

What Attorneys Need to Know About Fines, Costs, and Restitution

JUSTIN ROMANO, JUBELIRER, PASS & INTRIERI, P.C.

ANDREW CHRISTY, ACLU OF PENNSYLVANIA



Introduction

1. What do defendants owe, and how does it affect them?
2. Background on criminal court debt
3. The imposition of fines, costs, and restitution at sentencing
4. Setting affordable payment plans
5. Methods courts use to collect debt
6. Eliminating debt
7. Failure to pay – contempt and probation violations
8. ARD and diversion programs

Types of financial obligations

- **Fines**
 - Punishment
 - Part of the sentence
- **Costs**
 - “Fees” and “costs” are the same
 - “Incident to the judgment” akin to collateral consequences
 - *Not* part of the sentence and not punishment
- **Restitution**
 - Compensation to a victim and rehabilitative
 - Part of the sentence (usually)

Court debt follows defendants for years

- Typical public defender client owes \$1,300 in fines, costs, and restitution in common pleas case
 - Generally about \$1,000 in court costs alone
- Statewide collection rates after 10 years:
 - Fines: 45%
 - Costs: 58%
 - Restitution: 25%

Court debt harms defendants

- Garnished wages
- Private debt collection
- Driver's license suspension
- Contempt – incarceration
- Probation violations – incarceration or extended supervision
- Ineligibility for TANF or food stamps
- Ineligibility for Clean Slate, expungements, and pardons

Tackling court costs at sentencing

- The only way to effectively protect your client in the long term is to ensure the court does not impose an unaffordable amount at sentencing
- There are systemic problems that require educating judges, court staff, and district attorneys

What to say at sentencing

- Do not ask the court to “waive” your client’s fines or costs
 - Put the onus on the court to only *impose* something your client can afford
 - The court is not doing you a favor – it’s following the law
- An approach: “We know that the Court needs to consider client’s ability to pay fines and costs and make findings on the record when imposing those obligations, so I would like to put some evidence on the record about my client’s ability to pay for your consideration about what my client can afford.”

Evidence to put on the record

- Monthly income
- Minus monthly expenses (rent, food, utilities, medicine, transportation, childcare, child support, cable, phone, church ..)
- People on SSI, public assistance, and SNAP are indigent and can't afford to pay (public assistance should not be going to pay court costs)

How to determine what your client can reasonably pay

- Start by identifying how much your client is likely to pay each month
- Try to identify a period of time for payments
 - Length of probation (or probation tail)
 - Length of statutory max sentence
 - Some other principled length of time
 - Goal is to have some time limit for the court to consider
- Multiply monthly payments x that period

Ability to pay

- People on SSI, public assistance, and SNAP are indigent and can't afford to pay
- Entire financial picture and life circumstances
 - Use eyes of a “housewife,” not an “accountant”
 - Cannot ignore the “ordinary expenses attendant on everyday life”
- Only the defendant's finances count
 - Cannot be required to borrow money from friends or family

Financial obligations at sentencing

- Fines – court must consider ability to pay
 - Mandatory vs discretionary fines
- Costs – court may consider ability to pay
 - Currently litigating whether courts *must* consider ability to pay
- Restitution – court can only consider ability to pay for certain types of restitution

Discretionary fines

- **42 Pa.C.S. § 9726** requires considering ability to pay
- **Commonwealth v. Ford**, 217 A.3d 824 (Pa. 2019): “But the plain language of the statute is clear: trial courts are without authority to impose non-mandatory fines absent record evidence that the defendant is or will be able to pay them.”
- **Commonwealth v. Allshouse**, 924 A.2d 1215 (Pa. Super. 2007): “[A] trial court must enter specific findings that would allow it to determine whether a defendant could pay a specific amount in fines.”

Court obligation in imposing discretionary fines

- Consider the defendant's ability to pay a fine
- Make findings on the record
- Impose a fine the evidence shows the defendant is or will be able to pay
- Ensure the defendant will still be able to pay restitution (if any)

Mandatory fines

- **Commonwealth v. Cherpes**, 520 A.2d 439 (Pa. Super. Ct. 1987): “. . . we ruled that specific penalty provisions prevail over more general penalty provisions. Such is the situation here. The penalty provision . . . is specific, and . . . must prevail over the more general provision in § 9726(c).”
 - Issue currently on appeal in several cases

Costs – key provisions

- Pa.R.Crim.P. 706(C): The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations.

Costs – key provisions

42 Pa.C.S. § 9721(c.1): Mandatory payment of costs.--Notwithstanding the provisions of section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties) or any provision of law to the contrary, in addition to the alternatives set forth in subsection (a), the court shall order the defendant to pay costs. In the event the court fails to issue an order for costs pursuant to section 9728, costs shall be imposed upon the defendant under this section. No court order shall be necessary for the defendant to incur liability for costs under this section. The provisions of this subsection do not alter the court's discretion under Pa.R.Crim.P. No. 706(C) (relating to fines or costs).

42 Pa.C.S. § 9728(b.2): Mandatory payment of costs.--Notwithstanding any provision of law to the contrary, in the event the court fails to issue an order under subsection (a) imposing costs upon the defendant, the defendant shall nevertheless be liable for costs, as provided in section 9721(c.1), unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C) (relating to fines or costs). The absence of a court order shall not affect the applicability of the provisions of this section.

Costs - key case law

- Under current Superior Court case law, courts *may* waive costs but it is discretionary to consider ability to pay
- ***Commonwealth v. Mulkin***, 228 A.3d 913 (Pa. Super. 2020): “The trial court may also provide that a defendant shall not be liable for costs under Rule 706.
- ***Commonwealth v. Lopez***, 248 A.3d 589 (Pa. Super. 2021) (en banc): Court has discretion to reduce or waive costs at any time but is not required to do so unless defendant faces incarceration for nonpayment

Costs - key case law

- ***Commonwealth v. Hudson*, 231 A.3d 974 (Pa. Super. 2020)**: Costs are not part of the defendant's sentence but merely incidental to it. As a mere incident to judgment, costs are not reasonably related to the rehabilitation of the defendant.... Accordingly, we are constrained to conclude that costs are not authorized as a condition of probation under Section 9754.

Imposing Restitution

- Restitution under 18 Pa.C.S. § 1106
 - Part of the sentence, defendant's ability to pay is irrelevant
 - Not automatically a condition of probation
 - Remains owed until paid
- Restitution under 42 Pa.C.S. § 9763 (formerly § 9754)
 - A condition of probation only, not part of the sentence
 - Must be based on ability to pay:
 - “in an affordable amount and on a schedule that the defendant can afford to pay”
 - Obligation expires at the end of probation even if unpaid

Recap

- Fines: tell the court to only impose a fine your client can afford
 - Cite Section 9726, **Ford, Allshouse**, and the Excessive Fines Clause
- Costs: ask the court to only impose costs your client can afford
 - Cite Rule 706(C), Section 9721(c.1), **Martin, Lopez**
- Restitution: ask the court to clarify whether it is imposing restitution as part of the sentence or as a condition of probation
 - If only as a condition of probation, tell it to only impose restitution your client can afford while on probation

Payment plans

- No minimums – based on financial resources
- Defendant always has the right to a court hearing
- Court must make findings regarding ability to pay
- Payment plans must be affordable
- Appeals
 - Can always appeal a decision setting a payment plan
 - Appeal from MDJ to common pleas leaves case permanently at common pleas court

Collection methods

- Payment plans
- Civil judgments entered at sentencing in all cases where over \$1,000 is owed
- Department of Corrections deducts inmate funds
- Private debt collection agencies
 - Requires court finding that defendant is able to pay
 - Adds 25% surcharge to debt

Eliminating debt

- Payment plan – pay over time
- Community service
- Common pleas level only – waiver of costs
- MDJs only – ask for time served if recently incarcerated

Contempt and probation violations for nonpayment

- Nonpayment (of fines and restitution) = violation *only if* the defendant willfully refuses to pay
 - Willfulness has a mens rea element of intentional disregard for the court's order
 - Willfulness can be inferred if the defendant does not make a bona fide effort to find employment
- Commonwealth has the burden to show willful nonpayment
- Otherwise, the defendant is not in contempt and has not violated the terms of probation/parole
 - Which means no jail and no probation extension

Indigence and willfulness

- **Commonwealth v. Diaz**, 191 A.3d 850, 866 n.24 (Pa. Super. 2018): “A finding of indigency would appear to preclude any determination that Appellant's failure to pay the court-ordered fines and costs was willful.”
- **Commonwealth ex rel. Wright v. Hendrick**, 312 A.2d 402, 404 (Pa. 1973): “As noted before, the only testimony in the trial court was that Wright was then penniless and unable, through no fault of his own, to pay any sum on the delinquencies. Such a record does not support a finding of willful noncompliance.”

Indigence defined

- Can the defendant meet his basic life needs?
- Presumptions of indigence:
 - Receives means-based public assistance
 - Services of the public defender
- Income at or below 125% federal poverty level

Probation violations – threshold issues

- Payment of costs is *not* a valid condition of probation
 - Nonpayment is never a probation violation – but could be the basis of contempt proceedings
- Did the court make payment of fines or restitution a condition of probation?
 - Such conditions are optional and *not* automatic

Contempt specific

- **Civil contempt purge condition**
 - Separate from the underlying finding of contempt
 - Must have present ability to comply with purge
- **MDJ jail sentences – automatically stayed for 30 days**

Probation and contempt - suggestions

- Before a hearing, try to work out payment arrangement
- Explain law to court, including that Commonwealth bears burden to prove ability to pay and willfulness
- Ask not to be held in contempt/violation of probation
- Present evidence about financial circumstances
- Ask court to waive unaffordable debt

ARD and other diversion programs

- Indigent defendants cannot be denied entry to ARD, or completion and an expungement
 - Expelled only due to willful nonpayment
- Court must allow alternatives to paying costs and/or restitution for low-income defendants
 - Propose alternatives such as community service, job skills training, GED classes, drug or alcohol treatment
- Ask to only have affordable amounts of costs and restitution imposed

Thank you for attending!

- www.aclupa.org/finesandcosts
- Justin Romano: jtr@jpilaw.com
- Andrew Christy: achristy@aclupa.org