



Commonwealth of Massachusetts
Office of the State Auditor
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Making government work better

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Statewide Survey of the Implementation of the Increased Administrative Probation Fee at District Courts

For the period July 1, 2009 through June 30, 2010



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Chapter 27, Sections 99 and 100, of the Acts of 2009, amended Massachusetts General Laws Chapter 276, Section 87A, to increase the administrative probation fee from \$21 per month to \$50 per month effective July 1, 2009. In response to the law, both the Administrative Office of the District Court (AODC) and the Office of the Commissioner of Probation (OCP) issued to the District Courts guidance in its implementation explaining the change as applying to both active cases as of June 30, 2009 as well as new cases effective July 1, 2009.

In the course of regular court audit work, the lack of uniform implementation of the fee came to the attention of the Office of the State Auditor (OSA). Some courts implemented the change for people already on probation while other courts did not. Also, some courts did not apply the increased fee to those probationers who had prepaid their account prior to July 1, 2009 for a term extending past that date. The implementation of the fee to new probation cases was not an issue; the problem only existed with cases active as of June 30, 2009.

For nine District Courts previously audited, six courts fully complied with the implementation of the increased fee, whereas three courts did not. As a result of these findings, the OSA conducted a statewide survey of the remaining 53 District Courts and eight Divisions of the Boston Municipal Court, sending out a total of 61 surveys to assess the adherence to the law and the AODC and OCP directives in the implementation of the increased fee during the period July 1, 2009 through June 30, 2010. All 61 courts responded.

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The survey results disclosed that 52 of 70 courts (74.3%) properly implemented the increased fee to existing cases, thereby assessing an estimated \$5.4 million in potential additional revenue; 18 of 70 courts – (25.7%) did not fully comply with the law and AODC and OCP directives on existing cases, which resulted in an estimated \$1.2 million in unrealized potential revenue. Of the 18 courts, 11 did not charge the higher rate to existing probationers, resulting in unrealized potential revenue of an estimated \$802,199. Seven of the 18 courts did not charge the higher rate to probationers who had prepaid the full amount of their probation fees, resulting in unrealized potential revenue of an estimated \$421,421. Moreover, the lack of uniformity in application of the law resulted in an inequitable administration of justice. For example, probationers in neighboring towns could pay two different fees based solely on which court had jurisdiction over their case.

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INTRODUCTION

Background

Chapter 27, Sections 99 and 100, of the Acts of 2009, amended Massachusetts General Laws Chapter 276, Section 87A by increasing the monthly administrative probation¹ fee from \$21 to \$50 for individuals on probation. This change, effective July 1, 2009, was explained in a June 30, 2009 memorandum from the Chief Justice of the Administrative Office of the District Court issued to all District Court Judges, Clerk-Magistrates, and Chief Probation Officers. The memorandum, among other things, stated the effective date and made clear which probationers would be affected by stating, in part:

*Please take immediate steps to implement the following fee increases on July 1, 2009.
... This increase applies to current as well as future administrative probationers.*

The Chief Justice's memorandum also discussed the need for increased revenue collection because of budget cuts:

The courts will be required to collect an additional \$10 million in retained revenues above the \$43 million in FY 09 ... Clearly we must continue to be diligent in our collection efforts.

In addition, a July 3, 2009 memorandum from the Deputy Commissioner of Probation to all Chief Probation Officers stated that the fee was to be applied to future probationers as well as those active on June 30, 2009, whether they paid monthly or prepaid.² The supervised probation³ fee remained unchanged at \$65 per month. The memorandum summarized the change, made clear who would be affected, and established a process for communicating such change to the affected parties, as quoted, in part, below:

¹ Level I - Financial Accountability: This represents the level of restriction/accountability that is typically associated with administrative probation. It is primarily designed to monitor the timely payment of restitution, fines, victim/witness fees, and the like, by the offender. Massachusetts Sentencing Guidelines issued by the Massachusetts Sentencing Commission, February 1998.

² Accounts where the probationer pays the amount of money owed in a lump sum (usually toward the beginning of the probation period) rather than spreading the payments out over a period of time (usually monthly).

³ There are three levels of supervised probation:

Level IV - 24-Hour Restriction: The offender is *subject to* 24-hour restriction/accountability of his whereabouts. This represents the maximum level of restriction/accountability short of incarceration.

Level III - Daily Accountability: The offender is *subject to* daily accountability of his whereabouts. This represents the level of restriction/accountability that falls in between 24-hour accountability and standard probation supervision.

Level II - Standard Supervision: The offender is *subject to* weekly accountability of his whereabouts. This represents the level of restriction/accountability that is typically associated with standard probation supervision. Massachusetts Sentencing Guidelines issued by the Massachusetts Sentencing Commission, February 1998.

*On June 29, 2009, the Governor passed the Commonwealth's budget for FY2010. Outside sections 99 and 100 of the budget amend G. L. 276 § 87A, increasing the monthly supervision fee from \$21 to \$50 (\$45 monthly fee for probation supervision and \$5 monthly fee for the victim service surcharge). This increase is **effective July 1, 2009**. All probationers required to pay administrative supervision fees as of the effective date are required to pay the increased fees, regardless of the start date of probation. The increased fees, however, are not to be applied retroactively prior to the effective date of July 1, 2009.*

Based on the foregoing, please identify all probationers that are presently paying administrative fees and notify them that, as of July 1, 2009, they are required to pay the increased monthly supervision fee of \$50.

Survey Scope, Objectives, and Methodology

There are 70 District Courts in the Commonwealth of Massachusetts, eight of them being divisions of the Boston Municipal Court and 62 separate District Courts. The Office of the State Auditor conducted a survey of the implementation of the increased administrative probation fee at 61 District Courts including the eight divisions of the Boston Municipal Court for administrative probation cases active as of June 30, 2009. The survey was initiated after the results of audits at nine District Courts⁴ identified that administrative probation fees were not always being properly or consistently assessed to individuals on administrative probation as of June 30, 2009 at three of the nine courts. Accordingly, the OSA conducted a survey of the remaining 61 District Courts including the Boston Municipal Court to determine the extent and effect of this practice statewide. The methodology included creating and submitting a survey questionnaire to 61 of the 70 District Courts including the Boston Municipal Court Department during April 2011 to determine whether the increased administrative probation fee was being properly assessed. (Survey questionnaires were not submitted to the nine courts where the OSA had previously examined and reported on this issue. Six of the nine audits have been included in the results of this report using the methodology applied to the other courts surveyed, while three of the nine incorporate the results discussed in the previous audits).

It is important to note that the survey information is self-reported and was not tested for accuracy. In addition, the survey did not include an examination of how much money was actually collected or what community service was performed in lieu of the fee. Moreover, the survey reports only whether the probation fee amounts were assessed. The dollar figures are estimates based on the number of active administrative probation cases reported by the Commissioner of Probation as of June 30, 2009, and the average number of cases that terminate monthly at each court location.

⁴ The nine district courts audited were the Attleboro, Barnstable, Chicopee, Dedham, Falmouth, Natick, Newton, Orleans, and Woburn District Courts.

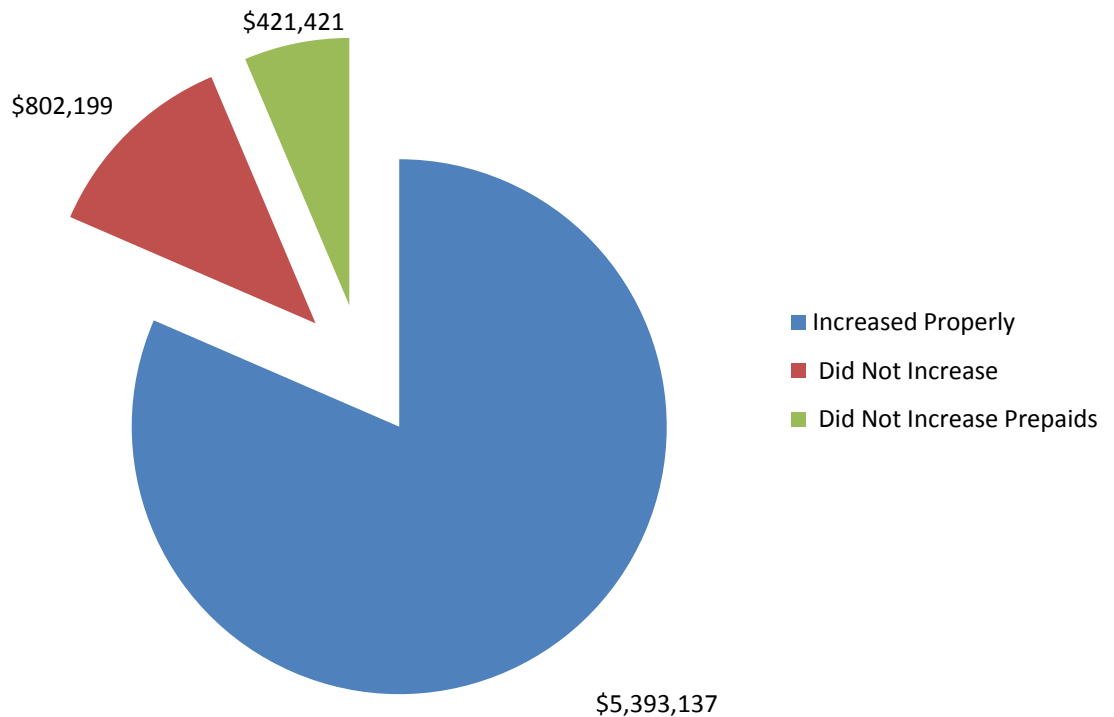
Other mitigating factors include the fact that some probationers could have stopped paying and have a default warrant outstanding, and some courts may have forgiven an outstanding balance as permitted by statute.

SURVEY RESULTS

The number of active administrative probation cases on June 30, 2009 was 39,407, which would account for a total of \$6.6 million in increased fee assessments. The survey and previous nine audits showed that some courts decided to not charge the higher rate if a probation contract was in place, and some did not charge the rate to probationers who prepaid their account prior to July 1, 2009 for a term extending past that date.

The survey disclosed the following results:

- Fifty-two of 70 courts (74.3%) properly implemented the increased fee to existing cases, thereby assessing an estimated \$5,393,137 in potential revenue.
- One in four courts – 18 of 70 – (25.7%) did not fully comply with the law on existing cases, which resulted in an estimated \$1,223,620 in unrealized potential revenue.



- Eleven of the 18 courts that did not properly charge the increased fee failed to charge the higher rate to existing probationers, resulting in unrealized potential revenue of an estimated \$802,199.

| <u>Courts That Did Not Increase Fees</u> | <u>Amount</u> |
|---|-------------------------|
| Eastern Hampshire | \$139,722 |
| Plymouth | 131,370 |
| Lowell | 122,844 |
| Falmouth* | 110,230 |
| Chelsea | 87,087 |
| East Boston BMC | 61,248 |
| Charlestown BMC | 45,240 |
| Westfield | 39,382 |
| Natick* | 31,581 |
| Barnstable* | 19,285 |
| Pittsfield | <u>14,210</u> |
| | <u>\$802,199</u> |

* Indicates that the amount was previously reported in an OSA audit.

- Seven of the 18 courts did not charge the higher rate to probationers who had prepaid the full amount of their probation fees, resulting in uncollected revenue of an estimated \$421,421.

| <u>Courts That Did Not Increase Prepaids</u> | <u>Amount</u> |
|---|-------------------------|
| Fall River | \$321,813 |
| New Bedford | 55,019 |
| Framingham | 23,664 |
| Northampton | 16,078 |
| Wrentham | 2,233 |
| Northern Berkshire | 2,036 |
| Somerville | <u>579</u> |
| | <u>\$421,421</u> |

The lack of uniformity in application of the law resulted in an inequitable administration of justice (see Appendix). For example, probationers in neighboring towns could pay two different fees based solely on which court had jurisdiction over their case.

Court officials indicated that the implementation of the increased fee to existing and prepaid probationers resulted in: increased administrative time to recalculate balances owed; additional time

spent explaining increased amount to probationers, who were often angry; increased mailing costs and phone charges of notifying probationers of the increased amount; and additional court time in cases where probationers contested the new amount and wanted a court hearing.

Recommendation

The Office of the Commissioner of Probation (OCP) should consider modifying the language in the probation contract to clearly spell out that future increases of probation fees are possible. Additionally, given the increased court resources spent adjusting accounts, notifying probationers, and hearing appeals from probationers, we recommend that future increases of this type consider whether the increase will be applied to existing probationers.

Surveyed Entities' Responses

Officials at courts that did not fully implement the increased fee gave various reasons. For example, some court officials stated that the implementation of the increased fee rate may invalidate a previous plea arrangement or probation contract or result in an ex post facto⁵ change.

Court officials also stated there were extenuating circumstances in not implementing the increased fee, such as cases involving minor offenses with first-time offenders who prepaid their probation to resolve the case in its entirety, or those involving college students who may live out of state and be difficult to contact, often involving minor offenses that, once terms are complied with, will not remain on the individual's record. Courts questioned the fairness of issuing a default warrant and giving the individual a criminal record for a minor offense when the probation was already prepaid.

Auditor's Reply

The guidance issued by the AODC explicitly states that case law invalidates the ex post facto claim in regard to the implementation of the increased fee:

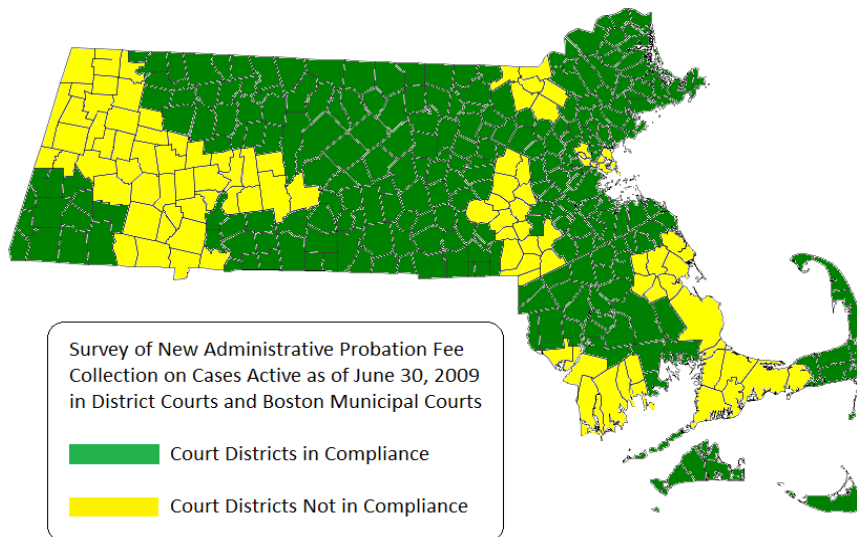
This increase applies to current as well as future administrative probationers. As with past increases in probation supervision fees, Taylor v. Rhode Island, 101 F.3d 780 (1st Cir. 1996), cert. Denied, 521 U.S. 1104 (1997), has settled that such fees are designed to reimburse the Commonwealth for the costs of supervising probationers living in the community rather than to punish such offenders, and therefore the Legislature may apply such fee increases to already-sentenced probationers without violating the Ex Post Facto Clause (art. I §10) of the U.S. Constitution.

⁵ An ex post facto or retroactive law is a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law.

The OSA understands the circumstances that court officials cited in explaining their decision to not implement the legislatively mandated increase. However, if courts disagreed with the law or its interpretation, they should have addressed the Legislature with these concerns or used proper procedures through the court system. Once the fee became law, the courts were obligated to implement it.

APPENDIX

Geographic Inequity of Implementation of Chapter 27 of the Acts of 2009



Municipalities within Court Districts Not in Compliance (Listed by County)

| | | | | |
|--|-----------------------------------|--------------------------------------|----------------------------------|---------------------------------------|
| Barnstable | Lenox | Russell | Middlesex | Millis |
| <u>Barnstable District Court</u> | Peru | Southwick | <u>Framingham District Court</u> | Norfolk |
| Barnstable | Pittsfield | Tolland | Ashland | Plainville |
| Sandwich | Richmond | Westfield | Framingham | Walpole |
| Yarmouth | Washington | | Holliston | Wrentham |
| | Windsor | | Hopkinton | |
| <u>Falmouth District Court</u> | | Hampshire | Sudbury | Plymouth |
| Bourne | Bristol | <u>East Hampshire District Court</u> | Wayland | <u>Plymouth District Court</u> |
| Falmouth | <u>Fall River District Court</u> | Amherst | | Duxbury |
| Mashpee | Fall River | Belchertown | <u>Lowell District Court</u> | Halifax |
| | Freetown | Granby | Billerica | Hanson |
| Berkshire | Somerset | Hadley | Chelmsford | Kingston |
| <u>Northern Berkshire District Court</u> | Swansea | Pelham | Dracut | Marshfield |
| Adams | Westport | South Hadley | Lowell | Pembroke |
| Cheshire | | Ware | Tewksbury | Plymouth |
| Clarksburg | <u>New Bedford District Court</u> | <u>Northampton District Court</u> | Tyngsboro | Plympton |
| Florida | Acushnet | Chesterfield | | |
| Hancock | Dartmouth | Cummington | <u>Natick District Court</u> | Suffolk |
| New Ashford | Fairhaven | Easthampton | Natick | <u>Charlestown BMC District Court</u> |
| North Adams | Freetown | Goshen | Sherborn | Charlestown |
| Savoy | New Bedford | Hatfield | | |
| Williamstown | Westport | Huntington | <u>Somerville District Court</u> | <u>Chelsea District Court</u> |
| Windsor | | Middlefield | Medford | Chelsea |
| | Hampden | Northampton | Somerville | Revere |
| <u>Pittsfield District Court</u> | <u>Westfield District Court</u> | Plainfield | | |
| Becket | Agawam | Southampton | Norfolk | <u>East Boston BMC District Court</u> |
| Dalton | Blandford | Westhampton | <u>Wrentham District Court</u> | East Boston |
| Hancock | Chester | Williamsburg | Foxborough | Winthrop |
| Hinsdale | Granville | Worthington | Franklin | |
| Lanesborough | Montgomery | | Medway | |