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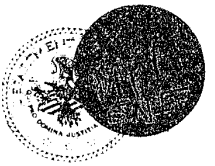

National Institute of Justice / *Issues and Practices*

Containing the Costs of Indigent Defense Programs:

Eligibility Screening and Cost Recovery Procedures

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Director

U.S. Department of Justice
National Institute of Justice
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Containing the Costs of Indigent Defense Programs:

Eligibility Screening and Cost Recovery Procedures

Principal Author

Robert L. Spangenberg

Contributing Authors

Richard J. Wilson
Patricia A. Smith
Beverly N.W. Lee

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The following individuals provided information and assistance in the conduct of this study:

Professor Michael Altman
Arizona State Law School
Tempe, Arizona

James Hennings
Metropolitan Public Defender
Portland, Oregon

Kathy L. Mays
Director, Judicial Planning
Supreme Court of Virginia
Richmond, Virginia

Program Monitor
Bruce A. Johnson
National Institute of Justice
Washington, D.C.

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Chapter 1

Introduction

Between 1976 and 1982 the cost of providing indigent defense services in U.S. state courts more than tripled, rising sharply from approximately 200 million to over 600 million dollars.[1] Much of this dramatic increase in state and local government support for indigent defendants can be attributed to the expanding legal mandate for indigent defense. Although the right to counsel was first recognized in 1932,[2] it was not until 1963, in the landmark case of *Gideon v. Wainwright,*[3] that the Supreme Court extended the right to all persons charged with serious crimes. Since then, the right to counsel for indigent defendants has quickly grown to embrace virtually all aspects of the criminal process.[4] Data currently available suggest that the cost of providing comprehensive indigent defense services will continue to rise.

In recognition of this trend, a number of jurisdictions have begun to explore administrative approaches that aim both to increase efficiency and control the cost of indigent defense programs. This report reviews two of the most popular methods: (1) systematic review of defendants' eligibility for representation to ensure that only the truly indigent are provided defense services, and (2) cost recovery from those defendants able to contribute part or all of the costs of their defense.

Approaches to Improving Cost Efficiency

Although the U.S. Supreme Court has essentially mandated the development of indigent defense systems, it has left the financing and type of delivery

system up to states and counties. Thus, the expansion of legal rights and consequent increase in costs has fallen most severely on state and local government. Given the recent public sector fiscal austerity, defender programs and funding agencies have explored various methods for limiting cost and improving efficiency, while assuring the constitutional rights of indigent defendants. Some jurisdictions have attempted to develop less expensive alternatives to the public defender or private court appointed attorney. (For example, some have instituted contract defense systems whereby private attorneys are paid on a contractual basis to represent a certain number of cases during the year.) Others have begun to look at two other methods of cost containment:

1. improved indigency screening to ensure that only the truly indigent are provided representation at public expense; and
2. cost recovery from defendants of all or part of the costs of their representation, traditionally in the form of recoupment after disposition, and more recently in the form of contributions from those defendants who can pay back part of their costs.

The logic of indigency screening programs is clear: public funds for defense services are reserved for those who are truly in need, and screening programs help to offer a systematic method of separating the needy from the non-indigent. The logic of cost recovery programs is equally compelling, though somewhat more complex. None of the U.S. Supreme Court decisions have suggested that the right to counsel includes the right to free counsel in all cases, with no obligation to pay back a portion of the costs. This interpretation was set forth most clearly in *Fuller v. Oregon*.[5] Thus, while defendants may be deemed "indigent," this designation does not necessarily exclude them from all financial obligation for their defense, so long as they have the present ability to pay back part of or all of the expense without imposing an undue hardship on themselves or their families.

With this definition in mind, many jurisdictions are now requesting that some indigent defendants pay back a portion of their defense costs. Some jurisdictions have created two categories of indigent defendants:

- those with such limited resources that they are exempt from any cost recovery efforts and receive representation free of all costs; and
- those who have sufficient resources to repay a portion of their costs. Under various systems, these defendants have been termed "marginally indigent," "partially indigent," or "indigent but able to make partial payment."

In describing cost recovery efforts, this report deals with programs directed toward this latter type of defendent.

Although screening and cost recovery are related procedures, they can operate independently. For example, eligibility determination is conducted in many jurisdictions where no attempt is made to collect part or all of the costs of defense services from defendants. Likewise, cost recovery programs exist where there is limited indigency screening. However, coordinating these two approaches to cost reduction may offer additional financial benefits, by providing a more comprehensive review of defendants' financial circumstances and, thus, their eligibility for representation and ability to contribute to the costs of their defense.

There is clearly a great deal of intuitive and political appeal to the use of these procedures. In these times of restrained government spending and diminishing public resources, citizens and public officials are particularly cost-conscious and concerned with how their tax dollars are being used. Indigency screening and collection mechanisms can demonstrate to constituents that publicly compensated counsel are being provided only to defendants who are truly indigent, and that, if possible, these defendants will be expected to reimburse the government for at least some portion of their legal services.

Practical and Constitutional Concerns

While the federal and state courts have expanded the constitutional right to counsel, they have offered only limited guidance on how to determine who is eligible for indigent defense services and who should be required to pay back some of the costs of indigent defense. The only U.S. Supreme Court decision which has addressed the question of eligibility for publicly compensated counsel established the "substantial hardship" test as the basis for qualification. In *Atkins v. E. I. Dupont Co.*[6] the Court stated:

> We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot, because of his poverty, pay or give security for costs . . . and still be able to provide himself and dependents with necessities of life.

The test has been embraced by the American Bar Association in Standard 6.1, *Standards Relating to Providing Defense Services* and by the *National Legal Aid and Defender Association Standards for Defense Services* in Standard 2.1.[7] Thus, the Precise determination of who is eligible to receive services has devolved to the states and local jurisdictions.

Existing literature and program experience regarding state and local responses to this problem offer conflicting perspectives on the usefulness of developing detailed indigency screening procedures. Some have questioned

the advantages of such criteria, arguing that the cost of determining indigency and administering an indigency screening system will exceed any savings from the program. It has also been argued that eligibility screening poses an inordinate danger of violating a defendant's right to counsel by denying him a publicly compensated attorney, while forcing the defendant to trial. In the early 1970s, a system which would provide a publicly compensated attorney to any defendant upon request was proposed as a more practical alternative to indigency screening.[8] However, given the substantial increase in costs and pressures on the criminal court system in general, such a suggestion is no longer practical.

Likewise, recouping the costs of indigent defense has been the source of considerable debate. In *Fuller v. Oregon,*[9] the U.S. Supreme Court upheld recoupment as a condition of probation and, in *James v. Strange,*[10] upheld the imposition of a civil judgment against the indigent defendant based on the defendant's ability to make payments. In opposition to these decisions, it has been argued that compelling the defendant to repay the cost of appointed counsel may violate the Constitution's due process and equal protection clauses.[11] However, the authors are not aware of any state court decisions which have found recoupment to be unconstitutional as long as the general guidelines set forth in *Fuller* and *Strange* are followed.

In addition to the question of constitutional rights, some have expressed doubts as to the practical success of existing recoupment programs. One concern is that such programs may not be cost effective, in that much more is spent on administration than is actually collected from defendants. Others, however, claim that they can generate revenues of sufficient size to warrant continuing their recoupment programs. In response to the potential problems with recoupment, a number of jurisdictions have recently begun to require partially indigent defendants to contribute towards the costs of their representation *prior to disposition of their cases.* It is claimed that these programs have a higher rate of return and may be more cost effective than recoupment programs. While there is a fair amount of program experience in this area, policymakers and practitioners who wish to implement eligibility screening and cost recovery programs have had little information to guide them in their efforts. In addition, decisionmakers have lacked information on the legality, practicality and cost effectiveness of the various alternatives.

Development of This Report

This Issues and Practices document was designed to fill this critical information gap for policymakers, judges, court administrators and public defense practitioners, particularly those operating in urban court systems with

large indigent criminal defense caseloads. The specific goals of this research were to provide:

- detailed examples of indigency screening and collection procedures employed in selected sites around the country;
- an analysis of whether these procedures conform with constitutionally mandated due process requirements;
- an examination, where possible, of the extent to which these programs are cost effective; and
- recommendations regarding the preferred methods of indigency screening and cost recovery, where appropriate.

To address these concerns, we relied on several sources of information:

- Background information on the use of cost recovery and screening procedures available from Abt Associates' work on the *National Criminal Defense Systems Survey*.
- A fifty state statutory survey of indigency screening and recoupment conducted by Richard J. Wilson of the National Legal Aid and Defender Association (NLADA) in conjunction with this study. The findings from this survey are included in Appendix A.[12]
- An extensive survey on screening and recoupment conducted by the Executive Secretary's Office of the Virginia Supreme Court in 18 states.
- A telephone survey of 24 jurisdictions, which was used to gather additional information on sites with known screening or cost recovery programs, and to identify sites for on-site study. In order to identify sites which were active in both indigency screening and recoupment, we began with a sample of the nation's 149 largest cities of over 250,000 in population. This category was chosen because it was determined that large urban areas would be most likely (1) to have the greatest need for establishing uniform systems and reducing costs and caseloads and (2) to have a sufficient volume of criminal cases to offset the administrative costs of screening and recoupment. With the help of our Government Project Monitor and Advisory Committee we selected sites for telephone contact when our data indicated there were established, systematic, and well documented systems for indigency screening and recoupment. In addition to the type of screening and recoupment systems, sites were selected based on the type of indigent defense system—public defender or private bar (contract and assigned counsel)—and the type and quality of data reported

to be collected by the program, particularly relating to program costs and caseload.

- Site visits to three jurisdictions—Los Angeles, California; Seattle (King County), Washington; and the state of Colorado—which appeared to offer the most efficient and well-established eligibility screening and/or cost recovery procedures and appeared to have comparatively complete and reliable data on their screening/cost recovery programs.

The three sites covered a wide range of indigent defense system types, agencies responsible for eligibility and cost recovery, and procedures employed. The major features of each site's program are summarized below.

• *Los Angeles County, California*

The indigent defense system in Los Angeles County is the largest in the country. It consists of a number of individual programs: a large county public defender agency, a private non-profit public defender program that handles the overload and conflicts from the county agency, several small contract defender programs, and a large assigned counsel system.

The Los Angeles system has an extensive, clear, written set of eligibility criteria for indigent defense services. While several approaches are used, in most county courts defendants are interviewed by county personnel at the time of arraignment to determine their eligibility for free counsel, and to make an initial assessment of their ability to make partial reimbursements. Following disposition, the same employees who conducted the initial screening review cases to make a final recommendation regarding recoupment. If the court agrees that the defendant is able to pay, the case is then referred to the County Department of Collections for recovery.

• *Colorado*

Separate indigency screening units have been established under Supreme Court directive in Colorado's largest judicial districts: 2nd—Denver, 4th—Colorado Springs, 8th—Fort Collins, 10th—Pueblo, 17th—Brighton, 18th—Littleton, and 20th Boulder. As part of the screening responsibility, the nine full-time eligibility investigators and five half-time clerks identify partially indigent defendants who cannot afford the full fees of privately retained counsel. These partially indigent defendants are asked to contribute to the cost of their representation prior to case disposition.

Eligibility investigators also pursue reimbursements, checking with the court clerks at the end of each month to determine whether payments have been made. If not, they send follow-up letters to defendents who have agreed to make contributions.

• *Seattle, Washington*

In Seattle (King County), Washington, there are six programs involved in providing indigent defense services. Four public defender organizations are under contract to the county to provide various services in the superior, district, municipal and juvenile courts. A private assigned counsel program fills whatever gaps exist in services. Finally, the King County Office of Public Defense (CPD) fulfills several administrative functions for the overall system. The principal functions of the OPD include: (1) determining indigency; (2) contracting with the four non-profit public defense organizations; and (3) establishing a panel of attorneys to handle assigned counsel cases.

Recoupment procedures exist for the superior, district and municipal courts. Costs recouped in the municipal court are credited to indigent defense bills received on a monthly basis, while costs recouped in superior and district courts are returned to the general fund of the county.

OPD also administers a partially indigent program in which certain defendants are asked to execute a small promissory note for payment of the cost of defense.

Overview of This Report

This Issues and Practices Report is designed to isolate the fundamental procedural aspects of cost recovery systems and identify a variety of approaches to fulfilling those functions. Accordingly, this report is process-oriented, using examples from numerous jurisdictions to illustrate the available alternatives for the various steps in the process. This organizing principle enables the reader to gain a broad perspective on the issues that arise in eligibility screening and cost recovery from indigent or partially indigent defendants.

Organization

Chapter 2 provides a comprehensive discussion of procedures for determining the eligibility of potentially indigent defendants. In this chapter the reader will find numerous concrete examples of the various types of eligibility tests that are used to screen defendants.

Chapter 3 reviews the methods employed to collect all or a part of the costs of representation from indigent defendants. This includes an extensive discussion of the typical method of ordering recoupment after disposition of a case and a description of the more recent, and less common, practice of collecting contributions from partial indigents prior to disposition.

Chapter 4 examines, to the extent possible, the cost-efficiency of the various procedures described in Chapters 2 and 3 and the relative merits of different approaches to cost recovery.

Chapter 5 provides a summary of the general guidelines and recommendations that appear throughout the report regarding the implementation and operation of screening and cost recovery mechanisms.

Footnotes

1. NLADA, *Guidelines for Legal Defense Systems in the United States,* Report of the National Study Commission on Defense Services (Washington, D.C.: NLADA, 1976); Abt Associates Inc., *National Criminal Defense Systems Study,* March 1984, prepared through a contract with the Bureau of Justice Statistics, U.S. Department of Justice.
2. Powell v. Alabama, 287 U.S. 455 (1932).
3. 372 U.S. 335 (1963).
4. *See, for example,* Holloway v. Arkansas 435 U.S. 475 (1978), (appointment of second attorney required in cases involving co-defendants where a conflict of interest is identified); Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel must be provided for misdemeanor and petty offenses possibly resulting in incarceration); Coleman v. Alabama, 399 U.S. 1 (1970), (right of counsel extended to all postcharge witness-suspect confrontations); in re Gault, 387 U.S. 1 (1967), (due process protection extended to juveniles in delinquency proceedings leading to possible incarceration); Miranda v. Arizona, 384 U.S. 436 (1966), (right of counsel extended to pre-charge police in interrogations); Douglas v. California 372 U.S. 353 (1963), (due process and equal protect clauses entitle defendant to counsel on first appeal).
5. 417 U.S. 40 (1972); *see infra* p. 4.
6. 335 U.S. 331 (1948).
7. American Bar Association, Standards for Criminal Justice (1979).
8. *See,* Fortune, *Financial Screening in Criminal Cases—Impractical and Irrelevant,* Wash. U.L.Q. 821 (1979).
9. 417 U.S. 40 (1972).
10. 407 U.S. 128 (1972).
11. *See,* Note, *Counsel as a Condition of Probation,* 30 **BAYLOR L. REV.** 393 (1978); Leen, *Fuller v. Oregon: The Cost of a Constitutional Right,* 55 **OR. L. REV.** 99 (1976); Note, *Fuller v. Oregon: Cost Recoupment from Indigent Defendants Upheld* 11 **WILLAMETTE L.J.** 284 (1974).
12. Figures presented in the text of this report reflect a combination of court rules, local customs, *and* relevant state laws. Therefore, some discrepancies between the statutory framework for a particular jurisdiction (as shown in Appendix A) and actual practices may occur.

Chapter 2

Eligibility Screening

In the past, in many jurisdictions, counsel was appointed simply on the request of the defendant. Some judges asserted that the time and effort necessary for eligibility screening was unwarranted, since only a few defendants would be excluded. Others were concerned that screening might seriously interfere with the smooth running of the court's docket. In recent years, however, there has been a noticeable trend toward more formal indigency screening as a result of either legislative or state supreme court mandates. In part, this has occurred in response to the constantly rising cost of indigent defense services.

This chapter explores the options available to the courts in all aspects of eligibility screening: who conducts screening, when and where determinations are made, how different jurisdictions define and calculate eligibility, and how to verify and modify determinations. Information on national trends in screening is included, where appropriate, from Abt Associates' National Criminal Defense System Study.[1] More specific and detailed examples are drawn from on-site research conducted during the course of this study as well as from previous defender-related research. In addition, we draw from studies and recommendations in several states that have addressed the indigency question including Rhode Island, Virginia, Massachusetts, Maryland, Wisconsin and North Dakota. Finally, this chapter draws information from both a legal analysis and fifty state statutory survey conducted by NLADA as part of this overall research effort (see Appendix A). This work was performed by Professor Richard J. Wilson while he was the Defender Director of NLADA.

Who Conducts Eligibility Screening?

Every state, the federal system, and the District of Columbia has a statute which deals with the eligibility determination process. However, there is little uniformity of practice in eligibility determinations across state systems. Screening authorities may include the trial judge, a magistrate, court clerk, independent agency, public defender, or private assigned counsel. The one unifying thread is that the judge almost invariably has final authority to make or ratify the indigency determination.

Initial Screening

There are a number of methods used to establish responsibility for eligibility screening. Some states assign the responsibility through legislation; the statutes of 30 states charge the judge with the initial determination decision. In other states, the state supreme court or state court administrator delegates this responsibility. Finally, some states do not establish any statewide policy on this issue with the decision typically left to individual criminal court judges. When this occurs in a jurisdiction with a public defender, the judge frequently assigns the task of indigency screening to the public defender. In jurisdictions with private assigned counsel or contract defense programs, judges usually assign the task to court clerks or probation officers. However, in some states with no explicit requirements, screening may be performed by different individuals from court to court, and sometimes the process is different even within the same court. Depending upon the jurisdiction, then, any of the following may be responsible for making eligibility determinations:

- Public defender office personnel, including attorneys, investigators, paralegals and secretaries;
- Independent county or local administrative office personnel;
- Court personnel, including judges, magistrates, probation officers, juvenile court personnel, court clerks and court volunteers;
- Private attorneys; or
- Some combination of the above.

Results of the National Criminal Defense Systems study disclose that jurisdictions that are sparsely populated tend to rely on less formal screening procedures. In these smaller court systems, screening will often be performedby court personnel; however, in larger jurisdictions, it is less likely that court personnel will play this role.

The three jurisdictions selected for on-site study display interesting variations in screening. Prior to June of 1984, the Los Angeles County Public Defenders Office was responsible for screening in most of the county's 24

municipal courts and the 10 superior court departments. Lawyers, paralegals and investigators conducted the screening. In a small number of the remaining courts, screening was conducted by the court clerk. In an effort to relieve the public defender of this time-consuming burden and to provide more uniformity and regularity to the process, the screening is now done in most courts by the county's Department of Collections.

In Seattle, the Office of the Public Defender (OPD), screens all criminal defendants seeking the appointment of counsel. The OPD office is located downtown and all defendants who are charged in the downtown courts and are not in custody are required to report to the OPD office for an interview during regular business hours. OPD screeners visit the jail each day to interview defendants who are unable to make bail; on appointed days during the week they also interview defendants in the outlying district courts of the county.

In Colorado, screening for eligibility is conducted in two ways. In the less populous counties, responsibility for screening lies with the state public defender who provides representation statewide. Actual interviewing is frequently conducted by paralegals or secretaries. In Colorado's seven largest judicial districts, the public defender provides screening only for defendants held in custody. Eligibility determinations for all other defendants are made by special Indigency Screening Units (ISUs), created as the result of 1983 legislation designed to control the costs of court-appointed counsel. Funded and supervised through the State Court Administrator's Office, these units are normally housed in the various county courthouses where most defendants are brought for first appearance. Five of the judicial districts have one full-time screener and two have two full-time screeners.

Other approaches to screening can be found in the state of Virginia, where guidelines for court-appointed counsel prescribe which agency and/or individuals will conduct the screening.[2] First, it is suggested that, with proper training and the development of a set of procedures, local magistrates—often the first court officials to have contact with defendants—can be responsible for screening. Second, within the juvenile courts, the guidelines propose that juvenile court probation counselors conduct indigency screening. They specifically provide that staff from the juvenile court services unit may be directed by the judge to investigate the financial status of parents to determine their ability to pay for an attorney for their child. A third alternative is the use of court volunteers. Some courts in Virginia already use volunteers to question defendants on their financial eligibility for court appointed counsel. Finally, the Virginia guidelines suggest that screening can be performed by staff of the Commonwealth's attorneys office; district court clerks or their deputies; staff from the pre-trial release programs; and/or personnel from

Offender Aid and Restoration programs. While Virginia's guidelines give local jurisdictions a great deal of flexibility in determining who does the screening, comprehensive standards ensure uniformity in the final eligibility test and decision.

In our view, the most important question in the initial screening decision is not "who should conduct screenings," as long as the individuals responsible for screening are accessible (that is, located centrally within the judicial district or county and available during convenient times). Far more important is the question of whether there are specific standards and guidelines for screeners to follow in making indigency determinations.

Final Authority to Determine Indigency

In most jurisdictions around the country, it is the trial judge who is given final authority on the question of eligibility. For example, the National Criminal Defense System Study conducted in 1983 revealed that in over three-fourths of the 700 counties reporting, the final decision was made by judges.[3]

However, caution should be used when reviewing these figures, since formal authority does little to ensure that this function is given significant attention by judges. Both our on-site investigation and experience in other jurisdictions suggest that judges tend to rely heavily on the recommendations of screeners, approving them in virtually every case. This reliance highlights the need for uniform eligibility criteria to guarantee consistency in the screener's recommendations.

In counties where judges are not given final authority, the public defender, independent screeners, or other court personnel make final eligibility decisions. In fifteen states, by statute, the indigency determination is made by the public defender. The ABA *Standards for Criminal Justice* (Standard 5-6.3) suggest that the determination of eligibility should be made by public defenders or assigned counsel. Under this kind of system, information divulged during screening is treated as confidential because of the nature of the attorney client relationship. Screening by public defenders also prevents the court's limited resources from being consumed by this task.

While no one of these options represents a clear advantage over the others, the experience of one state might be instructive when deciding on screening authority. In its final report to the Rhode Island Supreme Court on improving the system for providing counsel to indigent defendants, the Study Committee on Defense of Indigents recommended that the public defender be given total responsibility for determining indigency, including the final determination, which in 1981 lay with the state's judges.[4] The Committee felt that assigning all responsibility for indigency determination to the public

defender would achieve greater consistency in the final determinations, since that would centralize the function and public defender staff assigned to screening would develop expertise in making the eligibility decisions.

When is Screening Conducted?

In many jurisdictions an indigent defense program is not permitted to provide representation until a formal court appointment is made by the judge. However, most jurisdictions will not permit the criminal process to proceed beyond the first appearance without the appointment of counsel. Thus, the timing of the screening decision is greatly dependent on the jurisdictions' policies concerning timing of first appointment of counsel. Both for reasons of court efficiency and to ensure the due process rights of defendants, screening and court appointment should take place as early as possible.

Eligibility Practices and Procedures

The American Bar Association Standard 5-6.1 suggests that counsel should be provided for those persons who are "financially unable to obtain counsel without substantial hardship to themselves or their families." All but three states—Colorado, Delaware, and Illinois—provide their own statutory definition of indigency. Among these, the most common standard employed is "the inability to pay for counsel." Thirty-four jurisdictions use this standard or a slight variation of it, such as "unable to employ or obtain counsel" or "insufficient money to pay for counsel." One state, Massachusetts, allows its statewide defender agency, the Committee for Public Counsel Services, to define indigency and set the criteria for determining it. Another thirteen states include statutory reference to a requirement that counsel be appointed when the inability to pay would cause "substantial or undue hardship," usually to either the defendant *or* his family.

An examination of the various state statutes pertaining to indigency determination reveals several frequently addressed factors. Thirty-seven states provide some type of specific statutory criteria. By far, the most frequently used criterion is income. Most statutes do not distinguish between net and gross income. Some states provide for a presumption of indigency when the defendant is receiving some form of public assistance. Almost half of the states consider property owned by the defendant in determining income, but do not distinguish between real and personal property. Twenty-one states allow consideration of the age and number of dependants supported by the defendant. Fifteen states consider the outstanding financial obligations of the defendant. A small number of states consider the nature of the offense and the attorney's probable fee, based upon prevailing rates in the area.

Although many states share similar eligibility criteria, there are a number of different methods employed in determining whether a defendant is eligible for indigent defense services. In some jurisdictions presumptive tests (of both eligibility and ineligibility) are applied. In others, income formulas are used to compare defendants' income with an established standard to determine their ability to pay. Elsewhere, a more complex comparison of defendants' income and assets with their expenses and liabilities is used in determining indigency. These methods and the guidelines designed to provide uniformity in their application are discussed in detail in the following sections.

There are several general guidelines which are common to many sets of eligibility standards. Appendix B contains examples of such written guidelines from North Dakota and Los Angeles, California. Common themes include the following:

- When in doubt, questions regarding defendants' indigency should be resolved in favor of eligibility. This will assist case processing, protect full constitutional rights and can be balanced by more active collection practices.
- The eligibility determination should not impose an extensive time burden on the court.
- The administrative costs of making eligibility determinations should be carefully considered.
- Normally, lower court judges should make the final indigency decision and judges at the next level should not normally review the question unless new information becomes available.
- Counsel should not be denied to any person merely because his or her friends or relatives have resources adequate to retain private counsel or because bond has been posted by or on behalf of the defendant.
- A basic test to consider is whether or not an experienced private criminal practitioner would be willing to represent the defendant under his or her present financial condition.

One underlying concern in all of the eligibility guidelines is that denial of counsel might ultimately result in an appeal and possible re-trial of the case, due to a violation of constitutional guarantees. Furthermore, serious delays may result if court appointed counsel is denied and the defendant's attempts to retain his or her own private attorney prove fruitless.

Using Eligibility Criteria

There are two ways that specific eligibility criteria are used in indigency determination. In the first, if the defendant meets the established criteria, he or she is presumed to be eligible. Under the second, defendants meeting certain specific conditions are automatically assumed to be ineligible. These presumptive tests may of course be supplemented by further income tests.

• *Presumptive Eligibility*

The most common presumptive test for eligibility is to determine whether or not the defendant is a current recipient of a state or federally administered public assistance program for the indigent, such as AFDC, Food Stamps, Medicaid, or SSI. If the applicant is receiving public assistance, he/she is automatically considered to be eligible for court appointed counsel and no further inquiry into his or her finances is required unless a judge believes that a more thorough examination is necessary. Such scrutiny reportedly occurs only in rare instances.

A presumption in favor of applicants receiving public assistance exists in several states including California, Connecticut, Maryland, Minnesota and Virginia. In addition, a presumptive test for eligibility has been recommended in Massachusetts by a Committee advising the Chief Administrative Judge on guidelines for all trial courts in the Commonwealth.[5] Under the Massachusetts recommendation, there would be no further test beyond confirmation of the fact that the applicant was receiving some form of public assistance.

A number of states, such as Kentucky, New Jersey, and North Dakota, rely on other presumptive standards for determining eligibility. For example, automatic eligibility is extended to defendants who are unemployed and without liquid assets, those who are held on bond pre-trial and have no liquid assets, or those who have recently been determined eligible and had counsel appointed in another case.

• *Presumptive Ineligibility*

Presumptive tests can also be established to preclude applicants from eligibility. For example, in Florida defendants who have been released on bond in the amount of $5,000 or more or defendants who have more than $500 in cash are presumptively ineligible. In other states, ownership of a car or home or being disqualified from receiving public assistance are used to presume defendants ineligible.

However, many of these tests raise serious questions of law and policy. For example, in the case of *William v. Superior Court,*[6] California courts have concluded that it is improper to reject an applicant as financially ineligible simply because he or she has obtained a release from custody on bail.

Standard 5-6.1 of the ABA *Standards for Criminal Justice* state that counsel should not be denied "because bond has been or can be posted." The commentary that follows the standard states further that, "the ability to post bail is rejected as a basis for denying counsel because it requires the accused to choose between receiving legal representation and the chance to be at liberty pending trial. Since a person's freedom prior to trial often is essential to the preparation of an adequate defense, placing the defendant in this dilemma is arguably a denial of the effective assistance of counsel."

A number of jurisdictions have also concluded that ownership of a home and/or a car should not be used as criteria for automatic ineligibility. Their view is that doing so implies either 1) the belief that individuals who can afford to acquire these properties can afford to pay for private counsel, or 2) that they could be liquidated for that purpose. The first assumption ignores the fact that some Americans who own homes or cars may have used most of their available income to acquire and maintain them and might have little remaining for legal fees. The second assumption ignores the fundamental nature of these properties to defendants' livelihoods, and the undue hardship that might result from being forced to liquidate them to pay for their defense. Because these questions regarding ownership of a home or car are raised frequently, they are discussed in further detail below in the section on defining assets.

Determining Indigency Through Income Formulas

In an effort to increase uniformity across the state, some jurisdictions have developed formulas to guide indigency decisions. The most commonly used indigency formula is the one developed by the federal Legal Services Corporation governing the eligibility of applicants for civil legal aid. Under that system, counsel will be provided to those with income levels at or below 125 percent of the official poverty level threshold, as defined by the federal Department of Health and Human Services (HHS). These guidelines are updated by HHS on a periodic basis and would require revisions from time to time if adopted for use in an indigent defense system. Table 1 shows the Legal Services Corporation guidelines established at 125 percent above the HHS figures published on February 11, 1986.[7]

Table 1

Maximum Income Levels For Eligibility For Legal Services

	Household Size			
	1	2	3	4
Annual Gross Income	$6,700	$9,050	$11,400	$13,750
Monthly Gross Income	558	754	950	1,146
Weekly Gross Income	129	174	219	264

If the household size exceeds four, $2,350 gross income per year is added for each additional member of the household.

This Legal Services Corporation poverty formula is used in a number of states, including Colorado and North Dakota, to determine eligibility for court appointed counsel. However, each state makes different adjustments in applying the formula to allow for extenuating circumstances. For example, in North Dakota, a defendant whose income resources exceed these guidelines may still be eligible based upon the following factors:

- Current income prospects, taking into account seasonal variations in income;
- Age or physical infirmity of household members;
- The estimated cost of obtaining private legal representation with respect to the particular matter for which assistance is sought;
- The nature of the criminal charge; and
- The anticipated complexity of the defense.

According to a study of 18 states conducted by the Virginia Supreme Court in 1983, seven of the states examined used one or more variations of an indigency formula test. These tests included:

- the Bureau of Labor Statistics national poverty threshold test (California, District of Columbia, West Virginia);
- Legal Services Corporation test (Colorado);[8]
- state or local poverty level test (California, Connecticut, Georgia); and
- formula developed locally by a bar association or committee (Georgia, Minnesota, New Jersey).[9]

There are two potential problems in using income tests to determine eligibility. First, eligibility determinations based on formulas may not be

flexible enough to meet individual needs. Second, an income formula does not take into consideration the varying costs of legal representation charged by lawyers in retained criminal cases. These are two problems that led Rhode Island and Massachusetts to decide against the use of the income test.

The National Center for State Courts has echoed these concerns, concluding that there are both advantages and disadvantages to using an income formula.[10] While a single standard is being applied to all defendants seeking counsel, cut-off tests alone often do not sufficiently reflect individual circumstances nor do they take into account the cost of private legal representation for different types of charges. The Center cautions that, ". . . when these levels are intended as a floor below which indigency is presumed, they sometimes become a ceiling above which appointments are rare, even when justified."[11]

Comparing Income/Assets with Expenses/Liabilities

Most states that do not use a simple income formula test tend to apply a more complex test comparing a defendant's income and assets to their expenses and liabilities. Generally speaking, if the expenses and liabilities exceed the income and assets, then the applicant is found to be eligible for defense services. However, in a few jurisdictions, even when the income and assets exceed the expenses and liabilities, additional steps are required to determine eligibility, such as comparing the surplus income figure to the cost of retaining private counsel.

While this concept is relatively simple, income/assets and expenses/liabilities need to be clearly defined. For example, in defining income, is household income attributed to the applicant? Is parental income attributed to juveniles? If a defendant owns a home or a car, should that property be included in calculating his or her assets? In calculating expenses and liabilities, similar definitional problems arise, especially with regard to exceptional expenses that might preclude the possibility of retaining private counsel. The criteria which are to be used in conducting this type of eligibility test should be explicit and consistently applied; however, they should be flexible enough to take into account exceptional circumstances.

• *Defining Income*

The most obvious source of income is salary or wages which are recognized as income in all jurisdictions. Beyond wages the definition of income can vary substantially. Some jurisdictions have developed detailed lists of items qualifying as income for screening purposes. In North Dakota, for example,

the following items are considered as income for eligibility purposes:

- money wages and salaries before any deductions;
- income from self-employment after deductions for business or farm expenses;
- regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments;
- public or private employee pensions and regular insurance or annuity payments;
- income from dividends, interest, rents, royalties, estates or trusts; benefits from any governmental income maintenance program;
- money received from the sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury.

While it is obvious that few applicants for public legal representation will have many of these sources of income, the detailed list ensures that exceptional circumstances will be taken into account.

A far simpler definition has been recommended for use in Rhode Island. As prescribed by the Supreme Court Committee on the Defense of Indigents, income includes salary, wages, interest, dividends, or other earnings that are reportable for federal income tax purposes.

While only seven states are specifically authorized to do so by statute, jurisdictions also consider the income of the applicant's spouse when determining eligibility. For example, in Virginia, the income and assets of the spouse, who is a member of the applicant's household, must be considered unless the spouse was the victim of the offense allegedly committed by the applicant. California has a similar rule which states that unemployed, otherwise eligible, married persons are ineligible if their spouses have sufficient community property, income or assets under tests set forth in the standards. Finally, the Colorado courts have recently extended this approach to cases in which there is no official marital status. By amendment to their court rules in 1982, the Colorado Supreme Court changed the language "total family income" to read "total household income." The Court indicated that "this change is designed to permit the court to consider all contributions to the support of an indigent defendant by persons domiciled together, whether the contributor is a legal spouse or a natural parent, or not."[12]

Another question arises regarding the applicant's income when the defendant is a juvenile living with or supported by his or her parents. Statutes in fourteen states provide for counsel to be appointed, but require parents to pay back all or a portion of the costs. This practice is also common in several other states. The Massachusetts Committee on Competent Counsel addressed this problem in some detail and concluded that parents' income, assets and expenses should be considered in determining eligibility for appointed counsel for juveniles and young adults who are still dependent on their parents, provided that: 1) the payment of counsel by the parent must not result in a conflict of interest; and 2) it is likely that such income and assets will be readily available. Virginia is even more explicit: the financial and legal responsibility of parents is mandated by law. Parents must complete a financial statement if a court appointed lawyer is requested for the juvenile. Parents are then liable for the costs of such counsel up to $100 if a lawyer is appointed and the parents are financially able to pay.

There are two reservations that appear throughout most juvenile eligibility standards and statutes. The first relates to cases in which the parent is the direct victim of the juvenile's conduct. The second is where forcing the parent to pay may exacerbate the already strained relations between the parent and child. In these cases parental income is not attributable to the juvenile, and the parent has no obligation either to obtain counsel for their child or to reimburse the state for the cost of counsel.

All national standards and many commentators oppose the practice of considering third-party assets. The ABA Standards for Criminal Justice, Standard 5-6.1 states that "counsel should not be denied merely because friends or relatives have resources adequate to retain counsel." The commentary that follows the standard suggests that such practices are of questionable constitutionality, since the right to counsel is a personal one, and the consideration of assets of others associated with the defendant, however close the relationship, is inappropriate. They further state that such considerations may also raise questions of conflict of interest, particularly with juveniles whose parents are required to finance the minor's attorney. Court decisions reviewing this practice almost unanimously have found consideration of third party assets to be improper, whether for eligibility or recovery purposes.

• *Defining Assets*

Most comparative tests of eligibility consider both income and assets. However, there are times when it is difficult to distinguish between the two and some standards do not make explicit distinctions. For the most part,

however, in order to be considered, assets must be liquid or easily converted to liquid assets.

Under the Public Defender Eligibility Procedures in Maryland, liquid assets are defined as those assets which can be readily converted to cash to pay for private representation. Examples given include heirlooms, jewelry, paintings, cameras, etc. However, the guidelines go on to state that any property owned jointly with friends, spouse, or other family members is not considered a liquid asset for eligibility purposes.

Virginia has a slightly different definition. Its guidelines require an examination of all assets that can be converted into cash within a reasonable period of time without causing substantial hardship or jeopardizing the applicant's ability to maintain home and/or employment. Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit and tax refunds. All personal property owned by the applicant is also considered for income purposes.

Ownership of a home or car raises particularly thorny issues when determining eligibility for representation, and jurisdictions differ widely in their policies concerning these properties. For example, Los Angeles, California guidelines acknowledge that in today's society an adequate means of transportation is a necessity for both work and family. Consequently, the ownership of, or equity in, a car will not ordinarily disqualify an applicant from eligibility. An exception is made when there is sufficient equity in the car so that, if sold, the applicant would realize sufficient funds: (1) to secure an adequate alternative means of transportation; and (2) to hire a private attorney.

The ownership of a home has also been the subject of controversy when calculating assets. Connecticut, Maryland, New York, North Dakota, Pennsylvania, South Carolina and West Virginia all require that the equity in a home be included for purposes of calculating assets. We are not aware of any jurisdictions where the defendant is ineligible solely because of the ownership of a home, but generally, if the applicant has no mortgage or loan payments remaining on the house and has some additional income, he or she would normally be found to be ineligible under any of the tests applied.

• *Expenses and Liabilities*

The definition of expenses and liabilities also varies among states. For example, in North Dakota, expenses and liabilities include all living expenses, business or farm expenses, fixed debts and obligations (including federal, state and local taxes). Specific additional factors to be considered include food, utilities, housing, child support and alimony obligations, education or employment expenses, child care, medical expenses and transportation.

In Massachusetts, recommended categories of expenses and liabilities include: (a) monthly rent (plus the cost of home heating if not included), mortgage payments or room and board payments; (b) allowance for the living expenses of the accused and his or her dependents; (c) payments pursuant to a court order; and (d) special or emergency expenses incurred by the individual such as medical bills or fuel and utility debts, but exclude non-essential consumer debts.

Virginia takes a different approach to calculating expenses since their income formula already assumes certain everyday and necessary expenses. After examining income and assets, Virginia requires the court to consider exceptional expenses only. These are defined as unusual expenses of the applicant and/or his or her family which would, in all probability, prohibit him or her from being able to secure private counsel. Such items include costs for medical care, court ordered support obligations, and child care payments.

• *Comparing Income/Assets Against Expenses/Liabilities*

Finally, states weigh income and assets against liabilities and expenses in different ways. Some states make the eligibility determination on an informal, case-by-case basis, while in others the decision is based on a much more standardized set of guidelines.

In Seattle, there are no standardized tests or written guidelines to determine which defendants are eligible and which are ineligible. After the data on income/assets and liabilities/expenses are recorded on the application, the liabilities are subtracted from the assets. If, in the screener's judgment, the liabilities exceed the income on a monthly basis, the defendant is determined to be indigent. If, on the other hand, the defendant's assets *substantially* exceed the liabilities on a monthly basis, the defendant is declared to be ineligible and is sent to the Lawyer's Referral Service of the local bar. The decision is made on a case-by-case basis: if the assets are "slightly over the line or below the line" the defendant will be found indigent. The result of this policy is that about 95 percent of all defendants screened in Seattle are found eligible. However, many of these defendants are required to pay for a part of their representation by signing a promissory note after it has been determined that they have some ability to pay a portion of their defense costs.

Some might argue that there is little value to applying such informal, permissive criteria if the final decision on eligibility is left to the judgement of the individual screener. This type of system might be more acceptable if the revenue brought in on cost recovery exceeded the administrative cost of screening. There is no evidence, however, that this is true.

In Virginia, the test is much simpler, and is substantially more standardized. After the applicant's net income and assets are determined, exceptional expenses are deducted. The net figure is then compared to the following indigency formula which is drawn from the Legal Service's Corporation poverty guidelines:

	Household Size			
	1	2	3	4
Annual Available Funds	$6,225	$8,400	$10,575	$12,750

In households of more than four, $2,175 is added for each additional member of the household. If the net income and assets exceed the prescribed income levels, then the defendant will normally be found ineligible. However, in exceptional circumstances the court may appoint an attorney to represent the defendant provided that the reasons are recorded in writing, though such exceptions occur rarely.

A third variation of the application of the comparative test can be found in the proposed recommendations of the Massachusetts Committee on Competent Counsel. While all applicants receiving public assistance are automatically eligible, those not receiving public aid must provide information on their income, liquid assets, expenses and real and personal property. As in other states, defendants will be declared eligible if their liabilities exceed their income and assets on a monthly basis. If, on the other hand, the defendant has sufficient income to cover all liabilities, eligibility is then determined by considering the estimated cost of obtaining competent private representation for the particular offense charged. The specific methods used to accomplish this are detailed below.

Considering the Costs of Retaining Private Counsel

Obtaining private defense counsel can be a costly proposition. Even defendants whose assets exceed their liabilities could experience hardships due to the cost of hiring an attorney. For this reason, provisions relating to the cost of obtaining private retained counsel can be found in the eligibility guidelines in California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota and the District of Columbia. Usually these costs are taken into account only after a comparison of income and expenses has been made and the screener has determined that the defendant's income exceeds his or her liabilities.

Both Massachusetts and Los Angeles, California have examined in considerable detail the cost of private representation, and its significance in the

eligibility determination process. In Massachusetts, the Committee on Competent Counsel found that the standard charge for retained criminal representation varied not only by type of case (juvenile, misdemeanor, felony, or appeal), but also by the seriousness of the charges within each category; thus, both variables should be factored into the eligibility decision. Furthermore, it recognized that the size of the fee might also be related to whether the case was within the jurisdiction of the lower court, or the felony court. Thus, the committee suggested that adoption of the eligibility guidelines should be accompanied by development of a uniform fee schedule to permit maximum standardization. It was further recommended that such a fee schedule should take into account differences between attorney's fees in the metropolitan and rural areas of the state.

Los Angeles, California has looked at the problem of retaining private counsel in even greater detail. As noted above, one of the general eligibility tests in Los Angeles is whether or not a competent private attorney would be interested in representing the defendant in his or her present economic circumstances. In considering this question, the Supreme Court of California has held that:

- The cost of counsel should be examined against the denial of certain constitutional rights. For example, the Court concluded that applicants should not have to choose between retaining a private attorney and posting their own bond. If there are not sufficient funds for both, the defendants should be found eligible;
- The Court also found that if defendants can afford the attorney's fee for a non-jury trial, but are unable to afford that required for a jury trial, they should be found eligible;
- Finally, the Court offered the example of a defendant who cannot afford the immediate payment necessary for the retainer, but who, if allowed a continuance for a substantial period of time, could save the necessary amount for representation. In this case, if the delay to make payments might conflict with the defendant's right to a speedy trial, he or she should be found eligible.

The Los Angeles guidelines conclude the discussion of applying the income/expense test and the cost of retaining private counsel by stating that:

> In applying the general test of indigency, consideration must also be given to such factors as the seriousness of the charges, the complexities of the case, the expenses necessary for defense, and the standards in the community for the cost of legal services. In determining eligibility, the attorney should estimate the probable cost of retaining private counsel for the same or similar case, including

the estimated cost of investigation and/or expert services, plus the probable cost of a fine upon conviction.[13]

Finally, Maryland's written guidelines include sample private bar fees for a number of misdemeanor and felony charges. These fees were derived from a survey of 330 privately retained criminal lawyers who practice in the circuit courts of Baltimore City. For example, fees for misdemeanor charges ranged from $300 for malicious destruction of property to $500 for driving while intoxicated. The general guidelines published by the state public defender require that the private bar be surveyed in each of the public defender districts, and that the results of the survey be used to establish the prevailing fee schedule for that district.

Partial Indigent Determination

The infinite variations in the definitions of income, assets, liabilities, and expenses, combined with the different ways of deriving cut-off points, make the eligibility decision difficult, especially in the borderline cases. It is often difficult to declare with certainty that a defendant is either indigent and eligible for court appointed counsel or non-indigent and ineligible. Furthermore, the question has been raised whether the right to counsel at public expense is something which should belong only to the *truly* indigent, or whether the right also exists for those who might be able to raise the money necessary for counsel but who, in so doing, might seriously jeopardize the economic well-being of themselves and their family. To address concerns about these cases, many states are now recognizing a new category of defendant: the partial, or marginal indigent.

Partially indigent or marginally indigent defendants have the same constitutional right to counsel as those defendants who are determined to have no present ability to contribute any funds whatsoever to their representation.[14] The only distinction between the two categories is that partially indigent defendants can make some form of contribution to their defense at the outset of the case. The statutes of 29 states permit cost recovery when partial eligibility is found.

The determination of partial indigency is part of the initial screening process. Typically, defendants' financial circumstances are measured against the program eligibility standards discussed above. If their circumstances clearly fall within the guidelines, defendants will likely be found to be totally indigent and not asked to contribute to their defense. If, however, their income slightly exceeds the guidelines but they do not have sufficient resources to employ a privately retained lawyer, defendants may be found to be partially indigent.

An example of this method is found in Seattle. The King County Office of the Public Defender screens and contracts out eligible clients to the various organizations providing direct legal services to indigent defendants throughout all the courts in the county. The authority for the partially indigent program can be found in County Ordinance 383, which states:

> [I]f a person has some resources available which can be used to secure representation but not sufficient resources to pay the entire costs of private legal services without substantial hardship to himself and his family, the administrator shall determine how much the person shall pay for the legal services provided through the office of public defense.[15]

In Seattle, there are no written eligibility guidelines and a great deal of discretion is left to the individual screener. After comparing the defendant's assets and liabilities on a monthly basis, if the screener determines that there is "something like $200 left over," the defendant is asked to make a contribution toward his or her defense. If the defendant agrees, he or she is asked to execute a promissory note in that amount. The director of the Office of Public Defender, responsible for administering the program, strongly supported this policy which leaves wide discretion in the hands of the screener. He felt that each case presents unique facts and that his screeners were well-trained and experienced in conducting the interviews.

In Colorado, the indigency determination is based upon the monthly income of the defendant and his or her family. Defendants whose monthly income exceeds the federal Legal Services Corporation guidelines are informed that they must seek private representation. They are also told that if two private criminal attorneys refuse to represent them, appointed counsel will be made available, with the requirement that the defendants reimburse the state for all or a portion of the cost of representation. There seemed to be substantial variation among Colorado's judicial districts on the question of how many defendants in this category did in fact come back for representation. The variation is due in part to the fact that some ISUs have been able to establish a so-called "low pay, slow pay" panel of private attorneys who are willing to reduce their normal charges to participate in the program.

Massachusetts has also addressed the partially/marginally indigent issue through their recent study committee. The committee's work was aided by a pilot test undertaken in one of the local courts which attempted to apply new standards that differentiate between applicants who were found indigent and unable to contribute, and those who were found indigent, but able to contribute. During the pilot period all defendants whose total net available funds were greater than zero but less than the anticipated cost of private

counsel were found indigent but able to contribute and, at the same time, the project recommended a certain contribution for each case.

Verifying Eligibility Information

One additional question that is often raised regarding the screening process is whether or not information provided by the defendant should be verified. In many jurisdictions, it is felt that the administrative cost of verification outweighs any potential savings. In other jurisdictions, resources are simply thought to be too scarce to undertake any verification. Still, others report that verification can result in important cost savings, especially if the verification effort is limited to specific kinds of information or reports of unusual circumstances.

In Colorado, ISU employees verify information in all cases where the defendant reports that he or she is employed. The screeners will also frequently check with the county welfare department regarding food stamp or Medicaid income (after obtaining a waiver from the defendant for release of the information). Finally, to verify mortgage and equity information on the defendant's property, screeners may check with the county assessor's office, title companies and banks. The screeners who we interviewed indicated that it was the rare case where the information provided by the defendant was not positively verified through these follow-up procedures.

In New Jersey, verification of information occurs in only about ten percent of the total cases referred; however, among those 10 percent, approximately half are subsequently found ineligible as a result of the verification. Those cases chosen for verification are not randomly selected, but are chosen because of circumstances or information that appear to be unusual or questionable, such as the ownership of a late model car. Similarly, information provided to the public defender's office in Los Angeles County and King County's OPD is typically verified only when well trained screeners sense that something does not sound right or some substantial piece of information is obviously missing.

In general, it would seem to be wasteful of scarce resources and unnecessarily dilatory to verify all defendants' information in every case. However, screeners should be trained to watch for unusual or missing information and should have full authority to make the necessary inquiries to verify questionable data.

Indigency Review and Re-Determimation

It is assumed in most jurisdictions that if the financial condition of the defendant improves between the time of initial appointment and trial, appointed counsel will notify the court and either ask for a re-determination or, after providing assurance that the defendant's right to counsel will not be adversely affected, ask to be granted permission to withdraw from the case. While eighteen states permit by statute a subsequent review of the eligibility determination, few have established formal procedures to re-determine the defendant's financial circumstances. However, few jurisdictions have established more formal procedures to address cases in which the defendant's financial circumstances change.

New procedures and guidelines in Virginia instruct judges of the district courts (lower court) to make the eligibility determination and appointment of counsel in all cases. While judges of the circuit court normally rely on the district court's decision, they may reopen the issue of eligibility if new information comes to the court's attention or a party requests review. In North Dakota, the Legal Counsel for Indigents Commission published a set of guidelines in May 1983 which expressly provide that the review of eligibility may be made on appeal and cite for authority the case of *State v. Heasley.*[16] Finally, the ABA *Standards for Criminal Justice* state that redetermination of eligibility should be made when new information becomes available to counsel. An obvious problem occurs when appointed counsel believes that the defendant committed perjury in supplying information at the outset which resulted in a false determination of indigency. The question is an ethical one and not easily answered. However, as a general rule, if an appointed attorney receives information of a change in financial condition he or she is obliged to advise the appointing judge and ask to be relieved of the assignment. However, if an attorney discovers that the defendant has provided erroneous information, he or she should request to be relieved of the appointment, but not be required to break the confidence of the attorney-client relationship. In any event, an attorney must make certain that the defendant's right to counsel remains protected until new counsel is available.

Resources and Studies

Within the past several years, a number of states produced studies, part or all of which focus on the eligibility determination process. These documents may prove useful to those who are about to undertake a comprehensive review of their own eligibility provisions. A selective list of the best of these studies includes the following:

- *Providing Legal Services to Indigents in Colorado,* National Center for State Courts, San Francisco, California (Dec. 1982)
- *Indigent Defense in Iowa,* Iowa Crime Commission, Des Moines, Iowa (Fall 1980)
- *Proposed Standards of Indigency for Court- Appointed Counsel,* Supreme Judicial Court, Boston, Massachusetts (July 20, 1981)
- *Guidelines for Determining Eligibility for Assignments of Counsel,* Office of Projects Development, Supreme Court of the State of New York, Appellate Division, First Department, New York, New York (undated)
- *A Report to the Governor and General Assembly on Indigency Standards: Determining Eligibility for Court-Appointed Counsel Services in Virginia,* Office of the Executive Secretary, Supreme Court of Virginia, Richmond, Virginia (1983)
- *Guidelines and Format for Determining Eligibility for Assignment of Counsel in the State of Washington,* (Adaptable for use in other jurisdictions) National Legal Aid and Defender Association, Washington, D.C. (July, 1978)

Conclusion

As a matter of public policy, courts should no longer assume, as some have done in the past, that all defendants who request counsel are, in fact, indigent. Although creating a centralized administrative authority for screening is important to ensure fairness and consistency, developing written guidelines and procedures is even more important:

- While implementation of any set of guidelines is subject to substantial discretion by the court, there is a far better chance that there will be uniformity with a set of written guidelines and procedures;
- Written guidelines will eliminate defendants who are clearly ineligible and whose representation may well cause serious Public clamor; and
- The adoption of eligibility guideline procedures will assist screeners in making decisions about marginally eligible clients in jurisdictions that are authorized to conduct partially indigent programs.

There are three primary methods of screening for eligibility: 1) using eligibility criteria to conduct threshold presumptive tests; 2) determining indigency through income formulas; and 3) comparing income/assets with expenses/liabilities. Of these methods, the comparative test appears to be most

equitable since it offers two important advantages: it takes greater cognizance of the individual defendant's unique financial circumstances; and it can more readily take into account the costs of private legal representation for different types of cases.

Footnotes

1. Robert Spangenberg, et al., "National Criminal Defense Systems Study" (Cambridge, Mass.: Abt Associates Inc., May 1984) (publication by U.S. Department of Justice, Bureau of Justice Statistics pending).
2. Office of the Executive Secretary, Supreme Court of Virginia, *Court-Appointed Counsel: Procedures and Guidelines Manual* (Supreme Court of Virginia, July 1984).
3. Spangenberg, "National Criminal Defense Systems Study," p. 92.
4. "Final Report of the Study Committee on Defense of Indigents" (Supreme Court of Rhode Island, February 1981).
5. Committee on Competent Counsel, Supreme Judicial Court, "Counsel for Indigent Criminal Defendants" (Supreme Judicial Court of Massachusetts, December 1981). (Draft)
6. 226 CA 2d 866 (1964).
7. 47 F.R. 15417
8. As noted on the preceding page, North Dakota also uses the Legal Services Corporation poverty formula for determining eligibility.
9. Office of the Executive Secretary, Supreme Court of Virginia, "A Report to the Governor and General Assembly on Indigency Standards: Determining Eligibility for Court-Appointed Counsel Services in Virginia" (Supreme Court of Virginia, 1983), Appendix, p. 34.
10. R. Van Duizend, *Guidelines for Determining Indigency in Criminal Cases* (National Center for State Courts, July 1980), p. 3.
11. Supreme Judicial Court of Mass., "Counsel for Indigent Criminal Defendants," p. 32; quoted in Supreme Court of Virginia, "Determining Eligibility for Court-Appointed Counsel Services in Virginia," p. 22.
12. Supreme Court of Colorado, Chief Justice Directive No. 82-1 of April 2, 1982.
13. Chief Administrative Officer, County of Los Angeles, *Guidelines to Financial Standards for Representation by the Law Offices of the Los Angeles County Public Defender* (June 7, 1982), p. 5.
14. *See,* Fuller v. Oregon, 417 U.S. 40 (1974).
15. King County, Washington Ordinance 383, Sec. 6 (1970).
16. 180 N.W. 2d 242 (N.D. 1970), *see,* North Dakota Legal Counsel for Indigents Commission, *Indigent Defense Procedures and Guidelines* (May 1983).

Chapter 3

Cost Recovery Procedures

While eligibility screening helps to contain costs by ensuring that only the truly needy receive indigent defense services, other measures can also be used to control the cost of public defense. Through the adoption of *cost recovery procedures,* jurisdictions can identify those individuals who can afford to pay for some or even all of their defense, either before or after disposition. Cost recovery is not a new idea; many states have had cost recovery statutes for years. Until recently, these programs have seldom generated significant revenue. However, our on-site visits suggest that, with proper implementation, cost recovery programs can work.

Two approaches to cost recovery are currently in use, recoupment and contribution. In recoupment—the most common procedure—the judge assesses the cost of representation after disposition of the defendant's case. Often, payment by the defendant is ordered as a condition of probation, though it may also be in the form of a civil suit, lien, or simple court order. In contrast, *contribution* is a more recently developed method that asks partially indigent defendants to contribute to the cost of their defense before disposition.

While both of these approaches must have screening and collection mechanisms, there are some substantial differences between recoupment and contribution. Each has unique implementation concerns, both legal and practical. Recoupment, because it occurs after disposition of the case, raises certain concerns about due process that may not be raised by contribution programs. Similarly, certain enforcement procedures in recoupment (such as

imposing recoupment as a condition of probation) may raise questions about the possibility of imprisonment for debt. Contribution, on the other hand, may offer some practical as well as legal advantages. For example, some believe that defendants are more likely and better able to pay contributions. It has also been suggested that contribution offers legal advantages due to its voluntary nature.

While there has been no litigation to test the constitutionality of contribution, a recoupment statute has been reviewed by the Supreme Court. In *Fuller v. Oregon,*[1] the petitioner, Fuller, pleaded guilty to a felony charge in state court, while represented by a private attorney appointed for his defense. He was subsequently sentenced to five years probation and work-release, with conditions which included the obligation to reimburse the county for the fees and expenses of both the appointed lawyer and an investigator whose services were provided. On appeal, Fuller contended that the State could not condition his probation on the repayment of these expenses. He raised arguments that such a condition violated his constitutional right to equal protection, in that the legislation created improper classifications, and that it discriminated unfairly against those convicted of such offenses. Both claims were rejected by the high Court.

In doing so, the Court placed great reliance on the protections provided by the Oregon statute. The recoupment provision stated that a convicted defendant's costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." The Court approved the statute only after noting several of the procedural protections which it provided, including provisions which prohibited orders from being issued unless the defendant was able to pay, or if payment would cause hardship to the defendant or his family.

The Court has not reviewed another recoupment statute since its decision in *Fuller,* so it is impossible to say what types of recoupment provisions currently in force would withstand constitutional scrutiny. Almost none of the current statutes contain all of the protections enumerated in *Fuller,* while many contain distinct or even contrary language. Most state appellate decisions since *Fuller* have approved statutes tested against the *Fuller* criteria. Three recent decisions, however, should be noted. In Cregon, Kansas, and New Hampshire, new cost recovery statutes drafted since *Fuller* have been struck down for their failure to provide essential procedural guarantees. Federal courts in both Oregon and Kansas found that the recovery provisions "chilled" the defendant's right to counsel because they forced him to choose between refusing counsel and submitting to payment.[2]

Starting with recoupment, this chapter investigates these procedural, practical, and legal issues so that jurisdictions can improve existing cost recovery practices and institute new ones.

Recoupment

Thirty-six states have a specific statute authorizing recoupment. All of the other fourteen states allow some form of general recovery of costs at the discretion of the trial judge. Abt Associates' National Criminal Defense Systems study showed that over 75 percent of the counties surveyed had a system whereby judges could require indigent defendants to make some payment towards the cost of their representation following disposition of criminal charges.

While the authority exists to impose recoupment throughout much of the nation, it is not implemented in many jurisdictions. Some judges fail to issue orders in any cases, in part because they believe little will be collected. Other judges are concerned about the court time that would be needed to hold a hearing. The Criminal Defense Systems study disclosed the fact that, in the majority of jurisdictions where recoupment is authorized and recoupment orders are entered by judges, less than 10 percent of the recoupment orders are actually collected.

Still, recoupment does work in some jurisdictions. By drawing on the experience of these sites and combining this with the recommendations of various study groups, we can explain the most important issues and provide guidance for those jurisdictions interested in implementing a recoupment program.

Who Should Pay Recoupment?

Under constitutional and state law, recoupment can be ordered only if the defendant has the present ability to pay and only if he or she is provided a hearing. Most states require the judge to conduct a formal inquiry or hearing before recoupment can be imposed. Failure to provide such a hearing raises the risk that such procedures would violate the constitutional requirements of *Fuller v. Oregon,* which mandates that a hearing must be held before a recoupment order is imposed. A few states set a specific time following disposition, after which recovery can no longer be pursued. This period ranges from two years in Kansas and Oregon to up to 10 years in New Jersey. Fifteen states allow recovery to occur if the defendant becomes financially able to pay some time after disposition, even though he or she had no present ability to pay at the time of disposition. While a few states do not set a specific time limit, most do, with as short a period as 30 days in Illinois, and as long as 10 years in Illinois and Maryland.

A few states are beginning to limit recoupment only to those defendants who plead guilty or are found guilty. Eighteen states now impose such requirements. Cases on this issue have been divided, with decisions from Kansas and Oregon holding that only convicted defendants can be compelled to pay counsel costs, while Illinois rejected any distinction between the convicted and the acquitted defendant.[3]

Juveniles, their parents, and defendants in custody hearings may also be subject to recoupment orders. These defendants present unique concerns for anyone planning a recoupment program.

Ability to Pay

In the leading case, *Fuller v. Oregon,* the court established that an order to recoup expenses may be issued if the defendant "is or will be able to pay them." The "ability to pay" standard refers both to the defendant's present ability to pay as well as the likelihood that he or she will be able to pay in the future. According to *Fuller,* no recoupment order should be made which "will impose manifest hardship on the defendant or his family," and the defendant should be free to petition the court at any time "for a remission of the payment of costs or any unpaid portion thereof."

In a few jurisdictions, however, the defendant's "ability to pay" recoupment does not appear to be the primary criterion for *ordering* recoupment. For example, in order to receive appointed counsel in Oregon (and many other states) defendants are required to sign a form acknowledging the fact that they may be assessed recoupment upon disposition of their cases. As a result, one judge in Oregon stated that "[in] order to maintain continuity for all persons, regardless of their financial state, I am obligated to enter an Order requiring each criminal defendant to repay the State for the cost of Court-appointed attorneys."[4] Similarly, in Virginia virtually all persons convicted of a criminal offense are assessed the cost of their court-appointed attorneys. Under such systems, the defendant's ability to pay is at best a secondary consideration and this practice could raise some legal questions if all of these orders were enforced. (See section on enforcement and collection later in this chapter).

However, the vast majority of jurisdictions impose recoupment only upon those indigent defendants who have some resources which can be applied toward their defense. Thirty states impose an eligibility test for recoupment using the words "financial ability to pay." Eight of these states also add the requirement that recovery not constitute "undue hardship." Normally, the recoupment order will be for the actual cost of appointed counsel, but in some states, judges reduce this figure somewhat in the hopes that more

defendants will be able to pay at least some portion of their defense costs. In most jurisdictions, the defendant is permitted to return to the court subsequent to the recoupment order should his financial condition worsen. Seventeen states permit such a review, usually by the trial court, of the changed circumstances of the defendant.

Despite the fact that the defendant's ability to pay affects both initial screening for eligibility and recoupment proceedings, initial screening guidelines are often more explicit than recoupment guidelines, which are usually informal. The language of most recoupment statutes simply states that the court will determine the defendant's present ability to pay and make the appropriate order. Some sites, however, have partially formalized this process in an effort to boost recoupment orders and ensure some uniformity in their application. For example, in Seattle the judges are required to assess the defendant's ability to pay through a hearing held in open court. In North Dakota, this responsibility falls to the state's attorney, who reviews the defendant's application for appointed defense services, interviews the defendant after disposition, and makes a recommendation to the court. A more formal process is used in Los Angeles County: judges often refer defendants to the screening unit that originally interviewed the defendant for the initial eligibility determination. The screener reviews the defendant's ability to pay and then makes a recommendation on recoupment to the trial judge.

The use of the of "ability to pay" standard can have both important practical and legal benefits. If the defendant is without resources, a recoupment order will frequently remain unpaid. Low recoupment rates and high administrative and collection costs will be the likely result. From a legal standpoint, attempting to collect recoupment orders from defendants who cannot pay may result in time-consuming litigation and may not accord with established constitutional guidelines.

Guilt or Innocence

To many it makes intuitive sense that indigent defendants who have been acquitted of all charges should not be forced to pay the cost of their defense. In this view, recoupment would be the equivalent of imposing a fine or penalty, as if the person were guilty. Eighteen states do not impose recoupment on acquitted defendants; only those who plead guilty or are found guilty can be assessed recoupment charges.

Thus, in some jurisdictions recoupment is viewed as a vehicle for revenue enhancement, like any other charge for services rendered at public expense. On this basis, a small number of states have extended the reach of their recoupment statutes to acquitted defendants. In Colorado, for example, the courts

have the authority (under Section 16-8 of the Colorado General Statutes) to collect the costs of representation from defendants whether or not they are found guilty.

The Oregon recoupment statute (ORS 13.055 [6]) applies to acquitted defendants as well, although it has recently come under attack in the case of *Fitch v. Belshaw*,[5] where the U.S. district court in Oregon ruled that the state's recoupment statute used to recoup attorney fees from acquitted indigent defendants "impermissibly chills an indigent defendant's exercise of the Sixth Amendment right to counsel and violates the Due Process clause of the Fourteenth Amendment."

Aside from questions of law, the costs of assessing recoupment against acquitted defendants may outweigh the benefits. Financial gains from recoupment of acquitted defendants are unlikely to be substantial, given the fact that convicted defendants will far outnumber acquitted defendants in most jurisdictions. In addition, the likelihood that this practice will be challenged in the courts increases both its risk and cost. Until the issue is ultimately resolved through future litigation, the wiser practice may be to assess recoupment only against those found guilty.

Incarcerated Defendants

It might be argued that imposing recoupment on defendants who are sentenced to prison is only fair—after all, they are likely to be more serious offenders and the burden of recoupment should not be disproportionately borne by lesser offenders. However, practical concerns dictate that prisoners are unlikely to have enough resources to pay recoupment, and any income they may receive in prison is either negligible or subject to other charges or restrictions. We have not been able to find any jurisdictions, other than those few which order recoupment in all cases, that impose costs on defendants who are incarcerated.

Juveniles and Other Defendants

It is difficult enough to determine who should reimburse the state in adult criminal cases, but what about other kinds of cases? Cases where the defendant is under age and has to rely on parental support? Or cases which are not strictly criminal, such as child custody proceedings? Most states provide public representation in these types of cases, and many extend recoupment procedures to them as well. For example, in North Dakota, recoupment can be ordered against:

- Defendants in criminal cases;

- Indigent parties in juvenile court cases;
- Parties for whom a guardian ad litem has been appointed; indigent parties in child custody proceedings; and
- Parties involved in involuntary termination of parental rights in adoption proceedings.

These cases present some unique concerns which are not present in adult criminal cases. Asking a parent to pay for a child's defense may contribute to troubled family relations—a point that is recognized in the North Dakota guidelines. In addition, it is not uncommon for the parents and child to be "opposing parties." If the parent is bringing action against the child, or if the parent's interests are adverse to those of the child, it may be unwise to ask the parent to reimburse the government for the child's defense costs.

In general, however, cases involving these issues do not occur frequently, and recoupment can be applied as long as the ability to pay, the nature of the charges, and the juvenile's relationship with the family, are considered.

Calculating How Much is Due

Most recoupment statutes stipulate that payments should reflect the actual costs of representation, though in some jurisdictions judges are free to set lower amounts. Although calculating these costs would seem to be a simple requirement, in practice it may be difficult to determine what the actual costs of the case were, greatly due to inadequate cost records.

Setting Rates for Public Defenders

Since most public defenders are paid on a salaried basis, many do not keep records of the time spent on individual cases. As a result, it may be extremely difficult for a judge to determine and assess the actual cost of representation in public defender jurisdictions.

To address this problem, some jurisdictions have either established fixed rates for certain kinds of cases or have developed systems similar to those of assigned counsel programs, which set standard hourly rates for defender services and improve public defender record-keeping of the time spent on each case.

Fixed Rates

Setting a fixed cost for specific kinds of cases or proceedings offers the advantage of simplicity. There are no hourly records required, and no

multiplication of rates by hours. The judge needs only to determine the type of case and refer to the standard charge. In Seattle, the recoupment order is based on the negotiated contract figure by which public defender organizations provide representation in the courts in King County. For fiscal year 1983, these figures were as follows:

- Felony — $318;
- Misdemeanor — $115 to $142, depending upon the municipal or district court where the case is heard.

Table 2 shows a slightly more elaborate system developed in one judicial district in Colorado:

Table 2

Amounts to be Charged for Public Defender Representation 20th Judicial District (Boulder County, Colorado)

	Dollar Amount
Traffic Offenses with Disposition	75
Petty Offenses with Disposition	75
Misdemeanor with Disposition	75
If the above go to trial	175
Driving Under the Influence	100
Driving Under the Influence, Trial	200
Felonies with Disposition	150
Felonies that go to Trial	300
Juvenile	75
Juvenile cases that go to Trial	175

As the table indicates, the Boulder County system accounts for both the type of case (felony, misdemeanor, traffic, petty offenses, juvenile, and driving under the influence) and the scope of the court proceeding (disposition or trial). Although this approach is somewhat more difficult to apply, it can more accurately reflect the actual cost of representation for various types of cases and court involvement.

Standard Hourly Rates

Systems which establish an hourly rate of compensation for appointed counsel are more complex and time consuming, since attorneys must record the number of hours spent on each case and then multiply this number by the hourly rate for defender services. Still, this is a more accurate system of cost determination which can have benefits for defendants and defender alike. Since assessments are based on actual, rather than average costs, no defendant will have to pay more than his actual share of the service costs. In contrast, in a fixed rate system a defendant whose case is disposed of shortly after arraignment will be required to pay the same fee as one who has had the benefit of counsel for a two- or three-week trial.

In 1983, the Judicial Department in Colorado established a standard hourly rate of $29 for public defender representation. This figure was specifically designed to cover the cost of operations for the entire organization, not just the salaries of defenders. In the judicial districts that have adopted this plan, each assistant public defender lists the approximate time spent at the conclusion of each case. This number is multiplied by $29 to arrive at the maximum fee to be charged for recoupment. The hourly rate is updated each year by the Judicial Department.

A similar approach is used in Los Angeles County, where the Auditor/Controller developed hourly rates for public defender services which are now being pilot tested in several municipal courts. These hourly rates include salaries and employee benefits; services and supplies; and applicable departmental, divisional, sectional and county-wide indirect expenses. The Los Angeles system is somewhat more complex than Colorado's, in that the time per case must be estimated for *each* public defender and investigator who worked on the case. These hours are multiplied by the appropriate rates and added together to arrive at the maximum recoupment amount allowed.

Setting Rates in Assigned Counsel Programs

In many jurisdictions, the primary method of providing indigent defense services is through the appointment of the private bar. Typically, compensation is provided on a fixed hourly basis. In these jurisdictions, determining the costs of private attorney representation presents no major problems. The court must only multiply the number of hours spent by the authorized hourly rate. However, attorneys fees are not the only cost involved; some states specifically allow other expenses to be added to the fee for recoupment purposes. For example, in North Dakota the Commission's guidelines permit all costs directly attributable to the representation of the defendant to be

recouped, including defense investigatory costs. However, prosecution costs, court expenses, or expenses of recoupment cannot be the subject of recoupment. In Colorado, Los Angeles and King County, Washington, expenses which are incurred by the court-appointed attorney and approved by the trial judge may be added to the attorney's hourly charges for recoupment purposes. In Virginia, however, there is no provision for recouping costs other than for attorney's fees, despite the fact that attorneys can be reimbursed for some of these costs.

Imposing the Recoupment Obligation

Although probation officers, defense attorneys, or other representatives of the court may all have some say in the recoupment decision, recoupment procedures in most jurisdictions share one common feature: the judge must ultimately impose the recoupment obligation on the defendant. Aside from this, the proceedings established to investigate the recoupment question, and the vehicles for imposing a recoupment order vary considerably between jurisdictions.

Recoupment Proceedings

Since recoupment orders require cost assessments by the state against the defendant, various constitutional due process issues may arise.

From a practical and constitutional viewpoint, one of the most important safeguards is to provide a hearing at which defendants can appear in person and present witnesses and evidence on their behalf. As noted above, the U.S. Supreme Court recognized this right in *Fuller v. Oregon,* and found that before recoupment orders can be entered, a hearing must be held by the court to determine the individual's present ability to pay. However, the Court did not define the full nature of the defendant's rights at this hearing, leaving that to the states to decide.

Though most states have not yet addressed this issue in detail, some have established a fairly comprehensive set of hearing requirements. For example, a recent Oregon case, *Fitch v. Belshaw,* upheld the defendant's constitutional right to a recoupment hearing and declared that minimum due process safeguards should include:

- written notice of the time, place, and subject of an assessment hearing;

- written notice of the standards the court will apply in determining present ability to repay;
- defenses that may be asserted;
- records of attorney's time and the amount of fee requested;
- the opportunity for the defendant to be heard in person and to present witnesses and other evidence; and
- written findings by the court.

Similar requirements have been established under California law. If a hearing on the defendant's ability to pay is conducted, the defendant is entitled to be heard in person, to present witnesses and other documentary evidence, to confront and cross-examine witnesses, to have a disclosure of the evidence against him, and to have a written statement of the court findings.

Finally, the North Dakota Legal Counsel for Indigents Commission has recommended that, whenever a recoupment order is contemplated, the defendant is entitled to a hearing separate from the sentencing hearing. If the defendant intends to challenge the amount of the recoupment order, he or she is entitled to the appointment of new counsel for this purpose.

Most states exercise one of two options in providing recoupment hearings for the defendant. In most cases, the judge will hold a hearing. In a few jurisdictions, with the approval of the defendant, the hearing is held before some other administrative officer who subsequently makes a recommendation to the judge. For example, in Los Angeles all defendants are notified that they have a right to a full scale hearing, but this seldom occurs. Instead, after interviews with the Department of Collection staff, defendants are asked whether or not they are willing to waive their rights to a hearing before a judge and appear before an administrative official. This practice has been received favorably by judges, who were concerned about the time-consuming nature of the recoupment process should large numbers of defendants request a formal in-court hearing.

Like the waiver of counsel by indigent defendants, waiving the recoupment hearing before a judge cannot be taken lightly. In each case the defendant should be fully advised of the right to a hearing and the consequences of waiving the right. In addition, all waivers should be voluntary and in writing, signed by the defendant, and filed with the court. If such a policy is adopted, constitutional requirements should be satisfied.

Recoupment Payment Orders

Once the decision is made to require a recoupment payment, there are a variety of ways in which it can be ordered and collected. The most common is one that makes it a part of the court costs imposed at the time of sentencing. Many states also permit, within certain time limits, a civil suit against the defendant to recover costs. Nine states permit some form of lien, while thirteen states specifically permit the recoupment order to become one of the conditions of probation.

Ordering recoupment as a condition of probation is common in most states, although authorized by statute in only thirteen. Local court rules frequently spell out this procedure and in some states it occurs as a matter of custom in the trial courts. For example, in Colorado and Seattle, where there is no specific statutory authority, the recoupment order is almost always part of the probation conditions. While this practice is certainly common, it is also controversial, raising questions about the observance of due process and the defendant's right to counsel. Unfortunately, recent decisions on the issue have been conflicting. In *Fuller v. Oregon,* the U.S. Supreme Court conceded that making a recoupment order a part of a probation order was valid, provided that it was determined through a hearing that the defendant had the ability to pay at the time the order was made. In contrast, the California state courts have held that attachment of recoupment to probation conditions was an unconstitutional impediment to the free exercise of the right to counsel.[6]

Enforcement and Collections

In all too many jurisdictions, recoupment payments lag far behind orders. In some jurisdictions, recoupment has been reduced to a pro-forma exercise—fully one quarter of the counties surveyed by Abt Associates reported that they received no payments on recoupment orders. Only 17 percent reported that more than 25 percent of the orders were actually collected.[7]

While part of the solution to this dilemma lies in targeting appropriate clients—those with the financial and practical ability to pay—the other part rests with enforcement and collection procedures.

Collection Responsibility

Agencies directly involved in criminal case processing are generally given responsibility for collecting recoupment payments. Most often, the probation department has this duty, but in a few cases the responsibility is placed

with the public defender or the civil division of the state's attorney office.

The individual or organization responsible for collecting recoupment may be established by court rules, county and state regulations, or by state statutes. Collection responsibility may also be influenced by the type of recoupment order employed in a given jurisdiction. For example, where recoupment is made a condition of probation, it is likely that the probation department will be charged with the collection responsibility.

Although a number of organizations are certainly *capable* of collecting recoupment payments, a variety of practical and ethical concerns may be raised by some of these arrangements. For example, many public defenders or private appointed counsel feel that acting as a collection agent for defense costs may conflict with their role as legal counsel. The American Bar Association has reviewed the issue of attorney involvement in collections and expressed concern that any requirement for collection placed upon the public defender or appointed counsel might interfere with the attorney-client relationship.[8] As a consequence, the ABA recommends that collections be handled by the court or the court's designee.

Problems of a different nature often arise when responsibility is given to the probation department. All too often, probation departments are overworked and burdened with tasks only peripherally related to their primary mission.[9] In this context, the efficacy of adding the responsibility for collecting recoupment orders may be questionable.

The experience of Los Angeles County, California illustrates this problem. Prior to 1981, the Department of Probation was totally responsible for all recoupment collections. During this period, collections were at best sporadic, and the amounts collected were very low. In March 1981, Los Angeles County began an experiment with a new approach—giving responsibility to a separate agency, independent of the courts. The pilot program was introduced into the Rio Hondo Municipal Court by the county's Department of Collections (DOC). Rather than relying on the Probation Department to collect recoupment orders, the DOC assigned one of its staff to this function. As a result of this pilot program there was a positive increase in both the total revenue brought in and the number of cases in which some collection was made. The program has since been expanded, and by April 1984 the program was in operation in 21 of the 24 municipal courts in the county.

North Dakota is another jurisdiction that has given collection responsibility to an independent organization—a private sector debt collection agency. The potential advantages of this approach, they feel, are considerable. By delegating the responsibility for debt collections to a professional service, it is expected that the collection effort will be more effective, and collections

will increase. Since the courts themselves are not directly involved with the collections, the credibility of the judicial system is better maintained. Finally, it is envisioned that use of private collection agencies will be more economical than giving this responsibility to a government agency since such private firms are in the business of collections and familiar with collection procedures.

However, private sector contracting is not without its pitfalls. For example, cost advantages have yet to be proven, and problems of accountability and control can be significant.[10] North Dakota has attempted to avoid these difficulties by establishing formal agreements with the agencies and establishing certain guidelines for operation. The North Dakota guidelines state that the collection agency must be licensed and bonded in North Dakota. A written agreement must be prepared between the state's attorney and the collection agency which clearly states the agency's authority to seek collection of indigent defense costs as accounts receivable for the state or county. Finally, any enforcement procedures initiated by the collection agency must be supervised by the state's attorney.

Clearly, the agreement established between the court and the collection agency is one of the primary vehicles for maintaining control and preventing abuse. The North Dakota Legal Counsel for Indigents Commission has prepared a model agreement for collection agency services which is contained in this document as Appendix C.

Enforcement Procedures

The availability of sanctions for nonpayment is closely tied to the way in which the recoupment order is enforced by the court. If the judge imposes recoupment payments through a court order or as a condition of probation, defendants who fail to make payments may be subject to sanctions for violation of the court order or for a violation of probation. However, even in these cases defendants would not be subject to criminal penalties for failing to make recoupment payments without a further hearing on the defendant's present ability to pay.

Sixteen states also permit, within certain time limits, the pursuit of a civil judgment against the defendant to recover fees and costs. Such suits are usually entered and pursued by the local prosecuting authority; however, this method is used only in a small number of cases. It is generally felt that the substantial time and expense required to litigate a suit outweighs the amount that will ultimately be recovered. A number of states establish absolute time limits, beyond which civil suits cannot be pursued. They range from two years in Kansas and Oregon to 10 years in New Jersey.

In nine states, the court is permitted by statute to place a lien on the defendant's property for failure to make repayment. When attempting to impose a lien, however, it is necessary to conform to general statutory exemptions in the state which are enforced for all debt collections. (Most states permit a defendant in a debt collections case to exempt a certain amount of personal property and real estate from collection.) For example, it was recommended that North Dakota recoupment procedures apply the major exemptions in North Dakota law, including (1) a personal property exemption of $5,000 for the head of the family; (2) a $2,500 exemption for a single person; and (3) an exemption of $80,000 for any homeowner.

Intuitively, civil enforcement may be less compelling to defendants, and may result in lower recoupment payments. Yet proper collection procedures can result in significant recoupment revenues. The Los Angeles program uses a businesslike, civil procedure. The Department of Collections mails a reminder letter 25 days after the required date of payment has passed; if the payment is still not received after 60 days, the account is passed to the Department's enforcement division. Similarly, in North Dakota, standard debt collection procedures are used for "past due" recoupment accounts.

The practice of imposing recoupment orders as a condition of probation, while authorized in a number of states, raises certain legal issues. For example, if the recoupment order is in arrears and, as a result, the probation officer wishes to revoke the defendant's probation, the defendant could possibly be incarcerated. However, this would be tantamount to imprisonment for nonpayment of a debt—a practice proscribed by law in virtually every state. Similar problems could arise if the defendant were cited for contempt and threatened with incarceration. In either case, a separate hearing would have to be held to determine whether the defendant has wilfully refused to pay or is simply unable to pay. Clearly, in either case, the defendant could not be jailed if it is determined at the time of the hearing that he is "unable to pay" or "unable to pay without substantial hardship." The information that we have collected indicates that it is rare for probation to be revoked solely because of an outstanding recoupment order. When this does occur, we are told it is limited to cases where the defendant has wilfully and flagrantly refused to pay under circumstances where he readily has the funds to meet this obligation. Despite this clearly stated view, it does appear that some jurisdictions continue to use at least the threat of such sanctions to enforce recoupment orders.

Managing Recoupment Payments

In administering the collection of recoupment payments, it is important to establish a careful set of rules and procedures. Defendants must be told how to make the payments, and arrangements should be made to accommodate those who may not have the "cash on hand" for recoupment payments. An administrative decision must be made as to how to account for recoupment funds, and where such revenues will be deposited. Finally, procedures must be established for renegotiating recoupment orders should the financial circumstances of the defendant change for the better or for the worse. These procedures are essential both in terms of uniformity and fairness to the defendant.

Payment Options

Due to the high costs associated with lengthy or complicated jury trials, in some cases courts decline to issue recoupment orders for the full cost of the defense services provided. Courts are reluctant to demand repayment of large sums from partially indigent defendants for two reasons: 1) from a practical standpoint, it is unlikely that the defendants would be able to meet such a payment, even over an extended period of time; and 2) an extended payment schedule could be a source of continuing hardship for the defendant and his family. Thus, most courts impose only a reasonable amount in their recoupment order--ordinarily not more than $500 to $1,000. In effect, some partially indigent defendants are required to pay a greater percentage of their total costs than others; however, it is presumed that this compromise is necessary in light of the practical limitations on the court's ability to collect full payments.

For similar reasons, many jurisdictions prefer defendants to make lump sum payments soon after the order is imposed. These jurisdictions feel strongly that the longer it takes to receive payment, the greater the chance that payment will not be made. In addition, they are concerned that the administrative cost of pursuing installment payments will be too great. In the view of these jurisdictions, any lump sum payment—even if it is only a portion of the total obligation—is better than no payment at all.

Other jurisdictions, however, prefer to establish payment schedules with defendants while ensuring that the monthly cost of the recoupment payment will not exceed the defendant's ability to pay. Los Angeles County, for example, requires a minimum monthly payment, usually $25.

Whatever the method of payment, caution must be exercised to ensure that the payments do not cause undue financial hardship or adversely affect

the public interest (as would be the case if large recoupment payments forced the defendant to seek public assistance). In such instances, most jurisdictions prefer to reduce or rescind the payment obligation.

Deposit of Recouped Funds

In virtually every jurisdiction, the costs recovered from indigent defendants are deposited in the general fund of either the state or county treasury, depending on which is responsible for funding indigent defense services. Often, the amounts added through recoupment are not separately recorded, so that it is impossible to determine the total amount of recoupment orders collected and placed in the general fund. While this approach offers certain administrative conveniences, it has one serious drawback: without information on revenue from recoupment orders, it is impossible to evaluate their cost efficiency. There may also be a lack of incentive on the part of those individuals responsible for collection if there is no way to measure the total amount collected.

One of the few exceptions to this policy is found in Seattle, where the Office of Public Defender deposits recoupment payments in its own account. These funds are not used as a source of extra funds for the OPD; instead, recoupment payments are set off against the OPD budget. Though at first glance this might seem to serve as a disincentive for active collection efforts, some argue just the opposite: if the agency can document that recoupment provides a positive source of revenue, it is believed that funding sources will look more favorably on defender requests for increased funding.

Reconsidering the Recoupment Order

Occasionally, after sentence has been passed and the decision regarding recoupment has been made, the financial circumstances of the defendant may change. If these circumstances improve, some states permit a recoupment order to be entered well after the disposition of the case. However, certain time limits are generally set. For example, in Colorado a recoupment order may be entered up to five years after final disposition, while in North Dakota, enforcement of the recoupment order can extend for as long as ten years. Los Angeles County, on the other hand, limits the reconsideration period to six months, and gives the government only one opportunity to request reconsideration within that period.

Unfortunately, it is at least as likely that the defendant's circumstances may worsen, and the recoupment obligation may become unduly burdensome. This possibility was recognized in *Fuller v. Oregon,* where the court held that

as long as a defendant is not in continuous default on recoupment payments, he or she can petition the court at any time for remission of the costs or any unpaid portion of the costs. In examining the petition, the courts are to consider whether the payment of the amount due will impose severe hardship on the defendant or his immediate family. In seventeen states there is specific statutory authority for review, usually by the trial court.

Effects of Other Forms of Court Costs on Collection of Recoupment Orders

The number and dollar amount of recoupment orders that can actually be collected will depend, in part, on other costs, fines or assessments imposed on the defendant at the time of final disposition and the relative priority for collection given to each of these assessments. Most defendants will be limited in the total amount they are able to pay. Thus, a jurisdiction which has many forms of assessments and gives a low priority to recoupment will receive only limited revenues from recoupment orders.

A good example of this problem is found in Seattle, where a large variety of assessments can be imposed. The following collection orders may be assessed at final disposition:

1. Filing fee
2. Justice information service fee
3. Costs of pre trial detention
4. CV penalty
5. Restitution ($1,000-$15,000)
6. OPD (recoupment) assessment
7. Traffic fine
8. City of Seattle fine
9. State of Washington fine
10. MVIP
11. Driver's education assessment
12. Other city fine
13. Other assessments

These assessments are presented in the priority for payment established by the Superior Court in April 1984. Previously, OPD recoupment was third in priority, after filing fees and costs of pre-trial detention. County officials predict that recoupment revenues will diminish rather substantially over the next year, since recoupment has fallen to sixth priority, and is now below restitution, which can be assessed up to a total of $15,000 in Washington state.

The experience in Seattle is not unique. Over the past few years, many state legislatures have established new programs such as victim compensation, special computerized information services, or victim assistance programs. Often, these programs are not funded by an annual appropriation from the state's general fund, but rather by assessing the costs on criminal defendants as a user's fee or a fine. In addition, the costs of certain criminal justice functions, such as pretrial detention, indigent defense, or court filing fees may

also be assessed against defendants. The net result is an increase in the variety and amount of costs that can be imposed at the end of the case. Since the majority of defendants processed through the criminal justice system are indigent or partially indigent, only those assessments given the highest priority are likely to be collected.

Contribution Procedures

While recoupment can be ordered only after disposition of the case, for a variety of practical and legal reasons, this may not be the optimal time to request that the defendant support the cost of his or her defense. After disposition, the defendant's ability to pay may be severely limited. If sent to prison, sources of income will disappear, and any existing savings may be needed to support the defendant's family. In addition, the convicted defendant may be asked to pay a variety of other costs, including court filing fees, restitution, victim compensation fees, or the costs of pretrial detention. As indicated in the previous section, if these fees and fines are given higher priority than recoupment, defense costs may never be reimbursed.

Practically speaking, efforts to collect recoupment costs after conviction may also be hampered by the defendant's willingness to pay. Once convicted, the defendant has little incentive to pay for a service that he or she may perceive as having failed. From a legal point of view, recoupment also raises a host of constitutional issues, including due process concerns, issues of right to counsel, and the possibility of imprisonment for debt.

An alternative to recoupment is to institute contribution programs, in which defendants who are found indigent but with some ability to pay (partially indigent defendants), pay some portion of their defense costs. At present, eleven states authorize contribution by statute. Contribution programs typically are invoked early in the criminal process—well before the disposition of the case—so some of the legal and practical pitfalls of recoupment can be avoided: there is less risk of violating constitutional safeguards if the defendant has agreed to a voluntary payment; defendants may be more willing to contribute before disposition; and some defendants are likely to have more financial resources available to them.

To date, contribution programs for the partially indigent are operating in only a few jurisdictions. In the course of this research, a number of contribution programs were identified and studied: a pilot project in one Massachusetts district court; six district court programs operated by the Intensive Screening Units in Colorado; and the program in Seattle. In addition, though no contribution program was operating in North Dakota, the North Dakota Legal Counsel for Indigents Commission has addressed the issue of

partially indigent defendants in their guidelines for eligibility and recoupment. Our research draws on the experience of these jurisdictions, the recommendations of the American Bar Association, and the National Legal Aid and Defender Association standards for defense services.

Who Should Make Contributions

Like recoupment programs, contribution programs hold the defendant's present *ability to pay* as one of the most important selection criteria. However, contribution programs differ quite markedly from recoupment in the means they use to choose defendants for participation.

Contribution programs are almost invariably linked with indigency screening programs, such as those described in Chapter 2. By investigating defendants' financial resources and applying standardized eligibility criteria, the screening agency routinely separates indigent defendants into two categories: those who have no ability to pay and those who have some ability to pay. Contribution programs are specifically targeted for the latter group.

However, meeting the criteria for partial indigency does not necessarily guarantee that the defendant will participate in the contribution program. Participation in contribution programs is voluntary: defendants are asked—not ordered—to contribute before representation is provided.[11] Thus, the defendant's willingness to participate also determines who will make contribution payments.

While the U.S. Supreme Court has clearly sanctioned the use of recoupment as a method to recover costs, it has yet to examine the question of contributions. In fact, we are unaware of the issue being addressed by any state supreme court. The concept of contribution is founded, in most cases, on the defendant's *voluntary* agreement to pay some amount. But what if the defendant refuses to pay? Can a court order payment? Can a court impose sanctions for failure to pay? If a defendant makes some payment and is found not guilty, can he request reimbursement? To our knowledge, there are no appellate decisions in the country addressing any of these questions. But it does seem clear, in our judgment, that counsel cannot be withheld for failure to pay, assuming that the defendant has been found eligible for court-appointed counsel. These and other questions will no doubt be tested in the future as contribution programs expand into additional jurisdictions. In the meantime, we can only recommend that these various legal issues be considered by any jurisdictions considering a new contribution program.

As in recoupment programs, contribution programs may seek to recover costs from juveniles and other defendants involved in such proceedings as

child custody or mental health hearings. Unlike recoupment, however, such factors as the guilt or innocence of the defendant or the type of sentence imposed after conviction are not relevant, since contribution payments are made before disposition of the case. As a result, contribution programs avoid some of the practical and legal constraints faced by recoupment programs, and offer the potential to recover costs from many more individuals.

How Much Should Be Contributed?

How does the program determine how much the partially indigent defendant should contribute? In a recoupment program, defense services have already been rendered, and the problem is simply to calculate the cost of the representation. This is done using fixed rates for certain kinds of cases or standard hourly charges which are then multiplied by the number of hours spent on the case. However, in a contribution program for partially indigent defendants, payments are determined at the time of the screening interview, when it is not possible to predict how far into the system the case will go and how many hours will be spent on the case. As a result, the only apparent option available is to establish fixed rates for certain case types.

In most respects, fixed rate systems for the partially indigent are identical to those used by recoupment programs. For example, Seattle uses the same payment schedule for its recoupment and contribution clients: $318 for felony cases, and $115 to $142 for misdemeanor cases. These amounts are based on the payments negotiated between the county and three contract public defenders.

However, in some programs the fixed rates constitute a maximum payment which is rarely assessed in practice. In these programs, defendants are rarely expected to pay the full cost of their representation; rather, they are assessed only a portion of those costs. The Massachusetts Pilot Program established a maximum payment of $125 for each misdemeanor case; however, actual assessments averaged only $40 each, due to the reported reluctance to charge the maximum assessment allowed.

Setting the Contribution Obligation

Perhaps the key difference between recoupment and contribution programs lies in the procedures and mechanisms used to establish the payment obligation. Recoupment is essentially a judicial procedure. To meet constitutional requirements, recoupment programs must provide an opportunity for a hearing on the recoupment issue, and once recoupment is determined to

be feasible, a judge must make the recoupment decision and impose the obligation.

Contribution programs, however, are basically an administrative procedure based upon a voluntary commitment of the defendant that requires no formal hearings and no judicial order. Typically, the only proceeding involved in the contribution program is the screening interview. The contribution payments are arranged through a voluntary agreement between the screening agency and the defendant. The Seattle program exemplifies these procedures: once defendants are screened by the Office of the Public Defender, those found partially indigent are asked to sign a promissory note through which they agree to pay some portion of their defense costs.

Enforcement and Collections

In most cases, the responsibility for collecting contributions from partially indigent defendants lies with the individual or agency that conducts the eligibility determinations. For example, in Seattle, once the defendant has signed the promissory note, it is entirely OPD's responsibility to collect the payments. In the Massachusetts Pilot Program, the district court probation department collected the pretrial contributions, while in the six Colorado sites conducting partial indigency programs, the Intensive Screening Units take responsibility for collections.

In all these jurisdictions, the procedures used for collections are informal. Defendants are urged to pay pretrial contributions as early as possible, and may be reminded of their agreement periodically. For example, the Massachusetts Pilot Program simply provided defendants with a notification form indicating the amount of the payment, the date by which the payment is due and the payment procedure. The Colorado Intensive Screening Units remind defendants of their obligation through telephone calls and letters, and judges may be asked to remind partially indigent defendants of their ongoing responsibility whenever further court appearances occur. In Seattle, defendants are reminded of their payment obligation through a series of follow up letters. As yet, however, more active collection efforts have not been instituted in these jurisdictions, due in part to economic reasons: a more active collection program could mean that administrative costs would exceed collections.

Enforcement procedures in contribution programs are similarly constrained. In recoupment, there are clear civil or criminal remedies for nonpayment. However, in contribution programs, some question the "enforceability" of the agreements since contribution payments are voluntary and are not ordered by the court. Because contribution payments are voluntary, occur before disposition, and are not imposed through judicial action (such as a court order

or a condition of probation), there is little apparent risk of defendants raising constitutional questions of due process, imprisonment for debt, or abrogation of the right to counsel. Still, the issue has yet to be litigated and special caution should be applied in enforcing contribution payments.

Managing Contribution Payments

Like recoupment payments, pretrial contributions can be an important source of revenue which must be administered with care. However, because payments are generally smaller and the programs involve administrative rather than judicial proceedings, the task of managing contribution payments is somewhat less complex.

Most partial indigency programs strongly prefer that contributions be made in one or two payments scheduled shortly after or at the time when counsel is actually appointed. For example, the National Legal Aid and Defender Association standards for indigent defense services emphasize that "the contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination."[12] Nevertheless, a variety of procedures, including payment schedules, are employed in the contribution programs studied.

In Seattle, felony defendants are asked to pay approximately $50 per month until the total amount (usually $319) is paid. In misdemeanor cases, where assessments range from $115 to $142, the defendant is urged to either pay the total amount upon appointment of counsel or to pay the assessment in two equal monthly payments. In Colorado, the Intensive Screening Units begin to collect payments from partially indigent defendants immediately after the appointment of counsel. In most cases, there is an effort to collect a sizable portion of the assessment at the earliest point possible.

Collection from partially indigent clients has also been addressed in the guidelines promulgated in North Dakota, which state that:

> Collection of defendant's contribution should be made by prepayment to avoid administrative burdens on court personnel. Percentage payment requirements should be discouraged to avoid financial uncertainty and administrative problems. Lump sum payments should be based on present ability to pay.

Pretrial contributions, like recoupment payments, are almost always deposited in the general fund of the state or county which is responsible for funding the indigent defense system. In Colorado, for example, all funds delivered to the court clerks are eventually turned over to the state for deposit in the general fund. The North Dakota guidelines on partial indigency

programs similarly recommend that all payments should be made directly to the state or county which pays for appointed counsel. In Seattle, contribution payments are retained by the Office of the Public Defender as an offset against appropriated funds.

Since pretrial contributions are basically an administrative concern, procedures for reconsideration of the assessment are typically quite informal. Most frequently, the defendant will inform the program that payments are no longer feasible, or the program itself will determine that payments are causing hardship through its follow-up contacts with the defendant. At this point, the program is free to revise or cancel the assessment, with no further action required.

Conclusion

Recoupment and contribution programs both attempt to reduce the overall cost of court-appointed counsel by recovering all or a portion of the defense costs from defendants. However, in other respects, there are clear differences between the programs. Recoupment involves a judicial proceeding in which the court is responsible for determining whether an order will be issued and the amount of the order. Recoupment may also involve a series of legal sanctions issuing from failure to pay the required order. However, in the case of contributions, the decision regarding who has the ability to make some form of payment and how much the payment will be is usually decided by an individual or agency responsible for initial eligibility screening. Also, under contribution, the participation of the defendant is voluntary. If he or she chooses not to participate or refuses to make the payment once agreed upon, there are no legal sanctions that can be imposed to force payment.

From both a legal and practical standpoint, cost recovery programs that require contributions from partial indigents prior to disposition appear to be preferable to those ordering recoupment after disposition. This same conclusion has been reached by a number of national legal organizations, most notably the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), and the National Advisory Commission on Criminal Justice Standards and Goals (NAC).

The NAC has eschewed any standard on recoupment, recommending instead that "an individual provided public representation should be required to pay any portion of the cost of representation that he is able to pay at the time."[13] Similarly, the NLADA National Study Commission on Defense Services concluded that:

> The balance appears to this Commission to weigh heavily against recoupment in light not only of the chilling effect upon the right to counsel and the deterrent to rehabilitation, but the simple economic factors of the cost of administering recoupment.[14]

The Commission went on to recommend:

> If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense.[15]

The ABA takes an even stronger position which opposes any form of recoupment program, but suggests the possibility of contributions. They point out that:

> Contribution orders do not impose on defendants long-term financial debts and normally are not entered unless there is a realistic prospect that the defendants can make reasonably prompt payments. Accordingly, contribution orders, in contrast to orders for reimbursement, are less likely to chill the exercise by defendants of their right to counsel.[16]

Properly administered, recoupment programs may offer a means of recovering some indigent defense costs. However, it is clear that contribution programs are not currently subject to the same legal and constitutional questions, and they may be more practical for reasons of efficacy and efficiency. In addition, contribution programs may result in higher revenues than recoupment, since contributions do not compete with other court costs and fines. Clearly, the weight of the evidence suggests that pretrial contributions should be considered in lieu of recoupment programs.

We are aware, however, that some jurisdictions will continue to use recoupment for a variety of reasons. Where this does occur, jurisdictions should concentrate on issuing recoupment orders in all appropriate cases and developing methods of enforcement that are cost effective and which minimize the legal issues presented by these programs. If this is done, revenues may be collected from recoupment, which can help to defray the ever-increasing costs of indigent defense services. However, we are aware of only a handful of jurisdictions that have collected substantial sums through recoupment programs.

Footnotes

1. 417 U.S. 40 (1974).

2. See cases collected at 79 A.L.R. 3d 1025. Cases which strike down statutes include *Olson v. James* and *Fitch v. Belshaw,* supra. note 4, and Opinion of the Justices, 431 A. 2d 144 (N.H., 1984).

3. *Olson v. James,* 603 F. 2d 150 (10th Cir. 1979); *Fitch v. Belshaw,* 581 F. Supp. 273 (Or. Dist. 1984); *People v. Kelleher,* 452 N.E. 2d 143 (Ill. App. 1983), cert. denied 104 S. Ct. 1686 (1984).

4. A Yamkill County, Oregon District Court Judge describing his understanding of the Oregon recoupment statute in a letter dated 20 September 1983, quoted in *Fitch v. Belshaw,* 581 F. Supp. 273 (Or. Dist. 1984).

5. 581 F. Supp. 273 (Or. Dist. 1984).

6. *People v. Johnson,* 104 Cal. Rptr. 75, 27 Cal. App. 3d 781 (1971), *In re Allen,* 71 Cal. 2d 388.

7. Robert Spangenberg, et al., "National Criminal Defense Systems Study," (Cambridge, MA: Abt Associates Inc., May 1984) (Publication by U.S. Department of Justice, Bureau of Justice Statistics pending), p. 94.

8. American Bar Association, "Providing Defense Services," *American Bar Association Standards Relating to the Administration of Criminal Justice,* 2nd edition (American Bar Association, 1978).

9. Joan Petersilia, et al., *Granting Felons Probation: Public Risks and Alternatives* (Santa Monica, CA: Rand, January 1985), p. xi.

10. Joan Mullen, Kent Chabotar and Deborah M. Carrow, *The Privatization of Corrections* (U.S. Department of Justice, National Institute of Justice, February 1985), pp. 77-81.

11. This view is consistent with the standards developed for indigent defense services by the American Bar Association, but may be inconsistent with the position of the National Study Commission, which appears to endorse the concept of mandatory payment for partially indigent defendants.

12. National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States,* report of the National Study Commission on Defense Services (Washington, D.C.: NLADA, 1976).

13. National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973), Standard 13.2 (emphasis added).

14. NLADA, *Guidelines For Legal Defense Systems in the United States* report of the National Study Commission on Defense Services (Washington, D.C.: NLADA, 1976), p. 120.

15. *Ibid.*

16. *Providing Defense Services,* American Bar Association Standards Relating to the Administration of Criminal Justice, 2nd edition (ABA, Fall 1978), Commentary on Standard J-6.2.

Chapter 4

Cost Efficiency

A fundamental question that arises in any thoughtful review of indigency screening and cost recovery programs, is whether or not such programs are cost efficient. In other words, do the benefits of screening for eligibility and assessing the cost of representation to defendants outweigh the costs of administering these programs? Based upon extremely limited data, this chapter attempts to answer this question. If the answer is yes, then it is clear that these programs achieve their goal of helping to control the overall costs of indigent defense. If no, then they fail to accomplish one of their primary aims and their use should be re-evaluated.

The question of cost efficiency is the most frequently expressed concern regarding eligibility screening and cost recovery. Many observers have felt that such programs could not be cost efficient and have objected to their implementation on that basis. Thus, it has been the standard practice in some jurisdictions to simply provide court-appointed counsel to any defendants who request it without review of their financial condition, and to disregard statutory provisions for cost recovery on the basis that few defendants would have adequate resources to help defray the costs of their defense. However, empirical data supporting or disproving these contentions are limited, if available at all. The following sections present what statistical and experiential information has been compiled in the sites under study in order to provide insight into the question of cost efficiency.

Cost Efficiency of Eligibility Screening Programs

• *Colorado*

Defendants in Colorado may be declared fully indigent and eligible for public defender services, non-indigent and ineligible, or partially indigent and subject to assessment of some or all of the costs of representation. Of the 9,000 defendants screened by the Indigency Screening Unit (ISU) in FY 1983, approximately 5,300 were found eligible, 1,700 were deemed ineligible, 1,000 were declared partially indigent, and 1,000 withdrew their requests for appointment after the screening interview. Thus, in 1983 representation was provided for 2,700 *fewer* defendants than would have been the case had counsel simply been appointed for all who requested it. Further, representation was provided under the partially indigent plan to an additional 1,000 defendants, a portion of whom made payment back to the state.

Using a cost per case of $200 for representation by the public defender, estimated by the state public defender's office for FY 1983, the ISU screening program states that it yielded a gross savings of approximately $540,000. (This savings, of course, would be further increased by the level of contributions received from the 1,000 partial indigents.) To determine the net savings, one must consider the total costs of the ISUs. The FY 1983 budget was $224,000 for nine full-time investigators and five part-time clerks in the seven largest judicial districts.

However, each of the ISU staff perform two functions, screening and administering the partially indigent program. There is no data on how screeners' time is divided between these functions. But, even assuming that all of the time of the screeners were spent determining eligibility, there would be a resulting net savings to the system of approximately $316,000. In addition to these cost savings, there is some evidence that in-depth eligibility investigation causes some defendants to withdraw their application, resulting in fewer defendants determined to be indigent. Unfortunately, however, no data are available on the number of defendants who were found ineligible or who withdrew their application in the period prior to the establishment of the ISUs and thus a comparison of the system before and after the institution of the ISU program is not possible.

• *Massachusetts*

The marginal indigency pilot project conducted in Massachusetts in 1981 included an eligibility determination component. A total of 189 cases were reviewed for eligibility by *both* the probation department and pilot project

staff. The latter applied a uniform standard of evaluation, while the former used only *ad hoc* procedures. In 89 cases, or 47 percent of the sample group, different recommendations concerning eligibility for appointed counsel were made by the two organizations. It was found that in those cases where the interviewer probed for more detailed information, the pilot project tended to produce more stringent recommendations than did the probation department.

The evaluators of the pilot project concluded that this difference was due to the application of a set of reasonable and uniform guidelines in a systematic manner, enabling the pilot project interviewer to probe the financial circumstances of each defendant more deeply and accurately, and with greater consistency among defendants. Thus, they suggest that intense probing of the financial condition of an applicant and a mechanism for evaluating the information which is obtained, will produce fewer findings of indigency among defendants who request court-appointed counsel.[1] This analysis is logical but needs to be examined in terms of the percentage of defendants who were screened and in the context of the pilot program.

While no cost figures were available for the Massachusetts pilot project because of the small number of defendants involved and the project's short duration, the experience in Massachusetts suggests that eligibility screening may be cost effective, especially if conducted by a centralized organization applying uniform eligibility guidelines in a consistent fashion to all potentially indigent defendants.

Cost Efficiency of Cost Recovery Programs

While most states have statutory authority to recover the costs of defense services from defendants following disposition, very few have made any systematic effort to enforce the statutes. Traditionally, practitioners and policymakers have been skeptical about their ability to collect sufficient revenues to offset the costs of collection, much less contribute significantly to the revenues available for public defense. But is such skepticism justified? Evaluations of cost recovery programs have been rare, and when such efforts have been examined, they generally provide inconclusive results, usually because of the lack of reliable data.

In our view, when evaluating the costs and benefits of any program, it is important to measure performance against program goals. In the case of most cost recovery programs there are two major goals:

1. *Financial*—to limit the overall costs of indigent defense services borne by local and state governments; and

2. *Public Policy*—to foster a sense of responsibility in defendants by requiring them to contribute to the costs of their representation and in some jurisdictions to serve as a punitive function.

The second of these goals is clearly not quantifiable for the purpose of performance measurement. However, as long as the fulfillment of this nonmonetary public policy goal is considered important, a cost recovery program may be deemed successful even when its revenues just offset the operating costs or when it runs at a slight deficit.

Second, most attempts to evaluate cost-efficiency have compared the revenues from cost recovery programs with the *total* costs of the indigent defense system. This typically has led to dismal conclusions about the practical success of existing cost recovery programs. This method of assessing cost efficiency is misleading and incorrect. However efficient the cost recovery program, it is *not* applied to every defendant represented by the indigent defense system: only those with some ability to pay are asked to participate. Thus, comparing the costs of a recoupment program with the costs of the entire defense service is obviously improper. Instead, the revenues from cost recovery programs should be compared against the costs of administering the *cost recovery program itself.* If there is a net gain—that is, if the program brings in more funds than it costs to administer—it will result in a savings in the total cost of the indigent defense service.

Some recent data, that compare the amounts recovered with the costs of administration, provide some evidence of success. Furthermore, systems that have operated over a multi-year period have demonstrated modest gains in cost effectiveness. For example, in 1971, the New Jersey State Public Defender recoupment program collected approximately $80,000 in reimbursements, but cost $100,000 to administer. The same agency collected $155,000 in 1979, $206,000 in 1980, and $240,739 in 1981, while it cost only $165,000 to administer the plan in each of those years.

This evidence of cost efficiency is the result of positive and systematic efforts to improve collections. For the most part, the historical evidence in many jurisdictions suggests that revenues have been low due to the failure of the courts to impose recoupment orders systematically and to collect on the orders when they were made. With the introduction of more pre-trial contribution programs actively collecting funds from defendants, the prospects for cost recovery of significant revenues should improve in the future.

Recoupment Programs

• *Los Angeles, California*

A pilot recoupment program initiated in the Los Angeles County Rio Hondo Municipal Court in 1981 by the county Department of Collections (DOC) demonstrated that recoupment could generate revenue. Before the pilot program was introduced, this court had collected no reimbursement fees over a ten-month period ending in 1980 and had referred to DOC a total of only four orders in the total amount of $800. Ten months after a DOC screener was placed in the court, 936 orders had been referred to Collections, for a total of more than $125,000. During this period, expenditures in this court for indigent defense amounted to roughly $200,000. While no data are available on the total amount of the $125,000 that was collected, the increase in total orders was considered extremely important. By 1982, 72 percent of the 1,541 defendants referred to the Rio Hondo program were found able to pay recoupment orders totaling $169,018. The success of the Rio Hondo pilot in generating recoupment orders led to the implementation of two similar cost recovery programs. One of these programs, in the South Bay Municipal Court, resulted in recoupment orders totaling $46,480 entered on 76 percent of all defendants referred by the judges to the screening unit. While a substantial number of recoupment orders were entered, data regarding the total amount recovered in these two courts is unavailable. However, the Rio Hondo and South Bay courts accounted for a disproportionately large percentage of the total collections in the county: though the two courts handled only 4 percent of the criminal filings, they collected 28 percent of all the FY 1982 recoupment revenues ($150,000 out of $534,000).[2]

Due to these apparent successes, in November 1982 the Board of County Supervisors authorized expansion of the cost recovery program to all of the county's 24 municipal court districts. The county-wide cost recovery program was expected to generate an estimated $3 million per year from the municipal courts, ten times the amount the Probation Department had previously been able to collect.

In April 1984 the Los Angeles County Grand Jury published an evaluation of DOC's cost recovery program.[3] Under the Grand Jury's direction, an accounting firm hired by the county conducted a management audit of all services and staffing provided by the Department of Collections and other county agencies.

The auditors reported that between July 1983 and February 1984, only $272,787 or 33.8 percent of the $807,259 total recoupment ordered was collected by DOC. In addition, the report stated that the cost of the program

exceeded revenues by $142,573. In only three of the 22 judicial districts audited did program collections exceed program costs.

Though the auditors acknowledged that the newness of the program may have created measurement problems, they nevertheless concluded that only by increasing the number of referrals and decreasing corresponding program costs could the program become cost effective. Specifically, they suggested three ways in which the program could become more cost effective:

- expand to the remaining municipal courts in Los Angeles, thus covering *all* municipal courts;
- increase the number of referral orders from municipal court judges; and,
- reduce the total number of DOC screeners employed while making more efficient use of the remaining staff.

Recent information obtained from the Los Angeles County program in April, 1986 is instructive. While some progress occurred in resolving several of these problems within the last two years, a decision was made to add an element of contribution. Beginning July 1, 1986, screeners will be placed in all municipal courts with three specific functions. First, they will be responsible for the initial indigency screening process. Second, in accordance with procedures that have been developed by the County, they will identify those defendants at the screening interview who have the ability to contribute to the cost of their defense and they will be asked to make a contribution. Finally, they will continue to screen defendants who are referred by the court following disposition for their ability to pay a recoupment order.

The second change contemplated in the program will be to contract out to private collection agencies all costs (including recoupment) assessed by a judge following final disposition. These referrals will not, however, include costs established by way of contribution at the beginning of the case. County officials are convinced that these new procedures will substantially add to the cost efficiency of the overall program.

While the grand jury report provides helpful data related to cost recovery program outcomes, aspects of program or operation may influence a program's ability to be cost effective. First, the cost efficiency of a recoupment program depends in large measure on the willingness of individual judges to make referrals to the financial screeners. Yet as shown in Los Angeles County, the rate of referrals by judges (15.5 percent) may not provide a sufficient volume of orders for a program to operate at maximum efficiency. Second, screener efficiency is, in part, determined by court demands, which may work against screener cost effectiveness. For example, some courts demand that

a full-time screener be available whenever the judge is prepared to make a referral. Yet to maintain cost efficiency in the lower volume courts, the screener need only attend during the hours of full disposition of criminal cases. The need to gain entry and establish credibility with the courts may lead programs to oblige judges' requests even though it is not efficient.

Finally, the lag time between orders and collections may result in an underestimate of recoupment revenues when assessing program outcomes. Sufficient time must elapse after the issuance of the recoupment order to allow for payment.

• *Wisconsin*

By statute in Wisconsin, parents or guardians of children who are found delinquent may have recoupment orders entered against them. In 1983, the Wisconsin state legislature asked the Judicial Council (the research arm of the State Supreme Court) to review the implementation of the program to determine whether statutory changes were needed to increase the efficiency of the recoupment process.

In January 1984, the Wisconsin Judicial Council concluded that they were opposed in principle to such recoupment practices, feeling that "enforcing recovery places substantial burdens, both monetary and non-monetary, on the court system, county government, juvenile service agencies, and the families involved."[5]

In spite of these reservations, the report projected surplus revenue of nearly $75,000 from the program. The revenue projections are based on data obtained from a survey of court officials indicating that about one-third of the cases in which a juvenile is represented by the state public defender— 4,233 cases—will result in an order for reimbursement. Multiplying this figure by an average fee of $85 per case (assuming that some percentage of these juveniles will make no payment and others will make only partial payment) yields potential annual gross revenues of about $360,000.

The cost projections included in the report are notably comprehensive, including calculations of:

- the amount and expense of caseworker time necessary for making indigency determinations;
- the costs of computing and approving bills for attorney's time;
- the costs of court review of the eligibility recommendations and hearings, based on an average cost of $155 per hour for juvenile court operations, including judge, clerk, reporter and overhead; and

- the loss to the uniform fee system (which supports social services for juveniles) resulting from recoupment payments.

Comparing these costs and potential revenues, the Judicial Council concluded that the program could operate with a substantial profit of $74,500, while pointing out that these projections were based on fragmentary data and that there were additional non-monetary costs of the program. Nevertheless, the Judicial Council's calculation of the costs of collecting recoupment is one of the most comprehensive attempts to date and one that clearly shows the potential for cost savings in a recoupment program. Of course, as in all recoupment programs, the success of the program is dependent upon two factors: judges ordering a sufficient number of juvenile defendant's families to reimburse the courts; and families providing payment in a very high percentage of those cases.

• *Seattle, Washington*

Revenues from recoupment orders in Seattle were obtained for the Superior and Municipal/District Court through the Office of the Public Defender for the one-year period March 1983 through February 1984. Average monthly payments in the Superior Court were approximately $16,000 and ranged from $13,326 to $20,649. Total payments for the one year period amounted to $192,027. Average monthly payments in the Municipal/District Courts averaged $2,467 with a range between $1,143 and $4,008. The total amount collected for the year was $29,602.

As these data indicate, the vast majority of the collections came from the superior court. Unfortunately, the superior court was not able to provide data on the total number of recoupment orders for this period so that we could calculate the percentage of orders that were actually collected. The Department of Corrections was also unable to provide the costs of collections since they do not collect those data. However, most of this money was paid voluntarily or as a result of the mailing of form letters. The introduction of more active collection procedures would no doubt result in substantially greater revenues, though it would also increase collection costs.

Partial Indigency Cost Recovery Programs

• *Seattle, Washington*

In Seattle, revenues are also collected from defendants who are found to be partially indigent and who are required to sign promissory notes at the time of their eligibility determination. The Office of the Public Defender

provided data for the period between March 1983 and February 1984. During this one year period, defendants signed promisory notes totaling $82,659. Total monthly notes ranged from $5,385 to $9,107. For this same period of time, defendants paid a total of $40,928 on their promisory notes. Total monthly payments ranged from $2,363 to $4,070. Thus, for this recent twelve month period 49.5 percent of the promissory notes taken were paid. Program administrators report that this percentage has remained constant over the past few years. No specific data were available on the costs of collecting these funds. OPD estimated that the costs would consist of a small fraction of the time of two of their clerical personnel and an even smaller portion of the time of a supervisor and the OPD administrator.

Given the limitation in available data regarding administrative costs, it is not possible to measure the cost efficiency of the program. However, based upon the revenues of $262,557 from both recoupment and promissory notes—a relatively high figure compared to other jurisdictions—there is reason to believe that Seattle has realized some net savings from this program. The office has begun to improve its collection procedures by developing a more detailed plan for the collection of promissory notes and recoupment orders, action which should improve overall program efficiency.

- *Colorado*

Revenues collected by the ISUs in their contribution program in Colorado for fiscal 1983 were $187,000. The best estimate of the cost of administering the program for that period is $98,000, resulting in an approximate net savings of $89,000. It will be important to examine more recent data, when it becomes available, to see whether or not these savings have been sustained over a period of several years.[6]

- *Massachusetts*

The Massachusetts pilot program reported recovery from 32 defendants who had been found partially indigent. These defendants were assessed a total of $1,260 and an aggregate amount of $770 was collected. Although it is not possible to evaluate the cost efficiency of the pilot project because of the small number of defendants involved and its short duration, this collection rate of 61 percent in the limited experiment suggest that a more comprehensive cost recovery program is warranted in an effort to determine whether an expanded program could attain the same results.

Conclusions

Eligibility screening and cost recovery programs have been implemented around the country primarily as a means of holding down the spiraling costs of indigent defense services. The question of the cost efficiency of these programs is fundamental to determining whether they achieve this goal. The examples provided above illustrate the dearth of data available to evaluate the cost efficiency of eligibility screening and cost recovery programs. Nonetheless, some tentative conclusions can be reached based on the limited data available.

Eligibility screening programs appear to discourage applicants who are not eligible for court-appointed counsel from pursuing their requests any further. Also, experience suggests that eligibility screeners operating with a set of uniform guidelines applied in a systematic fashion will produce fewer findings of indigency than screeners making *ad hoc* eligibility decisions. However, while eligibility screening may result in the representation of fewer defendants, the use of uniform guidelines ensures that public defense services will be available to the truly indigent. Where clear guidelines are provided for making the eligibility determination (such as presumptive tests for defendants on public assistance), the cost of conducting screening should be minimal. Thus, we tentatively conclude that eligibility screening programs can achieve their goal of holding down costs, and should be considered in an expanded number of indigent defense programs nationwide.

Even less data is available regarding the cost efficiency of cost recovery programs. Further testing and evaluation need to be conducted in order to develop the necessary data. Jurisdictions operating cost recovery programs will have to closely monitor collections from all sources in order to calculate program revenues. In addition, programs will have to establish more comprehensive accounting standards for the costs of collection in order to make reliable calculations of their operational cost efficiency. The types of costs that should be taken into consideration include:

- costs of the organization(s) responsible for screening indigents;
- costs of the organization(s) responsible for monitoring and collecting payments;
- expenses of the court in reviewing recommendations, making reimbursement orders, holding hearings on request to review orders, and enforcing orders.

For the purpose of evaluating cost-efficiency, the revenues collected should be compared *only* to those administrative costs directly attributable to operating the cost recovery and screening program. Comparing revenues

collected from defendants with the *total* costs of an indigent defense program is an inappropriate approach to measuring cost-efficiency.

Evidence presented above suggests that carefully administered cost recovery programs which require systematic reimbursement orders and use routine collection procedures may create sufficient revenues to offset their own operating expenses and may even generate net revenues for indigent defense services. The key to cost efficiency in both recoupment and contribution programs is to generate a large volume of reimbursement orders and to actively pursue the collection of the ordered amounts, at least in those jurisdictions where recoupment orders retain a high priority on the list of court costs that may be assessed. While both types of cost recovery have shown some promise in terms of cost efficiency, there is evidence, though sketchy, that it is most cost efficient to collect the total amount assessed at the earliest possible point in the proceedings. Thus, a policy of requiring partially indigent defendants to contribute to the costs of their representation would appear to provide maximum revenue at a minimum expense and should continue to be pursued, at least on an experimental basis once all other significant policy issues have been resolved.

Footnotes

1. Committee for Competent Counsel, Supreme Judicial Court, "Counsel for Indigent Criminal Defendants" (Supreme Judicial Court of Massachusetts, 1981) (Draft), p. 10.

2. Harvey M. Rose Accountancy Corporation, "Report to the Los Angeles County Grand Jury: Management Audit of the County Funded Services Provided to the Municipal Courts" (April 1984).

3. *Ibid.,* p. 52.

4. Walter J. Dickey, Chairman of the Wisconsin Judicial Council, in a letter dated 15 January 1984.

5. State of Wisconsin, Judicial Council, "Report to the Legislature on Recovery of the Cost of Legal Representation for Juveniles from Their Parents and Guardians Under S. 48.275(2), Stats." (Madison, WI: 15 January 1984), pp. 11-12.

6. Alexander B. Aikman, Frederick G. Miller, Larry L. Spies, *Providing Legal Service to Indigents in Colorado* (National Center for State Courts, December 1982), pp. 21-22.

Chapter 5

Recommendations

Throughout this report actual procedures for implementing and administering eligibility screening and cost recovery programs have been presented. In order to provide guidance to practitioners and policymakers, recommendations for preferred procedures have been made where possible and appropriate. This final chapter summarizes the most significant of those recommendations.

Eligibility Screening

Recommendation One: All potentially indigent criminal defendants applying for appointed counsel should be screened for eligibility in order to ensure that only the truly indigent are provided representation at public expense, and to identify those partially indigent defendants who are unable to afford a private attorney but who have some ability to contribute to the costs of their defense. Courts should *not* assume that all defendants requesting counsel are indigent.

Recommendation Two: Eligibility guidelines and screening procedures should be in writing and available to all relevant parties (screeners, judges, and defendants) in order to ensure that they are applied in a consistent and equitable fashion. The presumptive test regarding public assistance should be applied in each case since it appears that a large number of criminal defendants fall into this category. Secondly, after applying the presumptive test, the comparative test of income/assets and expenses/liabilities appears to be more

equitable because it takes greater cognizance of the individual defendant's unique financial circumstances. Further, eligibility screeners should take into consideration in making indigency determinations the prevailing rates in their jurisdiction for retaining private counsel in different types of cases.

Recommendation Three: Eligibility screening should be conducted in a centralized location by a single responsible organization—whether it be the public defender, an independent agency, court personnel or other organization—in order to ensure efficiency and uniformity in making the determinations.

Cost Recovery

As more and more jurisdictions have turned to cost recovery programs to help restrict the increasing costs of indigent defense services, attention has been focused on the constitutionality, practicality and cost-efficiency of the two primary methods: contribution from partial indigents prior to disposition, and recoupment after disposition.

Recommendation Four: Any jurisdiction implementing or modifying a cost recovery program—whether by contribution or recoupment—should carefully document the costs of administering the program, the total number and amount of recoupment orders, and the revenues collected. Only in this way can the practicality and cost efficiency of individual cost recovery programs be properly evaluated and necessary adjustments made in their procedures and/or administration to guarantee that they are both fair and meet legal requirements.

Contribution from Partial Indigents

Recommendation Five: Comparing the two approaches to cost recovery, a carefully administered program to collect contributions from the partially indigent prior to disposition shows the greatest promise for recovering substantial amounts of money with minimal associated costs. This approach not only avoids the serious constitutional questions that may arise in attempting to enforce recoupment, but also appears to provide an opportunity to collect from a broader range of defendants. From a practical standpoint, defendants appear to be more willing to voluntarily contribute to their costs of representation before disposition than being requested to pay after entering a plea or having been found guilty.

Recommendation Six: To determine the appropriate amount of contribution to be made pre-trial, it is necessary to establish standards based on the average costs of attorney representation in different types of cases at different

court levels. A system of uniform flat rates appears to present the best solution to this problem. Jurisdictions imposing contribution requirements should be careful to set their rates at a reasonable, affordable level to further enhance their ability to collect from a greater number of partially indigent defendants.

Recommendation Seven: The simpler the payment plan, the better the chances are that the required contributions will be made in full. Thus, payments should be made in a lump sum or in a minimum number of installments, with final payment to be made at the earliest possible point in the proceedings.

Recommendation Eight: The responsibility for the collection of contributed payments should remain with the screening agency, provided it is not part of the criminal court trial system, which should not be subject to the additional time burden. Otherwise, the responsibility should be turned over to an independent county, state or private collection agency. Public defenders or assigned counsel should not be responsible for collection because of the serious conflict that could arise between their role as advocate for the defendant on the one hand, and their role as a collection agent on the other.

Recoupment

While the authors do not recommend that recoupment plans be employed as the primary method of cost recovery, some jurisdictions will continue to use this method. Where recoupment is ordered, the following safeguards should be applied.

Recommendation Nine: Recoupment should be ordered only in cases involving a guilty plea or conviction. Those who have been acquitted of charges brought by the prosecution should not be required to pay back the costs of their defense. From a practical standpoint, recoupment should not be ordered against defendants who receive a prison sentence, even though this may be perceived by some as unfair, because of the unlikelihood that they will be able to make payment. Only those defendants who have the *present* ability to pay at the time of disposition should be assessed the costs of their defense. This is also the case with juveniles. Juveniles' families should be charged with recoupment, but only when such an order would not create a legal conflict between the interests of the parent (or guardian) and the juvenile, and when it would not exacerbate tensions within the family.

Recommendation Ten: It is most important that all defendants subject to recoupment be accorded appropriate minimum constitutional due process safeguards, including:

- an assessment *hearing,* with adequate written notice;
- written notice of the *financial standards* that will be used to determine the ability to pay;
- documented records indicating the *costs* of representation to be assessed;
- the opportunity to appear in person and present *witnesses* and *evidence;* and
- written findings of the court.

Waivers of the right to a full recoupment hearing should be in writing, and courts should endeavor to ensure that defendants understand the implication of such waivers.

Recommendation Eleven: The recoupment process should be separated from the sentencing process, and all legal sanctions for nonpayment should be pursued in civil court. Like any other action for debt, all exemptions which apply to other civil debtors should apply to indigent defendants ordered to pay recoupment. Separating recoupment from sentencing also avoids the constitutional pitfalls inherent in attaching recoupment to the conditions of probation. Bringing suit in civil court relaxes the burden of the criminal courts and utilizes a forum more appropriate for the collection of revenues. Pursuit of a civil legal remedy should be undertaken only in a small number of cases, when the defendant clearly has the ability to pay and simply refuses to do so.

Recommendation Twelve: Only those costs *directly* attributable to the defense of a particular defendant should be charged to that individual. These include not only the direct lawyer cost, but also allowable expenses, as well as a reasonable portion of the overhead or administrative cost of the indigent defense program. In no case should the recoupment order exceed the actual costs of the case.

Recommendation Thirteen: Collection on recoupment orders, like contributions, should be conducted by a separate state, county, or private collection agency. Public defenders should not be put in the role of collection agents because of the inherent and unavoidable conflict with their role as advocates. Probation departments are inappropriate for this role since they lack sufficient resources to carry out the collection responsibility and since it would conflict with their duty to monitor and aid in the rehabilitation of probationers.

Recommendation Fourteen: Where a change in circumstances occurs, or when the recoupment payment begins to work a hardship on the defendant and his or her family, he or she should be able to petition the court at any

time for a redetermination and to request a modification or remission of the full balance of the order. The state, on the other hand, should have the right to request a redetermination when it has clear evidence that the defendant's financial condition has improved. Further, if the defendant has no ability to make payment at the time of disposition, the state should have the right to review the situation sometime within a reasonable period after disposition. However, a specific period of review should be set to ensure that the government does not have an unlimited right to attach future earnings and property acquired by a defendant.

Recommendation Fifteen: Collection of recoupment orders should only be attempted in a legal environment which places a relatively high priority on those assessments. The proliferation of court costs that may be charged to defendants upon disposition of their cases has made it increasingly difficult to ensure that defendants, many of whom are indigent, can afford to comply with such orders. This has led a number of courts to establish a hierarchy of court costs, indicating the priority order of payment for each of these costs. If recoupment orders are not sufficiently high on this list of priorities, it may be difficult or impossible to collect any substantial amount of reimbursement for the costs of defense services.

Appendix A

Recoupment and Eligibility Specifications by State

Recoupment Specifications by State

RECOUPMENT (as of June 1985)	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
A. Recoupment Statute																																																				
1. General language						•	•	•	•			•	•		•													•																	•	•				•			•
2. Specific statute	•	•	•	•	•					•	•			•			•	•	•	•	•	•		•		•	•		•	•	•		•	•	•			•	•		•	•			•	•	•		•	•	
B. Pertains to Defendants who are:																																																			
1. Partially eligible	•	•	•			•	•				•	•	•	•			•	•													•												•	•			•		•		•	•
2. Convicted of charges	•	•						•		•							•			•	•	•		•		•	•	•		•				•	•	•					•				•		•			
3. Financially able after services				•			•			•		•	•				•	•	•		•			•		•			•		•	•			•	•						•									
4. Other					•			•							•						•			•																		•									
C. Test for Recoupment																																																			
1. Financially able	•	•	•	•	•		•	•		•	•			•				•	•	•	•			•		•	•			•	•	•		•				•	•				•		•	•	•	•	•	•
2. Without undue hardship		•	•							•							•									•													•							•					
3. Limits	•						•										•				•										•				•	•			•		•	•			•		•			
D. Time Limit for Recovery																																																			
1. Statute sets												•					•	•			•			•				•		•	•							•											•		
2. Court determined	•									•																																			•		•				
3. Other																										•	•																									
E. Types of Orders																																																			
1. Condition of probation	•									•							•				•			•		•	•			•								•										•	•		
2. Civil judgment										•											•					•		•		•				•																	
F. Penalties for Default																																																			
1. Contempt of court	•							•		•																•	•	•																								
2. Civil judgment			•		•		•	•									•							•			•		•	•		•							•				•	•					•	•
G. Review of Changed Circumstances	•				•		•	•		•			•				•				•			•		•	•											•	•		•		•			•				
H. Partial Eligibility																																																			
1. Contributions		•							•								•	•				•		•							•												•	•	•			•		
2. Other method			•		•						•	•	•						•		•		•			•	•		•					•		•			•	•						•	•	•	•		•
I. Third Party Assets Considered																																																			
1. Parents of minors					•		•			•				•						•	•	•									•	•			•	•			•	•									•	
2. Spouse							•																																	•	•										
3. Other																	•																																			

Eligibility Specifications by State

ELIGIBILITY (as of June 1985)	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
A. Definition of Indigency	•	•	•	•	•		•		•	•	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
B. Test for Indigency																																																				
1. Substantial hardship										•	•					•					•	•					•	•				•	•														•		•	•	•		
2. Inability to pay for counsel	•	•	•	•	•		•		•			•			•		•	•	•	•			•	•	•	•			•	•			•	•		•	•	•	•			•	•	•		•				•
3. Other													•																												•												
C. Criteria for Indigency																																																				
1. Net Income	•				•											•					•																												•				
2. Gross Incom		•	•		•		•			•	•		•			•	•	•	•	•		•	•	•	•	•				•	•					•															•
3. Liquid Assets	•		•		•		•										•		•	•		•	•	•																							•			•	
4. Property		•	•		•					•	•		•				•		•				•		•						•	•				•		•	•								•			•	•
5. Dependents		•	•		•					•	•		•			•	•	•	•	•		•			•	•					•	•															•	•		•	•
6. Financial Obligations							•						•					•	•	•					•	•					•	•						•	•	•							•	•			•
7. Attorney's Cost	•									•					•		•			•	•																								•							
8. Other	•	•			•					•	•				•	•				•	•	•	•	•																						o	•		•		•	•	
D. Who makes determination																																																				
1. Judge	•	•		•	•				•	•	•		•	•			•		•	•		•			•			•	•	•		•		•		•													•	
2. Public defender						•	•	•				•					•				•			•		•		•				•			•		•													•	
3. Magistrate			•																				•											•			•														
4. Other															•			•																																			
E. Review of Determination			•			•	•	•				•			•		•		•			•	•	•		•								•	•														•		•	•
F. Required Affidavit of Indigency																																																				
1. Confidential		•			•		•																	o	•																									•			
2. Court record	•			•													•	•								•																											
3. Use Not Mentioned			•							•		•	•	•					•	•		•	•	•			•		•	•	•	•														•		•	•	•		•
G. Ability to Post Bond																																																				
1. Not Determinative of Solvency		•									•		•						•	•																																	•
2. Presumption of Solvency										•																•																											
H. Third Party Assets Considered																																																				
1. Parents or Legal Guardians of Minors					•		•			•										•	•	•		•	•	•				•	•				•	•												•			
2. Spouse																									•	•				•							•	•											•		•	
3. Persons to Whom Property of Assets Transferred																										•																											
4. Other																																		•							•												

Appendix B

Eligibility Guidelines — Los Angeles

GUIDELINES TO FINANCIAL STANDARDS FOR REPRESENTATION BY

THE LAW OFFICES OF THE LOS ANGELES COUNTY PUBLIC DEFENDER

The following Guidelines to Financial Standards for Representation by the Public Defenders Office were developed in conjunction with the Los Angeles County Bar Association's Special Committee on the Public Defender Management Audit and were approved by the Board of Supervisors. Los Angeles County Public Defender employees are to use these guidelines in qualifying clients for Public Defender representation.

I. **FINANCIAL STANDARDS FOR DEFENDER SERVICES**

Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. In applying this standard, the following criteria and qualifications shall be governing:

A. The standard in question is a flexible one, and contemplates such factors as amount of income, bank account, ownership of a home, car or other property, tangible or intangible, the number of dependents and the cost of subsistence for defendant and his dependents.

B. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond.

C. A basic test to be applied is that of whether or not an experienced competent private attorney would be interested in representing the defendant in his present economic circumstances.*

D. Since few attorneys will accept a criminal case on a credit basis, and will require a substantial cash advance, the fact that an accused on bail has been able to continue employment following his arrest is not to be considered determinative of his ability to employ private counsel.

E. The administration of the method or procedure whereby it is determined whether or not a defendant is entitled to have counsel provided may not deter either the said defendant or other defendants who may reasonably be expected to have knowledge thereof from exercising any constitutional rights. Specifically, such rights shall not be deterred by any means including, but not limited to, the following:

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*This test has been approved by the California Supreme Court in In re Smiley, 66 C.2d 606, 620 (1967), citing Note, Representation of Indigents in California, 13 Stan. L. Rev. 522, 540. The Court acknowledged that the test lacked precision but doubted that a more precise test could or "should" be formulated.

1. By such stringency of application of financial eligibility standards as may cause a defendant to waive representation by counsel rather than incur the expenses of private counsel.

2. By unnecessarily conditioning the exercise of the right to counsel by a defendant on the waiver of some other constitutionally-based right.

F. The defendant's own assessment of his financial ability or inability to obtain adequate representation without substantial hardship to himself or his family shall be given appropriate consideration.

COMMENTARY

From time to time, the question has been raised as to whether the right to counsel at public expense is something which should belong to truly indigent, or whether this right exists also for those who might be able to raise the money necessary for counsel but who, in so doing, would thereby devastate the economic well-being of themselves and their families. For example, an accused might have a low-paying job which he had held for a long time and which had resulted in a substantial accumulation in a pension fund. By leaving his job, he might be able to obtain the money in the pension fund but, at the same time, he and his family might be forced to become welfare recipients and his family might well lose the protection of any survivor's benefits provided by the pension plan. The better rule, given the objectives of the criminal justice system, is that counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. (See "Providing Defense Services," Approved Draft, ABA Project on Minimum Standards for Criminal Justice, 1967, Part VI, pp. 53-59, Section 6.1).

The standard in question should consider such factors as the amount of the accused person's income, any bank account, ownership of a home, car or other personal property, whether tangible or intangible, the number of his dependents, and the cost of the necessary food, clothing and medical attention for him and his dependents. (See People v. Lewis (1971) 19 C.A.3d 1019, 1023; Williams v. Superior Court (1964) 226 C.A.2d 666, 672; People v. Ferry (1965) 237 C.A.2d 880, 13 Stan. L. Rev. 522, 545). He should not be refused appointed counsel at public expense merely because his relatives have resources adequate to retain counsel for him or because he has posted or is capable of posting bond. With respect to this latter factor, it is often critically important to the adequate defense of a case for an accused person to be released so that he can assist in investigation. Therefore, seeking release through the posting of bond or other measures is essential to adequate representation. (See "Providing Defense Services," supra, Section 6.1).

As to what constitutes legal indigency in the sense of financial inability to obtain adequate representation, the principal test as a matter of logic would be that of whether or not a competent private attorney would be interested in representing the defendant in his present economic circumstances. (See In re Smiley (1967) 66 C.2d 606, 618; Williams v. Superior Court, supra, at 673; People v. Ferry, supra, at 887. The provision re competent counsel is added per 12 Rutgers L. Rev. 289, 325).

One hazard inherent in the problem of adequate financial screening is that it may unnecessarily compel the waiver of constitutional rights, including the very right to counsel itself. For example, an accused person may desire counsel in order to contest a drunk driving charge. If he is found financially ineligible for counsel at public expense on the grounds that he can afford $500, which may be the local fee rate for private counsel in such cases, a dilemma may present itself to him. He can, with some effort, raise the $500, but when it appears that the fine in question is only $300, the court may be confronted with a pro per trial or plea of guilty wherein the defendant, having reluctantly waived counsel, consoles himself with the thought that he has "saved" at least $200 and might have had to pay $800 (attorney's fees plus fine) if unsuccessful at trial. In such a case, the defendant may have been unnecessarily deterred from exercising his right to counsel. (Compare In re Allen, 71 C.2d 388, 391).

Another example would be that of the defendant who cannot afford counsel in terms of the immediate payment in advance of the required fee, but who, if allowed a continuance for a substantial period of time, can save the necessary money from his paychecks. The defendant would prefer to have his trial soon and get it over with (specifically, he does not wish to waive any right he may have to a speedy trial), but is confronted with the fact that a finding of financial inability to retain private counsel compels him to choose between his right to counsel and his right to a speedy trial. (See Earls v. Superior Court (1971) 6 C.3d 109, 117). Indeed, numerous continuances result in a disservice to the entire criminal justice system for dockets become clogged, witnesses discouraged and justice delayed.

Then there is the defendant who may be able to afford the attorney's fee for a non-jury trial, but unable to afford that required for a jury trial; a finding of financial inability to retain counsel will again compel him to waive his right to trial by jury.

Finally, the financial screening process itself may, if conducted in accordance with local custom in many parts of the United States compel the waiver of an important constitutional right. i.e., the privilege against self-incrimination. If a defendant is charged with criminal non-support of his minor children (the sole issue in the case being whether or not he had the financial ability to support them), his request for appointed counsel may result in the arraigning judge examining him, perhaps under oath in open court, concerning his financial ability to obtain private counsel. Such an open inquiry may well be expected to delve into the defendant's earnings, assets, and economic resources. In other words, the examination will be into the very issues which are and will be the issue at trial. Under such circumstances, the defendant is compelled to waive his privilege against self-incrimination in order to assert his right to counsel. (See Sanitation Men v. Commissioner (1968) 20 L.Ed. 2d 1089, 1092; Griffin v. California (1965) 14 l.Ed. 2d 106, 109, 110).

Giving due consideration to the problems which accompany the entire matter of financial screening the eligibility determination, one is left with the conclusion as a matter of logic that the most constitutionally sound method of assessing the defendant's ability to obtain private counsel is to give great weight to the defendant's own evaluation of his situation in this regard. While this may result in some abuses by some accused persons, the fact remains that most people in serious trouble prefer to retain their own attorney if they possibly can and this almost universal desire is the best single safeguard against excessive use of appointed counsel or defender's services at public expense by non-needy persons.

II. IMPLEMENTATION AND APPLICATION OF STANDARDS

A. Assets and Debts

Application of the indigency test requires a careful inquiry regarding an applicant's financial situation, including his or her assets, debts and reasonable subsistence requirements.

1. Assets

Assets include any cash or income, or any property (real or personal) which might reasonably provide a source of payment of attorney fees. Income includes such things as salary, vacation pay, disability and Veteran's allowances, social security payments, pensions, annuities, union vacation trust funds, and trust fund payments. Real property includes any present interest in any land, farm, ranch, house or other building. Personal property includes any stock, bonds, jewelry, cameras and motor vehicles (cars, motorcycles, trucks, boats and airplanes). Appropriate consideration should be given to exemption statutes and case law. (See COP 690, et. seq., bankruptcy laws, etc.).

2. Debts and Obligations

All legally enforceable obligations existing against the defendant must be considered in appraising his ability to employ counsel. Basic subsistence needs, i.e., the reasonable costs of providing necessary food, clothing, shelter, work-related expenses and medical care for an applicant and his or her dependents, should be considered in determining indigency.

B. Other Considerations

1. Seriousness of the Charges, Complexity of the Case and Community Standards

In applying the general test of indigency, consideration must also be given to such factors as the seriousness of the charges, the complexities of the case, the expenses necessary for defense, and the standards of the community for the cost of legal services. In determining eligibility, the attorney should estimate the probable cost of retaining private counsel for the same or similar case, including the estimated cost of investigative and/or expert services, plus the probable cost of a probable fine upon conviction. (See American Cr. L. Rev., Vol. 12, #4 (Spring, 1975), published by A.B.A. Section of Cr. Justice "The Right to Appointed Counsel" (Argersinger and Beyond) by Steven Duke).

2. Sympathy and Bias

In no event should eligibility determinations be influenced by sympathy for or bias against an applicant or his or her case, or personality conflicts with the applicant; nor should the supposed merit of a case, its public interest, or the probability of a successful defense enter into such determinations.

3. Custody

A defendant in custody who states that he cannot make bail or employ counsel is presumptively eligible for public defender services.

4. Bail

It is improper to reject an applicant as financially ineligible simply because he or she has obtained a release from custody on bail. (See Williams v. Superior Court (1964), 226 C.A.2d 666).

5. Spouses Assets

The financial condition of a married applicant's spouse is relevant and should be ascertained and considered in determining the financial eligibility of the applicant. Thus, for example, if an unemployed, otherwise eligible married woman applies for representation but her husband has sufficient community property income or assets, under tests set forth in this section, the applicant is ineligible.

The income or separate property of a separated spouse who is estranged or is the complaining witness against an applicant should not be considered in determining financial eligibility. Community property not immediately accessible to the defendant cannot be considered in assessing his or her eligibility.

6. Motor Vehicle Assets

In recognition of the fact that in today's society an adequate means of transportation is a necessity for both work and family, ownership of or equity in a car or other motor vehicle will not disqualify an applicant except under the following tests: If there is sufficient equity in the vehicle so that, if sold, the applicant would realize sufficient funds: (1) to secure an adequate alternative means of transportation and (2) to hire a private attorney, as outlined in B-1 above, then the applicant is not eligible for services.

In applying this test, if an applicant owned or was buying an early model car with a small equity (e.g., $500 to $700), the sale of the car would not afford sufficient funds to achieve both of the test objectives and the ownership of the vehicle would not make the applicant ineligible. In this example, it would be unlikely that the applicant could secure enough money to satisfy the above test by using the car as collateral for a loan. Most lending institutions will not accept a car five years old or older as security for a loan.

However, if the applicant owned a fully or substantially paid-for late model car, the sale of that car or its use as collateral for a loan might permit the retainer of an attorney and the purchase of an adequate, older, less expensive car. Under this circumstance, the applicant would be presumed ineligible.

7. Home Ownership

Because of the general policy of state law to encourage and protect home ownership as indicated by the homestead exemption, home ownership does not make an applicant financially ineligible. In applying this test, if an applicant has a fully paid-for house, and a small income, he or she would be ineligible. The state policy of protecting home ownership would mitigate against requiring such an applicant to take a mortgage to hire an attorney. It would result in the applicant losing the home because of inability to make the mortgage payment.

8. Economic Impact

In evaluating the defendant's ability to hire private counsel, the attorney must take into due consideration public policy decisions in re claims of exemption, that is, the defendant and his family, regardless of the defendant's improvidence, will be permitted to retain enough money to maintain a basic standard of living in order that the defendant may have a fair chance to remain a productive member of the community. (See: Bailey v. Superior Court, 215 C. 548; Avilla v. Avilla, 81 C.A.2d 210; Perfection Paint Products v. Johnson, 164 C.A.2d 739, and public policy as stated in Government Code 13967, relating to the imposition of fines: "Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a

fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, but not to exceed ten thousand dollars ($10,000). The fine shall be deposited in the Indemnity Fund in the State Treasury, hereby continued in existence, and the proceeds of which shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this article"). (Emphasis added).

9. Work History

In determining the defendant's income, the following factors should also be considered:

a. How long has the defendant worked for this employer?

b. Is employment seasonal?

c. Are layoffs periodic in employment history?

d. What is defendant's employment history?

e. Have the current charges affected the defendant's employment?

III. PROCEDURES

While the original determination of which defendants are eligible for the services of the Public Defender may be made by either the Public Defender or the Court, the ultimate responsibility lies with the Court. Each deputy public defender has a continuing responsibility at all stages of the case to review the possibility that the defendant is able to employ private counsel. This is true even though a judge and/or another deputy public defender at an earlier stage of the proceedings concluded that the defendant did not have sufficient funds to employ counsel.

A. Forms

1. Wherever feasible -- and without exception as to defendants on bail and charged with one or more felonies -- the office form entitled "Defendant's Financial Statement" is to be completed. Each attorney shall review and discuss all information contained in that form with the client. Oral inquiries as to the defendant's financial situation are to be made as well as written recordation wherever time and court procedures permit. In order to effectively evaluate the defendant's financial ability or inability to hire private counsel, the attorney shall discuss with the defendant all relevant facts of the case.

2. If upon review of the Financial Form, and discussion with the client, additional information is required, the attorney shall himself fill out the follow-up form, "Detail of Expenses."

B. Investigation

If the deputy public defender requires further information in reaching an evaluation of the defendant's financial condition, the deputy may request the assistance of the Investigation Division.

C. Review

1. Each supervisor shall make every effort through personal observation and conversation, to review written materials and court and office records pertaining to financial statements to insure that the financial qualifications of each client are being properly evaluated. Utilizing such information, each supervisor shall give whatever advice and/or correction in individual cases is deemed proper.

2. Each appropriate supervisor shall follow the procedure of random audits which has previously been implemented by the Public Defender, in accordance with discussions between him and the Auditor/Controller, the C.A.O. and Grand Jury.

3. Each supervisor shall impress upon the attorneys under his supervision the importance of compliance with the above procedures and of discussion with the supervisor any areas of concern as to question of eligibility for Public Defender services.

Eligibility Guidelines — North Dakota

FINANCIAL GUIDELINES FOR ELIGIBILITY FOR DEFENSE SERVICES FOR INDIGENT DEFENDANTS PURSUANT TO SECTION 27-20-26 NDCC

Statutory Standard

The only present statutory standard for court indigency determinations is Section 27-20-26 NDCC. Section 27-20-26 NDCC provides that a party is entitled to representation by legal counsel at all stages of a criminal proceeding or juvenile proceeding. If the defendant or juvenile is a needy person and unable to employ counsel the court will provide appointed counsel. Criminal and juvenile proceedings include pretrial, trial, appellate and post-conviction proceedings.

A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A juvenile is considered to be a needy person if the parent(s) cannot, without undue financial hardship, provide full payment for legal counsel and other expenses of representation.

Scope of Proceedings

Rule 44 NDRCrimP requires appointed counsel for every indigent criminal defendant at every step of the criminal proceeding from initial appearance through appeal, in the absence of a knowing and intelligent waiver, except in non-felony cases in which the judge determines that sentence upon conviction will not include imprisonment. (See State v. Jensen, 241 N.W. 2d 557 (ND 1976).

Section 14-17-18 NDCC provides for appointment of counsel for any party to a proceeding pursuant to the Uniform Parentage Act who is financially unable to obtain counsel. (See C.B.D. v. W.E.B., 298 N.W. 2d 493 (ND 1980).

General Guidelines

In order to aid case processing, and meet the court's constitutional responsibilities, the following policies should be considered:

1. Close questions regarding defendant's indigency should be resolved in favor of eligibility. Close questions between partial eligibility and full eligibility should be resolved in favor of full eligibility. This will assist case processing, protect constitutional rights, and will be balanced by more active recoupment procedures.

2. Early appointment of counsel is desirable. Counsel should be appointed at the earliest feasible time (at the initial appearance on the criminal charge or within three working days of the arrest, whichever is earlier) at the request of the defendant or on the court's own motion.

3. The eligibility determinations for defense services based on financial resources should not impose an extensive time burden on court officials.

4. The information forms should be viewed as a means of providing the court with all relevant information for a review of the appointment decision. No formula is suggested. Judges are encouraged to recognize general indications of poverty in welfare recipients or previous appointment of defense counsel as indicated on the short form application. The additional financial information is available for consultation in unusual cases at the request of the judge or counsel.

5. The administrative costs of making eligibility determinations should be considered.

6. Except in exceptional circumstances, judges of county court should make the eligibility determination and appointment of counsel for all cases. Judges of district court should rely on the decision of the judge of county court and only open the issue of eligibility if new information comes to the court's attention or upon request of any party.

7. Defendants should be reminded of the penalties for giving false information in the eligibility determination process.

8. Early in the proceedings defendants should be reminded by the judge presiding in the case and by appointed defense counsel that all defendants are subject to recoupment for the fees and expenses of counsel at the end of the trial.

9. Any indication of anticipatory transfer of assets by defendant to create the conditions for eligibility for defense services should be scrutinized and dealt with decisively.

10. Except in exceptional circumstances, any anticipated change to indigent defense counsel from private counsel midway in a case should be avoided by a finding of eligibility for appointed defense counsel and appointment of the same counsel and recourse to partial eligibility payments or recoupment procedures.

11. Judge may wish to inquire periodically throughout the proceedings regarding substantial changes in defendant's financial status. However, this information should not be permitted to disrupt the flow of court proceedings, but should be considered in the civil collection process at the end of the court proceedings.

Section A. · ADULTS

Consideration should be given to:

1. income resources;
2. non-income resources;
3. expenses and liabilities; and
4. estimated cost of defense services

of the defendant in determining eligibility for defense services pursuant to Section 27-20-26 NDCC.

FINANCIAL GUIDELINES FOR ELIGIBILITY FOR DEFENSE SERVICES FOR INDIGENT DEFENDANTS PURSUANT TO SECTION 27-20-26 NDCC

Statutory Standard

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2. Early appointment of counsel is desirable. Counsel should be appointed at the earliest feasible time (at the initial appearance on the criminal charge or within three working days of the arrest, whichever is earlier) at the request of the defendant or on the court's own motion.

1. INCOME RESOURCES

These guidelines for gross income levels are offered as income levels at or below which eligibility for defense services should be considered:

Household Size	1	2	3	4
Annual Gross Income	$5,850	7,775	9,700	11,625
Monthly Gross Income	488	648	808	969
Weekly Gross Income	113	150	187	224

(Add $1,925 for each additional member in households of more than four.)

These income levels reflect 125% of the official poverty level threshold as defined by the Department of Health and Human Services (47 F.R. 15417, April 9, 1982). They are provided for information only and should be updated and amended to meet local standards. For persons with incomes above these levels, consideration should be given to the exceptional factors in Section A.4.

a. How to Determine Income Resources

The defendant's income resources include total cash receipts before taxes of the defendant and those persons who are legally responsible for the defendant. Seasonal income should be considered on an annualized basis.

Spouse income should not be included in the calculation of defendant's income, but should be considered in determining the actual extent of defendant's living expenses and liabilities.

Consideration should be given to the following specific factors:

a. money, wages and salaries before any deductions;
b. income from self-employment after deductions for business or farm expenses;
c. regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments;
d. public or private employee pensions, and regular insurance or annuity payments;
e. income from dividends, interest, rents, royalties, estates or trusts;
f. benefits from a governmental income maintenance program (AFDC, SSI, unemployment compensation, or state or county general assistance or home relief;
g. food or rent received in lieu of wages;
h. money which is received from sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury;

i. non-cash benefits (Foot Stamps, etc.); and
j. payments from rental of Indian Trust Land and Tribal per capita payments authorized by the Indian Claims Commission.

The following factors should not be included in determining defendant's income:

a. bail funds.
b. spouse income.

b. How to Determine Household Size

All individuals who are actually dependant on defendant for financial support should constitute a single household for purposes of assessing income levels for eligibility for defense services.

2. NON-INCOME RESOURCES

These guidelines for non-income financial resource levels are offered as resource levels at or below which eligibility for defense services should be considered.

For persons with non-income resources above these levels, consideration should be given to the exceptional factors in Section A.4.

a. Homestead Exemption

Only equity in homestead property exceeding the statutory allowances in Sections 28-22-02 and 47-18-01 NDCC should be considered. Statutory homestead exemption property should not be considered.

All claimed homestead property must be contiguous property.

Mobile homes should be considered as homestead property.

b. Personal Property Exemption

Only equity in personal property exceeding the statutory allowance in Section 28-22-03 and 28-22-05 NDCC should be considered. Personal property exempted by statute should not be considered.

c. Other Real Property and Personal Property

The following factors should be considered in making a determination of financial eligibility:

-Equity in homestead property in excess of the statutory allowances in Sections 28-22-02 and 47-18-01 NDCC.
-All equity in non-homestead real property.
-Personal property in excess of the statutory allowance in Sections 28-22-03 and 28-22-05 NDCC.

The following factors should not be included in assessing non-income resources:

-Indian Trust Land

3. EXPENSES AND LIABILITIES

The defendant's expenses and liabilities include all living expenses, business or farm expenses, fixed debts and obligations (including federal, state and local taxes).

Consideration should be given to the following specific factors:

a) food
b) utilities
c) housing
d) child support and alimony obligations
e) education or employment expenses
f) child care
g) medical expenses
h) transportation

Spouse income should be considered in determining the extent of defendant's actual living expenses and liabilities.

4. EXCEPTIONAL FACTORS

A defendant whose income resources or non-income resources exceed these guidelines may still be eligible to receive legal assistance based on the following factors:

a. Current income prospects, taking into account seasonal variations in income;
b. Age or physical infirmity of household members;
c. The estimated cost of obtaining private legal representation with respect to the particular matter for which assistance is sought;
d. The nature of the criminal charge; and
e. The anticipated complexity of the defense.

Section B. JUVENILES

The eligibility guidelines for an adult defendant in Section A should be considered in determination of eligibility of juveniles.

The financial and legal responsibility of parents or adoptive parents is provided in Section 27-20-26 NDCC:

> "1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain

whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict separate counsel shall be provided for each of them.

2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if his parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter shall, unless undue financial hardship would ensue, be responsible for providing legal counsel and for paying other necessary expenses of representation for their child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents."

Consideration should also be given to potential conflicts of interest for attorneys employed by a juvenile's family.

The judge should consider appointment of counsel for appropriate juveniles even if counsel is not requested by the juvenile or the parents.

Section C. PARTIAL ELIGIBILITY

Defendants may be found to be partially eligible for defense services. However, consideration should be given to avoiding complex financial or collection arrangements and any payment responsibility which could disrupt case processing responsibilities of the court.

Specific consideration should be given to the following factors:

a. Collection of defendant's contribution by pre-payment should be considered to avoid administrative burdens on court personnel. Percentage payment requirement should be discouraged to avoid financial uncertainty and administrative problems. Lump sum payments should be based on present ability to pay.

b. All payments should be made directly to the county or state which pays for appointed counsel. No payment directly to counsel should be permitted.

c. Defendant should be notified that partial payment is not a waiver of recoupment procedures.

Section D. REVIEW OF ELIGIBILITY DETERMINATION

It is in the interest of all parties and the court to resolve the issue of eligibility for appointed defense services at the earliest stage of the criminal proceeding, and to avoid successful challenge of a conviction on grounds of an erroneous eligibility decision. Therefore, care should be given to providing appointed counsel in doubtful cases and recourse to the recoupment process to assure appropriate defendant contribution to these expenses.

Review of eligibility determinations may be made on appeal. (See State v. Heasley 180 N.W. 2d 242 (ND 1970).) See also Sections 28-27-02, 29-28-06, 29-28-07, Article VI, Section 2, North Dakota Constitution and State v. LaFontaine, 293 N.W. 2d 426 (ND 1980).)

Inquiries regarding these guidelines should be directed to the Presiding Judge of the Judicial District or the Chairman of the North Dakota Legal Counsel for Indigents Commission, North Dakota Supreme Court, State Capitol, Bismarck, North Dakota 58505.

Appendix C

Model Collection Agency Agreement — North Dakota

North Dakota Legal Counsel for Indigents Commission Approved 10/18/83

MODEL AGREEMENT FOR COLLECTION AGENCY SERVICES FOR DEFENDANT REIMBURSEMENT OF INDIGENT DEFENSE COSTS IN NORTH DAKOTA

_____, herein referred to as "COLLECTOR" and _____, States Attorney of _____ County, herein referred to as "CLIENT", agree that the CLIENT'S accounts placed with the COLLECTOR are subject to the terms and conditions of the following agreement.

1. Collection effort will be commenced and continue on accounts during the entire period such accounts are held by COLLECTOR. Collection activities shall be in compliance with federal, state and local laws or regulations, including but not limited to the fact that COLLECTOR shall, if required, at all times be licensed by the proper state authority.

2. Collections made by COLLECTOR on CLIENT'S designated accounts for _____ county will be deposited within _____ days in a trust account maintained in a reputable bank acceptable to CLIENT. Such collections, less COLLECTOR fees held in trust by COLLECTOR, shall be the property of _____ county and not be available for any other use by COLLECTOR or COLLECTOR'S other clients.

   Collections made by COLLECTOR on CLIENT'S designated accounts for the state of North Dakota will be deposited immediately in a trust account maintained in a reputable bank acceptable to CLIENT. Such collections, less COLLECTOR fees held in trust by COLLECTOR, shall be the property of the state of North Dakota and not be available for any other use by COLLECTOR or COLLECTOR'S other clients.

3. All collections made by COLLECTOR on CLIENT'S accounts for _____ county and the state of North Dakota will be remitted respectively to the _____ county treasurer and the state treasurer within ____ days, less COLLECTOR'S collection fee, accompanied by remittance advice, consisting of the: account number, name, date payment was received by COLLECTOR, gross amount of collection, collection fee due COLLECTOR, and net amount remitted. A copy of the remittance advice will be sent simultaneously to CLIENT.

4. CLIENT agrees to provide COLLECTOR with information on all direct payments received by CLIENT from accounts placed for collection with COLLECTOR. COLLECTOR will prepare a statement containing the account number, name, gross amount of direct payment to CLIENT and

collection fee due COLLECTOR. This statement shall be combined with the appropriate remittance advice listing collections made by COLLECTOR. COLLECTOR shall deduct the collection fee due COLLECTOR on payments made direct to CLIENT from the amount due CLIENT on collections made by COLLECTOR.

5. Status reports on all accounts are to be supplied to CLIENT by COLLECTOR quarterly, beginning _____, and upon request.

6. Client agrees to pay the COLLECTOR as its sole compensation a contingent fee equal to (a) ____ percent on first assignment; (b) ____ percent on accounts requiring the following types of special collection effort - legal action, forwarding to other Collection Agencies; or (c) ____ percent on all second assignments.

   Costs incurred by COLLECTOR in instituting legal action may be recovered by COLLECTOR if such costs have been added to the balance originally due by decision of the court, prior to remitting to CLIENT the proceeds of collections made on the account as a result of legal action.

   In the event CLIENT shall credit a customer's account with the full balance thereof by way of an adjustment, such accounts shall be returned by COLLECTOR to CLIENT and no fee shall be paid to COLLECTOR. In the event the amount of any credit adjustment shall be less than the outstanding balance, then no contingent fee shall be payable to the COLLECTOR hereunder with respect to the amount of such adjustment only.

   COLLECTOR agrees that it will not settle any customer account for less than the total amount of the balance due thereon without first obtaining written authorization from CLIENT.

7. COLLECTOR must secure express written approval of CLIENT on all accounts prior to instituting any legal action.

   COLLECTOR shall keep CLIENT advised, when requested, of the status of legal actions instituted hereunder, and shall furnish copies of summons, pleadings, orders, citations, judgments, and all other papers filed by either party in the legal action when requested to do so by CLIENT.

   In the event any action, complaint, or counterclaim is instituted or interposed by the debtor against CLIENT, COLLECTOR shall immediately advise CLIENT of same, and forward copies of all pleadings or other papers by it or its attorneys.

8. Audits of COLLECTOR may be performed from time to time by CLIENT or persons retained by CLIENT and may include a review of collection effort, maintenance of trust account, adequacy of cash controls, promptness of recording and remitting payments, compliance with this agreement and any other normal audit procedures and tests.

9. Comparative Profit & Loss and Balance Sheet Statements on the business of the COLLECTOR, properly certified by an independent auditor, are to be supplied to CLIENT by COLLECTOR no later than 90 days after the close of the COLLECTOR'S calendar or fiscal year, if requested by the CLIENT.

10. Accounts placed by CLIENT with COLLECTOR for collection may be withdrawn by CLIENT at any time, by either oral or written request. Upon receipt of such requests, COLLECTOR shall return the account along with all documents and records pertaining to such account. COLLECTOR also agrees to cause any suit instituted by it to be settled or dismissed, as CLIENT may direct. Bankrupt accounts are to be returned immediately to CLIENT by COLLECTOR with proper notation. No compensation shall be paid COLLECTOR on any returned or withdrawn accounts.

11. COLLECTOR hereby agrees to indemnify and hold CLIENT harmless from any loss, damage, attorney's fees and court costs which CLIENT may suffer due to any efforts by COLLECTOR to collect referred accounts. COLLECTOR agrees to save CLIENT harmless from any liability resulting from acts, errors, or omissions by COLLECTOR.

12. COLLECTOR will provide CLIENT with written evidence of insurance naming CLIENT as an additional insured and containing a provision that the carrier will notify CLIENT at least 10 days in advance of the termination or cancellation of coverage or any material change in coverage, in carriers, and limits acceptable to CLIENT, in the following areas:

    A. PERSONAL INJURY LIABILITY INSURANCE, INCLUDING CONTRACTUAL LIABILITY

       (To include, but not limited to, false arrest, detention, accusation, imprisonment or malicious prosecution. Also libel, slander, defamation or violation of rights of privacy, wrongful entry or eviction, other invasion of right of private occupancy, or abuse of process).

    B. COMPREHENSIVE GENERAL LIABILITY INSURANCE, INCLUDING CONTRACTUAL LIABILITY

C. WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE INSURANCE, INCLUDING EMPLOYERS LIABILITY INSURANCE

(To comply with laws of the State(s) in which the work is to be performed or elsewhere as may be required. Employers Liability Insurance shall be provided with a limit of not less than $50,000.00.)

D. AUTOMOBILE LIABILITY INSURANCE (owned or non-owned).

E. EMPLOYEE DISHONESTY BOND

13. This agreement shall be effective as of the date shown in effect until terminated hereinafter provided.

Either party may terminate this agreement by giving the other party at least 30 days prior written notice of date of termination; provided, however, that CLIENT may terminate this agreement immediately in the event COLLECTOR shall violate any of the terms or provisions of this agreement, or if CLIENT shall, in its sole judgment, determine that there has been an adverse change in COLLECTOR'S financial condition. Termination or cancellation of this agreement by either party shall not affect the collection, enforcement or validity of any accrued obligations owing between the parties. In the event of termination, COLLECTOR shall promptly turn over to CLIENT all accounts placed with COLLECTOR, together with all documents and records pertaining to such accounts. In the event COLLECTOR should refuse to turn over such documents and records, CLIENT shall have the right to enter the premises of the COLLECTOR for the purpose of recovering such documents and records. COLLECTOR shall also promptly turn over to CLIENT the amount of all collections made on CLIENT accounts previously remitted to CLIENT, less the applicable collection fee.

14. Except as otherwise provided herein or by law, neither this agreement nor any of its rights, duties or obligations, or payments due or to become due, hereunder, shall at any time be assigned, sold, or pledged by the COLLECTOR.

COLLECTOR shall have the right to forward any accounts to other collection agencies. However, CLIENT shall not be responsible for any cost incurred either by COLLECTOR or by any person designated by COLLECTOR with respect to the collection of such accounts. CLIENT liability hereunder being limited to the fee payable to COLLECTOR as specified in paragraph 8 above. In the event CLIENT is required to pay such costs, the amount thereof shall be deducted from the contingent fees payable to the COLLECTOR hereunder.

In the event accounts are forwarded by COLLECTOR to other agencies, then COLLECTOR agrees to be responsible to CLIENT for the amounts collected by such other agencies.

15. Nothing contained in this agreement shall be construed as requiring CLIENT to place any set number or type of accounts with COLLECTOR and CLIENT is expressly given the right to place as many or as few accounts with COLLECTOR as it may from time to time determine, including the right to place no accounts even though this agreement may be still in force. This agreement does not give COLLECTOR the exclusive right to collect CLIENT'S accounts and CLIENT is free to enter into such other agreements as it may choose for the collection of its accounts.

16. COLLECTOR at the request of CLIENT shall state in writing the names of all of its employees, agents and attorneys working on any of CLIENT'S accounts at the time of such request. CLIENT at its sole discretion may then request that certain employees, agents and attorneys of COLLECTOR not perform any further work on CLIENT'S accounts which request shall be granted by COLLECTOR.

17. Nothing contained herein shall be construed as creating an employer-employee relationship, a partnership or joint venture between the parties and COLLECTOR'S only relationship with CLIENT is that of an independent contractor.

18. All notices required to be sent under the terms of this agreement shall be sent to CLIENT addressed:

and to COLLECTOR addressed:

Such designations may be changed at any time by either party giving written notice of a new name and/or address.

The provisions of this agreement shall override any and all contrary provisions contained in any past or present acknowledgment, receipt or other form of agreement used by the COLLECTOR and constitute the entire agreement between the parties. All amendments shall be in writing.

BY:_____
CLIENT

DATE:_____

Accepted:_____
NAME OF COLLECTOR

BY:_____
OWNER, PARTNER OR PRESIDENT

DATE:_____

U.S. GOVERNMENT PRINTING OFFICE:1987- 181-493/ 65088