



## Idaho Supreme Court

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**To: Patti Tobias**  
**Subject: Reimbursement Provisions for Public Defender Services**  
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This memo summarizes some of the approaches taken to obtaining reimbursement, in whole or in part, from defendants for the services of a public defender.

### Constitutionality

The United States Supreme Court upheld the constitutionality of a statute requiring a defendant to repay the state for the costs of counsel in *Fuller v. Oregon*, 417 U.S. 40 (1974). The Oregon statute that was considered in that case permitted a court to require a convicted defendant to pay for the costs of counsel. The court could order a defendant to pay these costs only if he "is or will be able to pay them." Also, a defendant could petition the court to remit the payment of costs or any unpaid portion of those costs, and the court could remit the payment if it would impose manifest hardship on the defendant or his immediate family. The Supreme Court held that the statute was constitutional. The Court pointed out that those who were slightly above the line separating the indigent from the nonindigent often had to borrow money or sell off assets to pay for a lawyer. "We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship." 417 U.S. at 53-54.

### Current Idaho Law

Two Idaho statutes directly address reimbursement for the services of a public defender. Idaho Code 19-854(7) states:

Upon conviction, notwithstanding the form of judgment or withheld judgment, plea of guilty or finding of guilt for any crime regardless of the original crime or number of counts, an indigent person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services related to the conviction, plea of guilty or finding of guilt, unless the requirement would impose a manifest hardship on the indigent person. The current inability of the indigent person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.

The provision that only persons who were found guilty may be required to pay reimbursement was added by HB 147, enacted in 2013, as was the provision that reimbursement would not be ordered if the requirement of such payment would impose a manifest hardship on the indigent person.

Idaho Code 18-858 has two provisions regarding obtaining payment for services of a public defender. First, the statute provides that a prosecuting attorney may recover payment or reimbursement for the services of a public defender if the person who received those services: (1) was not entitled to such assistance; (2) was not an indigent person when the services were received; or (3) has failed make the certifications regarding indigency required by statute and has refused to pay or reimburse. An action under this section must be brought within five years after the date on which the public defender services were received.

Second, the statute provides that the prosecuting attorney may recover payment or reimbursement for public defender services from a person who, at the time when the suit is brought, is financially able to pay or reimburse the county without manifest hardship but refuses to do so. A suit under this section must be brought within three years after the services were received.

### Provisions in Other Jurisdictions

Most states, as well as the federal system, have a provision for some type of contribution or reimbursement from defendants for the costs of public defense. The attached list of public defender reimbursement provisions in the western states and in the federal system gives some idea of the range of approaches. Among those states with provisions for reimbursement at the conclusion of a case, most will impose an obligation to pay these costs only on defendants who have been convicted. The obligation to pay is generally tied to the ability to pay, and obligations to pay are generally not imposed or are set aside if payment would impose a “manifest hardship” or “substantial hardship” on the defendant. These types of provisions are reflected in current Idaho law.

Many states require payment of relatively small “application fee” at the outset of a case, which can generally be waived if the defendant is unable to pay even that amount. This will be discussed further below.

Another approach is to divide defendants into three categories: indigent, for whom counsel will be appointed and no reimbursement required; not indigent, for whom counsel will be appointed; and indigent but able to contribute, for whom counsel will be appointed but who will be required to make some payment toward the costs of providing defense counsel. Massachusetts S.J.C. Rule 3:10 provides an example of this approach.

### Application Fees

Beginning in the early 1990’s, several states adopted “application fees” or “contribution fees” as a method for recovering some of the cost of public defender services. These fees are imposed at the outset of the case at or near the time of the application for public defender services. The fees can range from \$10 up to a few hundred dollars, sometimes depending on the number of counts or the seriousness of the charges. The fees can be waived or remitted if the defendant is unable to pay even this modest amount without hardship.

A report for the American Bar Association (ABA) prepared by the Spangenberg Group provided information on statewide application fee provisions in 17 states and county application fee programs in five other states. It appears that about 18 states now have statewide programs and about 10 states have such programs

adopted by individual counties. In some jurisdictions, the application fee is the only method for recovering public defender costs from defendants; in others, it is used in combination with other reimbursement provisions.

Advocates of application fees point out that these fees can provide a more reliable and predictable revenue stream to support public defender programs. They contend that there will be no “chilling effect” on public defender applications as long as the fees can be waived in appropriate cases. Further, they claim that having indigent defendants pay a small fee for public defender services reduces any feeling that they are not being provided with a “real” lawyer and improves the attorney-client relationship.

Critics of these fees fear that hitting an applicant with a fee at the outset of a case will deter some defendants from seeking counsel. They also question whether this approach will actually produce sufficient revenue to significantly offset the costs of administering such a program.

### ABA and NLADA Standards

The ABA has long adhered to a standard that counsels against seeking reimbursement from defendants for public defender services, except in the case of fraud in obtaining those services, but that would permit some contribution from defendants if there are adequate procedural safeguards. Standard 5-7.2 of the ABA Standards for Criminal Justice, Providing Defense Services, states:

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.

In 2004 the ABA adopted the ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases. It set out recommended standards and procedures when contribution fees are imposed. A copy of those guidelines is included with this memo. Some of the more significant recommendations are:

- Fees should not impose a substantial financial hardship or chill the exercise of the right to counsel.
- The court or its designee should be responsible for collecting the fee. It should never be the duty of defense counsel to collect the fee.
- Failure to pay the fee should not result in denial of counsel or imprisonment.
- Prior to an offer of counsel or upon a request for counsel, the defendant should be informed that he or she may be required to pay a fee.

Also included with this memo is section 1.7 of the NLADA Guidelines for Legal Defense Systems. It states that defendants who are able to make a limited cash contribution to the cost of their defense without imposing a substantial financial hardship upon themselves or their dependents should be required to do so.

State / Jurisdiction	Act / Rule	Provisions
Arizona	16A A.R.S., Rules Crim. Proc., Rule 6.7(d)	If the court determines that the indigent person has the financial resources to allow him/ her to offset some or all of the costs of the legal services, the court shall order him/her to pay appointed attorney or county the amount the court finds he/she is able to pay without "incurring substantial hardship to himself or herself or to his or her family." Not paying as ordered by the court is not grounds for contempt but is grounds for civil judgment.
	A.R.S. §11-584(C ), (D)	The court may order an indigent assessment costing not more than \$25. Any party (including juveniles or those put on probation) can be ordered to reimburse the county a reasonable for legal services. Reimbursement will be ordered in all types of cases. The court will consider the financial resources available to the defendant and the burden repayment places on him/ her or his/her family.
California	Ann. Cal. Penal Code §987.8	Upon the court determining that the defendant is indigent, the court can hold a hearing to determine if the defendant owns property. If the defendant owns property, the county can place a lien on the property that is superior to all other liens to the extent permitted by law. If the defendant fails to appear at this hearing, or within 20 days thereof, the court can order defendant to reimburse the full amount of costs associated with the defense. If the court finds that the defendant has the present ability to pay some, the court will determine a reasonable amount for the defendant to pay. Any order for reimbursement cannot be enforced by contempt, but only through civil judgment. The court may consider the current financial position, "reasonably discernible future financial position", likelihood defendant can get a job within 6 months of the hearing, and any other factor the court finds important.
	Ann. Cal. Penal Code §1203(j)	If the defendant is sentenced to probation, the court may order a defendant to appear before a county financial evaluation officer to determine ability to pay restitution and reimburse for court-related costs. If the defendant fails to appear, it is a violation of probation. If there is a balance at the end of probation, the court can obtain a civil judgment.
Idaho	I.C. §19-854	The court may consider defendants income, property, outstanding debts, cost of bail, and number and ages of dependents in determining ability to pay. If a person is determined to be able to pay, the court may order payment for the services and court costs. If a defendant is convicted, the defendant may be ordered to reimburse the county for all or a portion of the costs unless the court determines it would cause a "manifest hardship" on the defendant. Current inability to pay does not inhibit the court from ordering defendant to reimburse.

Montana	Mon. Code Ann. 46-8-113	If defendant pleads guilty prior to trial, cost of one or more misdemeanors is \$250, and cost of one or more felonies is \$800. Costs after going to trial will be determined based on hours spent on the case and expenses incurred for the trial, which must be prepared and filed by the public defender. The costs imposed must be included in the court's judgment. Court can only order reimbursement if defendant has the ability to pay.
	Mon. Code Ann. 46-8-114	If the defendant is ordered to reimburse county, the court may set specific payment amounts and / or deadlines to pay.
Nevada	2011 Nev. Assembly Bill No. 49, 76 <sup>th</sup> Reg. Sess.	Authorizes reimbursement of certain extra costs of public defenders' services. (\$4 admin. fee for misdemeanors, \$5 increase in one admin. fee for misdemeanors, \$50 admin. fee for gross misdemeanor or felony.)
	N.R.S. 176.059 - 176.062	A person who pleads guilty or is convicted of a crime must pay administration assessments plus additional penalties ordered by the judge.
New Mexico	N.M.S.A. 31-15-12	A person shall pay an application fee of \$10 at the time the person applies for a public defender. When the person remains in custody and is unable to pay, the court may waive payment of the fee.
	N.M.S.A. 34-6-46	The district court shall order reimbursement from each person who has received or desires to be represented by a public defender after a determination is made that he was not indigent.
	NMRA, Form 9-403	An applicant for public defender services who is ineligible for free representation but is unable to hire private counsel may sign a contract for public defender representation on a reimbursement basis.
Oregon	O.R.S. 161.665	The court may order a convicted defendant to pay a reasonable attorney fee for appointed counsel. A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the Public Defense Services Commission. The court may not sentence a defendant to pay these costs unless the defendant is or may be able to pay them.
Utah	U.C.A. 77-32a-1 through 77-32a-6	The court may order a convicted defendant to pay attorney fees of assigned counsel. The defendant may not be ordered to pay these costs unless the defendant is or will be able to pay them. The court may remit all or part of the amount due if payment will impose manifest hardship on the defendant or his immediate family. Payment of costs may be made a condition of probation.
Washington		No statute authorizing reimbursement. Individual counties have adopted public defender application fees.

Wyoming	W.S. 1977 §7-6-106	The judge must determine if a person is able to pay any or all of the costs of legal representation. If the person is not, the court must enter a specific finding on the record. If they are, the court must order the person to reimburse the state for all or part of the costs or state on the record why such order was not entered. If a person goes from appointed counsel to private counsel, the court can order reimbursement for the appointed counsel. If the person is sentenced to probation, the court must order the person, as a condition of bail or probation, to repay if the defendant has the ability to pay or there is a reasonable probability that the defendant will have the ability to pay.
Congressional Acts	112 <sup>th</sup> Congress, 2 <sup>nd</sup> Session, S 2197(h)(2)	The U.S. government may be required to reimburse for attorneys' fees if actions of it prosecuting a defendant were due to negligence, recklessness, or knowing conduct by the government and violated defendant's rights. This includes reimbursement for public defender fees.
Federal Provision	18 U.S.C.A. §3006A	If a person that is receiving public defender representation is found to be able to pay, the court may order reimbursement.

# **ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases**

*August 2004*

## **Guideline 1. Provision of Satisfactory Procedural Safeguards**

Contribution fees to reimburse governments for the cost of defense counsel in criminal cases should not be assessed against accused persons unless procedural safeguards are provided to assure that assessments do not impose substantial financial hardships and do not chill exercise of the right to counsel.

## **Guideline 2. Determination of Ability to Afford a Contribution Fee**

An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford. Whenever an order for a contribution fee is under consideration, the accused person or counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded. If a contribution fee is ordered prior to providing counsel for the accused person, the decision to require a contribution fee should be subject to review at the request of counsel and counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded.

## **Guideline 3. Collection of the Fee**

The court or its designee, not counsel, should be responsible for collecting payment of any contribution fee.

## **Guideline 4. Enforcement of Payment**

Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.

## **Guideline 5. Rights Upon Imposition of Contribution Fee**

An accused person ordered to contribute to the cost of defense counsel should retain the right to petition the court to waive the fee in the event of future inability to pay. The court

should waive a fee previously ordered if the court determines that payment will result in substantial financial hardship to the person or to the person's dependents.

#### **Guideline 6. Notice of Potential Obligation of a Contribution Fee**

Prior to an offer of counsel or upon request for counsel in the event counsel is not offered, an accused person should be informed, both orally and in writing, that a contribution fee may be required. This notice of a potential obligation of a contribution fee should specify that if counsel is provided:

- the person may be required to pay a fee for the cost of counsel if the person has the ability to do so without substantial financial hardship;
- that counsel will be provided at all stages of proceedings regardless of whether the person actually pays the fee;
- that failure to pay the fee will not result in imprisonment;
- that the person's attorney can challenge the imposition of the contribution fee; and
- that in the event of future inability to pay the fee, the person will have the right to petition the court to waive the required fee.



## NLADA GUIDELINES FOR LEGAL DEFENSE SYSTEMS – 1.7

### 1.7 Partial Eligibility

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.

(a) The defender office or assigned counsel program should determine the amount to be contributed under this section, but such contribution should be paid directly into the general fund of the state, county, or other appropriate funding agency. The contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination.

(b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.