(a-1).

- Eligibility for representation by a court-appointed attorney or public defender;[4]
    - This creates a presumption of indigency, which is an element to waiving fines and costs.
    - Under 24.04(m), the court "may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection." This means that courts should not be considering factors such as the person's ability to borrow money or whether or not the person's parents or other relatives can afford to pay for an attorney.
- Current receipt of any needs-based public assistance/benefits;
    - This indicates that the government has already made a finding of indigency on a person's behalf.
- Household size/number of dependents as compared to net income:
    - Net income is below 100% of HUD's "very low" individual income limit for public housing;[5]
    - Net income is below MIT's living wage calculator for the given jurisdiction;[6] or
- Homelessness or housing insecurity.

[4] Factors to consider when appointing counsel are listed under Tex. Code Crim. Pro. Art. 24.04(m).
[5] Income limits can be found at https://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.
[6] The MIT Living Wage Calculator can be found at https://livingwage.mit.edu/.

- Courts should subtract significant recurring costs (i.e., treatment for disability or long-term ailment, child support payments) when calculating net income for the purposes of ability to pay findings.

Much of the information courts need to determine ability to pay can be gleaned from a sworn affidavit detailing a person's financial situation.[7] To endorse information provided in the affidavit, a person can attach paystubs, proof of receipt of government benefits, monthly bills, and any other information that they feel is relevant to explaining their financial situation.

Intentionality. This finding must be specific to the person who may be ordered to pay fines or costs. If a court assesses ability to pay by considering each defendant's situation individually, it avoids setting low-income folks up for failure by assessing amounts they have no hopes of paying. It prevents unnecessary incarceration or extensions of probation sentences for a person's inability to pay. It also ensures smoother court procedures in the long-term as courts see fewer cases of financial delinquency.

Flexibility. These findings must also be flexible and understand that a person's financial situation can change. Reassessments are required in cases where individuals experience difficulty in keeping up with payments. Furthermore, as discussed later on in

[7] The Supreme Court of Texas approved the Statement of Inability to Afford Payment of Court Costs, which can be found at https://www.txcourts.gov/media/1436042/stmtofinability.pdf. This is just an example of an affidavit that can be submitted to the court to detail a person's financial situation; any other sworn, detailed statement can be used.

this Guidance, it is wholly appropriate for already-ordered amounts to be reevaluated and even waived entirely during a sentence.[8]

"Reimbursement Fees" are now explicitly eligible for waiver "(Article 43.015(3)).

SB 1373 added "reimbursement fees" to the definition of "costs" as a category eligible for waiver under Texas Code of Criminal Procedure Article 43.015(3). Reimbursement fees include, but are not limited to:

- Payments for pretrial intervention programs[9]
- Fees to cover the services of peace officers for their time in a given case[10]
- Fees to cover the arrest and investigation of intoxication charges[11]

The explicit inclusion of pretrial diversion fees as waivable costs is a considerable development in the area of indigent defense. Previously, these programs have been largely only accessible to wealthier individuals. Now, the Code specifically provides that if a court deems a person a good candidate for pretrial diversion programs but the person is unable to pay the associated fees, the court should waive the fees and allow them access to the program. This will decrease post-conviction supervision loads and court dockets, and give individuals access to diversion programs they normally are kept out of due to their poverty. The process of waiving such fees is described in more detail below.

[8] Tex. Code Crim. Pro. ann. art. 43.035(a).
[9] Tex. Code Crim. Pro. ann. arts. 102.012 and 102.0121.
[10] *Id.* at Art. 102.011
[11] *Id*. at Art. 102.018.

If Fines, Fees, and Costs are Imposed, Which Can Be Reduced or Waived?

Costs:

Under Tex. Code Crim. Pro. Ann. art. 43.015(3), "costs" include any fees, including a reimbursement fee (described above), imposed by the court. This includes:

- Probation monthly supervision fees
    - Includes additional separate fees associated with probation, such as urinary analysis fees
- Court costs
- Pretrial fees[12]

While fines are only waivable if the person both (1) cannot afford to pay, and (2) cannot perform community service without undue hardship,[13] waiver of costs is appropriate with *only a finding of inability to pay*.[14] The legislature saw fit to make this distinction in 2019 with the passage of Senate Bill 346, due to the fact that, unlike fines, costs are non-punitive, and therefore it does not make sense to convert costs into community service. This is consistent with precedent set by the Texas Court of Criminal Appeals, *see, e.g.*, *Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009)("we hold that court costs are not punitive[.]").

The "ability to pay" threshold is a broader standard than indigency. Therefore, even folks who are not necessarily considered indigent by the court may still be unable to pay court costs, and are still eligible to have them waived.

[12] Tex. Code Crim. Pro. Ann. art. 43.015(3)). This is a change that was implemented with the passage of SB 1373 (2021).
[13] Tex. Code Crim. Pro. Ann. art. 43.091(a).
[14] *Id*. at 43.091(c)(1).

Probation-specific costs are waivable (Arts. 43.091(d), 42A.652(b))

Community supervision fees are waivable under both Article 43.091 and Article 42A.652(b). Article 42.A.652(b) explicitly permits the Court to waive community supervision fees if the Judge determines such payment would cause the defendant significant financial hardship. This includes monthly supervision fees, along with miscellaneous fees charged to the probation department, such as urinalysis fees. For these people, the monthly fee may be wholly waived outright (i.e., set to $0 a month).

However, for those that the court deems able to afford the costs of their community supervision, the Code dictates that monthly community supervision fees range between $25 and $60.[15] As ability to pay determinations ought to be individualized, monthly fees should be assessed within this range to the level a person is able to afford. For example, it may be appropriate to set the monthly fee to $25 for those who earn a steady income at 200% of the "very low" HUD individual income limit.

Fines (Articles 43.09 and 42.15)

Fines are assessed as a punishment specific to the charge. All ranges of charges can carry fines with them. Courts can set most fines very low or at $0 at the outset.

A waiver of a fine is appropriate and necessary for those who are unable to pay. A court should waive all or part of a fine if a person is both (1) indigent, and (2) unable to complete an alternative discharge method without undue hardship.[16] This includes fines that were imposed by a jury.

[15] Tex. Code Crim. Pro. Ann. art. 42A.652(a).
[16] Tex. Code Crim. Pro. Ann. art. 43.091.

Articles 43.09 and 42.15 lay out these alternative methods of discharging fines, the most common of which is community service. However, the Code defines community service several ways, including work and job skills training, or GED preparatory classes.[17] Courts are encouraged to take advantage of this broad range of community service to incentivize participation in programs that can lead to better outcomes for the individual.

In determining whether a person is unable to perform community service without undue hardship, the court may consider several factors. The Code of Criminal Procedure lists a few of the most common factors contributing to undue hardship:

(1) significant physical or mental impairment or disability;

(2) pregnancy and childbirth;

(3) substantial family commitments or responsibilities, including child or dependent care;

(4) work responsibilities and hours;

(5) transportation limitations;

(6) homelessness or housing insecurity; and

(7) any other factor the court determines relevant.[18]

It is worth noting that "undue hardship" does not equate to total impossibility. The Code does not require a person to exhaust every avenue possible before deeming community service an unsuitable replacement for a fine. A person can have completed community service previously but still experience an undue hardship in completing additional hours to discharge a fine due to the factors listed above.

[17] *Id*. at 43.09(h).
[18] *Id*. at (b).

If a person is indigent *and* faces an undue hardship in completing one of the alternative methods for discharging the fine, the Code dictates that waiver of all or part of the fine is the appropriate course of action. If only part of the fine is waived, the remaining balance must still be an amount that the person is able to afford.

Furthermore, it is recommended that courts offer *all individuals* the opportunity to complete various forms of community service, such as enrolling in job skills training or completing GED courses, in the interests of providing opportunities for personal growth.

Attorney's Fees

A defendant found indigent when counsel was appointed "is presumed to remain indigent for the remainder of the proceedings in the case unless a *material change* in the defendant's financial circumstances occurs." [19] Absent a finding of a material change in a person's finances from the time of appointment of counsel, a person is presumptively, and factually, indigent, and must not be charged attorney's fees, even as part of a plea negotiation.

The court can only assess attorney fees only if the court makes a finding that the person's financial circumstances have changed and the person now has an ability to pay those fees.[20] Thus, "the defendant's financial resources and ability to pay are *explicit critical elements* in the trial court's determination of the propriety of ordering reimbursement of costs and fees."[21] A finding of a material change in a person's ability

[19] Tex. Crim. Proc. Code Ann. art. 26.04(p) (emphasis added).
[20] *Id*. at 26.05(g); *see also* Wolfe v. State, S.W.3d 141, 144 (Tex. App. 2012) ("By now, it is well established that in order to assess court-appointed fees in a judgment, a trial court must determine that the defendant has the financial resources that enable him to offset in part or in whole the costs of legal services provided).
[21] Mayer v. State, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (emphasis added).

to pay must be made to lawfully assess reimbursement for a court-appointed attorney, and only the same financial factors considered when appointing an attorney may be considered when reassessing whether or not the person can later pay.[22]

Payment plans. (Art. 42.15(a-1)).

It is important to note that assessed fines and costs (including supervision costs) ought to be proportionate to a person's income. A person making $30,000 a year should not be assessed the same amount in fines and costs as a person making $100,000 a year, and payment plans should not take up a substantial portion of a person's income. In order to provide some structure and predictability to payments, courts are authorized to create payment plans under Article 42.15(a-1)(1). However, if a person experiences difficulty in maintaining this payment schedule, courts are authorized and encouraged to reassess the person's ability to pay under Article 43.035, as described below.

Courts have discretion to ensure that payment plans are not inordinately long. Even where a court sets a low monthly payment on a large balance, a person diligently paying each month can be trapped in the payment plan for many months or even years due to that large balance. This likely sets low income people up for failure. So for example, where a person is demonstrably struggling after six to twelve months of timely payments, the court can reassess the total balance and waive the remaining fines and costs. It need not extend a sentence of community supervision solely to continue enforcing the obligation on an already overwhelming balance of fines and costs.

[22] Factors to consider when appointing counsel are listed under Tex. Code Crim. Pro. Art. 24.04(m).

The Right to Have Ability to Pay Reassessed (Article 43.035)

Under Tex. Code Crim. Pro. Ann. art. 43.035, courts must reassess fines and costs if they have reason to believe the person is struggling to pay. A person may notify the court of their inability to afford assessed fines and costs via:

(1) Voluntarily appearing and informing the court or the clerk of the court in the manner established by the court for that purpose;

(2) Filing a motion with the court;

(3) Mailing a letter to the court; or

(4) Any other method established by the court for that purpose.

If the person provides the court with this above-listed notice under 43.035, the court must determine whether the fines and charges should be satisfied through the methods listed under 42.15(a-1). Furthermore, if a person provides the court with this notice and the court declines to grant relief on the papers, the court *must* conduct a hearing on the matter ("If a defendant notifies the court that the defendant has difficulty paying the fine and costs in compliance with the judgment, the court shall hold a hearing to determine whether that portion of the judgment imposes an undue hardship on the defendant.")[23]

The same options of full waiver, reduction, and payment plans are available to discharge already-assessed fines and costs.

[23] Tex. Code Crim. Proc. Ann. art. 43.035(a).

When a Person is Struggling to Keep Up with Payments (Mandatory Reassessment Under 43.035)

If a person falls behind on payments, the court is required by statute to conduct a reassessment of ability to pay and provide the defendant with the opportunity to explain their financial situation.[24] From there, the court ought to assess whether a full waiver, reduction, or payment plan for costs and fines is necessary. Finances and circumstances are ever-changing, and reevaluation of monetary obligations may sometimes be necessary. A person should not be punished for their poverty.

Conclusion

Texas law provides clear guidance on assessing fines and costs for justice-involved individuals, and outlines remedies the court must implement for those who are unable to afford fines and costs. Appreciating and understanding these laws ensure that our courts continue to operate in the interests of justice, and not at the expense of Texans experiencing poverty.

Contact

For questions regarding this guidance, feel free to contact Harjeen Zibari, member of the Legal Services for the Poor in Criminal Matters Committee ("LSP"), at indigent@tcdla.com.

[24] Tex. Code Crim. Proc. Ann. art. 43.035.