

CPCS

CRIMINAL DEFENSE TRAINING

CHALLENGING UNCONSTITUTIONAL FEES, FINES AND RESTITUTION ORDERS

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Introduction

Judges routinely impose fines, court fees, and restitution costs on indigent defendants in Massachusetts. This **guide and worksheet** highlight relevant legal principles and are intended to help attorneys use the law to protect their clients from crushing court debt.

1. Judges must consider a client's ability to pay before setting restitution or imposing fines or fees, and cannot set a restitution amount that the defendant is unable to pay.

- This principle is clearest in the restitution context because of the recent decision in Commonwealth v. Henry, 475 Mass. 117 (2016). Much of the reasoning of Henry is equally applicable to the fees or fines context. Id. at 127 (“[t]he payment of restitution, *like any court-imposed fee*, should not cause a defendant substantial financial hardship.”) (Emphasis added); id. at 122 (“imposing restitution that the defendant will be unable to pay violates the *fundamental principle* that a criminal defendant should not face additional punishment solely because of his or her poverty.”) (Emphasis added).
- When restitution is imposed as a probation condition, the judge must first determine the appropriate probationary term, without considering how long it will take the defendant to pay. Henry, 475 Mass. at 124. Only then may restitution be set “at the maximum monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss. The amount of restitution ordered should not exceed this monthly amount multiplied by the months of probation, even if that amount is less than the amount of financial loss sustained by the victim.” Id. at 125.
- A defendant is not able to pay if payment would, “cause a defendant substantial financial hardship.” A judge must consider whether payment would leave the defendant without the ability “to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents.” Id. at 126-127.
- One may argue that mandatory fees are unconstitutional when imposed without consideration of a person's ability to pay, particularly if there is no community

service option. E.g., G.L. c. 90, § 24(1)(a)(1) ¶ 2 (unwaivable OUI \$250 Head Injury Fee); G.L. c. 90, § 24(1)(a)(1) ¶ 3 (mandatory \$50 OUI Victim’s Assessment Fee).

2. Probation cannot be extended solely to accommodate payment of restitution or other court fees if the defendant has been unable to pay.

- Where a defendant is not able to pay the full amount of restitution within the period of probation, probation may not be extended in order to give the defendant more time to pay. Henry, 475 Mass. at 118.
- The same principle should apply to the failure to pay court fees, because a non-willful failure to comply with a probation condition is not a violation. Id. at 121 (citing Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010) (homeless probationer with no access to electrical outlets could not be found in violation for failure to charge a GPS because violation was not willful and to hold otherwise was “akin to punishing the defendant for being homeless.”).

3. The defendant bears the burden of proving an inability to pay

At a restitution hearing, or where a defendant faces a probation violation hearing for non-payment of fees or restitution, it is the defendant’s burden to prove that he or she is unable to pay. At least informally, counsel should assume that the defendant bears the same burden when he is asking for fees or fines to be remitted at some other stage of the proceeding.

- In Henry, the defendant met this burden by testifying, but you can also submit an affidavit from your client (and others, if relevant, like a spouse). Commonwealth v. Casanova, 65 Mass. App. Ct. 750, 756 (2006) (affidavits and letters admissible at restitution hearings).
- “A judge may consider a defendant's ability to earn based on ‘the defendant's employment history and financial prospects,’ but a judge may attribute potential income to the defendant only after specifically finding that the defendant is earning less than he or she could through reasonable effort.” Henry, 475 Mass. at 127 (quoting Nawn, 394 Mass. 1, 9 (1985)). Be prepared to present evidence either that your client is making reasonable efforts to find a job or that he or she is unable to because of a disability or family responsibilities. These issues should be addressed in the affidavit.
- Your client should be aware that a judge can require, as a condition of probation, that he or she report any material change in economic circumstances, and that any restitution amount may be consequently modified. This works in both directions. If your client’s economic circumstances worsen after the imposition of fees, fines, or restitution, consider moving to reduce them. See Commonwealth v. Goodwin, 458 Mass. 11, 18 (2010) (judge may modify or change probation conditions “where there has been a material change in the probationer’s circumstances”).

4. Judges should not incarcerate defendants for failure to pay court costs without a hearing, with counsel, to determine whether the failure to pay was willful.

Due process and equal protection principles prohibit “punishing a person for his poverty.” Bearden v. Georgia, 461 U.S. 660, 671 (1983). A defendant cannot be incarcerated because he has failed to pay restitution, fees, or fines unless the court first determines at a hearing, at which the defendant has counsel, that the failure was willful. See id. at 672-673; Turner v. Rogers, 564 U.S. 431, 443 (2011) (Due Process violated where court jailed parent for contempt for failure to pay child support absent finding that parent had ability to pay); Commonwealth v. Gomes, 407 Mass. 206, 210 (1990) (court could not commit defendant, in this case for 9 days, where he failed to pay default fee absent a hearing to determine whether the default was willful).

- The SJC recently promulgated a rule forbidding the incarceration of a defendant for failure to pay the indigent counsel fee. SJC Rule 3:10, 11(e), effective November 1, 2016.
- Note that SJC Rule 3:10 has also been changed to require that the “indigent counsel fee shall be waived where a judge, after the indigency verification process, determines that the party is unable without substantial financial hardship to pay the indigent counsel fee within 180 days.” SJC Rule 3.10, 10(a). This should happen even where the defendant could perform community service; the rule specifically contemplates a community service alternative for people for whom the fee is not waived for inability to pay. Id.
- Under G.L. c. 127, § 144, a person confined for nonpayment is entitled to \$30 per day of credit, and where that statute was last amended in 1987, when adjusted for inflation a person confined for nonpayment today would be entitled at the warrant removal hearing to \$63 per day in credit. *CPI Inflation Calculator*, U.S. DEPT. OF LABOR, http://www.bls.gov/data/inflation_calculator.htm. CPCS lawyers have had success in this regard.

5. Default fees cannot be imposed absent proof that the default was willful and a showing that the default caused actual expenses incurred by the court.

Some judges impose default removal fees on clients who appear late to court, or who miss court dates and appear later. This assessment is discretionary and “is intended to be exercised only upon the willful default of a defendant and as to those costs which directly result therefrom.” Gomes, 407 Mass. at 209 (1990) (emphasis added). Default fees must be reasonable and limited to “expenses incurred as a result of the entry of the default....Court personnel are not paid on a piecework basis, and defendants may not be charged as if they were.” Id. at 209-210.

PROOF OF INABILITY TO PAY WORKSHEET

Submit copy of probation intake form, if helpful, which proves indigency; submit supporting documentation for as much as possible; provide an affidavit signed by your client

<http://www.mass.gov/courts/docs/forms/sjc/supplementaffidavit.pdf>

<ul style="list-style-type: none"> • Under SJC Rule 3:10, your client is considered indigent if they receive any of the following: <ul style="list-style-type: none"> <input type="checkbox"/> Transitional Aid to Families with Dependent Children (TAFDC) <input type="checkbox"/> Emergency Aid to Elderly, Disabled and Children (EAEDC) <input type="checkbox"/> need-based veterans' benefits <input type="checkbox"/> Supplemental Nutrition Assistance Program (SNAP) benefits <input type="checkbox"/> Refugee Cash Assistance <input type="checkbox"/> SSI State Supplemental Program • The court should also consider whether your client receives: <ul style="list-style-type: none"> <input type="checkbox"/> Social Security Disability Insurance (SSDI) • List total net monthly income (after all taxes or deductions): \$ _____ 	<p>Determine avg. weekly or monthly basic living expenses:</p> <p><i>Be prepared to argue that these expenses are necessary to meet your client's basic human needs (e.g., your client needs a car or will lose his job)</i></p> <ul style="list-style-type: none"> • Rent or rent-type contributions \$ _____ • Necessary repairs to house or home \$ _____ • Food \$ _____ • utilities (electric, gas, oil, heat, water) \$ _____ • individual (non-employer) health ins. \$ _____ • health visit co-pays \$ _____ • prescription costs or co-pays \$ _____ • dental visits, co-pays or non-employer dental insurance \$ _____ • cost of glasses or new glasses if needed \$ _____ • transportation \$ _____ <ul style="list-style-type: none"> • car payments \$ _____ • car insurance \$ _____ • car repairs \$ _____ • MBTA pass \$ _____ • Clothing, laundry, cleaning \$ _____ • education \$ _____ • child care \$ _____ • alimony \$ _____ • child support payments \$ _____ • loans payments including credit cards \$ _____ • • home or renter's insurance \$ _____ phone bill \$ _____ • Any of the above as they relate to client's children or dependents \$ _____ • Other expenses \$ _____ <p>TOTAL EXPENSES: \$ _____</p>
<p>Debt, including money owed to courts, RMV, etc.:</p> <ul style="list-style-type: none"> • Credit card debt \$ _____ • Back taxes \$ _____ • School loans \$ _____ • Money owed to any court for fees, probation, restitution, etc. \$ _____ • Money owed to RMV (lic. fees, tickets) \$ _____ • Other debts \$ _____ <p>TOTAL: \$ _____</p>	<p>Limitations on ability to work:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Whether the person is homeless, incarcerated, or resides in a mental health facility <input type="checkbox"/> Any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges <input type="checkbox"/> Family responsibilities: whether the person is the primary/sole caregiver of a child or other family member

COMMONWEALTH OF MASSACHUSETTS

COUNTY

COURT NAME

DOCKET NO.

COMMONWEALTH

v.

AFFIDVAIT REGARDING DEFENDANT’S ABILITY TO PAY

I, _____, do hereby depose and swear to the best of my knowledge and belief:

1. I am the defendant in the above captioned matter.
2. My total monthly **living expense**, including the costs I must pay for my family, is: \$_____. This includes:
 - a. _____
 - b. _____
 - c. _____
 - d. _____
 - e. _____
 - f. _____
3. I owe public or private **debt** in the amount of: \$_____.
4. My total **monthly net income** over the past 3 months has been a monthly average of \$_____.
5. My current **employment situation** and ability to work is _____.
6. I am barely able to cover my monthly living expenses.
7. The imposition of additional fees or costs would cause a substantial financial hardship to myself or my family.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY
