

**CONVERSATION ON COLLECTION OF CLASS C FINES AND FEES
THE UNIVERSITY OF TEXAS SCHOOL OF LAW
MAY 20, 2016**

BACKGROUND

In March 2015, the U.S. Department of Justice (DOJ), while investigating law enforcement practices in Ferguson, Missouri, uncovered unconstitutional court practices employed by the Ferguson municipal court to collect criminal fines and fees. In December 2015, the White House held a convening on the assessment and enforcement of criminal fines and fees, and in March 2016, the DOJ issued a Dear Colleague Letter outlining seven principles for administering fines and fees in a manner consistent with the U.S. Constitution.

Meanwhile, Texas judges, court administrators, and advocates have been examining state and local practices for collecting fines and fees, to ensure that municipal and justice of the peace courts are complying with the Constitution and state laws. The Office of Court Administration undertook a process to revise its Collection Improvement Program rules, involving stakeholder participation and feedback, and ultimately adopted new rules on September 2, 2016.

On February 10, 2016, the William Wayne Justice Center for Public Interest Law hosted its first Stakeholder Convening on Class C Fines and Fees, bringing together municipal and justice of the peace judges, state officials, and advocates. Participants in the first convening discussed ways in which existing practices for the assessment and collection of court fines and fees in Class C proceedings mirror practices that have been documented nationally in Ferguson and elsewhere, and considered existing resources as well as potential statutory and regulatory changes that could serve to promote access to justice and fair outcomes for all Class C defendants regardless of their income.

The Justice Center hosted a second Stakeholder Convening on Class C Fines and Fees on May 20, 2016. In the second convening, speakers shared their insights on current court practices around the state that serve as potential models for addressing concerns that have been raised about the fairness of some existing systems for the assessment and collection of court fines and fees in Class C proceedings.

First, a representative of the state's Collections Improvement Program discussed the program's rules and requirements, and explained why it was harmonious with the principles for constitutional administration of criminal fines and fees laid out in the DOJ's Dear Colleague Letter. Second, several judges shared their court's innovative practices for working with low-income defendants who lack the ability to pay their fines and fees immediately upon assessment. Finally, academics shared additional proposals to increase flexibility for working with Class C defendants who lack the ability to pay.

THE STATE'S COLLECTION IMPROVEMENT PROGRAM

Jim Lehman, Technical Support Manager of the Collections Improvement Program (CIP) of the Office of Court Administration (OCA), began the program by providing a summary of the components of the CIP, which he described as a set of principles and processes designed to assist municipalities in collection of fines and fees when they are not paid immediately.

In setting forth the CIP components, Lehman emphasized three important points. First, CIP does not conflict with the authority and discretion exercised by judges under state law. In other words, CIP does not limit judges' authority to order community service, payment plans, and other alternatives according to the circumstances of each case, at all stages of the case.

Second, CIP audits seek compliance with *processes* required by state law, including communications with defendants at various stages of the case through mail and telephone, but the outcome of an audit does not turn on the *results* of a jurisdiction's collections activities. CIP audits do not focus on monetary performance, and jurisdictions are not expected to raise any certain amount of revenue or collect any certain percentage of assessed fines and fees.

Third, Lehman discussed the seven basic constitutional principles relevant to the adjudication and collection of criminal fines and fees that are set forth in the DOJ's Dear Colleague Letter. Among those principles are that courts "must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful" and that courts "must consider alternatives to incarceration for indigent defendants unable to pay fines or fees." Lehman compared the CIP program to each of the seven principles in the DOJ letter, noting that CIP is completely compatible with the DOJ's principles, and indeed that CIP "seeks to strongly encourage the use of community service and alternative compliance options for offenders who do not have the ability to pay fines and costs."

Next, David Slayton, OCA's Administrative Director, provided an update on the ongoing process to amend the Collection Improvement Program rules. He stated that on February 25, 2016, OCA proposed emergency rules revisions that, if adopted, would specify that CIP processes do not apply to indigent defendants and eliminate the current requirement that Class C payment plans require full payment within a four-month period. Slayton noted that the process to consider these proposed revisions was ongoing.

Slayton also noted that OCA's Advisory Committee on CIP regulations, composed of judges, court personnel, and advocates, was considering further rules changes. He stated that the committee was considering, among other things, how to integrate "ability to pay" determinations with CIP processes, how to ensure that CIP processes respect judicial discretion and decision-making, and procedures to ensure that judges may partially or fully waive fees, fines, and costs for defendants who lack ability to pay. He remarked that the program's name may change, and he underscored Lehman's point that CIP audits are for processes and not for amount of revenue collected. Slayton noted that these proposed amendments to CIP rules would be discussed in June and possibly approved in August.

Slayton also noted that Chief Justice Nathan Hecht is part of a national task force on fines and fees, and Justice Hecht's goal is to ensure that Texas remains a front-runner in ensuring compliance with constitutional principles in enforcement of fines and fees. Justice Hecht has appointed Judge Spillane to be a part of the national task force process as it moves forward.

CURRENT COURT PRACTICES ACROSS THE STATE

Tanya Skinner, Brazos County Collections Manager and President of the Governmental Collectors Association, began by explaining her processes in Brazos County to ensure that litigants are informed of their rights, and that collections personnel work individually and flexibly with defendants of limited financial means. Skinner's office handles enforcement of court orders for numerous Brazos County courts. Skinner emphasized that her employees always advise defendants that the court will revise the payment plan if needed, for example if a defendant's financial circumstances change and the defendant becomes unable to make payments in the originally specified amount. Skinner's staff also provides information about community service locations. If a defendant misses a payment, her staff makes phone calls, sends three postcards, and finally sends a "last chance" letter so that defendants are aware of their obligations before any enforcement action is taken. Staff stops and re-starts payment plans for defendants with changed circumstances. Skinner's office recalled thousands of warrants over five years old, and began to set show cause hearings on all pending warrants to encourage defendants to come to court and resolve their cases. It credits community service at \$10 per hour for defendants on probation. Skinner reiterated that these practices of working flexibly with low-income defendants have proven effective and have built trust with community members.

Judge Barbara Hartle, Director and Presiding Judge of the City of Houston Municipal Court, explained that expanding defendants' access to the court has been a priority in Houston. The municipal judges opened annex courts in different locations around the city, where defendants can walk in without being on the docket, ask to see a judge, and get payment plan modifications if needed, without any threat of arrest on outstanding warrants. Those courts have weekend and late weeknight hours to ensure greater access to the public, and prosecutors are available at the extended hours as well to work out pleas. The courts also have set aside areas where defendants can discuss their financial situation with court staff in private. When defendants with outstanding warrants come to court, judges have issued a standing order to dismiss their failure to appear charge. In addition, the court has coordinated with the City's 311 telephone service, so that defendants can find out the status of their cases, including warrant status, anytime by calling 311. Court personnel hold clinics in libraries and community centers to inform community members that they can resolve their cases by going to court without threat of arrest. Judge Hartle also emphasized that the court has coordinated with the police department to ensure that people arrested on Class C warrants are brought before a magistrate before they are booked, in order to resolve their cases without incarceration. She further noted that the court has strategies for preventing people from accruing surcharges with the Department of Public Safety (DPS), including resolution of cases without convictions and communicating with DPS directly.

Judge Kathleen Person, Presiding Judge of the City of Temple Municipal Court, explained her court's methods for evaluating defendants' ability to pay, and for designing payment and community service plans that enable defendants of all income levels to fully comply with judicial orders. Judge Person uses a simplified financial affidavit based on the sample provided by the

Texas Municipal Courts Education Center. She engages defendants who complete the affidavit in short conversations regarding their income and obligations, and she structures payment plans or community service plans that are tailored to what each defendant is capable of in light of the defendant's individual financial and other circumstances. Court personnel are trained to bring all defendants who have difficulty paying before Judge Person for an individualized inquiry before a warrant for nonpayment is issued. The overall goal is to achieve compliance without setting low-income defendants up for failure through the imposition of financially unrealistic payment plans. Judge Person noted that ordering reduced payments or community service based on a determination of a person's ability to pay is doable, results in better outcomes for community members, and does not adversely impact compliance with court orders.

Judge Edward Spillane, Presiding Judge of the City of College Station Municipal Court, made a strong case for expanding educational alternatives for all defendants, including those who have limited ability to pay. He explained that his court's two goals—deterrence of traffic and other crimes, and greater public safety education—are being met through a variety of educational programs that defendants are ordered to attend in lieu of full payment of fees and fines. For example, defendants attend programs on driver education for youths, victim impact, and noise abatement. Judge Spillane explained that the court identifies these programs, which are run by other state and local entities in the vicinity, and that defendants pay modest fees for these programs in lieu of full payment of their fines. He also noted that his court tailors its community service assignments to defendants based on their schedules and capacity, and the court liaises with community service providers to ensure that defendants complete their service. He noted the positive effects on community members and on community organizations that result from his court's emphasis on community service.

Judge Lester Rorick, Presiding Judge of the City of Pasadena Municipal Court, explained how the Collections Improvement Program had helped him bring structure, management, and tracking to his Class C docket. Judge Lester has a staff to work with defendants on the majority of cases before his court, which are traffic violations. He holds a "re-work" docket once a month to help defendants who are unable to make their commitments, and orders waivers of fines and fees for appropriate cases involving defendants who cannot afford to pay. He discusses defendants' individual circumstances, and orders defendants who are able to perform community service to do so through the city's program.

Judge John Bull, Presiding Judge of the City of San Antonio Municipal Court, discussed his court's decision in 2007 to cease jail commitments for Class C cases. He recounted that for years, the city had been billed by the county for jail use for Class Cs and had not paid. After discussions, the city realized that jail commitments were a net drain on its financial resources since they did not produce much revenue and incurred significant jail costs for the city. As a result, Judge Bull, along with the county judge and the city manager, proposed to end jail commitments, and all of the municipal judges agreed. In the nine years since, the city has not seen any spikes in traffic crime, and their new court processes have resulted in the collection of more, not less, revenue. Judge Bull explained that they now have court personnel try to resolve cases with defendants when they come in, by setting a tailored payment amount that the defendant can pay that same day. People with outstanding warrants are not arrested if they come to court. Although police still arrest people with Class C warrants in the field, those defendants are promptly brought before a magistrate within eight hours, and their cases are resolved without

further jail time. The court also maintains an all-day compliance docket where defendants can come in to see a judge to resolve their case without fear of arrest. Judge Bull noted that it is important for the court clerk and presiding judge to work together, and in San Antonio the court clerk is a lawyer who understands that traffic ticket cases are not just accounts receivable for the city, but are cases that must be individually adjudicated.

Judge Kevin Madison, Presiding Judge of the City of Lakeway Municipal Court, began by encouraging all judges to review the training materials of the Texas Municipal Courts Education Center, which are helpful on these issues. Judge Madison decided to create a permanent safe harbor in his court to ensure that every person who comes into court will not be arrested and will be able to talk to a judge to help resolve the person's case. When a defendant appears in court, any warrants against them are recalled immediately and a court hearing is set. Judge Madison created a brochure that details defendants' rights in court, and he has copies of the brochure in the court lobby. He also recorded a message with similar information for the court's telephone line, which he said has been very effective in informing defendants of their options. He noted that in cases involving indigent defendants, he tries to use deferred dispositions in order to avoid convictions that would invalidate the defendant's driver license and insurance. He emphasized that each case is about a person's real life, and working with people and their financial circumstances is key. He also noted that community service benefits the community and non-profit organizations, in addition to providing an alternative method of satisfying the court judgment.

ADDITIONAL PROPOSALS FOR WORKING WITH DEFENDANTS WHO LACK THE ABILITY TO PAY

Bringing Stakeholders on Board: Andrea Marsh, Clinical Lecturer and the Director of the Richard and Ginni Mithoff Pro Bono Program at the University of Texas School of Law, facilitated a discussion about bringing other stakeholders on board with the use of collection practices that include individualized assessments of ability to pay and avoid incarceration for nonpayment, a collection practice that has a long history in the state and is deeply embedded in some local jurisdictions.

- Judge Spillane discussed how he trained his court personnel on his judicial philosophy, for example to ensure that court staff talks with defendants about their income and ongoing obligations when setting payment plans, and that defendants can see the judge whenever they want to resolve their cases without fearing arrest without a warrant.
- Judge Person explained how she communicated with the City Council on the front end to explain her court practices, so that they would understand what the law requires and how tailoring fines to defendants' individual financial circumstances and ordering community service has positive benefits for revenue and for the community.
- Judge Bull mentioned that he explained to City Council members that judges must assess appropriate fines in each case, and that courts cannot be used as revenue generators. With the news on Ferguson and the DOJ Dear Colleague Letter, he noted that this is a great time to have that conversation with local stakeholders, who are likely to be more attuned to the controversy surrounding the use of incarceration as a collections tool.

- Judge Hartle stated that she and other municipal court judges talk with police cadets at their academy about arrest practices and how and why to divert Class C arrestees from jail into magistration. She said that changing the mindset of new and veteran police officers is key, and requires ongoing effort.
- Jude Volek, an attorney from the U.S. Department of Justice, shared four principles for best practices in adjudicating criminal fines and fees, based on DOJ's research. These principles include: (1) ensuring that judges meaningfully review the work performed by court staff, and that court staff do not have revenue-based performance measures that influence their work; (2) ensuring that ability to pay determinations occur at the time of the assessment of the fine, not later, so that fines can be calibrated correctly at the front end and noncompliance prevented; (3) avoiding unnecessary jail time whenever possible, for example by releasing arrestees on their own recognizance and setting them for a court date, instead of keeping them in jail until a judge is available to hear the case; and (4) disentangling adverse consequences of inability to pay such as driver license suspensions from the adjudication process, through legislative efforts if needed. He concluded by noting that the culture of criminal fine adjudication is indeed changing, and courts should continue to strive to protect the constitutional rights of defendants, and work with them to promote successful satisfaction of judgments while protecting public safety.

Tailored Fines: Sandra Guerra Thompson, Alumnae College Professor in Law and Director of the Criminal Justice Institute at the University of Houston Law Center, discussed the concept of tailored fines. She began by noting that imposing the same monetary fines across the board to defendants of varying levels of income is inherently unequal and unfair. A structured fine system tailors the fine imposed based on a person's ability to pay. If applied to all criminal cases, a court would develop a sentencing table based on the seriousness of the infraction and the defendant's net daily (or monthly) income. The defendant's criminal history might also factor into the equation, as well as a person's dependents and specific financial circumstances. Based on these factors, a court would develop a matrix of fines, with the goal of setting a fine that the defendant can pay quickly and completely, for an efficient resolution of the case. The advantage of a tailored fine system is that defendants feel they are treated fairly, courts reduce administrative costs to collect fines that may never be paid, and collection rates and average payments increase. Jail costs can be drastically reduced as well.

Universal Access to Community Service: Andrea Marsh proposed that courts should make community service accessible to every defendant. The experience of courts in appointing counsel in more serious misdemeanor and felony cases has been that determining indigency is time-consuming and at times challenging. An effective determination requires a court to gather reliable information about each defendant's income, assets, and financial obligations. The high volume of Class C cases makes individualized indigency determinations time-consuming, and the pressure to process cases may pose a higher risk of error. One way to avoid these challenges is to allow all defendants to perform community service in order to satisfy their Class C judgments. The community would benefit from volunteerism, the defendant would benefit from having the choice to volunteer instead of pay, and the courts would benefit from having cases resolve more quickly, if community service orders were calibrated so that defendants can complete their obligations in a reasonably short time frame.

Access to Appointed Counsel for Indigent Defendants: Ranjana Natarajan, Clinical Professor and Director of the Civil Rights Clinic at the University of Texas School of Law, proposed ending uncounseled jail commitments of defendants who are unable to afford their own counsel. According to the Supreme Court's 1972 decision in *Argersinger v. Hamlin*, which was reaffirmed by the Court in 2002 in *Alabama v. Shelton*, a state may not imprison a defendant who is unable to afford counsel, even for a short period of time for the least serious misdemeanor, unless the state provides the assistance of appointed counsel. The Sixth Amendment of the U.S. Constitution requires the state to provide counsel at the beginning of the case if the court wishes to preserve the option of jailing that defendant. No court in Texas provides counsel for Class C defendants, and courts that are imprisoning Class C defendants who lack counsel and are unable to afford counsel are violating the Constitution. Given the challenges of appointing counsel for every defendant who is unable to afford counsel, courts should end their practice of jailing these uncounseled Class C defendants.