MASSACHUSETTS TRIAL COURT
FINES AND FEES WORKING GROUP

REPORT TO TRIAL COURT
CHIEF JUSTICE PAULA M. CAREY

November 17, 2016

Fines and Fees Working Group Members

Hon. Paul C. Dawley, Chief Justice of the District Court, Chair
Hon. Lisa Ann Grant, Associate Justice of the Boston Municipal Court
Hon. Jeffrey A. Locke, Associate Justice of the Superior Court
Hon. Jay D. Blitzman, First Justice of the Juvenile Court
Paul J. Burke, Deputy Court Administrator of the Housing Court
Denise M. Fitzgerald, Manager of Legal Research Services for the Probate and Family Court
Michael P. Coelho, Deputy Commissioner of Probation
Georgia K. Critsley, Senior Manager of Intergovernmental Relations for the Trial Court
A.W. (Chip) Phinney, Deputy Legal Counsel for the Supreme Judicial Court
Sarah W. Ellis, Director of Legal Policy for the District Court

REPORT
of the
TRIAL COURT FINES AND FEES WORKING GROUP

November 17, 2016

Mission of the Fines and Fees Working Group

In June 2016, the Chief Justice of the Trial Court, Hon. Paula M. Carey, established the Trial Court Fines and Fees Working Group. The mission of the Working Group is to review the seven recommendations that the United States Department of Justice Civil Rights Division set forth in a March 14, 2016 "Dear Colleague" letter, concerning court enforcement of fines and fees, and to evaluate 1) whether Massachusetts laws support each recommendation; and 2) whether the Trial Court is in compliance with each recommendation. This report further sets forth the Working Group's proposals for adoption and implementation of the Department of Justice recommendations.

Fines and Fees Legislative History

A substantive analysis of the United States Department of Justice recommendations first requires a review of the historical background of court imposed fees and fines in Massachusetts. The imposition and collection of fines and fees by the Trial Court is statutorily mandated by the Legislature. Over time, the number, categories, and amounts of fines and fees, which the Trial Court is required to assess across departments, has increased.[1] As a result of these increases, criminal defendants face a broad array of statutorily required assessments: regular fines, surfines, victim witness-assessments, default removal fees, arrest warrant fees, probation supervision fees, administrative probation fees, and victim services surcharges. In operating under the influence cases, defendants are assessed state fees, victim assessments, head injury assessments, as well as the cost of the driver alcohol education program itself. Other mandatory assessments in other types of cases include drug analysis fees, hate crime surfines, batterer's intervention program assessments, and a fine on top of any other penalty for the violation of a G.L. c. 209A order. All of this is in addition to any restitution that might be ordered, which is paid to crime victims.[2]

Over time, the Legislature has established or increased fees and fines as follows:

---

[1] Although many of the fines and fees discussed herein relate to criminal cases, statutory authority exists for the imposition of fines and fees across all Trial Court Departments. See G.L. c. 185C, § 19 (Housing Court); G.L. c. 119, § 21A (legal fees in Juvenile Court); Mass. R. Crim. P. 1(b) (applying Rules of Criminal Procedure to District Court, Juvenile Court, and Superior Court).

[2] Berg, Jerome S.*, Rough Justice to Due Process: The District Court, 1976 – 2004.* MCLE, © 2004, p. 136, enumerating the accumulation of fine and fee types in the District Court.

- In 1989, mandatory drug analysis fees under G.L. c. 280, § 6B were increased, with new fees ranging from $100 - $500 upon conviction or admission to sufficient facts for a variety of misdemeanor and felony drug offenses.
- In 1996, the mandatory certified batterer's treatment program assessment was increased to $350 for those under a court order to participate.
- In 2003, the mandatory surcharge against defendants convicted or found responsible of motor vehicle offenses was increased from $25 to $50.
- In 2003, a $25 mandatory fine was created to be assessed against defendants convicted of violations of restraining orders under G.L. c. 209A.
- In 2006, G.L. c. 265, § 47 was enacted, which required probationers placed on global positioning devices to pay the fees incurred to install, operate, and maintain the device, resulting in the mandatory imposition of a $5.95 per day fee.
- In 2008, a law passed requiring clerk magistrates to indicate on a sentence mittimus if any of three fees have been assessed against the defendant but remain unpaid: victim/witness fees (G.L. c. 258B, § 8); the $250 Head Injury Assessment required in cases of OUI (G.L. c. 90, § 24(1)(a)(1) ¶2) or Negligent Operation (G.L. c. 90, § 24(2)(a) ¶2), and the $50 OUI Victims Assessment (G.L. c. 90, §24(1)(a)(1) ¶3) required in cases of OUI (§ 24); Vehicular Homicide involving OUI (§ 24G) or OUI with Serious Injury (§ 24L).
- In 2009, the mandatory administrative probation fee was increased from $20 to $45, also adding a $5 surcharge.
- In 2009, the Legislature increased the total amount of probation fees that could be retained revenue by the Trial Court to $23 million (up from $20 million in prior years). The rate of collections (almost $1.8 million monthly) was $1.7 million short of what was needed to collect the full $23 million that year.
- In 2009, G.L. c. 90C, § 3(A)(4)(¶ 4) was amended to increase the appeal fee to $50 (from $20) to obtain a de novo civil motor vehicle infraction (CMVI) hearing before a judge.
- In 2011, G.L. c. 211D, § 2A was created, which requires an assessment of a legal counsel fee in both criminal and civil cases, unless waived, for every person who receives counsel through the Committee for Public Counsel Services. The new statute, in part, allowed the court to re-impose a previously waived $150 counsel fee, if, upon the 6-month (formerly 60 days) reassessment by probation of a person's indigency, the court concludes the person has the ability to pay (§ 2A(f)).
- In 2011, G.L. c. 211D, § 2A(h) was passed, requiring the Registry of Motor Vehicles to continue to refuse to issue or renew any driver's license or vehicle registration until notified by the court that the legal counsel fee had been collected or worked-off via community service.
- In 2013, the mandatory fees assessed against defendants convicted of or found responsible for motor vehicle offenses under G.L. c. 90 were increased from $37.50 to $50 in G.L. c. 90, § 20.

- In 2013, a $5 surcharge was added to any fine imposed against a person convicted or found responsible for a motor vehicle violation under G.L. c. 89 and G.L. c. 90.[3]
- In 2014, the domestic violence prevention assessment was created under G.L. c. 258B, § 8, which mandates that the court impose a $50 fee on defendants convicted of domestic violence crimes and strangulation.[4]
- In 2014, a 20% surcharge was added to the fines for crimes against the environment under G.L. c. 21A when the complainant is an environmental police officer (or deputy environmental police officer).[5]
- In 2014, a similar 20% surcharge was created for all fines for motorboat and recreational vehicle crimes under G.L. c. 90B, § 39(b).[6]
- In 2014, the cost of the Driver Alcohol Education (DAE) program in G.L. c. 90, § 24 for individuals convicted of a first-offense OUI was increased from $567.22 to a total of $707.76.

For many years, the Trial Court's budget depended, in part, on "retained revenue" from certain fees it collected. In 2009, when the fiscal year 2010 budget was passed, it required the Trial Court to collect an additional $10 million in retained revenues, above the $43 million in fiscal year 2009. The collection requirements placed on the Trial Court included an additional $3 million in probation supervision fees (for a total of $26 million) and $7 million more in general revenues (for a total of $27 million). Any shortfall in Trial Court collections resulted in an equal decrease in the Trial Court's budget. The judiciary opposed the practice of "retained revenue" budgeting because it effectively imposed production quotas on the fees that the court departments collected, creating the appearance of a conflict between the interests of justice and the interests of the court system. As former Chief Justice Margaret Marshall stated in budget testimony, "no one assessed a fine by the court should have to wonder whether interests of justice or of institutional preservation motivated the penalty."[7]

The Trial Court Retained Revenue Account was eliminated by the Legislature in fiscal year 2013.[8] As a result, the Trial Court's budget is no longer directly related to the collection of

[3] (St. 2013, c. 38).
[4] (St. 2014, c. 260).
[5] G.L. c. 21A, § 10I (as inserted by St. 2014, c. 165, § 41).
[6] as inserted by St. 2014, c. 165, § 128.
[7] Margaret M. Marshall, Testimony before Joint Committee on Ways and Means, Mar. 16, 2009, at 8. See also Roderick L. Ireland, Testimony before Joint Committee on Ways and Means, Feb. 28, 2012, at 6 (noting that "inclusion of retained revenue as part of the Trial Court Budget continues to be problematic for the Trial Court, both operationally and for proper budget planning").
[8] The use of retained revenue as a funding source for the judiciary was eliminated in FY2013. Compare FY2012 Budget Summary, available at http://www.mass.gov/bb/gaa/fy2012/app_12/dpt_12/htrc.htm, which shows retained revenue accounts for the Superior Court (0331-0104), District Court (0332-0104), Boston Municipal Court (0335-0004), with FY2013 Budget Summary, available at http://www.mass.gov/bb/gaa/fy2013/app_13/dpt_13/htrc.htm, which does not list those retained revenue accounts.

revenue, and none of the revenue collected by the Trial Court goes directly to the Trial Court budget. Instead, the funds collected by the Trial Court currently are now placed in the Commonwealth's General Fund or other funds designated by statute.

Trial Court collection of fines and fees continues to be a point of emphasis for revenue collection. The fiscal year 2015 budget included funding for a Revenue Maximization Unit to "prioritize improving revenue collections at district court locations which had more than 60 percent of court fees outstanding in fiscal year 2012."[9]

Separately, the Trial Court's collection of probation supervision fees was emphasized in 2015-2016 when the Office of the State Auditor performed an audit on sixteen District Court divisions, to review the administration and oversight of probation fee assessments from July 1, 2012 through December 31, 2013. An official Audit Report was issued on January 13, 2016. [10] The sixteen audit locations accounted for 12,470 (16%) of all Trial Court probationers as of December 31, 2013, and $7.5 million (23%) of the $32.8 million in probation supervision fees collected during the audit period. While the audit focused on the collection of probation supervision fees, the Audit Report also included a recommendation supporting the broader collection of fines and fees, beyond the context of probation fees, finding that the Trial Court "should instruct judges to assess other allowable court fines/fees to non-probationers, if judges feel that there are costs that those defendants should be responsible for."[11]

Fees and Fines Collection Data

The Trial Court collected $99,905,176.05 in fines, fees, and court costs in fiscal year 2016, in the following thirty state revenue collection categories:

1. unspecified general revenue (70% of which includes civil and small claims filing fees, and also includes court costs),
2. default warrant fees,
3. domestic violence certified batterer program fees,
4. diversity awareness,
5. miscellaneous,
6. civil surcharges,
7. environmental fines,
8. victim / witness fund,
9. alcohol fees,
10. probation fees,
11. drug analysis fund,
12. security fraud protection fund,
13. confiscated / seized funds,
14. fish & game violations,
15. inland fisheries fees,
16. legal counsel fee,

[9] St. 2014, c. 165.
[10] *Trial Court – Administration and Oversight of Probation Supervision Fee Assessments*, Official Audit Report – Issued January 13, 2016. Commonwealth of Massachusetts, Office of the State Auditor, Suzanne M. Bump.
[11] *Trial Court – Administration and Oversight of Probation Supervision Fee Assessments*, Official Audit Report – Issued January 13, 2016. Commonwealth of Massachusetts, Office of the State Auditor, Suzanne M. Bump. pgs. 2, 21.

17. indigent representation fees,
18. indigent but able to contribute fees,
19. Metropolitan District Commission violations,
20. Department of Public Utilities fines,
21. victims of drunk driving,
22. Ind. salary enhancement trust fund,
23. public safety training fund,
24. environmental surcharge,
25. domestic violence prevention and assistance,
26. highway fund,
27. off highway vehicle program,
28. human trafficking victims fund,
29. head injury program, and
30. Land Court assurance fund.

The largest category of collected revenue is "unspecified general revenue," which totaled $59.114 million. Unspecified general revenue in fiscal year 2016 included $7.3 million in court costs, $2.126 million in default warrant removal fees, and $9,109 collected in domestic violence fees, as well as other miscellaneous fees including civil and small claims filing fees.

The second largest collection category was probation fees, which totaled $20.2 million in fiscal year 2016. The third largest collection category for fiscal year 2016 was legal counsel fees, which totaled $6.9 million generally, and an additional $787,215 for litigants who were indigent but able to contribute. The Trial Court also collected $3.3 million in civil surcharges, and $2.3 million for the victim / witness fund.

These numbers do not include the collection of forfeited bail money. In Fiscal Year 2016, the Trial Court ordered $1,436,670 in forfeited bail money turned over to the General Fund. In addition, these numbers do not include the collection of restitution. In Fiscal Year 2016, the Trial Court assessed $73,958,796 in restitution and collected $12,219,369 in restitution for distribution to crime victims.

Waiver of Fees

Courts are legally required to assess statutory fines and fees. An exception lies if the statute allows for waiver and evidence is presented to meet the legal standard for waiver. Some mandatory fees and fines, however, cannot under any circumstances be waived by the judge.[12] For the fines and fees that can be waived by statute, there does not exist a uniform legal standard for waiver of a fee due to inability to pay. Instead, the many statutes that set forth mandatory fee

[12] A non-waivable fee was created in the supplemental budget (St. 2008, c. 302, §§ 14-15), which made changes to the G.L. c. 90, § 24 $250 Head Injury Assessment. The language that permitted a judge to waive the assessment upon written findings was repealed, and that provision was replaced by the following: "The assessment shall not be subject to reduction or waiver by the court for any reason." Other non-waivable assessments include the OUI Victim Assessment under G.L. c. 90, § 24(1)(a)(1)¶3, and the CMVI Appeal Fee under G.L. c. 90C, § 3(A)(4)¶3.

assessments contain distinct legal standards for the waiver of each fee. In addition, under certain statutes, some fees can be waived only if community service is performed.

In most cases, the statutory language dictates that fee or fine waiver is an analysis independent of any indigency determination. Despite the varied legal standards for waiving different fines and fees, when statutes allow for discretionary fee waiver determinations, the Trial Court historically has striven for uniformity.[13] Additionally, the Trial Court has undertaken measures to inject consistency into fee waiver determinations through the enactment of rules. Recently, on July 20, 2016, the Supreme Judicial Court approved amendments to SJC Rule 3:10, Assignment of Counsel, effective November 1, 2016.[14] This rule was amended to provide clarity and consistency when public counsel is appointed, and the changes included amendments to the definitions applicable to indigency determinations.

Only a judge, if the statute permits, can waive a mandated fee. The waiver must be made after a hearing, and the judge's finding must be made not only on the court record, but also in writing. Even orders for partial payment require a hearing and written findings.[15]

[13] "At the same time, all waivers must accord with statutory provisions and be carefully considered and appropriately documented. Court personnel should not recommend that fees be remitted simply to lighten the administrative burden or because the defendant has complied with all non-monetary requirements. Some degree of discretion is an inevitable and appropriate part of assessing undue hardship in individual cases, but First Justices and Chief Probation Officers should carefully consider their practices if their court's waiver rate differs greatly from other courts serving similarly situated communities. Comparative revenue performance reports have been distributed by the regional offices, and the Regional Coordinators are available to review these reports with you or to answer any questions." Dist. Ct. Transmittal No. 1031 (December 7, 2009).

[14] http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/amendments-to-sjc-rule-310-august-2016.html.

[15] Section 120 of the FY 2012 budget (St.2011, c. 68) amended G.L. c. 261, § 27C to permit judges, when faced with requests for waiver, substitution, or state payment of fees or costs, to order partial payment by the applicant of "normal" or "extra" fees or costs. Judges may order partial payment, and assign a date by which such payment must be made, only after a hearing and upon a finding that the applicant could reasonably pay part of the fees or costs. Further, if the order is appealed to the Appellate Division under G.L. c. 261, § 27D, the judge shall, within three days, set forth written findings and reasons justifying the order of partial payment, which document shall be included in the record on appeal. This provision, G.L. c. 261, § 27C(6), was effective as of July 1, 2011. This statutory change is consistent with *Underwood v. Appeals Court*, 427 Mass. 1012 (1998), in which the Supreme Judicial Court interpreted G.L. c. 261, § 27B to authorize judges to order partial, or "substitute," payment by indigent persons. However, a hearing is now required not only before the court denies the applicant's request, but also before ordering partial payment. Annotated G.L. c. 261, § 27C.

United States Department of Justice Recommendations

After the shooting death of Michael Brown on August 9, 2014, by a Ferguson, Missouri police officer, the United States Department of Justice began an investigation of the Ferguson, Missouri, police force and court system. The results of the investigation were released in a March 4, 2015, report, which found that the Ferguson, Missouri municipal court deprived people of their constitutional rights to due process, equal protection, and other federal protections.[16]

As a result of the United States Department of Justice report on the Ferguson police department and court system, the Department of Justice Civil Rights Division Office for Access to Justice convened a diverse group of stakeholders in December 2015 to discuss the assessment and enforcement of fines and fees in state and local courts.[17] As a result of the stakeholder meetings, the Department of Justice issued seven recommendations, directed at court systems, to ensure that "courts at every level of the justice system operate fairly and lawfully," and to suggest "alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system."[18]

In June 2016, Hon. Paula M. Carey, Chief Justice of the Trial Court, convened the Trial Court Fines and Fees Working Group to review the Department of Justice recommendations and to evaluate whether and how the Trial Court should ensure compliance with the seven recommendations. The Working Group, chaired by Hon. Paul C. Dawley, Chief Justice of the District Court, consists of representatives from six Trial Court departments, the Probation Service, and the Supreme Judicial Court. In addition to the chair, the members of the Fines and Fees Working Group are the following: Hon. Lisa Ann Grant, Associate Justice of the Boston Municipal Court, Hon. Jeffrey A. Locke, Associate Justice of the Superior Court, Hon. Jay D. Blitzman, First Justice of the Juvenile Court, Paul J. Burke, Deputy Court Administrator of the Housing Court, Denise M. Fitzgerald, Manager of Legal Research Services for the Probate and Family Court, Michael P. Coelho, Deputy Commissioner of Probation, Georgia K. Critsley, Senior Manager of Intergovernmental Relations for the Trial Court, A.W. (Chip) Phinney, Deputy Legal Counsel for the Supreme Judicial Court, and Sarah W. Ellis, Director of Legal Policy for the District Court.

The Working Group held its first meeting on July 26, 2016, at which the seven Department of Justice recommendations were reviewed. The Working Group endorsed the Department of Justice recommendations. The Working Group met again on September 15, 2016 and October 20, 2016, and continued to evaluate whether the policies and procedures of the departments of the Trial Court, as well as Massachusetts laws, are in alignment with these

[16] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg. 1, n.1.
[17] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg. 1.
[18] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg. 2.

recommendations. The Working Group identified existing statutes and Trial Court rules and policies that may interfere with consistent compliance with the Department of Justice recommendations. This report sets forth the Working Group's recommendations.

The Department of Justice Recommendations, taken in the broadest sense, relate to the imposition of both criminal and civil fines and fees. The Working Group, in an effort to focus on the situations that may present specific due process considerations, reviewed the Department of Justice recommendations against Massachusetts law and procedures primarily in criminal cases. The following is a review and evaluation of each recommendation put forth by the Department of Justice.

Department of Justice Recommendation Number 1:
Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.

Invoking the Supreme Court holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), that the government may not incarcerate a criminal defendant solely because of an inability to pay a fine or fee, the Department of Justice emphasizes that state and local courts must inquire as to a person's ability to pay prior to imposing incarceration for non-payment.[19] Principles of fundamental fairness bar the incarceration of a probationer who is financially unable to pay a fee, fine, or restitution, but has demonstrated "a willingness to pay his debt to society and an ability to conform his conduct to the social norms" through "sufficient bona fide efforts to pay his fine and restitution" and compliance with the other conditions of probation. *Bearden*, 461 U.S. at 670.

Massachusetts law is consistent with these principles. "[A] person may not be incarcerated *solely* because of *inability to pay* a fine" (emphasis added). *Commonwealth v. Gomes*, 407 Mass. 206, 212-213 (1990), citing *Santiago* v. *United States*, 889 F.2d 371, 373 (1st Cir. 1989). Accordingly, *Gomes* requires that "a hearing must be held to determine whether a defendant's [failure to make payments] was willful." *Gomes,* 407 Mass. at 213. Furthermore, before incarcerating a defendant for nonpayment, a judge must inquire into reasonable alternatives to incarceration, such as a long-term payment schedule or community service. *Id.* In contrast, "[n]o constitutional difficulty is posed by the incarceration of a defendant who *refuses* or *neglects* to pay a fine." *Commonwealth v. Gomes*, 407 Mass. at 213.[20]

The holding in *Gomes* was recently extended by the Supreme Judicial Court to the non-payment of restitution in *Commonwealth v. Henry*, 475 Mass. 117 (2016). In *Henry*, the

[19] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 3.
[20] Even in that instance, insofar as the defendant is being incarcerated for civil contempt pursuant to G.L. c. 224, § 118, the term of incarceration must be limited to 30 days, and the judge must make a new determination concerning the defendant's ability to pay and whether there is a realistic possibility that the defendant will comply before ordering further incarceration. *See In re Birchall*, 454 Mass. 827, 849-850 (2009).

Supreme Judicial Court established new procedures for considering a defendant's ability to pay in making restitution decisions, designed to prevent sanctions against persons unable to pay full restitution. Ordering the defendant to pay a restitution amount, which he might be unable to pay, "violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty." *Henry*, 475 Mass. at 122. "In determining the defendant's ability to pay, the judge must consider the financial resources of the defendant, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents." *Id*. at 126. The payment order may not "cause a defendant a substantial financial hardship." *Id*. at 127. "Where a defendant has been found indigent . . ., a judge should consider carefully whether restitution can be ordered without causing substantial financial hardship." *Id*.

The Working Group recommends that judicial education initiatives throughout the Trial Court emphasize the requirement for a hearing on a criminal defendant or juvenile offender's ability to pay any type of fee, fine, or restitution, before incarceration for the non-payment is imposed. Specifically, judges should be advised to appoint counsel, hold a hearing, assess the defendant or juvenile's ability to pay, consider alternatives to incarceration such as community service or full or partial waiver, and make findings on the record. Additionally, prior to incarceration for non-payment, judges must make findings that the defendant or juvenile not only had the ability to pay, but that the failure to pay was willful. Further, prior to committing a defendant or juvenile for non-payment, the judge should consider alternatives to incarceration. The Working Group recommends, and offers assistance with, the creation of a bench card, to be used as a judicial educational tool on the various legal requirements that relate to the imposition of fines, fees, court costs, and restitution.

Department of Justice Recommendation Number 2:
Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.

The Department of Justice cites *Bearden v. Georgia*, which requires consideration of "alternatives to imprisonment" when individuals of limited means cannot satisfy their financial obligations.[21] Massachusetts law is consistent with this recommendation. As noted above, before incarcerating a defendant for nonpayment, a judge must inquire into reasonable alternatives to incarceration, such as a long-term payment schedule or community service. *Gomes*, 407 Mass. at 213.

When permitted by statute, Massachusetts judges frequently order defendants, juveniles, and probationers to perform community service in lieu of paying fines or fees.[22] Certain laws

[21] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 4, citing *Bearden v. Georgia*, 461 U.S. at 660, 672 (1983).

[22] Examples of fees that may be waived or satisfied through the performance of community service include the Domestic Violence Prevention Assessment under G.L. c. 258B § 8, which requires a minimum of 8 hours of

require the performance of community service to waive a fee.[23] In fiscal year 2015, over 255,000 hours of community service were performed by over 12,400 individuals referred by the Probation Service to community service programs across all Trial Court departments.[24] This resulted in the conversion of approximately $2.19 million in fees owed to performance of community service hours.[25]

Massachusetts statutes do, however, limit judges' power to waive payment of a fine or fee or to order alternatives to payment. Certain mandatory fees and fines cannot under any circumstances be waived by the judge, and the judge has no legal authority to order an alternative such as community service.[26] For the fines and fees that can be waived by statute, there does not exist a uniform legal standard for waiver of a fee due to inability to pay. Instead, the many statutes that set forth mandatory fee assessments contain distinct legal standards for the waiver of each fee.[27]

In the past, attempts by judges to broaden the imposition of community service in lieu of the imposition of fees have resulted in scrutiny from the State Auditor for failing to adhere to statutory mandates. "If the Trial Court feels that the statute [G.L. c. 276, § 87A] places too much restriction on the judges' discretion, it should seek legislative changes."[28] Therefore, the Working Group recommends that the Trial Court propose legislative changes that would allow for greater judicial discretion in waiving fees and fines, and imposing alternatives to incarceration for the willful failure to pay. Until such changes are enacted, any alternative practices, aimed at expanding the remittance of fines and fees for those unable to pay, must of course be limited to statutorily permissible alternatives.

---

community service as part of a structured payment plan upon a finding of severe financial hardship, and the Counsel Fee under G.L. c. 211D, § 2A, which may be "worked off" with 15 hours of community service.

[23] In contrast, certain statutes may only be waived upon the performance of community service. The default warrant arrest fee, G.L. c. 276, § 30, ¶ 2, requires a fee of $75, "unless the judge finds that such person is indigent, in which case such person shall be required to perform one day of community service, unless the judge further finds that such person is physically or mentally unable to perform such service."

[24] Trial Court Community Service Program report for FY 2015.

[25] The Probation Service estimates this monetary amount by considering the different equivalency rates that each fee and fine type has for converting money owed to community service hours.

[26] The operating under the influence or operating to endanger head injury assessment under G.L. c. 90, § 24(1)(a)(1)¶ 2, c. 90, § 24(2)(a)¶ 2, and c. 90B, § 8(a)(4), "[S]hall not be subject to reduction or waiver by the court for any reason." The Operating Under the Influence Victim Assessment under G.L. c. 90, § 24(1)(a)(1)¶ 3, "[S]hall not be subject to waiver by the court for any reason." General Laws c. 90, § 24 was amended by the supplemental budget in 2008 (St. 2008, c. 302, §§ 14-15), repealing language that permitted a judge to waive the assessment upon written findings.

[27] "Substantial financial hardship" has been used in related contexts and may provide a useful uniform standard for fee waivers. See SJC Rule 3:10 (providing for waiver of the indigent counsel fee 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."); *Commonwealth v. Henry*, 475 Mass. 117, 127 (2016) ("The payment of restitution, like any court-imposed fee, should not cause a defendant substantial financial hardship."). In *Henry*, the court defined payments causing "substantial financial hardship" as "payments that would deprive the defendant or his or her dependents of minimum basic human needs." *Id.*

[28] *Trial Court – Administration and Oversight of Probation Supervision Fee Assessments*, Official Audit Report – Issued January 13, 2016. Commonwealth of Massachusetts, Office of the State Auditor, Suzanne M. Bump, pg. 2.

It is recommended that the Trial Court explore the feasibility of accepting partial payments or permitting defendants and juveniles to establish payment plans, which allow fines and fees to be paid down in installments. These alternatives may provide a fair and achievable option for many defendants who have an ability to pay, yet fail to make timely or complete payments. This recommendation would entail expanding accounting and collection practices in clerk magistrate offices across Trial Court departments.

The Working Group further recommends that the Trial Court continue its examination of alternative practices to expand the appropriate remittance of fines and fees. The Superior Court Best Practice Principles for Individualized Evidence-Based Sentencing recommend that incentives be established at the time of sentencing.[29] For example, the judge may inform the defendant at sentencing that compliance with conditions, such as the payment of any fees or fines imposed, will result in the court looking favorably upon a request to shorten probation or reduce conditions. Additionally, the Trial Court is partnering with the University of Minnesota Robina Institute of Criminal Law and Criminal Justice to review probation practices in Massachusetts and to recommend best practices for the Trial Court. The use of probation incentives, such as early termination of probation or the removal of conditions of probation, to positively affect probationers' conduct, may reduce the financial burdens on criminal defendants and are practices that will be explored under the Trial Court's efforts with the Robina Institute.

Department of Justice Recommendation Number 3:
Courts must not condition access to a judicial hearing on the prepayment of fines or fees.

The Department of Justice directs that courts must not condition access to a judicial hearing on the pre-payment of fines or fees. This is consistent with long-standing Trial Court criminal law practice,[30] and also with a recent Supreme Judicial Court rule amendment.

---

[29] Superior Court Best Practice Principles for Individualized Evidence-Based Sentencing, Principle 10.

[30] In the context of civil motor vehicle cases, legislation mandates that prepayment of a filing fee may, in certain specific instances, condition access to a judicial hearing. To contest responsibility for a civil motor vehicle infraction to a clerk magistrate, for example, the violator "may contest responsibility for the infraction by making a signed request for a noncriminal hearing on the back of the citation and mailing such citation, together with a $25 court filing fee, to the registrar [of motor vehicles]." G.L. c. 90C, § 3(A)(4) ¶ 1. (Section 73 of the FY 2010 budget, H. 4129, amended the first paragraph of G.L. c. 90C, § 3(A)(4) to provide that a motorist who requests a magistrate hearing on a civil motor vehicle infraction must pay a $25 fee to the court "prior to the commencement of the hearing before the clerk magistrate.") If the violator seeks appeal of the clerk magistrate's decision to a judge, "any violator so appealing the decision of a magistrate shall be responsible for paying a fee of $50 prior to the scheduling of the appeal hearing before a justice." G.L. c. 90C, § 3(a)(4) ¶ 3. The constitutionality of this statutory scheme was upheld in *Police Dep't of Salem v. Sullivan*, 460 Mass. 637 (2011) (concluding that St. 2009, c. 27, §§ 73-74, do not violate equal protection guarantees). *See also Gillespie v. City of Northampton*, 460 Mass. 148 (2011) (finding the imposition of $ 275 in filing fees to obtain judicial review of a final decision of a municipal parking clerk regarding a parking citation did not offend the Massachusetts Constitution). The impact of these fees, however, is mitigated

On July 20, 2016, the Supreme Judicial Court approved amendments to SJC Rule 3:10, Assignment of Counsel, which took effect on November 1, 2016. The amendments include provisions relevant to this recommendation, including a requirement that the failure to pay a legal counsel fee or contribution fee shall not be grounds for withholding or revoking appointed counsel,[31] and a provision allowing standby counsel to be appointed without the assessment of a fee, "regardless of whether the party is indigent."[32] Further, no party may be subject to incarceration for failing to pay a legal counsel fee or contribution fee.[33]

The amended Rule 3:10 is available on the Trial Court internet page, and on August 16, 2016, the amendments to Rule 3:10 were transmitted to all judges via the Executive Office of the Trial Court Transmittal 16-13. Training sessions on the Rule 3:10 amendment were held across the state in September 2016 to further educate judges and clerk magistrates on these changes.

The Working Group recommends that judicial education efforts continue across Trial Court departments on the amended SJC Rule 3:10. Additionally, it is recommended that legal guidance be provided by each Trial Court department to judges and clerk magistrates to ensure that nonpayment of outstanding fees does not result in the denial of the right to trial or access to criminal court proceedings.

Related to the requirement that court proceedings be accessible to those who have outstanding fees and fines, the development of a remote fee and fine payment system would expand court access and increase accountability for those interfacing with the criminal justice system merely to pay money owed. The development of an information technology solution allowing litigants to pay fees or fines remotely and electronically with the development of a centralized collection process could have the ancillary benefits of increasing the number of paid assessments and removing money collection cases from the courtroom, allowing judges to focus on the substance and merits of the cases before them. It should be noted that the Trial Court Strategic Plan 2.0 set forth a strategy that would require the roll-out of an electronic payment system, allowing the Trial Court to accept electronic and web-based submissions for payments across court departments and probation. The Working Group recommends, contingent upon funding, that the Trial Court adopt a remote access, electronic payment system.

---

by the Indigent Court Costs Law, G.L. c. 261, §§ 27A-29, which allows motorists who are indigent or of limited income to request that these filing fees be waived or reduced.

[31] SJC Rule 3:10, § 11(c).

[32] SJC Rule 3:10, § 4.

[33] SJC Rule 3:10, § 11(e).

Department of Justice Recommendation Number 4:
Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.

Whether there exists the right to court-appointed counsel for indigent persons in proceedings on the enforcement of fees and fines is a legally complex question and not clearly determined in Massachusetts. In all proceedings for the enforcement of fees and fines related to criminal cases, however, the appointment of counsel for an indigent person will significantly aid the court in reaching a proper determination and should substantially reduce the number of cases in which a person is erroneously sanctioned. Accordingly, to gain this benefit and to eliminate the danger of an adjudication without counsel where a person was legally entitled to counsel, the Working Group recommends a policy be adopted requiring judges to appoint counsel to represent an indigent person in a proceeding for the enforcement of fees and fines related to criminal cases whenever incarceration is a possibility.

When the non-payment of a fee or fine is enforced through a violation of probation proceeding, both notice of the violation and the right to counsel are set forth in Dist./Mun. Cts. R. Prob. Viol. P. 4(c) and the Guidelines for Probation Violation Proceedings in the Superior Court, § 5.[34] In this circumstance, counsel is provided to indigent persons as a matter of course. Judges and probation officers in the District Court and Boston Municipal Court received training on these requirements when the District / Municipal Courts Rules of Probation Violation Proceedings went into effect in 2015.

When a case has been dismissed upon the payment of court costs pursuant to G.L. c. 280, § 6, "as a condition of the dismissal or placing on file of a complaint," the remedy for non-payment is the reinstatement of the criminal complaint. The defendant has not met the condition of dismissal, and therefore the underlying criminal complaint should be placed back on the docket. The prosecution then may proceed against the defendant on the original criminal charges. An indigent person would be appointed counsel as a matter of course when the criminal complaint is revived, unless the charge does not entail the possibility of incarceration.

When the court imposes a fine or statutorily mandated fee as part of a criminal case disposition that includes a guilty finding but does not include a probationary term, the court provides the defendant a date by which to pay. If the defendant appears before the court but is unable to pay, the court should hold a hearing on ability to pay. If the defendant is unable to pay, the court should either allow for additional time or waive the fine or fee. If the defendant is able to pay but willfully refuses to do so, the court may allow additional time or commit the defendant until the defendant pays the fine or fee, with the fine or fee being reduced $30 each day pursuant

[34] The Superior Court adopted Guidelines for Probation Violation Proceedings, effective February 1, 2016. All Superior Court probation officers have been trained on the Guidelines. Regarding the notice of violation and the right to counsel, the Superior Court Guidelines codified longstanding Superior Court practice.

to G.L. c. 127, § 144. If the defendant defaults on the payment date by failing to appear in court, an arrest warrant may issue. G.L. c. 276, §§ 31 and 32. Upon the defendant's arrest and presentation to the court, the court should conduct the same ability-to-pay determination as when the defendant appears but has not paid.

Whether an indigent defendant in these circumstances has a right to appointed counsel is complex and somewhat undecided. For example, criminal defendants in Massachusetts have the right to counsel at a hearing on a default for failure to appear after non-payment of fees or fines, if the defendant faces imprisonment. *See Gomes*, 407 Mass. at 211 ("[T]he defendant also maintains that he had the right to be represented by counsel at the hearing that should have been held on his default. He is correct."). In *Gomes*, the defendant had been charged with a criminal violation of a municipal ordinance, possession of an open container of an alcoholic beverage, which provided for no term of incarceration. *Id*. at 207. The defendant admitted to sufficient facts before the District Court judge to warrant a finding of guilty pursuant to Mass. R. Crim. P. 12 (a) (3), and signed a form waiving his right to counsel. *Id*. at 207. The judge fined the defendant a total of $140 and continued the case for payment of the fines. *Id*. When the defendant failed to pay the fines and failed to appear on the scheduled court date, a default warrant issued, and $50 in costs were assessed against him. *Id*. at 208. When the defendant later appeared in court for an unrelated complaint, the defendant was committed to the house of correction on District Court mittimuses. *Id*. There was no hearing on the reasons for the defendant's default, the propriety of the costs assessed on the default, or the defendant's ability to pay the fines or costs. *Id*. The defendant was not represented by counsel. *Id*.

"A waiver [of counsel] made in circumstances in which there is no threat of incarceration does not extend to proceedings that could result in a loss of liberty." *Gomes*, 407 Mass. at 211. The facts in *Gomes* established that "nothing in the record indicate[d] that the defendant knew, at the time he initially waived his right to counsel, that he could face incarceration." *Gomes*, 407 Mass. at 211. The previously filed waiver of counsel, therefore, was insufficient to protect the defendant's Sixth Amendment right, and the court held the defendant had a right to counsel at the hearing on his default. *Id*. Whether the same analysis would apply in the absence of a default or where the defendant had previously waived the right to counsel in a case in which incarceration was a possibility has not been decided.

Furthermore, the Sixth Amendment right to counsel does not apply in civil proceedings. *Turner v. Rogers*, 564 U.S. 431, 441 (2011). The Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. *Turner*, 564 U.S. at 446; see also *Middendorf v. Henry*, 425 U.S. 25 (1976) (no due process right to counsel in summary court-martial proceedings). Where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Turner*, 546 U.S. at 441.

"Civil contempt differs from criminal contempt in that civil contempt seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." *Turner*, 546 U.S. at 441-442, citing *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911); see also *McCann v. Randall*, 147 Mass. 81, 90 (1988); *Frankel v. Frankel*, 173 Mass. 214 (1899) (order to return property obtained by fraud), *In re Brown*, 173 Mass. 498 (1899) (order to pay a debt). When a contemnor is held in custody, there is generally a simple test to determine whether the sanction is civil: "It is civil if the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, 'carries the keys of his prison in his own pocket.'" *In re Birchall*, 454 Mass. 827, 848 (2009).

A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Turner*, 546 U.S. at 442, citing *Hicks* v. *Feiock*, 485 U.S. 624, 638, n.9 (1988). "Ability to comply marks a dividing line between civil and criminal contempt." *Turner*, 546 U. S. at 445, citing *Hicks*, 485 U.S. at 635, n.7 (1988). It is only after a defendant has been found to have the ability to pay a fee or fine, that a defendant may be held in civil contempt for failure to pay. *See Turner*, 546 U.S. at 445 ("it is important to ensure accurate decision-making in respect to the key 'ability to pay' question").

Once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Turner*, 546 U.S. at 442, citing *Hicks*, 485 U.S. at 633 ("he carr[ies] the keys of [his] prison in [his] own pockets"). In Massachusetts, a defendant arrested on a default warrant for failure to pay fees or fines, for example, is typically issued a mittimus indicating release upon the payment of the money owed. In *Gomes*, for example, the mittimus held the defendant "In Default - To Be Removed and Released on Payment $50 Costs." *Gomes*, 407 Mass. at 208. Additionally, the provisions of G.L. c. 127, § 144 set a limit on the maximum length of incarceration on such a civil contempt by reducing the fine or fee owned by $30 each day.[35]

As the foregoing law makes evident, the dividing line between civil contempt cases in which a defendant does not have a right to counsel and cases in which there is a right to counsel can be difficult to discern. Furthermore, unless the court properly finds that the defendant is able to pay the fine or fee, any resulting incarceration cannot be civil, because the defendant cannot purge the contempt. In every case, the appointment of counsel for an indigent defendant will assist the court and ensure that the defendant's rights are protected. For these reasons, although there may not be a clear right to counsel in all proceedings relating to a non-payment of a criminal fine or fee, the Working Group advises that the court appoint counsel for an indigent defendant or juvenile prior to any proceeding in which incarceration is a possible outcome.

[35] Section 144 of chapter 127 of the General Laws, as appearing in the 1984 Official Edition, is hereby amended by striking out, in line 3, the word "three" and inserting in place thereof the following word: - thirty.

Both the District / Municipal Courts Rules of Probation Violation Proceedings and SJC Rule 3:10, Assignment of Counsel, support the Department of Justice recommendations for notice and appointment of counsel prior to a court hearing on the failure to pay criminal fees or fines.

The amendments to SJC Rule 3:10, Assignment of Counsel, expand the appointment of legal counsel to situations where an indigency determination has not been finalized. The amendments change the definitions applicable to indigency determinations, and the procedural process to be used in determining and collecting the indigent counsel fee and contribution fees. Additionally, any waivers of counsel must be executed in the judge's presence.[36]

The law remains that the party seeking appointment of counsel bears the burden of proving indigency by a preponderance of the evidence,[37] but, under the revised Rule 3:10, standby counsel can be appointed, "regardless of whether the party is indigent."[38] The rule continues to provide that, where a party seeks reconsideration of the entitlement to appointed counsel, the party is entitled to an evidentiary hearing, but now provides that, if requested by the party, the judge shall appoint counsel to represent the party at such evidentiary hearing.[39] These rule changes reflect a legal focus on ensuring a right to counsel, even when indigency is ambiguous or not yet determined.

Given the complexity implicit in determining whether a hearing on non-payment of a fee or fine constitutes resurrection of a criminal complaint, a violation of probation, or civil contempt, judicial education efforts are recommended across Trial Court departments regarding the appointment of counsel when a defendant appears in court, or has been arrested after default warrant, and has not paid a fine or fee. While promoting the appointment of counsel in all hearings on non-payment of criminal fines and fees may considerably expand demands on public counsel service resources, the Working Group recommends that judges afford defendants the right to counsel in all hearings that may result in the defendant's incarceration based on the non-payment of fees, fines, or costs in an underlying criminal case.

Department of Justice Recommendation Number 5:
Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.

The Department of Justice observes that in many jurisdictions, courts are authorized, and in some cases required, to initiate the suspension of a defendant's driver's license to compel the

[36] SJC Rule 3:10, § 3.
[37] SJC Rule 3:10, § 5(e).
[38] SJC Rule 3:10, § 4.
[39] SJC Rule 3:10, § 7(b).

payment of outstanding court debts. If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay.[40]

In Massachusetts, courts are statutorily required to report failure to pay certain court-imposed fees to the Registry of Motor Vehicles. General Laws c. 211D, § 2A(h), for example, requires the clerk within 60 days of the appointment of counsel to report to the RMV any outstanding indigent counsel fees. Amendments to Supreme Judicial Court Rule 3:10, however, reflect that the statutory requirement to notify the Registry of Motor Vehicles does not apply if a judge orders otherwise.[41]

The Legislature and the Governor recently took action to further reduce license loss as a collateral consequence to criminal conviction. On March 30, 2016, the Governor signed St. 2016, c. 64, An Act Relative to Motor Vehicle License Suspension, eliminating automatic suspensions of driver's licenses for convictions of drug crimes, except for non-marijuana trafficking crimes. Most of the Act was effective immediately.

Under the Act, most convictions for crimes under G.L. c. 94C no longer have the consequence of a five-year suspension of the defendant's driver's license.[42] Instead, only convictions for trafficking in drugs other than marijuana under G.L. c. 94C, § 32E(b), (c), or (c½) will result in automatic suspensions. Such suspensions will be for five years from the date of conviction, and the Registry may grant hardship licenses for employment or education purposes.[43] In addition, expired suspensions of driver's licenses for drug convictions, for failure to pay child support, or because of a default or arrest warrant shall be omitted from public driver history records.[44] The Registry was afforded six months to comply with this provision.[45] Finally, any person whose driver's license was suspended because of a conviction for a drug crime under the old law is immediately eligible for reinstatement without fee, if otherwise entitled to a driver's license.[46]

The use of arrest warrants for the non-payment of fines or fees is limited. A court may issue a default warrant when a defendant not only fails to pay a fine or fee, but also fails to appear in court on a scheduled court date. G.L. c. 276, §§ 31 and 32. The Working Group recommends that defendants be advised by the court at the time that a fee or fine is imposed that failure to pay may result in incarceration. It is further recommended that defendants also be

[40] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 6., citing *Bell v. Burson*, 402 U.S. 535, 539 (1071), *Dixon v. Love*, 431 U.S. 105, 113-14 (1977), *Mackey v. Montrym*, 443 U. S. 1, 13-17 (1979).
[41] SJC Rule 3:10, § 11(b) (rev. 11/2016).
[42] St. 2016, c. 64, § 1 (repealing G.L. c. 90, § 22(f)).
[43] G.L. c. 90, § 22½ (inserted by St. 2016, c. 64, § 2).
[44] G.L. c. 90, § 30 (as amended by St. 2016, c. 64, § 3); St. 2016, c. 64, § 6.
[45] St. 2016, c. 8.
[46] St. 2016, c. 64, § 5.

advised at the time that a fee or fine is imposed that they have until a date certain to pay the money, and if they fail to appear on the scheduled date, a warrant may issue for their arrest. Finally, it is recommended that such defendants be notified that in the event that circumstances change or a defendant is otherwise unable to pay, the defendant may advance the case to address the court on ability to pay.

The Working Group recommends that this notification be made by the promulgation of a written notice form, provided to a defendant at the time a fee or fine is imposed. Additionally, the Trial Court's inclusion in the Strategic Plan 2.0 of a tactic for technology initiatives to expand electronic notice to defendants of upcoming court dates and outstanding monies may act to further reduce the number of warrants issued under G.L. c. 276, §§ 31 and 32.

Department of Justice Recommendation Number 6:
Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.

The Department of Justice found that systems that rely primarily on secured monetary bonds without adequate consideration of defendants' financial means tend to result in the incarceration of poor defendants who pose no threat to public safety solely because they cannot afford to pay.[47] The Department of Justice recommends that to better protect constitutional rights while ensuring defendants' appearance in court and the safety of the community, courts should consider transitioning from a system based on secured monetary bail alone to one grounded in objective risk assessments by pretrial experts.[48]

The Massachusetts bail statutes governing pretrial release in the Trial Court, G.L. c. 276, §§ 57 and 58, establish a presumption of personal recognizance, except in cases punishable by life imprisonment without the possibility of parole. Additionally, the bail statutes set forth seventeen factors that judges shall consider in the setting of cash bail or conditions of release. Among the factors that a judge shall consider are a defendant or juvenile's "financial resources." Other factors include the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, record of convictions, any flight to avoid prosecution or fraudulent use of an alias or false identification, any failure to appear at any court proceeding, whether the person is on bail pending adjudication of a prior charge, and whether the person is on probation, parole, or other release pending completion of sentence for any conviction.[49] Further, any defendant or juvenile

[47] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 7, n.11, citing The United States' Statement of Interest in Varden, at 11.
[48] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 7, citing D.C. Code § 23-1321 (2014); Colo. Rev. Stat. 16-4-104 (2014); Ky. Rev. Stat. Ann. § 431.066 (2015); N.J. S. 946/A1910 (enacted 2015); 18 U.S.C. § 3142.
[49] G.L. c. 276, § 58.

denied release on his or her own recognizance in the District Court, the Boston Municipal Court, or the Juvenile Court is entitled to a prompt bail review in Superior Court.[50] In 2015, the Superior Court conducted 5,441 hearings on bail review petitions.[51]

The Massachusetts incarceration rate ranks 49th in the country.[52] A recent study by the Trial Court of 184,517 cases demonstrates that 91.2% of defendants in the District Court and Boston Municipal Court are released at arraignment.[53] Of this 91.2%, a large majority of defendants (86.8%) were released on personal recognizance, without posting any cash bail; 13.2% of those released were released after posting a cash bail.[54] The pretrial default rate, which is a failure to appear in court in the pending cases studied, was 13.7%.[55] The majority of defendants (over 65%) who defaulted were not subsequently detained by the court.[56] Only 6.8% of defendants released pretrial were subsequently arraigned on a new criminal offense during the pendency of the original case.

Practices that have fueled bail reform movements in other states, such as the employment of bail bondsmen[57] and the setting of uniform bail schedules,[58] do not exist in Massachusetts. The adoption of "early bail hearings," recommended by entities such as the Vera Institute, is already practiced in Massachusetts. Rule 14 of the Superior Court Rules Governing Persons Authorized to Take Bail (1991) prescribes that clerk-magistrates and bail commissioners respond to requests for bail "with all reasonable promptness." Cf. G.L. c. 276, § 57 (requiring persons taking bail to act in accordance with rules "established by the supreme judicial court or the superior court"). The Supreme Judicial Court has interpreted "reasonable promptness" to be within six hours.[59]

The Trial Court has several active initiatives aimed at standardizing procedures and expanding resources pertaining to the imposition of pretrial conditions of release, often in lieu of

---

[50] G.L. c. 276, § 58.
[51] The count of bail review petitions in 2015 was provided by the Administrative Office of the Superior Court.
[52] http://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR.
[53] *Analyses of District & Boston Municipal Court Pre-Trial Release Events*, Executive Office of the Trial Court, Division of Research and Planning, March 2016, pg. 12.
[54] *Analyses of District & Boston Municipal Court Pre-Trial Release Events*, Executive Office of the Trial Court, Division of Research and Planning, March 2016, pg. 13.
[55] *Analyses of District & Boston Municipal Court Pre-Trial Release Events*, Executive Office of the Trial Court, Division of Research and Planning, March 2016, pg. 27.
[56] *Analyses of District & Boston Municipal Court Pre-Trial Release Events*, Executive Office of the Trial Court, Division of Research and Planning, March 2016, pg. 28.
[57] Bail bondsmen were eliminated in 1971 in a pilot program in the Dorchester and Cambridge District Courts, and the elimination of this practice was recommended in the District Court Standards of Judicial Practice, and eventually approved by the Supreme Judicial Court. Rough Justice to Due Process, pg. 82, citing *Dist. Ct. Standards of Judicial Practice* 1:07 (August 31, 1977), and *Commonwealth v. Ray*, 435 Mass. 249 (2001).
[58] *See Varden v. City of Clanton*, Civil Action No. 2:15cv34-MHT (Alabama), *Pierce v. City of Velda City*, Case No. 4:15cv570 (Missouri), *Thompson v. Moss Point*, Mississippi, Case No. 1:15cv182LG-RHW (Mississippi).
[59] *Commonwealth v. Chistolini*, 422 Mass. 854, 856-857 (1996). "The bright-line six-hour limit on police questioning arguably is suggestive of the permissible outer limit of confinement."

cash bail. The Trial Court Pretrial Services Task Force was established by Chief Justice Paula M. Carey in 2013, and its membership consists of judges across Trial Court departments, clerk magistrates, probation officers, sheriffs, prosecutors, public defenders, and representatives from various state agencies. Upon the recommendation of the Pretrial Services Task Force, in January 2016, the Trial Court promulgated Pretrial Conditions of Release Guidelines. Additionally, the Trial Court has promulgated companion forms for ordering pretrial conditions of release and bringing forward violations of pretrial conditions of release, effective November 1, 2016. The Trial Court has also drafted and worked with legislators to file legislation, currently pending, that would amend G.L. c. 211F to allow the Office of Community Corrections to supervise defendants on pretrial conditions of release.[60]

While the Trial Court Pretrial Services Task Force currently is analyzing the utility of incorporating an evidence-based risk assessment instrument to inform judicial decisions in the setting of pretrial conditions of release and cash bail,[61] it is noteworthy that the baseline pretrial release data in Massachusetts differs significantly from other states that have adopted a risk assessment instrument.[62] Massachusetts has a dramatically higher percentage of pretrial release than states that have already incorporated risk assessment instruments into pretrial release and detention decisions, and Massachusetts has lower default and recidivism rates than both states that utilize pretrial risk assessment tools and the national average.[63]

Department of Justice Recommendation Number 7:
Courts must safeguard against unconstitutional practices by court staff and private contractors.

The Department of Justice cautions against the perils of part-time judges. The presence of part-time judges can result in the adoption of procedures in minor or local offenses by which clerks and court staff are tasked with conducting indigency inquiries, determining bond amounts,

---

[60] H1486 / S1275, now S2216.

[61] While the use of an adult evidence-based risk assessment instrument is currently under review, the Juvenile Court Department launched the use of a juvenile pre-trial risk assessment instrument in 2016. The *Juvenile Probation-Arraignment/ Appearance Screening Tool* (J-PAST) was developed during 2011-2014 by a collaborative effort of relevant Massachusetts state agencies. The J-PAST was designed for use by Massachusetts juvenile probation officers and juvenile courts when making decisions about bail in the context of juvenile bail hearings for youth scheduled for an arraignment on new charges. The J-PAST estimates the risk that a juvenile, recently charged for a suspected offense, will fail to appear for future hearings on the allegation. As such, the J-PAST is in a class of tools labeled "risk assessment instruments" (RAI).

[62] Subramanian, Ram. *Incarceration's Front Door: The Misuse of Jails in America*. Vera Institute of Justice, February 2015, Pg. 33, "Kentucky has a single statewide agency that assesses all defendants using a locally validated risk assessment instrument. In recent years, the court has released 70 percent of all defendants pretrial, with only four percent requiring bail. Outcomes for people released without monetary bail in Kentucky are far better than for those released nationally with such bail. In Kentucky, just eight percent of defendants at liberty in the community were rearrested during the pretrial period and 10 percent missed a court date. Among people released on bail nationwide, 16 percent were rearrested and 17 percent missed a court date."

[63] New data: Pretrial risk assessment tool works to reduce crime, increase court appearances, August 8, 2016. http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/.

issuing arrest warrants, and other critical functions with only perfunctory review by a judicial officer or no review at all.[64] Additionally, the Department of Justice points to additional due process concerns that arise when court designees have a direct pecuniary interest in the management or outcome of a case, such as when a court employs private, for-profit companies to supervise probationers.[65]

Since the abolition of Special Justices in 1979, there have been no part-time judges in Massachusetts.[66] Additionally, the Massachusetts Trial Court collects the fees and fines imposed without the assistance of an outside vendor or private subcontractor, and therefore avoids the potential pecuniary conflicts of interest discussed by the Department of Justice. Since the elimination of the Trial Court retained revenue account in fiscal year 2013, the Trial Court budget is no longer directly connected to the Trial Court's collection of fines and fees.

Further, many minor offenses that involve fee collection, such as motor vehicle offenses, have been decriminalized over the last thirty years, eliminating opportunities to delegate quasi-judicial functions in criminal cases, and minimizing the intersection of fee collection default, criminal charges, and notification to the Registry of Motor Vehicles. In 1982, the parking ticket function was shifted to the cities and towns.[67] The Court Reform Act of 1978 partially decriminalized motor vehicle violations punishable by a fine of $100 or less and not punishable by imprisonment. Legislation in 1986 created civil motor vehicle infractions (CMVI's), which were totally decriminalized, even in the case of a default. The enforcement action, which replaced criminal process, was action by the Registry of Motor Vehicles to suspend the violator's license as a result of failure to comply with the required procedures.[68]

Legislative Recommendations

In addition to the recommendations discussed above, the Working Group recommends five legislative amendments, which would change or eliminate laws that detrimentally affect the Trial Court's ability to adhere to the Department of Justice recommendations.

Recommendation Number 1: Create a Single Indigence Standard.

A single standard for assessing indigence and waiving fees, or assigning community service in lieu of fee payment, regardless of fee type, should be created. The single formula would apply to both civil and criminal fee assessments, including waiver of legal counsel fees, waiver of civil filing fees, and waiver of criminal fines and fees. This recommendation would require legislative amendment. Currently, as forms promulgated by the Trial Court departments

[64] U.S. Department of Justice, Civil Rights Division, Office for Access to Justice, March 14, 2016 "Dear Colleague" letter, pg 8.
[65] *Id.*
[66] Berg, Jerome S., *Rough Justice to Due Process: The District Courts of Massachusetts 1869-2004*. © 2004, pg. 18, n. 42.
[67] *Id.*, pg. 107, citing 1982 Mass. Acts c. 351, §§ 115-121 and 298 (the General Appropriates Act for Fiscal Year 1982).
[68] *Id.*, pg. 108, citing 1985 Mass. Acts c. 794.

succinctly demonstrate, the standard to waive a fee varies based on the type of fee. For example, the victim witness assessment and the domestic violence prevention assessment each can be waived upon a finding that payment would cause "severe financial hardship."[69] Probation fees can be waived if payment would constitute an "undue hardship on the defendant or his / her family."[70] The default warrant fee can be waived upon a finding of "good cause."[71] The Operating Under the Influence of Liquor, G.L. c. 90, § 24D fee can be waived if payment would cause "grave and serious hardship to the defendant and his or her family." The intimate partner abuse education program fee may be waived if the defendant is indigent or payment would cause "severe financial hardship to the defendant and his or her dependents."[72]

A single standard for indigence would promote clarity, uniformity, and transparency in court proceedings, and would eliminate instances in which indigent defendants may be incarcerated for a failure to pay a court fee.

Recommendation Number 2: Create a Single Probation Fee with Flexible Payment Options.

General Laws c. 276, § 87A provides for two distinct probation fees. Defendants placed on supervised probation must pay a $60 monthly fee, with a $5 surcharge, and those placed on administrative probation must pay a $45 monthly fee, with a $5 surcharge. This bifurcation leads to inconsistent practices. A single probation fee would promote uniform sentencing practices across the Trial Court, and would reclaim "supervised" and "administrative" probation as meaningfully descriptive categories, because the categories would relate to the level of supervision rather than the amount of the monthly fee.

Probation fees are imposed on a monthly basis, as required by statute. This procedure, however, creates a negative cumulative effect over time on defendants, as defendants owe an increasing amount of probation fees as time passes. Additionally, it can be difficult for defendants who experience transient employment to make timely monthly payments, or alternatively, defendants are unable to take advantage of more lucrative months to pay down future monthly fees. A legislative amendment to G.L. c. 276, § 87A to allow the flexibility for probation fees to be imposed either in monthly increments or in a single lump sum would increase defendants' ability to make timely payment of probation fees.

Recommendation Number 3: Eliminate Post-Release Probation Fees.

When criminal defendants have been convicted and sentenced to a period of incarceration, and afterward are supervised by probation upon release, these individuals are

[69] G.L. c. 258B, § 8.
[70] G.L. c. 276, § 87A.
[71] G.L. c. 276, §§ 30, 31.
[72] G.L. c. 209A, § 10.

assessed monthly probation fees. It is recommended that this post-release supervision category of individuals should be exempted legislatively from the imposition of probation fees.

Under current law, as noted above, criminal defendants who are placed on probation are charged either a supervision fee of $60 per month, plus a $5 surcharge, or an administrative supervision fee of $45 per month plus a $5 surcharge.[73] The probation fee is imposed even if the criminal defendant was sentenced to probation immediately following a period of incarceration. If a defendant was sentenced to probation following a period of incarceration, and the defendant is paroled prior to the conclusion of the sentenced period of incarceration, that defendant may be assessed monthly fees for both parole and probation supervision.

In contrast, juvenile offenders are exempt from Probation Supervision fees. Pursuant to Outside Section 121 of the Fiscal Year 2017 budget effective on July 8, 2016, juveniles under the age of 18 shall not be assessed a probation fee, regardless of whether the juvenile is supervised or on administrative probation.

Defendants who have been released from incarceration usually have limited financial independence or economic prospects. For this population, courts are required to impose monthly supervision fees that quickly become onerous as they accumulate. At a time when the criminal justice system is emphasizing support for an individual's successful re-entry into the community, the legislatively mandated imposition of a monthly probation fee on individuals who have just been released from incarceration creates a barrier to successful re-entry and the development of financial stability.

Although the Working Group recognizes the financial realities of the current fiscal year and that the Commonwealth's budget may pose obstacles to implementing this proposal, it is recommended that the Legislature amend G.L. c. 276, § 87A and G.L. c. 27, § 4 to exempt defendants who are placed on any form of post-release supervision by probation from monthly fees.

Recommendation Number 4: Amend statutes to clarify judicial discretion to waive fees or fines.

Several statutes require the Trial Court to impose mandatory fees or fines, but prohibit the waiver of such fees. These non-waivable fees do not consider a defendant's ability to pay, and legally require the court to impose and collect the money regardless of a defendant's individual circumstances. Examples of non-waivable fees include the $250 Head Injury Assessment under G.L. c. 90, § 24, which "shall not be subject to reduction or waiver by the court for any reason"; the OUI Victim Assessment under G.L. c. 90, § 24(1)(a)(1) ¶ 3, which "shall not be subject to waiver by the court for any reason"; and the civil motor vehicle infraction (CMVI) appeal fee under G.L. c. 90C, § 3(A)(4) ¶ 3, which provides that "any violator appealing

[73] G.L. c. 276, § 87A.

the decision of a magistrate shall be responsible for paying a fee of $50 prior to the scheduling of the appeal hearing before a justice." It is recommended that the Legislature amend such statutes to eliminate the prohibition against waiver, and to provide a common standard by which the court may assess ability to pay and order fee waiver.

Recommendation Number 5: Revise or Replace G.L. c. 127, § 144.

Pursuant to G. L. c. 127, § 144, a defendant may "work off" fines by receiving a $30 credit per day against the fines. *Gomes*, 407 Mass. at 214. Section 144 provides in part: "A prisoner confined in a prison or place of confinement for non-payment of a fine or a fine and expenses shall be given a credit of thirty dollars on such fine or fine and expenses for each day during which he shall be so confined, and shall be discharged at such time as the said credits . . . shall equal the amount of the fine or the fine and expenses." *Id*.

The Working Group has already made a number of recommendations above to ensure that judges appoint counsel for indigent defendants, hold a hearing, assess the defendant's ability to pay, consider alternatives to incarceration such as community service or full or partial waiver, and make findings on the record before ordering incarceration of any defendant for failure to pay a fee or fine. The Working Group further recommends that G.L. c. 127, § 144 be revised or replaced to codify the standards that judges must apply before ordering incarceration for nonpayment of a fee or fine.

The Working Group further recommends that G.L. c. 127, § 144 be revised or replaced to reflect current inflation rates when considering the value of a day of incarceration. General Laws c. 127, § 144 was last amended in 1987, when the credit was increased from $3 per day to $30 per day.[74] Calculating inflation, the $30 daily rate from 1987 would be worth $64.21 today.[75] Calculating inflation, the $30 daily rate from 1987 would be worth $64.21 today.[76] In 1987, the minimum wage was $3.35 an hour, while the minimum wage, effective January 2016, is $10 an hour.[77].

Conclusion

In conclusion, the Working Group endorses the seven recommendations of the Department of Justice and proposes the measures outlined herein to enable adoption of the recommendations across Trial Court departments and recommends five legislative changes. The Working Group remains committed to assisting the Trial Court in the implementation process, including further development of the Working Group's proposals for legislative and procedural change.

[74] St. 1987, c. 114, § 1, approved June 3, 1987.
[75] http://www.dollartimes.com/inflation.php?amount=3&year=1987.
[76] http://www.dollartimes.com/inflation/inflation.php?amount=3&year=1987.
[77] http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/minwage.html.