

The Montana Public Defender Commission's *2013 Report to the Governor, Supreme Court, and Legislature* reported on the issues that surround the Office of the State Public Defender's (OPD's) ability to gather information related to assessments and collections of public defender fees by Montana courts, and the challenges the agency faced in effectively accounting for and reporting on this activity.

In FY 2014, a change in the information flow from the courts to OPD resulted in the agency's inability to continue to report on assessments and collections in detail. At the October 18, 2014 Public Defender Commission meeting, the Commission adopted a resolution recognizing this fact. The resolution and the FY 2013 narrative on Assessments and Collections follow.

## PUBLIC DEFENDER COMMISSION RESOLUTION

Whereas, the 2005 Montana Legislature passed the Montana Public Defender Act, codified under Title 47 creating a statewide public defender system to deliver public defender services in all courts in the state; and

Whereas, the system is supervised by the Public Defender Commission (Commission) and administered by the Office of the State Public Defender (OPD); and

Whereas, 47-1-110, MCA, establishes a state special revenue public defender account for deposit of payments for the cost of a public defender ordered by the court pursuant to 46-8-113, MCA, as part of a sentence in a criminal case; and

Whereas, according to state and accounting rules, OPD is to account for assessments of costs by a judge as receivables and for the receipt of cash as a reduction of the receivable and as revenues; and

Whereas, in order to comply with state and accounting rules the agency needs information in sufficient detail from the courts; and

Whereas, OPD is required by 47-1-201 (10) (b), MCA, "to report to the legislative fiscal analyst for each fiscal year by September 30 of the subsequent fiscal year on the amount of funds collected as reimbursement for services rendered, including the number of cases for which a collection is made, the number of cases for which an amount is owed, the amount collected, and the amount remaining unpaid"; and

Whereas, OPD is not receiving information from the courts in the level of detail needed to perform the accounting and required reporting noted above; and

Whereas, public defender costs are assessed by individual judges in the various courts and made part of a legal sentencing that is up to the court to enforce, and therefore OPD does not have the legal authority to enforce payment of these fees; and

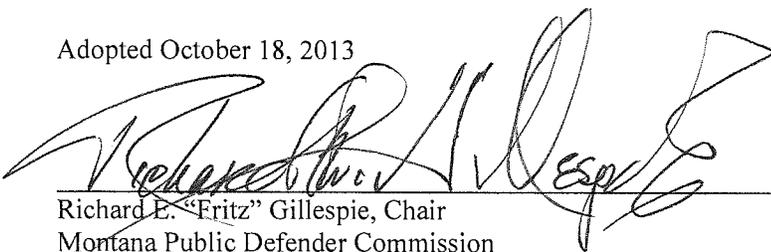
Whereas, OPD does not have the authority to refer its clients to the Department of Revenue (DOR) or any other collection agency to enforce collection of the court-ordered debts, which is a requirement of state agencies pursuant to the Montana Operations Manual Policy 320, Section XII; and

Whereas, OPD does not have the personnel or funds to commit toward collecting the detailed information it is not getting from 207 courts;

NOW, THEREFORE, BE IT RESOLVED BY THE PUBLIC DEFENDER COMMISSION OF THE STATE OF MONTANA:

1. The Commission understands that OPD can only record cash collected in summary until a resolution is found, because the agency does not receive detailed information from the courts and therefore will be out of compliance with state and accounting policy.
2. The Commission further understands that OPD will refrain from referring any open client account to the DOR or any other collection agency due to the facts noted above.

Adopted October 18, 2013

  
Richard E. "Fritz" Gillespie, Chair  
Montana Public Defender Commission

OFFICE OF THE STATE PUBLIC DEFENDER  
ASSESSMENTS AND COLLECTIONS

¶1 To its other purposes set out in *M.C.A. §47-1-102*, Senate Bill 187 (2011) [SB 187] added in subsection (6) that the Office of the State Public Defender [OPD] “ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients’ financial ability to pay.” How well the agency is doing in fulfilling this purpose will likely be measured differently among observers with divergent views between one that OPD clients do not have the financial ability to pay if qualified for public defender services to the other end that lifelong levies of the full cost of representation should be imposed on all convicted public defender clients without the protections other debtors have.

¶2 Annual amounts collected have grown steadily from greater amounts more and more clients are ordered to pay. During FY 2013 OPD received \$255,732<sup>1</sup> from 1,470 of 5,639 clients who had an account receivable open with OPD, up from \$191,890 received from 1,181 of 4,157 clients who had open accounts receivable at the end of FY 2012. Given the number of clients served, the amount received may not seem like much as the average for FY 2013 is only \$174. However, the impediments and constraints of law and fact provide insight into a better evaluation of how well the agency has done and how well it may do under current circumstances.<sup>2</sup>

¶3 The priorities set for the allocation of payments of restitution, charges, fees, costs, and fines in *§46-18-251(2)* are major impediments in the way of OPD recovering more of the costs of representation.<sup>3</sup> The sum of other assessments levied can be substantial. A sentence must require payment of full restitution to the victim if the sentencing judge finds that a victim has sustained a pecuniary loss.<sup>4</sup> The costs of supervising the payment of restitution are charged at a

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<sup>1</sup>Included is the accounting statement for the collection of the costs of representation assessed by courts on convicted criminal defendants as a part of or a condition under a sentence imposed. The statement details, by fiscal year, the number of people upon whom the courts assessed a payment of costs, the total amounts assessed in a fiscal year, the amounts collected by year, the number of people who paid in full their accounts during a year, the number of people who had accounts open at the end of a year, and the account balances owed at the end of a year.

<sup>2</sup>The FY 2010 and FY 2011 reports to the Governor, Supreme Court and Legislature contain an “Assessments and Collections” paper accompanying the “Judgments, Assessments and Collection of Legal Fees” statement which can be viewed on the OPD website under “Resources.” Without repeating them in this year’s report, the earlier “Assessments and Collections” papers analyze other impediments and constraints of law and fact that are as applicable today as they have been since the inception of the agency.

<sup>3</sup>*M.C.A. §46-18-251(2)*: (2) Except as otherwise provided in *46-18-236(7)(b)* and this section, if a defendant is subject to payment of restitution and any combination of fines, costs, charges under the provisions of *46-18-236*, or other payments, 50% of all money collected from the defendant must be applied to payment of restitution and the balance must be applied to other payments in the following order:

- (a) payment of charges imposed pursuant to *46-18-236*;
- (b) payment of supervisory fees imposed pursuant to *46-23-1031*;
- (c) payment of costs imposed pursuant to *46-18-232* or *46-18-233*;
- (d) payment of fines imposed pursuant to *46-18-231* or *46-18-233*; and
- (e) any other payments ordered by the court.

<sup>4</sup>*M.C.A. §46-18-201(5)* (2011).

rate of 10% of the restitution ordered, but not less than \$5.<sup>5</sup> All courts of original jurisdiction must tax upon conviction or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines of (a) \$15 for each misdemeanor charge; (b) the greater of \$20 or 10% of the fine levied for each felony charge; and (c) an additional \$50 for each misdemeanor and felony charge under title 45, §61-8-401, or §61-8-406.<sup>6</sup> Other financial obligations put on indigent defendants can further impede the recovery of the costs of OPD representation. A maximum fine allowed in felony cases is usually \$50,000. The maximum fine for most misdemeanors is \$500 although fines can be as high as \$1,500 for some offenses. §46-18-201(4)(d), (e), and (f) allow the sentencing judge to impose conditions for the payment of the costs of confinement, payment of a fine as provided in §46-18-231, and payment of costs as provided in §46-18-232.<sup>7</sup> §46-18-232(1) costs include the costs of jury service, the costs of prosecution, and the costs of pretrial, probation, or community service supervision in misdemeanor or felony cases. These costs must be limited to expenses specifically incurred by the prosecution or other agency in connection with the proceedings against the defendant, or \$100 per felony case or \$50 per misdemeanor case, whichever is greater.

¶4 There are incentives for assessing fines and other costs before ordering defendants to pay for the costs of their representation.<sup>8</sup> Courts are encouraged to assess a fine or costs because

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<sup>5</sup>M.C.A. §46-18-241(2) (2011).

<sup>6</sup>M.C.A. §46-18-236(1) (2011).

<sup>7</sup>§46-18-232(1) costs also include costs defined in §25-10-201. §25-10-201(9) allows for the recovery of “other and reasonable and necessary expenses that are taxable ... by express provision of law.” §46-8-113 expressly provides for payment of the cost of OPD lawyers appointed to represent convicted defendants to the extent those defendants have the ability to pay. Therefore, until the passage of SB 187 payment for the cost of counsel arguably had the same §46-18-251(2)(c) priority for the payment of other costs. However, SB 187 amended §46-8-113 to provide in subsection (2) that “Any costs imposed pursuant to this section must be paid in accordance with 46-18-251(e).” It is now guaranteed that OPD will be the last paid after a defendant has paid all of the other charges, fees, costs and fines taxed.

<sup>8</sup>A visit to county websites produces some information for comparison with the assessments of the costs of representation although one difficulty lies in being certain of the sources deposited into accounts designated differently from “fines” or “fines and forfeitures.” It must also be kept in mind that “forfeitures” suggest the persons charged did not have any legal representation and that all “fines” were not levied against OPD clients. Cascade County reported fines on a modified accrual basis of accounting in the amount of \$503,103, \$1,411,362, \$476,136, and \$399,334 for fiscal years 2007 through 2010, respectively. During the same period the Cascade County district and justice courts assessed \$2,235 in FY 2009, and \$5,965 in FY 2010 to pay into the OPD special revenue account. Also on a modified accrual basis of accounting, Butte-Silver Bow County reported fines and forfeitures on page 199 of its “Comprehensive Annual Financial Report for Fiscal Year Ended 2010” totaling \$582,229, \$643,978, \$632,353 (or \$436,261 on page 30), and \$675,297 (or \$520,570 on page 30) for fiscal years 2007 through 2010, respectively, *i.e.*, a total ranging between \$2,183,038 and \$2,533,857, while the courts assessed \$2,678 (FY 2008), \$1,636 (FY 2009) and \$15,280 (FY 2010), *i.e.*, \$19,594 for the cost of representation, during the same four years. In Gallatin County \$748,252 in fines and forfeitures were reported during FY 2008 while the district and justice courts assessed \$574 for the costs of representation; \$1,064,206 compared to assessing \$3,118 during FY 2009; and \$324,847 in fines and forfeitures while \$5,934 was ordered for payment into the OPD special revenue account in FY 2010.

The “Financial and Compliance” reports indicate Ravalli County reported fines and forfeitures in the amounts of \$254,836 (FY 2007), \$140,299 (FY 2008), \$237,331 (FY 2009) and \$150,750 (FY 2010), *i.e.*, \$783,216 for the county general fund. During those same fiscal years the district and justice courts in Ravalli County ordered OPD clients to pay \$4,545, \$213, \$66,911 and \$13,239 respectively, *i.e.*, \$84,908 for their cost of representation. \$57,127 of the \$66,911 assessed in FY 2009 for the OPD special revenue account was imposed in the sentence of Anne Marie Stout who is serving life in prison for the murder of her husband Bill. The \$57,127 made up 6% of the \$900,298 of accounts receivables owed at the end of FY 2011.

a court is required to waive payment of the §46-18-236(1) mandatory charges if it determines under §46-18-231(3) and §46-18-232(2) that the person is not able to pay a fine and costs or make payment within a reasonable time.<sup>9</sup> With a possible exception in drug cases, the clerks of the district courts pay fines and costs collected into the state general fund.<sup>10</sup> However, 50% of the fines and costs collected in justice courts are distributed into the county general fund with the remainder going into the state general fund.<sup>11</sup> *M.C.A. §46-18-236(1)(a)* (\$15) and *(1)(b)* (\$20 or 10%) charges collected are earmarked for paying the salaries of deputy county attorneys, other salaries in the office of the county attorney, or the salaries of city and town attorneys and deputies.<sup>12</sup>

¶5 Unlike fines and forfeitures, payments for the costs of OPD representation are deposited into a state special revenue account which may be used only for the operation of OPD without the counties receiving any share of those funds.<sup>13</sup> Plus, OPD is a state agency funded from the state general fund. Hence, as the numbers in footnote 8 demonstrate, there is little incentive for minimizing fines and §46-18-251(2)(c) costs so defendants have more ability to repay the cost of OPD representation.

¶6 However, impediments and constraints are not the only problems associated with the collection of the costs of representation. At page 6 of the October 2012 financial compliance audit conducted by the Legislative Audit Division it was recommended that OPD (A) “[d]etermine whether clients have satisfied higher priority restitution and assessment requirements; and (B) transfer the accounts to the Department of Revenue [DOR] or an outside collection agency in accordance with state policy.” The auditors referenced the new §47-1-102(6) purpose and noted that from the inception of OPD in 2006 until SB 187 amended §46-8-114 in 2011 payments for assessed costs were made to OPD directly instead of to the clerk of the sentencing court. Although the clerks of the courts began collecting payments ordered after July

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<sup>9</sup>*M.C.A. §46-18-236(2)* (2011).

<sup>10</sup>*M.C.A. §46-18-235(1)* (2011).

<sup>11</sup> *M.C.A. §3-10-601(2)* and *(3)* (2011); *M.C.A. §46-18-235(2)* (2011).

<sup>12</sup>*M.C.A. §46-18-236(6)* (2011).

<sup>13</sup>*M.C.A. §46-8-114* (2011) and *§47-1-110* (2011). The Montana Public Defender Act of 2005 established a public defender account in the state special revenue fund which can receive deposits from several sources including “payments for the cost of a public defender ordered by the court pursuant to §46-8-113 as part of a sentence in a criminal case.” *M.C.A. §47-1-110*. Before the system went into effect payments were made to the clerks of the district courts who, in turn, forwarded the payments to the department of revenue for deposit into the state general fund. *M.C.A. §46-8-114* (2005). If ordered in justice courts, 50% should have been paid into the county general fund and the other half deposited into the state general fund. *M.C.A. §3-10-601(3)* and *§46-18-235(2)* (2005). After the system became operational most of the payments came directly from the clients, although some payments were collected by clerks of court and forwarded to OPD, for deposit into the special revenue account. SB 187 amended *M.C.A. §46-8-114* (2011) to require the payments be made to the clerk of the sentencing court for allocation according to *M.C.A. §46-18-251(2)(e)* (2011) and deposit in the special revenue account. *M.C.A. §46-8-113(2)* (2011). The SB 187 amendments guarantee that the money deposited into the special revenue account will be collected by the court clerks from the last money OPD clients pay after making restitution and paying mandatory charges, supervisory fees, other costs assessed, and fines. The money deposited can be used only for the operation of the statewide public defender system. *M.C.A. §47-1-110*. One use will be for public defender commission [PDC] staff positions “only when the public defender account established pursuant to *47-1-110* has received sufficient revenue pursuant to *46-18-113(1)(a)* and *(1)(b)* to maintain a balance in the account that would sustain any staff position approved by the commission for at least 1 year.” *M.C.A. §2-15-1028(6)(b)* (2011).

1, 2011, those clerks have not necessarily collected payments ordered earlier; instead telling the person to pay OPD directly. The auditors found that OPD has the responsibility for the direct collection of about 3,800 accounts totaling \$938,066 as of June 30, 2012. The auditors identified some “valid concerns” OPD has in pursuing collections and transferring bad debts to the DOR. Nonetheless, the problem the auditors identified is that OPD does not have policies in place over the transfer of uncollectible public defender fee accounts to an outside collection agency or the DOR as required by state accounting policy. The auditors believe OPD should be able to get information from the courts as to whether the clients have satisfied assessments of higher priority and then transfer those accounts to an outside collection agency or the DOR for further collection efforts and, ultimately, let the DOR write off those that cannot be collected. It is not that simple.

¶7 First, there is the issue of whether DOR or OPD has the authority to “write off” a debt created by a court order. An answer was not forthcoming a year ago and to date has not been answered clearly. As a practical matter it can be assumed the judges will not look fondly on their orders being written off without consulting them. Telling the judges their assessments are going to be written off poses a quandary of whether the judges will stop ordering the payments. Most recently, DOR has advised that in its view of MOM Policy 320, Section XII, OPD need only refer what it deems “valid” accounts for collection services but has the discretion to write off other accounts OPD considers to be uncollectable. Under consideration is how many of the 3,800 accounts and how much of the \$938,066 OPD can “write off” using that interpretation even if it is unknown whether the assessing courts have rescinded the assessment order.

¶8 The ability of the OPD central office to manage the process of recovering the costs of representation by payments into the OPD special revenue account has been problematic from the outset. Public defenders [PDs] provide services in 207 courts below the Montana supreme court that are scattered from Plentywood to Lima. There are 56 district courts and 151 courts of limited jurisdiction. Of 30,912 new cases opened by OPD in FY 2012, 19,456 of those cases were in the courts of limited jurisdiction. In FY 2013, 20,330 new OPD cases arose in the courts of limited jurisdiction out of 31,980 new cases opened.

¶9 Only 1,754 clients that OPD knows of were ordered to pay some amount of the costs of representation in FY 2013, 261 more than the 1,493 clients assessed in FY 2012. Oftentimes, OPD receives payments from clients without first having a copy of the sentencing judgment. As such, OPD is required to accept the payment without knowing the amount of the public defender fee assessed by the court. One way OPD could learn about orders for payment is from judgments sent in by the PDs to the central office. While that happens on occasion, more frequently the PD does not get a copy of the sentencing judgment because on any given day the PD will likely represent several clients in a court session and will not be with the earlier clients when they go to the clerk who can make copies of the sentence. Because so few clients are ordered to pay, clerks frequently overlook sending copies to OPD, plus the cost of processing and postage comes out of the court’s budget. For similar reasons of time and cost many clerks of courts are reluctant or will not produce reports indicating whether clients have satisfied assessments of higher priority on sentences entered before July 1, 2011. Some courts of limited jurisdiction do not have clerks. Since this report a year ago, the Office of the Court Administrator has advised that no more assistance can be provided other than providing “rollup” reports which show the total amounts assessed and the total amounts collected by the courts

during the reporting period. Those reports do not offer any information about the individuals assessed, who made payments, or what balances remain in individual accounts. Some clerks advise that the clerks of court have been told it is not necessary to send OPD reports of who had been assessed how much or how much a person has paid. The local treasurers send money collected from the clerks to the DOR for deposit into accounts including OPD's state special revenue account. Unfortunately, the treasurers cannot tell OPD who paid how much of a deposit because that information is not provided by the clerks of court. The only other information OPD now receives is a notice from DOR of how much has been deposited in the special revenue account during a particular period. With these developments, OPD has less ability at "accounting" for the individual accounts receivable than it had a year ago.

¶10 Another facet is acceptance of the OPD accounts receivable by DOR. One DOR requirement is social security numbers. OPD does not identify its clients by social security numbers for privacy reasons and, consequently, will be unable to meet this requirement.

¶11 DOR requires a description of the efforts OPD has made at collection. Collection agencies will be contacted to see if any are willing to undertake collection efforts on the accounts receivable open on June 30, 2011, before the requirement for clerks to collect payments for the OPD special revenue account in §46-8-114 (2011) went into effect. Contact with the collection agencies will confirm or dispel a perception of some that those agencies are very reluctant or will not take small accounts. The vast majority of OPD accounts receivable have account balances of \$250 or less. It is not likely a collection agency will accept the \$57,093 Anne Marie Stout owes because of other liens with priority.<sup>14</sup> Incidentally, OPD received \$34 from DOC to her credit last year. Currently being considered is also sending letters demanding payment to the last known address of the former client before turning the accounts over to a collection agency.

¶12 Only defendants who plead guilty or are convicted of crimes can be ordered to pay for some portion of their costs of representation.<sup>15</sup> Some of those defendants are given deferred impositions of sentences. In those instances where a cost of representation is assessed, the courts can defer sentences for up to two years for misdemeanors and no more than six years for felonies.<sup>16</sup> Other defendants may receive some or all of their sentences suspended with a condition that some of the cost of OPD representation be paid. In those instances, under §46-8-

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<sup>14</sup>The \$57,093 made up 3% of the \$1,658,585 of accounts receivables owed at the end of FY 2013. Collecting from her is fraught with difficulty. Since sentencing on February 5, 2009, OPD has received \$34.00 toward the \$57,127 assessed against her. The same sentence ordering her to pay OPD also orders the reimbursement of Ravalli County in the amounts of \$2,794.47 for the cost of prosecution and \$11,776.52 for the costs of jury service. §46-18-251(2)(c) gives payment to Ravalli County priority over deposits into the OPD special revenue account. The home she had jointly owned with the husband she murdered had been sale listed for \$795,000 with about \$204,300 owed against it. OPD has not executed against the property because it doesn't have the financial ability to retire the remainder of the \$204,300 and the balance due, if any, on the \$14,571 owed Ravalli County at a sheriff's sale before beginning to recover the balance it is owed. Moreover, Bill Stout's heirs, presumably his surviving children, are entitled to \$125,000 of the \$250,000 homestead exemption while, arguably, Anne Marie is entitled to the other half that is exempt from execution. OPD would have to bid somewhere in the neighborhood of \$500,000 or more to buy the property for resale. The only hope OPD has of recovering the cost assessed is for someone to bid enough at a sale to cover the \$57,093 balance owed. Incidentally, this scenario also pretty much explains why she was represented by OPD rather than by a lawyer she retained.

<sup>15</sup>M.C.A. §46-8-113(1) (2011).

<sup>16</sup>M.C.A. §46-18-201(1) (2011).

114 the court can give the person the entire time of the suspension in which to pay the costs. A study is underway for determining how many of the deferred or suspended sentences have time expired with balances still owed OPD. Also being considered is what action can be taken for the collection of those balances, if any, after the term of a sentence is completed.

¶13 Other defendants are incarcerated, perhaps with terms of suspension afterwards, or parole following, during which the costs can be paid at any time depending on the §46-18-251(2) priorities and the time the court gives under §46-8-114. OPD receives payments from the department of corrections [DOC] institutions from the trust accounts of the inmates. Accompanying this paper is a sample journal from the DOC for one of the five institutions making monthly inmate payments for December 2012 showing that many of the payments received on behalf of the inmates are less than a dollar, more are less than two dollars, and only a few are more. The time DOC and OPD devote to processing these payments, *e.g.*, making journal entries often equals or exceeds the amount OPD receives. Thus, with the concurrence of the law and justice interim committee, OPD is submitting legislation that is designed for suspending payments during periods of incarceration.

¶14 OPD is not staffed or structured to sue delinquent clients ordered to pay. But already in place is the procedure for a defendant's compliance when ordered to pay toward the costs of representation. Courts have long been obligated under §46-8-113 to determine whether the defendant has or will have the ability to pay and, if so in cases now, how much of \$250, \$800, or the entire cost of representation can the defendant pay. Each court is now expressly required to determine from the available evidence "whether a convicted defendant should pay the costs of counsel assigned" before imposing any payment requirement.<sup>17</sup> A full-fledged adversarial inquiry is not required but, through the appointed PD, any defenses to payment asserted by the defendant are supposed to be fully considered.<sup>18</sup> During that proceeding the court must question the defendant about the ability to pay after informing the defendant "that purposely false or misleading statements may result in criminal charges against the defendant."<sup>19</sup> An order for the payment of the cost of representation cannot stand without a meaningful inquiry into the defendant's financial status and findings on the record that there are sufficient resources to repay the costs.<sup>20</sup> A sentence is illegal if the court does not make an affirmative finding that the defendant can afford to pay the amount ordered.<sup>21</sup> "In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose."<sup>22</sup> Of course, how much of the costs of representation a court can order paid is limited by the remaining financial ability of the defendant after paying the restitution, charges, fees, other costs, and fines ordered. The court may not sentence a defendant to pay the costs for assigned counsel "unless the defendant is or

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<sup>17</sup>M.C.A. §46-8-113(1) (2011).

<sup>18</sup>*State v. Farrell*, 207 Mont. 483, 492, 676 P.2d 168, 173-74 (1984), quoting from *United States v. Bracewell*, 569 F.2d 1194, 1200 (2<sup>nd</sup> Cir. 1978).

<sup>19</sup>M.C.A. §46-8-113(3) (2011).

<sup>20</sup>*State v. Hirt*, 2005 MT 285, ¶22, 329 Mont. 267, 124 P.3d 147, citing *Farrell*, 207 Mont. at 492, 676 P.2d at 173.

<sup>21</sup>*State v. Starr*, 2007 MT 238, ¶10, 339 Mont. 208, 169 P.3d 697.

<sup>22</sup>M.C.A. §46-8-113(4) (2011).

will be able to pay the costs imposed by subsection (1).”<sup>23</sup> Further, “[t]he court may find that the defendant is able to pay only a portion of the costs assessed.”<sup>24</sup> “Any costs imposed under this section [§46-8-113] must be included in the court’s judgment.”<sup>25</sup> A court cannot reserve the right to change a sentence or add conditions later and, absent statutory authority, lacks the jurisdiction to modify the sentence later.<sup>26</sup> Yet, the courts continue to display disparity in how the cost of representation issues are decided. How the defendant’s ability or inability to pay is proven and what evidence is admissible, seemingly, is not settled among the courts that do levy costs. Based on OPD’s information, it appears that roughly half of the courts do not impose the cost of representation onto convicted defendants.

¶15 Absent an appellate review, the defendant could return to the sentencing court for a change in the amount of the payments ordered on the basis of manifest hardship.<sup>27</sup> Similar provisions have been in §46-8-113 since 1981. Even later the defendant could argue a good faith effort to pay the cost of representation was made or that the default was not attributable to an intentional refusal to obey the court’s order at a §46-8-115 civil contempt hearing. The opportunity to show at any time that recovery of the costs of legal defense will impose “manifest hardship” is one of the reasons Montana’s procedure passes constitutional muster.<sup>28</sup> There are similar provisions for relief from charges, fees, costs, and fines.<sup>29</sup> Obviously, it is important for PDs to advocate the defenses against sentences ordering the payment of the cost of representation so lawful assessments are entered and so burdensome, unnecessary, costly, time consuming appeals and post-sentence hearings are reduced, if not avoided.

¶16 §46-8-115 provides for penalties that can be imposed by the sentencing court if a person ordered to pay the costs of defense is in default. This statute appears to be modeled after the recoupment statute approved by the United States Supreme Court in *Fuller v. Oregon*.<sup>30</sup> A person in default on the payment of the cost of representation ordered can be brought into court by the prosecutor or the court on a show cause citation or an arrest warrant to show why the default should not be treated as a contempt of court.<sup>31</sup> The court may modify the terms of payment or revoke the payment of any unpaid portion in whole or in part if the court determines

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<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*M.C.A. §46-8-113(6)* (2011).

<sup>26</sup>*Hirt*, ¶¶19-20; *State v. Hubbel*, 2001 MT 31, ¶37, 304 Mont. 184, 20 P.3d 111.

<sup>27</sup>*M.C.A. §46-8-113(5); §46-18-232(2); §46-18-246* (2011).

<sup>28</sup>*Farrell*, 207 Mont. at 492, 676 P.2d at 173, citing *Fuller v. Oregon*, 417 U.S. 40, 47 (1974).

<sup>29</sup> A court is required to waive payment of the §46-18-236(1) charges if it determines under §46-18-231(3) and §46-18-232(2) that the person is not able to pay the fine and costs or make payment within a reasonable time. *M.C.A. §46-18-236(2)* (2011). A court may not sentence a defendant to pay a fine or costs unless it is determined the person is or will be able to pay. *M.C.A. §46-18-231(3) and §46-18-232(2)* (2011). A defendant may seek remission for the payment of §46-18-232(1) costs. *M.C.A. §46-18-232(3)* (2011). §46-18-233(2) prohibits the revocation of a deferred or suspended sentence upon default if the default is not attributable to an intentional refusal to obey the court’s order or a failure to make a good faith effort to make the payment. The payment of restitution may be modified or waived. *M.C.A. §46-18-246* (2011). If the person ordered to pay restitution is not able to pay any restitution due to circumstances beyond his or her control the court may order the performance of community service for which the person must be given credit. *M.C.A. §46-18-241(3)* (2011).

<sup>30</sup>*State v. Lenihan*, 184 Mont. 338, 344-45, 602 P.2d 997, 1001 (1979).

<sup>31</sup>*M.C.A. §46-8-115(1)* (2005).

the default is not contempt.<sup>32</sup> Conversely, §46-8-115(2) permits the court to find the default constitutes civil contempt if the accused fails to show a good faith effort to make the payment or that the default was not attributable to an intentional refusal to obey the court's order to pay the cost. §46-8-115(3) sets the imprisonment penalty for a finding of contempt:

The term of imprisonment for contempt for nonpayment of the costs of assigned counsel must be set forth in the judgment and may not exceed 1 day for each \$25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

¶17 Further, §46-8-115(5) establishes the procedure for the collection of payments on which there has been a default:

A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

¶18 A financially eligible person cited to show cause should be entitled to representation by a PD since there is a potential for incarceration upon a finding the person is in civil contempt for not paying the cost of representation by a PD in an earlier proceeding. A role of the PD at the sentencing stage and during a contempt proceeding is to develop and present any defenses the defendant may have to the payment of restitution, charges, fees, fines, and the assessment of costs, including the cost of representation, and present those defenses at the hearing. Those issues are thereby preserved for appeal if there is something illegal about an order for payment.

¶19 The failure of a PD in fulfilling this role raises the issue of ineffective assistance of counsel perhaps because there would be no record on which a reviewing court could determine there was a meritorious defense. Further, an appellate court generally will not review sentencing issues on appeal that were not raised in the lower court by an objection.<sup>33</sup> The *Lenihan*<sup>34</sup> case provides an exception to the general rule but only allows appellate review of a sentence that is alleged to be illegal or in excess of statutory mandates.<sup>35</sup> A sparingly used common law plain error review might be available but that review is discretionarily determined on the basis of the particular facts and circumstances of each case compelling a finding that (a) not reviewing the claimed error may result in a manifest miscarriage of justice, (b) may leave unsettled the question of the fundamental fairness of the trial or proceedings, or (c) may compromise the integrity of the judicial process.<sup>36</sup>

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<sup>32</sup>*M.C.A.* §46-8-115(4) (2005).

<sup>33</sup>*State v. Kotwicki*, 2007 MT 17, ¶8, 335 Mont. 344, 151 P.3d 892.

<sup>34</sup>*Lenihan*, 184 Mont. at 343, 602 P.2d at 1000.

<sup>35</sup>*Kotwicki*, ¶8.

<sup>36</sup>*State v. Upshaw*, 2006 MT 341, ¶12, 335 Mont. 162, 153 P.3d 579.

¶20 Currently, the OPD central office must maintain accounts receivable for each person ordered to pay although, outlined in the foregoing five paragraphs, there is already an extensive procedure in place for cost assessment and accounting for payments of costs assessed at the courts. SB 187 amended §46-8-114 to provide for the payment of OPD costs to the clerks of the courts. Looking forward, OPD is proposing legislation for the clerks to account for the collections and provide quarterly summary reports of the assessments and collections to the OPD central office. This proposal is designed to eliminate the duplication of the accounting effort at OPD and to remove the extensive effort OPD puts into managing the accounts receivable of thousands of people.

Sample DOC Payment to OPD for Public Defender Fees  
December 2012

Resident	Current Payment	Case	Original Debt	Total Paid to Date	Balance
Inmate 1	\$0.75	OC-15-2009-541(C)	\$500.00	\$18.56	\$481.44
Inmate 2	\$0.98	DC-15-2008-091(A)	\$500.00	\$101.85	\$398.15
Inmate 3	\$1.66	DC-32-2010-231	\$500.00	\$58.93	\$441.07
Inmate 4	\$3.06	DC-56-2009-0339	\$650.00	\$74.89	\$575.11
Inmate 5	\$2.29	DC-15-2006-192(A)	\$500.00	\$114.51	\$385.49
Inmate 6	\$0.42	DC-32-2008-581	\$100.00	\$38.76	\$61.24
Inmate 7	\$0.17	DC-45-2010-03	\$500.00	\$42.92	\$457.08
Inmate 8	\$0.42	DC-15-2007-458(B)	\$500.00	\$37.30	\$462.70
Inmate 9	\$16.67	DC-56-2009-0206	\$500.00	\$78.40	\$421.60
Inmate 10	\$1.15	DC-32-2008-78	\$100.00	\$38.68	\$61.32
Inmate 11	\$2.13	DC-32-2008-466	\$100.00	\$16.98	\$83.02
Inmate 12	\$0.77	DC-15-201Q-151(B)	\$500.00	\$20.52	\$479.48
Inmate 13	\$0.93	OC-56-2010-0051	\$500.00	\$9.18	\$490.82
Inmate 14	\$0.83	DC-56-2010-0202	\$500.00	\$46.06	\$453.94
Inmate 15	\$0.30	DC-54-2008-01	\$500.00	\$31.68	\$468.32
Inmate 16	\$0.25	DC-32-2005-279	\$2,262.00	\$63.32	\$2,198.68
Inmate 17	\$0.57	DC-32-2010-291	\$500.00	\$7.94	\$492.06
Inmate 18	\$0.79	DC-32-2007-201	\$100.00	\$25.31	\$74.69
Inmate 19	\$1.63	DC-32-2010-388	\$500.00	\$14.67	\$485.33
Inmate 20	\$1.42	DC-31-2010-10	\$500.00	\$34.70	\$465.30
Inmate 21	\$0.83	DC-32-2009-513	\$500.00	\$22.86	\$477.14
Inmate 22	\$1.42	DC-41-2010-122	\$500.00	\$64.23	\$435.77
Inmate 23	\$1.55	DC-15-2008-146(C)	\$500.00	\$98.33	\$401.67
Inmate 24	\$1.59	DC-32-2010-159	\$500.00	\$25.17	\$474.83
Inmate 25	\$1.83	DC-15-2008-402(C)	\$1,000.00	\$21.76	\$978.24
Inmate 26	\$1.80	DC-32-2008-263	\$100.00	\$64.01	\$35.99
<b>Total</b>	<b>\$46.21</b>		<b>\$ 13,412.00</b>	<b>\$ 1,171.52</b>	<b>\$ 12,240.48</b>

*Excerpt from narrative ¶13:* OPD receives payments from the department of corrections [DOC] institutions from the trust accounts of the inmates. [This] is a sample journal from the DOC for one of the five institutions making monthly inmate payments for December 2012 showing that many of the payments received on behalf of the inmates are less than a dollar, more are less than two dollars, and only a few are more. The time DOC and OPD devote to processing these payments, e.g., making journal entries often equals or exceeds the amount OPD receives. Thus, with the concurrence of the law and justice interim committee, OPD is submitting legislation that is designed for suspending payments during periods of incarceration.