

Practice Tips for Challenging Legal Financial Obligations (LFOs) in Superior Court

Introduction

Legal Financial Obligations (LFOs) are financial obligations that a defendant owes upon a criminal conviction. LFOs fall into three categories: restitution, fines, and fees. There are limited mandatory LFOs, that the court cannot waive. There are also many discretionary LFOs, such as court costs, that a court may choose not to impose. LFOs may represent a significant burden on a defendant post-conviction, especially if the defendant is unable to pay. LFOs cannot be discharged in bankruptcy.¹ This advisory will define the categories of LFOs and discuss the best practices for effectively challenging imposition of LFOs, particularly on indigent clients. Another WDA resource on LFOs is a sample motion for Challenging LFOs in Superior Court in the WDA brief bank.

Fines, Costs, and Restitution

Fines

A fine is a monetary penalty.² Unlike costs, fines are meant to punish an offender rather than to recoup court administrative costs. Fines are discretionary.³ Sentencing courts are encouraged, but not required, to make an inquiry into the defendant's ability to pay before imposing fines.⁴ Fines cannot accrue interest upon sentencing.⁵

Costs

Costs are expenses incurred in prosecuting the defendant or administering the deferred prosecution program or pretrial supervision.⁶ Costs may include warrant service costs, jury fees, and incarceration costs.⁷ Costs cannot accrue interest upon sentencing.⁸

(1) Statutory Indigency

The court cannot impose costs if the defendant is indigent as defined in RCW 10.101.010(3)(a)-(c).⁹ A person is indigent when the person is receiving public assistance, such as TANF, disability, food stamps, or Social Security, or the person is involuntarily committed to a public mental health facility, or the person receives a net income of 125% or less of the current federally established poverty level.¹⁰ If your client is indigent at the time of sentencing, the court cannot impose discretionary costs.¹¹ These statutes apply prospectively to all cases not yet final when they went into effect on June 7, 2018.¹²

2018 125% of Federal Poverty Level Income	
<i>Individuals</i>	\$15,175
<i>Family of (2)</i>	\$20,575
<i>Family of (3)</i>	\$25,975
<i>Family of (4)</i>	\$31,375
<i>Family of (5)</i>	\$36,775
<i>Family of (6)</i>	\$42,175

(2) Present or Future Ability to Pay

Even if the defendant is not indigent as defined by RCW 10.101.010(3)(a)-(c), the court must make an individualized inquiry on the defendant's present and future ability to pay costs.¹³ *Blazina* and RCW 10.01.160(3) "[r]equire[s] the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."¹⁴ Such an inquiry must examine the defendant's employment history, income, assets and other financial resources, monthly expenses, and other debts, including LFOs from

other cases.¹⁵ An appellate court will review the adequacy of an inquiry into ability to pay de novo.¹⁶ The court may consider equity interest in real estate as part of the defendant's available funds for restitution.¹⁷ The *Blazina* court recommended that the sentencing court use the comment to GR 34 as a guide in determining whether a defendant lacks a present or future ability to pay.¹⁸

Restitution

Restitution is a monetary sum the court orders the defendant to pay to restore costs to the victim.¹⁹ When interest accrues on restitution, it accrues at a rate of 12%.²⁰ A court may elect not to impose interest on restitution after considering certain factors.²¹ Restitution is mandatory unless defendant lacks the current and likely future ability to pay and the entity to whom the defendant would owe restitution is an insurer or state agency.²² The term insurer "includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society."²³ (While a court need not impose restitution, it still must impose the victim penalty assessment).²⁴

Mandatory and Discretionary LFOs

Mandatory LFOs

Mandatory LFOs are fees that the court must impose without consideration of the defendant's financial circumstances. Restitution and the Victim Penalty Assessment (VPA) are mandatory LFOs.²⁵ The court must also impose a DNA database collection fee of \$100 upon a felony conviction for crimes specified in RCW 43.43.754(1)(a) unless the state has previously collected the offender's DNA as a result of a prior conviction.²⁶ There are also some offense specific fees that are mandatory.²⁷ An individual with a mental health condition that prevents him/her from participating in gainful employment may seek waiver of all LFOs except restitution and the VPA.²⁸

Discretionary LFOs

Discretionary LFOs are any and all remaining fees, fines and costs that a court may require a defendant to pay. ***The court may not impose discretionary costs when the defendant is indigent defined by RCW 10.101.010(3)(a) - (c)²⁹ or the defendant has a present or future inability to pay.³⁰***

Sanctions for Failure to Pay³¹

The court may not sanction a person for failing to pay LFOs unless the court finds that the failure to pay is willful.³² Failure to pay is "willful" if the offender has the current ability to pay but refuses to pay.³³ To determine whether an offender has the current ability to pay, the court will consider (1) the offender's income and assets, (2) the offender's basic living costs,³⁴ and (3) the offender's efforts to acquire additional resources.³⁵ If the defendant is indigent, the court must presume an inability to pay.³⁶ If the defendant is homeless, or mentally ill, failure to pay LFOs is not willful, and the court cannot sanction the offender.³⁷

If the court determines there was willful noncompliance, the court may order the offender to be confined for sixty days or less or other authorized sanctions per 9.94B.040(3)(a)(i).³⁸ If the court finds that the failure to pay was not willful, the court may modify the terms of the payment, reduce or waive non-restitution LFOs or convert the non-restitution LFOs to community restitution.³⁹ The VPA may not be reduced, waived, or converted to community restitution.⁴⁰ *See also WDA's practice advisories on probation violations and sanctions for failing to pay LFOs.*

Seeking Relief^{f41}

An individual can petition the court for relief from LFOs after sentencing. The court can reduce or convert discretionary LFOs if payment will impose a manifest hardship on the defendant or the defendant's family.⁴² The court can reduce restitution interest.⁴³

Practice Tips for Defenders

Objective: Advocate for sentencing orders that impose only the mandatory LFOs on indigent clients.

Pre-Sentencing Tips

(1) Establish Indigency

Early in representation, discuss the financial implications of a conviction with the client and determine your client's current and future ability or inability to pay discretionary LFOs.

Practice Tip! Use the Massachusetts' Institute of Technology (MIT) Living Wage Calculator (<http://livingwage.mit.edu/>) to compare your client's circumstances with cost of living and typical expenses in the county your client resides in. Also use the LFO Calculator (<http://beta.lfocalculator.org/>) to see how the court will approach imposing LFOs on your client.

(2) Plea Negotiations

When it will benefit your client, you can incorporate LFO issues and your client's ability to pay in plea negotiations. This may give you the opportunity to educate the prosecutor on your client's economic circumstances.

(3) Advising and Preparing the Client

Inform the client that the court will likely inquire about the client's indigence or ability to pay discretionary LFOs at sentencing. Reiterate that this inquiry is not an assessment of character but rather an attempt to prevent significant economic burdens in relation to the client's circumstances. Further advise the client that *you* will be advocating on his or her behalf based on the information gathered. Inform the client that, in your experience, the judge may try to question him or her directly about his or her economic circumstances.

Practice Tip! Help the client understand that you will make the case on his or her financial circumstances and if asked by the judge, respond with “No thank you, your honor, my attorney said it all” or “Your honor, I wish to have my attorney communicate with you regarding my financial circumstances, based upon the information I have provided him or her.”

Sentencing Tips

(1) Sentencing Memo and Defendant Declaration

In each case, counsel should submit an LFO sentencing memorandum and a declaration from your client outlining his or her financial circumstances.

(2) Making the Record and Advocacy at the Sentencing Hearing

The sentencing hearing is the best opportunity to establish your client’s statutory indigency or present or future inability to pay. Be prepared to articulate factors relevant to your client’s financial circumstances as documented in the sentencing memorandum and declaration. Tell the court if your client cannot work or if your client’s job prospects are substantially diminished due to lack of education, language barriers, and/or lengthy incarceration. Ask the court to consider important factors, such as other debts, including restitution and child support.⁴⁴

(3) Check the Judgment and Sentence (J&S)

A “check the box” form regarding the individual’s current and future ability to pay is not a sufficient inquiry into a defendant’s ability to pay discretionary costs.⁴⁵ Examine the J&S report closely to make sure the boxes checked and the fees imposed are valid and apply to the defendant. Often judges or clerks check boxes without looking at the defendant’s offense, and all the indicated LFOs may not apply. Also, check that the amounts ordered are actually the statutorily authorized amounts.

Practice Tip! A motion for post-judgment relief from interest on restitution may only be granted if the principle is paid. Upon payment to the court, restitution is paid before all other fines and costs. RCW 10.01.170(2)(a). Make sure the J&S reflects language that directs payments to apply to restitution before other costs.

(4) Advise the Client to Appeal

If the client is sentenced with discretionary LFOs and you have reason to believe they are indigent or an individualized inquiry did not take place, encourage the client to appeal.

Post-Sentencing Tips

(1) Appealing imposition of LFOs

Prior to the decision in *Blazina*, the prevailing view was that an appeal requesting relief from LFOs was not ripe until after the State began to collect the LFOs. The *Blazina* court rejected this ripeness argument.⁴⁶ An appellate court may use its discretion to review unpreserved claims of error.⁴⁷



Legal Financial Obligations (LFOs) in Superior Court Quick Table

Interest Rate	LFO Type	Purpose	Possible Modifications
12%	Restitution	To Make a Person Whole for Actual Injuries	Principal: Cannot waive or modify unless entity to whom restitution would be owed is an insurer or state entity.
			Interest: Can waive or reduce
	Costs	Court costs, cost of incarceration, cost of supervision, etc. *VPA cannot be reduced, waived, or converted	Principal: Issued at the court's discretion at sentencing. Will be waived if defendant is indigent. Can remit by showing a manifest hardship.
			No interest on non-restitution costs⁴⁸

0%	Fines	Class A felonies: \$0 - 50,000	Principal: Issued at the court's discretion at sentencing. Can remit by showing a manifest hardship.
		Class B felonies: \$0 - 20,000 Class C felonies: \$0 - 10,000	No Interest on Non-Restitution costs⁴⁹

¹ 11 U.S.C. 523(a)(7); State of Washington Dept. of Corrections policy [Policy DOC 200.380](#) (Restitution and other LFOs are non-dischargeable under Chapters 7 and 13 of the Bankruptcy Code).

² RCW 9A.20.021.

³ *State v. Clark*, 181 Wn.App. 369, 375 (2015) (“[A] fine is not a court cost subject to the strictures of RCW 10.01.160(3) and the trial court is not required to conduct an inquiry into the defendant’s ability to pay... nonetheless, we strongly urge trial judges to consider the defendant’s ability to pay before imposing fines. The barriers that LFOs impose on an offender’s reintegration to society are well documented in *Blazina* and should not be imposed lightly merely because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs.”)

⁴ *Id.*

⁵ 10.82.090(1).

⁶ RCW 10.01.160(2).

⁷ *Id.*

⁸ 10.82.090(1).

⁹ RCW 10.01.160(3).

¹⁰ RCW 10.101.010(3)(a)-(c); 125% of poverty rate amounts for 2018 are at this link: http://www.opd.wa.gov/documents/00531-2018_PovertyRate.pdf.

¹¹ RCW 10.01.160(3) (“The court *shall not* order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”) (*emphasis added*).

¹² *State v. Ramirez*, ___ Wn.2d ___ (95249-3) (September 30, 2018).

¹³ *State v. Blazina*. 182 Wn.2d at 839.

¹⁴ *Id.*

¹⁵ *State v. Ramirez*, ___ Wn.2d ___ (95249-3) (September 20, 2018).

¹⁶ *Id.*

¹⁷ See *State v. Johnson*, 179 Wn.2d 534 (2014).

¹⁸ *Id.*; GR 34.

¹⁹ *Seattle v. Fuller*, 177 Wn.2d 263 (2013).

²⁰ RCW 10.82.090(1).

²¹ RCW 10.82.090(2). Factors are:

(a) Whether the offender is indigent as defined in RCW 10.101.010(3) or general rule 34; (b) the offender's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other legal financial obligations; (c) whether the offender is homeless; and (d) whether the offender is mentally ill, as defined in RCW 71.24.025. The court shall also consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing interest on restitution.

²² RCW 10.82.090(3)(a)-(b); RCW 3.66.120(2).

²³ RCW 9.94A.750(3)(b); RCW 48.01.050.

²⁴ RCW 3.66.120(2).

²⁵ RCW 9.94A.753(5), RCW 7.68.035(1)(a); *State v. Curry*, 118 Wn.2d 911 (1992).

²⁶ RCW 43.43.7541.

²⁷ RCW 9A.88.120 (promoting prostitution); 9.68A.105 (commercial sex abuse of a minor) and 38.52.030 (DUI related).

²⁸ See RCW 9.94A.777 (2010) and the WDA Practice [Advisory Challenging LFOs – Reducing LFOs for a Client with Mental Impairment](#); RCW 7.68.035; RCW 9.94B.040(4)(f).

²⁹ RCW 10.01.160(3).

³⁰ *State v. Blazina*, 182 Wn.2d 827, 839 (2015).

³¹ *State v. Bigsby*, 189 Wn.2d 210, 221 (2017) (“[RCW 9.94B.040] applies only to crimes committed prior to July 1, 2000.”); RCW 9.94A.6333.

³² RCW 9.94B.040(4)(c); RCW 9.94A.6333(3)(a).

³³ RCW 9.94B.040(4)(c); RCW 9.94A.6333(3)(c).

³⁴ RCW 10.101.010 (2)(d) (“Basic living costs’ means the average monthly amount spent by the defendant for reasonable payments toward living costs such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.”).

³⁵ RCW 9.94B.040(4)(c); RCW 9.94A.6333(3)(c).

³⁶ RCW 9.94B.040(4)(d); RCW 9.94A.6333(3)(c).

³⁷ RCW 9.94B.040(4)(d); RCW 9.94A.6333(3)(d).

³⁸ RCW 9.94B.040(4)(e); RCW 9.94A.6333(3)(f).

³⁹ RCW 9.94B.040(4)(f); RCW 9.94A.6333(3)(f).

⁴⁰ *Id.*

⁴¹ See *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992), which delineates “the salient features of a constitutionally permissible costs and fees structure.” The following requirements must be met: (1) Repayment must not be mandatory; (2) Repayment may be imposed only on convicted defendants; (3) Repayment may only be ordered if the defendant is or will be able to pay; (4) The financial resources of the defendant must be taken into account; (5) A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end; (6) The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;

The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

⁴² RCW 10.01.160(4), RCW 9.94A.6333(2)(c)(iii), (d), 9.94B.040. *Sorrell*, 2 Wn.App.2d at 179.

⁴³ RCW 10.82.090.

⁴⁴ *Blazina*, 182 Wn.2d at 838.

⁴⁵ *Blazina*, 182 Wn.2d at 838. (“[T]he court must do more than sign a judgment and sentence with boilerplate language stating it engaged in the required inquiry”).

⁴⁶ *State v. Lyle*, 188 Wn.App. 848, 852 (2015).

⁴⁷ *Id.*

⁴⁸ RCW 10.82.090.

⁴⁹ *Id.*

Failure to Pay Felony LFOs: Finding Violations, Sanctions and Relief

Introduction

This practice advisory explains the constitutional and statutory law related to failure to pay LFOs imposed pursuant to a felony.

Constitution and Sanctions for Failure to Pay LFOs

A court violates equal protection when it automatically converts unpaid legal financial obligations (LFOs) to a jail sentence solely because the defendant is indigent and lacks the ability to pay.¹ Likewise, the court may not revoke probation because of a defendant's inability to pay LFOs.² Therefore, the court must inquire into the defendant's reason for nonpayment before it can impose sanctions.³ If only the United States Constitution protects the defendant from imprisonment, the defendant has the burden of showing the failure to pay is not willful.⁴ However, Washington statutes provide additional protections in some cases. A defendant has a right to counsel when facing sanctions for not paying LFOs.⁵

Failure to Pay Following Felony Convictions

The court may modify or impose punishment if a defendant violates a condition of a sentence by failing to pay LFOs.⁶ While the procedure for sanctioning a defender varies depending on the time of the offense,⁷ the court will almost always determine whether the defendant willfully failed to pay LFOs.

Procedures Based on Date of Offense

(1) Offenses before July 1, 2000⁸

The Department of Corrections ("department") and the defendant may enter into a stipulated agreement that failure to pay is willful noncompliance. The court may approve or modify that agreement.⁹ The department sanctions defendants with stipulated agreements. If there is not an approved agreement with the department, the court will determine whether the defendant willfully failed to pay LFOs.¹⁰

(2) Offenses after July 1, 2000¹¹

If a defendant fails to pay LFOs, the court will hold a hearing and consider whether to punish the defendant.¹²

Determining Ability to Pay for all Felony Offenses

The court may not sanction defendants for failure to pay LFOs unless the court finds at a hearing that the failure to pay is "willful."¹³ A failure to pay is "willful" if the defendant has the ability to pay but refuses to pay.¹⁴ In determining the defendant's ability to pay, the court will inquire and consider the defendant's income and assets, the defendant's basic living costs¹⁵ and other liabilities,¹⁶ and the defendant's bona fide efforts to acquire additional resources.¹⁷ A defendant who is indigent per RCW 10.101.010(3)(a)-(c) is presumed to lack the current ability to pay and cannot willfully fail to pay.¹⁸ The

court cannot impose sanctions for willful failure to pay on a person the court finds to be homeless or to have a mental illness.¹⁹

Sanctions and Relief

Upon a Finding that the Default is Willful

If the court finds that there is a willful failure to pay, the court may order confinement for a period not to exceed 60 days for each violation. The court may order, as an alternative to confinement, other sanctions such as community service and electronic monitoring.²⁰

Upon a Finding that the Default is Not Willful

If the court finds that the failure to pay is not willful, the court may modify the defendant's obligation to pay non-restitution LFOs.²¹ If the court finds that the defendant is indigent per RCW 10.101.010(3)(a)-(c), the court must modify the defendant's obligation to pay non-restitution LFOs.²² The court may adjust the terms of payment, reduce or waive non-restitution LFOs, or convert non-restitution LFOs to community service.²³ The court may not reduce, waive, or convert the defendant's obligation to pay the crime victim penalty assessment.²⁴

¹ *Tate v. Short*, 401 U.S. 395, 398 (1971); *State v. Curry*, 118 Wn.2d 911, 915 (1992).

² *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

³ *State v. Nason*, 168 Wash.2d 926, 945 (2010).

⁴ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112 (2002).

⁵ *Id.* at 112-13.

⁶ RCW 9.94B.040(1).

⁷ *State v. Bigsby*, 189 Wn.2d 210, 221 (2017) (“[RCW 9.94B.040] applies only to crimes committed prior to July 1, 2000.”); RCW 9.94A.6333.

⁸ RCW 9.94B.040.

⁹ RCW 9.94B.040(4)(a).

¹⁰ RCW 9.94B.040(4)(b); RCW 9.94A.6333(3)(a).

¹¹ RCW 9.94A.6333.

¹² RCW 9.94A.6333(3)(a).

¹³ RCW 9.94B.040(4)(b); RCW 9.94A.6333(3)(c).

¹⁴ RCW 9.94B.040(4)(c); RCW 9.94A.6333(3)(c).

¹⁵ RCW 10.101.010(d) (“‘Basic living costs’ means the average monthly amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.”).

¹⁶ RCW 9.94B.040(4)(c)(ii) and RCW 9.94A.6333(3)(c)(ii) (“... including child support and other legal financial obligations...”).

¹⁷ RCW 9.94B.040(4)(c); RCW 9.94A.6333(3)(c)(iii).

¹⁸ *Id.*; RCW 10.101.010(3)(a)-(c) (A person is indigent when the person is receiving public assistance, such as TANF, disability, food stamps, or Social Security, or the person is involuntarily committed to a public mental health facility, or the person receives a net income of 125% or less of the current federally established poverty level.).

2018 Income at or below 125% of the federal poverty level figures: \$15175 for individuals, \$20,575 for a family of 2, \$25,975 for a family of 3, \$31, 375 for a family of 4, \$36,775 for a family of 5, \$42,175 for a family of 6.

http://www.opd.wa.gov/documents/00531-2018_PovertyRate.pdf.

¹⁹ RCW 9.94B.040(4)(d); RCW 9.94A.6333(4)(d); see RCW 71.24.025 for definitions on persons who are mentally ill.

²⁰ RCW 9.94B.040(4)(e); RCW 9.94B.040(3)(a)(i) (... sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or

counseling sessions, supervision enhanced through electronic monitoring, jail time, or other sanctions available in the community.”); RCW 9.94A.633(1)(a)-(b).

²¹ RCW 9.94B.040(4)(f); RCW. 9.94A.6333(3)(f).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

WA State Superior Courts: 2018 Reference Guide on Legal Financial Obligations (LFOs)

**Disclaimer: Check statutory and case law cites to confirm law is current*

Imposing LFOs at Sentencing

LFOs include restitution, fees, fines, assessments, and costs imposed as part of a criminal judgment upon conviction. In some cases, costs may be imposed for pretrial supervision. State law authorizes both mandatory and discretionary LFOs, and each statute may differ in setting standards for imposition and waiver:

- **Mandatory LFOs** shall be imposed in every case or for every conviction for a certain type of offense regardless of the defendant's ability to pay (although some mandatory LFOs can be partially waived);
- **Discretionary LFOs** may be imposed or waived at the court's discretion.

Mandatory LFOs Include:

- **Victim Penalty Assessment (VPA):** \$500 for each case that includes one or more felony or gross misdemeanor convictions; \$250 for each case that includes misdemeanor convictions. *RCW 7.68.035*.
- **DNA Collection Fee:** The first sentence imposed in a defendant's lifetime for a crime specified in *RCW 43.43.754* must include a fee of \$100. *RCW 43.43.7541*; *but see RCW 9.94A.777* (not mandatory for defendants with mental health conditions).
- **Restitution:** Shall be ordered whenever a felony offense results in injury to any person or damage to or loss of property, unless extraordinary circumstances make restitution inappropriate. *RCW 9.94A.753(5)*; *but see RCW 9.92.060(2)(b)* and *City of Seattle v. Fuller*, 177 Wn.2d 263 (2013) (restitution discretionary for misdemeanors).
- **Crime-Specific LFOs:** Some LFOs are mandatory based on the type of offense. *See, e.g., RCW 9.68A.105* (requiring court to impose fee assessments for convictions for commercial sex abuse of a minor related offenses, *although* 2/3 of assessment may be waived if court finds, on the record, that the defendant lacks the ability to pay); *but see RCW 9.94A.777* (court must determine person with mental health condition has means to pay even mandatory LFOs, except for VPA and restitution).

Discretionary Costs are expenses specially incurred by the state in prosecuting the defendant or in administering pretrial supervision. *RCW 10.01.160*. These include, but are not limited to jury fees and costs of incarceration.

Caps for Certain Costs: Pretrial supervision (other than alcohol and drug monitoring) (\$150); warrants for failure to appear (\$100); costs of incarceration (actual cost – no more than \$100 per day). *RCW 10.01.160(2)*.

Imposing Costs: The court shall not impose costs, including the cost of incarceration, if the defendant is indigent at the time of sentencing. *RCW 10.01.160(3)*; *9.94A.760(3)*. "Courts should also look to the comment

in . . . GR 34 for guidance" to determine a defendant's ability to pay costs. *State v. Blazina*, 182 Wn.2d 827, 839 (2015). A court should "seriously question the ability to pay LFOs" if a defendant meets the GR 34 standard for indigence. *Id.* In determining the amount and method of payment for costs for defendants who are not indigent, the court shall consider the financial resources of the defendant and the nature of the burden that payment of costs will impose. *RCW 10.01.160(3)*. This includes consideration of factors such as incarceration and a defendant's other debts. *Blazina*, 182 Wn.2d at 838.

Time Payments of LFOs are required if the defendant is indigent. *RCW 10.01.170(1)*.

Imposing LFOs on Defendants with Mental Health Conditions: Before imposing any LFOs other than restitution or the VPA, the court must find that a defendant with a "mental health condition" has the means to pay the additional sums. *RCW 9.94A.777*.

Imposing Fines: Fines are generally discretionary. Some fines are mandatory but can be waived in full or in part on a finding of indigence. *See, e.g., RCW 69.50.430(1)* (fines for VUCSA offenses mandatory unless court finds indigence); *RCW 69.50.401(2)(b)* (court may impose fines for convictions for manufacture, possession, or delivery of amphetamines, \$3000 of which may not be suspended). Trial judges are strongly urged to consider a defendant's ability to pay before imposing fines. *State v. Clark*, 191 Wn. App. 369, 376 (2015).

Collection of LFOs

Monthly Payment Schedules: A monthly payment towards LFOs is a condition of sentence. *RCW 9.94A.760(11)*. The schedule can be set by (1) the court at sentencing, (2) DOC (if the person is on active supervision with DOC), or (3) the county clerk's office. *RCW 9.94A.760(1)*.

Persons Receiving Social Security Disability: Federal law prohibits courts from ordering defendants to pay LFOs if the person's sole source of income is social security disability benefits. *City of Richland v. Wakefield*, 186 Wn.2d 596, 609 (2016); 42 U.S.C. § 407(a).

Sanctions for Non-Payment

Requirement to Pay: The court may issue a summons or a warrant to guarantee the appearance of a defendant who has failed to pay. *RCW 9.94A.6333(3)(a)*; *9.94B.040(4)(b)*. The better practice may be to issue a summons for non-payment and a warrant upon any failure to appear. If using contempt procedures, the court must find that a person is in *willful* default prior to the issuance of a warrant: "A defendant sentenced to pay any fine, penalty, assessment, fee

or costs who willfully defaults in the payment thereof or of any installment is in contempt of court as provided in chapter 7.21 RCW.” *RCW 10.01.180(1)*. “The court may issue a warrant of arrest for his or her appearance.” *Id.*

Right to Counsel: Whenever a modification of sentence may result in jail, an indigent defendant has a right to appointed counsel at public expense. *State v. Stone*, 165 Wn. App. 796, 814-15 (2012).

Factors Court Must Consider Before Jailing a Defendant for Failure to Pay: A defendant may not be sanctioned for non-payment unless the court finds that the failure to pay is willful. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). This applies to all LFO debt, whether mandatory or discretionary. Failure to pay is willful if the individual has the current ability to pay but refuses to do so. *RCW 9.94A.6333(3)(c)*. An individual who is indigent as defined by *RCW 10.101.010(3)(a)-(c)* is presumed to lack the current ability to pay. *Id.*; *9.94B.040(4)(c)*. If the court finds the defendant is homeless or mentally ill, it cannot sanction the defendant for willful noncompliance. *RCW 9.94A.6333(3)(d)*; *9.94B.040(4)(d)*.

Burden of Proof: The state must show noncompliance by a preponderance of the evidence. *RCW 9.94A.6333(3)(b)*; *9.94B.040(4)(c)*. The court must determine, after a hearing and on the record, whether the failure to pay is willful, considering the defendant’s income and assets, basic living costs, other liabilities including child support and other LFOs, and bona fide efforts to acquire additional resources. *RCW 9.94A.6333(3)(c)*; *9.94B.040(4)(c)*.

Incarceration for Failure to Pay: Persons incarcerated for contempt for willful non-payment of LFOs receive credit towards the LFOs for each day served at the rate specified by the court in the commitment order. *RCW 10.01.180(4)*. Persons incarcerated for willful non-payment of felony LFOs have violated a condition of sentence and do not receive credit toward LFOs. *State v. Nason*, 168 Wn.2d 936, 946-47 (2010). These individuals may be sanctioned by the court with up to 60 days’ confinement for each violation or by DOC with up to 30 days’ confinement as provided in *RCW 9.94A.737*. *RCW 9.94A.633(1)*. Alternatives to incarceration may also be ordered. *Id.*

Post-Sentencing Relief

Interest Relief: As of June 7, 2018, interest shall not accrue on non-restitution LFOs. *RCW 10.82.090(1)*. Upon release from total confinement, a defendant may petition for waiver of non-restitution interest that accrued before the effective date, and the court shall grant the motion. *RCW 10.82.090(2)(a)*. The statute only applies to adult offenders. *RCW 10.82.090(3)*.

Remission of Discretionary and Appellate Costs: After release from total confinement, a defendant who is not in contumacious default may petition for remission of costs. If the court is satisfied that payment would impose manifest hardship on the defendant or the defendant’s immediate

family, the court may remit all or part of the costs, modify the method of payment under *RCW 10.01.170*, or convert unpaid costs to community restitution hours (if the jurisdiction operates a community restitution program) at no less than the state minimum wage for each hour of community restitution. Manifest hardship exists where the defendant is indigent as defined in *RCW 10.10.010(3)(a)-(c)*. *RCW 10.01.160(4)*; *10.73.160(4)*. Courts can and should use GR 34 as a guide for determining whether someone can pay costs. *Wakefield*, 186 Wn.2d at 606. If a person has no present or future ability to pay amounts that will satisfy his or her LFOs, remission in accordance with *RCW 10.01.160(4)* is a more appropriate and just option. *Id.* at 607.

Other Options for Conversion, Modification, Waiver:

- If the court finds that a violation for failure to pay was not willful, it may (1) modify the terms of payment, (2) reduce or waive non-restitution LFOs, or (3) convert the non-restitution LFOs to community restitution at a rate of no less than the state minimum wage. *RCW 9.94A.6333(3)(f)*; *9.94B.040(4)(f)*. If the court finds that the violation was not willful and the defendant is indigent as defined in *RCW 10.101.010(3)(a)-(c)*, it shall address the LFOs through one of the above listed options. *Id.*
- The VPA shall not be waived, modified, or converted to community restitution hours. *Id.*

Determining Indigence

RCW 10.101.010(3)(a)-(c) is used to define indigence. Under that statute, a person is indigent if he or she:

- **Currently receives benefits from TANF**, aged, blind or disabled assistance, medical care services, pregnant woman assistance, SSI, federal poverty-related veterans’ benefits, refugee resettlement, Medicaid or food stamps; or
- **Is involuntarily committed** to a public mental health facility; or
- **Has income at or below 125% of the federal poverty level (FPL)**, which for 2018 is:
 - \$15,175 for individuals
 - \$20,575 for a family of 2
 - \$25,975 for a family of 3
 - \$31,375 for a family of 4
 - \$36,775 for a family of 5
 - \$42,175 for a family of 6

For updates to the FPL, visit:
opd.wa.gov/documents/00531-2018_PovertyRate.pdf



**Provided by the Washington State Supreme Court
Minority and Justice Commission
June 2018**

Practice Tips for Challenging Legal Financial Obligations (LFOs) in Courts of Limited Jurisdiction

Introduction

Legal Financial Obligations (LFOs) are financial obligations that a defendant owes upon a criminal conviction. LFOs consist of restitution, fines, and fees. There are mandatory LFOs, which a court cannot waive and discretionary LFOs, which a court has the authority to waive. LFOs may be a significant burden on a defendant post-conviction, especially if the defendant is unable to pay. LFOs cannot be discharged in bankruptcy.¹ This advisory will define the types of LFOs and discuss best practices for effectively challenging imposition of LFOs. Another WDA resource is a sample motion for Challenging LFOs in Courts of Limited Jurisdiction in WDA’s brief bank.

Fines, Costs, and Restitution

Fines

A fine is a monetary penalty.² Unlike costs, fines are meant to punish an offender rather than to recoup court administrative costs. The court has the discretion to impose fines when sentencing a defendant. Sentencing courts are encouraged, but not required, to make an inquiry into the defendant’s ability to pay before imposing fines.³

Costs

Costs are expenses incurred in prosecuting the defendant or administering the deferred prosecution program or pretrial supervision.⁴ Costs may include warrant service costs, jury fees, and incarceration costs.⁵ Costs cannot accrue interest upon sentencing.⁶

(1) Statutory Indigency

The court cannot impose costs if the defendant is indigent as defined in RCW 10.101.010(3)(a)-(c).⁷ A person is indigent when the person is receiving public assistance, such as TANF, disability, food stamps, or Social Security, or the person is involuntarily committed to a public mental health facility, or the person receives a net income of 125% or less of the current federally established poverty level.⁸ If the defendant is indigent at the time of sentencing, the court cannot impose discretionary costs.⁹ The statutes that set out these rules apply prospectively to all cases not yet final as of June 7, 2018.¹⁰

2018 125% of Federal Poverty Level Income	
Individuals	\$15,175
Family of (2)	\$20,575
Family of (3)	\$25,975
Family of (4)	\$31,375
Family of (5)	\$36,775
Family of (6)	\$42,175

(2) Present or Future Ability to Pay

Even if the defendant is not indigent as defined by RCW 10.101.010(3)(a)-(c), the court must make an individualized inquiry on the defendant’s present and future ability to pay costs.¹¹ *Blazina* and RCW 10.01.160(3) “[r]equire the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”¹² Such an inquiry must include an examination of the defendant’s employment history, income, assets and other resources, monthly living expenses and other debts, including outstanding LFOs from other cases.¹³ An appellate court will consider the adequacy of an inquiry

into ability to pay de novo.¹⁴ The court may consider equity interest in real estate as part of the defendant's available funds for restitution.¹⁵ The *Blazina* court recommends that the sentencing court use the comment to GR 34 as a guide in determining whether a defendant lacks a present or future ability to pay.¹⁶

Restitution

Restitution is a monetary sum the court orders the defendant to pay to restore costs to the victim.¹⁷ Restitution is discretionary as evidenced by the word "may" in the statutes giving courts of limited jurisdiction authority to impose restitution.¹⁸ Additionally, statutes specifically say restitution is not mandatory if a person does not have the current or likely future ability to pay and restitution would be owed to an insurer or state agency.¹⁹

Interest

Penalties, fines, fees, and costs may accrue an annual interest of 12% only when assigned to a collection agency.²⁰ Interest on restitution only accrues upon assignment to a collection agency in most counties.

Mandatory and Discretionary LFOs

Mandatory LFOs

Mandatory LFOs are fees that the court must impose without consideration of the defendant's financial circumstances. The DNA Database Collection fee is a mandatory LFO.²¹ Every sentence imposed for a crime specified in RCW 43.43.754(1) includes a \$100 DNA Database Collection fee unless the state has previously collected the offender's DNA as a result of a prior conviction.²² There are additional offense specific fees that are mandatory.²³

Discretionary LFOs

Discretionary LFOs are any remaining fines, fees, and costs that the court may consider imposing. The court may not impose the \$43 conviction fee if a defendant is indigent as defined in RCW 10.101.010(3)(a)-(c).²⁴ Restitution for misdemeanors is discretionary.²⁵ All DUI fines, costs, and fees are discretionary LFOs that the court may waive due to a defendant's indigence.²⁶ ***The court may not impose discretionary costs when the defendant is indigent defined by RCW 10.101.010(3)(a) - (c)²⁷ or the defendant has a present or future inability to pay.***²⁸

Sanctions for Failure to Pay

Contempt of Court

The court may find a person is in contempt for failing to pay LFOs unless the court finds that the failure to pay is willful.²⁹ Failure to pay is "willful" if the offender has the current ability to pay but refuses to pay.³⁰ To determine whether an offender has the current ability to pay, the court will consider (1) the offender's income and assets, (2) the offender's basic living costs, and (3) the offender's efforts to acquire additional resources.³¹ If the defendant is indigent, the court must presume an inability to pay.³² If the defendant is homeless, or mentally ill, failure to pay LFOs is not willful, and the court cannot sanction the offender.³³ If the court determines there was willful noncompliance, the court may order the offender to be confined.³⁴ If the court finds that the failure to pay was not willful, the court may modify the terms of the payment, reduce or waive non-restitution LFOs or convert the non-restitution LFOs to community restitution.³⁵

Probation Violations

While it may help your client to argue that the protections in RCW 10.01.180 apply in a probation violation hearing, it is possible that only constitutional protections apply. A court violates equal protection when it automatically converts unpaid legal financial obligations to a jail sentence solely because the defendant is indigent and lacks the ability to pay.¹ Likewise, the court may not revoke probation because of a defendant's inability to pay LFOs.² Therefore, the court must inquire into the defendant's reason for nonpayment before it can impose sanctions.³ The defendant has the burden of showing the failure to pay is not willful.⁴

See also WDA's practice advisories on sentence violations and sanctions for failing to pay LFOs.

Seeking Relief

An individual may request a hearing to petition the court for relief from LFOs post-sentencing. The court can reduce or covert LFOs, except restitution, if payment will impose a manifest hardship on the defendant or the defendant's family.³⁶

Practice Tips for Defenders

Objective: Advocate for sentencing orders that impose only the mandatory LFOs on indigent clients.

Pre-Sentencing Tips

(1) Establish Indigency

Early in representation discuss the financial implications of a conviction with the client and determine your client's current and future ability or inability to pay discretionary LFOs.

Practice Tip! Use the Massachusetts' Institute of Technology (MIT) Living Wage Calculator (<http://livingwage.mit.edu/>) to compare your client's circumstances with cost of living and typical expenses in the county your client resides in. Also use the LFO Calculator (<http://beta.lfocalculator.org/>) to see how the court will approach imposing LFOs on your client.

(2) Plea Negotiations

When it will benefit your client, you can incorporate LFO issues and your client's ability to pay in plea negotiations. This may give you the opportunity to educate the prosecutor on your client's economic circumstances.

¹ *Tate v. Short*, 401 U.S. 395, 398 (1971); *State v. Curry*, 118 Wn.2d 911, 915 (1992).

² *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

³ *State v. Nason*, 168 Wash.2d 926, 945 (2010).

⁴ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112 (2002).

(3) Advising and Preparing the Client

Inform the client that the court will likely inquire about the client's indigence or ability to pay LFOs at sentencing. Reiterate that this inquiry is not an assessment of character, but rather an attempt to prevent significant economic burdens in relation to the client's circumstances. Further advise the client that *you* will be advocating on his or her behalf based on the information gathered. Inform the client that, in your experience, the judge may try to question him or her directly about his or her economic circumstances.

Practice Tip! *Help the client understand that you will make the case on his or her financial circumstances and if asked by the judge, respond with "No thank you, your honor, my attorney said it all" or "Your honor, I wish to have my attorney communicate with you regarding my financial circumstances, based upon the information I have provided him or her."*

Sentencing Tips

(1) Sentencing Memo and Defendant Declaration

In each case, counsel should submit an LFO sentencing memorandum and a declaration from your client outlining his or her financial circumstances.

(2) Making the Record and Advocacy at the Sentencing Hearing

The sentencing hearing is the best opportunity to establish your client's statutory indigency or present or future inability to pay. Be prepared to articulate factors relevant to your client's financial circumstances as documented in the sentencing memorandum and declaration. Tell the court if your client cannot work or if your client's job prospects are substantially diminished due to lack of education, language barriers, and/or lengthy incarceration. Ask the court to consider important factors, such as other debts, including restitution and child support.³⁷

(3) Converting Costs to Community Service

Counsel should oppose any attempt to impose community service in lieu of LFOs on clients determined to be indigent. A trial court may only impose statutorily authorized sentences³⁸ and most statutes that authorize LFOs do not contain provisions allowing courts of limited jurisdiction to convert LFOs to community service.³⁹ In addition, community service requirements are often bars to reentry and difficult or impossible for indigent defendants to meet.⁴⁰

(4) Check the Judgment and Sentence (J&S)

A "check the box" form regarding the individual's current and future ability to pay is not a sufficient inquiry into a defendant's ability to pay discretionary LFOs.⁴¹ Examine the J&S closely to make sure that the box is checked and the fees imposed are valid and apply to the defendant. Often judges or clerks check boxes without looking at the defendant's offense and all the indicated LFOs may not apply. Also, check that the amounts ordered are actually the statutorily authorized amounts.

(5) Advise the Client to Appeal

If the client is sentenced with discretionary LFOs and you have reason to believe they are indigent or an individualized inquiry did not take place, encourage the client to appeal. See WDA advisory on RALJ appeals and LFOs.

Post-Sentencing Tips

(1) Appeal Imposition of LFOs

The traditional view was that relief for LFOs was not available until after the state began to collect LFOs. The *Blazina* court rejects this view; an appeal of LFOs may be proper before collection begins.⁴²

Legal Financial Obligations (LFOs) in Courts of Limited Jurisdiction Quick Table

Interest	LFO Type	Purpose	Possible Modifications
12% <i>only</i> upon assignment to a collection agency due to nonpayment	Restitution	To Make a Person Whole for Actual Injuries	Principal: Issued at the court’s discretion at sentencing. Can remit by showing a manifest hardship.
			Interest: Accrues only upon assignment to a collection agency.
	Costs	Court costs, cost of incarceration, cost of supervision, etc.	Principal: Issued at the court’s discretion at sentencing. Will be waived if the defendant is indigent or has a current or future inability to pay. Can remit by showing a manifest hardship.
			Interest: Accrues only upon assignment to a collection agency.
	Fines	Penalty for Offense	Principal: Issued at the court’s discretion at sentencing. Will be waived if the defendant is indigent or has a current or future inability to pay. Can remit by showing a manifest hardship.
			Interest: Accrues only upon assignment to a collection agency.

¹ 11 U.S.C. 523(a)(7); State of Washington Dept. of Corrections policy [Policy DOC 200.380](#) (Restitution and other LFOs are non-dischargeable under Chapters 7 and 13 of the Bankruptcy Code).

² RCW 9A.20.021.

³ *State v. Clark*, 191 Wn.App. 369, 375 (2015) (“[A] fine is not a court cost subject to the strictures of RCW 10.01.160(3) and the trial court is not required to conduct an inquiry into the defendant’s ability to pay... nonetheless, we strongly urge trial judges to consider the defendant’s ability to pay before imposing fines. The barriers that LFOs impose on an offender’s reintegration to society are well documented in *Blazina* and should not be imposed lightly merely because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs.”)

⁴ RCW 10.01.160(2).

⁵ *Id.*

⁶ 10.82.090(1).

⁷ RCW 10.01.160(3).

⁸ RCW 10.101.010(3)(a)-(c); 2018 amounts for 125% of the federal poverty level are at this link: http://www.opd.wa.gov/documents/00531-2018_PovertyRate.pdf.

⁹ RCW 10.01.160(3) (“The court *shall not* order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”) (*emphasis added*).

¹⁰ *State v. Ramirez*, ___ Wn.2d ___ (95249-3) (September 20, 2018).

¹¹ *State v. Blazina*. 182 Wn.2d at 839.

¹² *Id.*

¹³ *State v. Ramirez*, ___ Wn.2d ___ (95249-3) (September 20, 2018).

¹⁴ *Id.*

¹⁵ See *State v. Johnson*, 179 Wn.2d 534 (2014).

¹⁶ *Id.*; GR 34.

¹⁷ RCW 3.66.120; *Seattle v. Fuller*, 177 Wn.2d 263 (2013).

¹⁸ RCW 9.92.060(2) (“the superior court *may* require the convicted person to make such monetary payments on such terms as the superior court deems appropriate under the circumstances... to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime...” (*emphasis added*)); RCW 9.95.210(2); RCW 3.66.010; *Fuller*, 177 Wash.2d at 279 (“... [T]he bill report for RCW 3.66.120 and RCW 3.66.130 recognized that ‘a court of limited jurisdiction *may* order that the offender pay restitution to the victim’...” (*emphasis added*)).

¹⁹ RCW 3.66.120; RCW 9.92.060(3)

²⁰ RCW 3.62.020(a)-(b) (interest may not accrue for penalties, fees, fines, bail forfeitures, and costs imposed during a criminal proceeding.)

²¹ RCW 43.43.754(1)(a).

²² RCW 43.43.7541.

²³ RCW 9A.88.120 (promoting prostitution); 9.68A.105 (commercial sex abuse of a minor); RCW 38.52.030 (DUI related); RCW 46.63.110(7) (traffic infraction fees); RCW 10.99.080 (penalty assessment for domestic violence); RCW 3.62.090 (public safety and education assessment).

²⁴ RCW 3.62.085.

²⁵ RCW 9.92.060; RCW 9.95.210; RCW 9A.20.030; *Seattle v. Fuller*, 177 Wn.2d 263 (2013).

²⁶ RCW 46.61.5055(1)(a)(ii); RCW 3.62.090(1); RCW 46.61.5054(1)(a); RCW 46.64.055; RCW 3.62.090(1); RCW 3.62.090(2).

²⁷ RCW 10.01.160(3).

²⁸ *State v. Blazina*, 182 Wn.2d 827, 839 (2015).

²⁹ RCW 10.01.180.

³⁰ RCW 10.01.180(3)(a).

³¹ RCW 10.01.180(3)(b).

³² RCW 10.01.180(3)(b)-(c).

³³ *Id.*

³⁴ RCW 10.01.180(4) (“If a term of imprisonment for contempt for nonpayment of any fine, penalty, assessment, fine, or costs is ordered, the term of imprisonment shall be set forth in the commitment order, and shall not exceed one day for each twenty-five dollars of the amount ordered, thirty days if the amount ordered of costs was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of any fine, penalty, assessment, fee or costs shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.”).

³⁵ RCW 10.01.180(5).

³⁶ RCW 10.01.160(4); RCW 9.94A.6333(2)(c)(iii)-(d); 9.94B.040.

³⁷ *Blazina*, 182 Wn.2d at 838.

³⁸ *State v. Paulson*, 131 Wn.App. 579 (2006).

³⁹ Other than Title 46 criminal justice penalty I RCW 46.64.055(1), no statutory authority exists authorizing a court of limited jurisdiction to convert LFOs to community restitution or community service.

⁴⁰ *Blazina*, 182 Wash.2d at 835 (“These problems [with LFOs] include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration).

⁴¹ *Blazina*, 182 Wn.2d at 838 (“[T]he court must do more than sign a judgment and sentence with boilerplate language stating it engaged in the required inquiry.”).

⁴² *Blazina*, 182 Wn.2d at 832-833 n.1.

Failure to Pay Misdemeanor LFOs: Finding Violations, Sanctions and Relief

Introduction

This practice advisory explains the constitutional and statutory law related to determining if punishment is allowed for failure to pay LFOs imposed pursuant to a misdemeanor conviction and what sanctions and relief are available following a failure to pay.

Constitution and Sanctions for Failure to Pay LFOs

A court violates equal protection when it automatically converts unpaid legal financial obligations (LFOs) to a jail sentence solely because the defendant is indigent and lacks the ability to pay.¹ Likewise, the court may not revoke probation because of a defendant's inability to pay LFOs.² Therefore, the court must inquire into the defendant's reason for nonpayment before it can impose sanctions.³ If only the United States Constitution protects the defendant from imprisonment, the defendant has the burden of showing the failure to pay is not willful.⁴ However, Washington statutes provide additional protections in some cases. A defendant has a right to counsel when facing sanctions for not paying LFOs.⁵

Failure to Pay Following Misdemeanor Conviction

Contempt of Court

If the court is sanctioning a defendant for failure to pay LFOs through a contempt proceeding, the court must determine whether the defendant is willfully failing to pay.⁶ Factors the court will consider include the defendant's income and assets, the defendant's basic living costs⁷ and other liabilities,⁸ and the defendant's bona fide efforts to acquire additional resources.⁹ A defendant who is indigent per RCW 10.101.010(3)(a)-(c) is presumed to lack the current ability to pay and cannot willfully fail to pay.¹⁰ The court cannot impose sanctions for willful failure to pay on a person the court finds to be homeless or to have a mental illness.¹¹

Probation Violation

While it may help your client to argue that the protections in RCW 10.01.180 apply to a probation violation hearing, it is possible that only constitutional protections apply. As explained above, the United States Constitution prohibits sanctioning a defendant for a failure to pay LFOs that is not willful.

Sanctions and Relief

Upon a Finding that the Default is Willful

(1) Contempt of Court

The court may impose sanctions against defendants who fail to pay LFOs through contempt proceedings.¹² The court may order a term of imprisonment for contempt by willful nonpayment of any fine, penalty, assessment, fee, or costs ordered.¹³ The commitment order shall not exceed one day for each \$25 of the amount ordered, thirty days if the court imposed the LFOs pursuant to a misdemeanor conviction, or one year in any other case, whichever is the

shorter period.¹⁴ A court must give a person incarcerated for nonpayment credit toward payment for each day of imprisonment at a rate specified in the commitment order.¹⁵

(2) Probation Violation

While it may help your client to argue that the protections in RCW 10.01.180 apply to a probation violation hearing, it is possible that only constitutional protections apply. A court violates equal protection when it automatically converts unpaid legal financial obligations (LFOs) to a jail sentence solely because the defendant is indigent and lacks the ability to pay.¹⁶ Likewise, the court may not revoke probation because of a defendant's inability to pay LFOs.¹⁷ Therefore, the court must inquire into the defendant's reason for nonpayment before it can impose sanctions.¹⁸ The defendant has the burden of showing the failure to pay is not willful.¹⁹

Upon a Finding that the Default is not Willful

If the court finds that the failure to pay is not willful, the court may enter an order to modify the defendant's obligation to pay.²⁰ If the court finds that defendant is indigent per RCW 10.101.010(3)(a)-(c), the court must modify the defendant's obligation to pay.²¹ The court has a variety of options that adjust the defendant's responsibility to pay LFOs, including allowing the defendant additional time to pay, reducing the monthly payment amount, revoking the unpaid costs in whole or in part, or converting the unpaid costs to community service hours.²²

¹ *Tate v. Short*, 401 U.S. 395, 398 (1971); *State v. Curry*, 118 Wn.2d 911, 915 (1992).

² *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

³ *State v. Nason*, 168 Wash.2d 926, 945 (2010).

⁴ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112 (2002).

⁵ *Id.* at 112-13.

⁶ RCW 10.01.180(3)(b).

⁷ RCW 10.101.010(d) (“Basic living costs’ means the average monthly amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.”).

⁸ RCW 10.01.180(3)(b) (“... including child support and other legal financial obligations.”)

⁹ *Id.*

¹⁰ *Id.*; RCW 10.101.010(3)(a)-(c) (A person is indigent when the person is receiving public assistance, such as TANF, disability, food stamps, or Social Security, or the person is involuntarily committed to a public mental health facility, or the person receives a net income of 125% or less of the current federally established poverty level).

¹¹ RCW 10.01.180(3)(c); see RCW 71.24.025 for definitions on persons who are mentally ill.

¹² RCW 10.01.180.

¹³ RCW 10.01.180(4).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Tate v. Short*, 401 U.S. 395, 398 (1971); *State v. Curry*, 118 Wn.2d 911, 915 (1992).

¹⁷ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

¹⁸ *State v. Nason*, 168 Wash.2d 926, 945 (2010).

¹⁹ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112 (2002).

²⁰ RCW 10.01.180(5).

²¹ *Id.*

²² *Id.*

WA State Courts of Limited Jurisdiction (CLJs): 2018 Reference Guide on Legal Financial Obligations (LFOs) in Criminal Cases

**Disclaimer: Check statutory and case law cites to confirm law is current*

Imposing LFOs at Sentencing

LFOs include restitution, fees, fines, assessments, and costs imposed as part of a criminal judgment upon conviction. In some cases, costs may be imposed for pretrial supervision. *RCW 10.01.160*. State law authorizes both mandatory and discretionary LFOs, and statutes may differ in setting standards for imposition and waiver.

Mandatory LFOs in CLJs

- **DNA Collection Fee:** \$100, limited to specified crimes and imposed only once in a lifetime. *RCW 43.43.7541*.
- **Public Safety & Educational Assessments:** Two separate assessments, which together equal 105% of any fines, forfeitures, or penalties imposed. *RCW 3.62.090*. Note that, per statute, the PSEA is applied slightly differently for DUI/Physical control cases.
- **Offense-Specific Fines:** Some offenses carry additional mandatory penalties. *See, e.g., RCW 26.50.110* (\$15 mandatory fine for Violation of a DV Protection Order).

Discretionary LFOs in CLJs:

- **Fines** are generally discretionary. *See RCW 3.62.010; 35.20.255*. Courts have the discretion to waive or suspend some “offense-specific” fines on a finding of indigence. *See, e.g., RCW 46.64.055(1)*.
- **Restitution** is permitted but not mandatory for non-felony offenses. *See RCW 9.92.060(2)(b); Seattle v. Fuller*, 177 Wn.2d 263 (2013).
- **Criminal Conviction Fee** of \$43 may not be imposed on indigent defendants. *RCW 3.62.085*.
- **DUI Fines, Fees and Costs** are all discretionary. *RCW 46.61.5055* specifies minimum fines that a court must impose as part of a DUI sentence “unless the court finds the offender to be indigent.” *See, e.g., RCW 46.51.5055(1)(a)(ii)*. The PSEA 1 of 70% is applicable to that fine; but the PSEA 2 of 35% is not. *RCW 3.62.090(1), (2)*. A court must impose a \$250 fee on a person originally arrested for DUI or physical control, but “[u]pon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay.” *RCW 46.61.5054(1)*.
- **Criminal Justice Funding Penalty** of \$50 must be imposed on Title 46 crimes, but the court can waive or reduce that amount if the defendant is indigent. *RCW 46.64.055(1)*. The PSEA is applicable to the criminal justice funding penalty. *RCW 3.62.090(1), (2)*.

Discretionary Costs in CLJs: Costs may not be imposed if a defendant is indigent. *RCW 10.01.160(3)*. Even in the absence of a statutory finding of indigency, courts are required to inquire into a defendant’s ability to pay costs. Courts should “look to the comment in...GR 34 for

guidance” to determine a defendant’s ability to pay costs, even in the criminal setting. *State v. Blazina*, 182 Wn.2d 827, 839 (2015). A court should “seriously question a person’s ability to pay LFOs” if that person meets the GR 34 standard for indigence. *Id.* In determining the amount and method of payment for costs for defendants who are not indigent, the court shall consider the financial resources of the defendant and the nature of the burden that the payment of costs will impose. *RCW 10.01.160(3)*. This includes consideration of factors such as incarceration and a defendant’s other debts. *Blazina*, 182 Wn.2d at 839.

Allowing Time to Pay: The court must allow an indigent defendant to pay LFOs within a certain time or in installments. *RCW 10.01.170(1)*.

Determining Indigence: *RCW 10.101.010(3)(a)-(c)* defines indigence. A defendant is indigent if he or she:

- Currently receives benefits from TANF, aged, blind or disabled assistance, medical care services, pregnant woman assistance, SSI, federal poverty-related veteran’s benefits, refugee resettlement, Medicaid or food stamps; or
- Is involuntarily committed to a public mental health facility; or
- Has a net (or take-home) income at or below 125% of the federal poverty level (FPL), which for 2018 is:
 - \$15,175 for individuals
 - \$20,575 for a family of 2
 - \$25,975 for a family of 3
 - \$31,375 for a family of 4
 - \$36,775 for a family of 5
 - \$42,175 for a family of 6

For latest updates to the FPL, visit:

opd.wa.gov/documents/00531-2018_PovertyRate.pdf

Collection of LFOs

Referral to Collection Agencies: CLJs may use collection agencies under Chapter 19.16 RCW to collect LFOs. *RCW 3.02.045(1)*. No debt may be assigned to a collection agency unless 30 days have passed since the debtor was notified that the debt may be assigned to a collection agency. *RCW 19.16.500(2)*. Once assigned, the court may add a reasonable fee, payable by the debtor, to the outstanding debt for the collection agency fee incurred. A contingent fee of up to 50% of the first \$100,000 of the unpaid debt per account is presumptively reasonable. *Id.* Costs, fees, fines, forfeitures, and penalties imposed in CLJs for criminal offenses do not accrue interest. *RCW 3.62.020; 3.62.040; 35.20.220; 3.50.100*.

Persons Receiving Social Security Disability: Federal law prohibits courts from ordering defendants to pay LFOs if the person’s sole source of income is social security

disability benefits. *City of Richland v. Wakefield*, 186 Wn.2d 596 (2016); 42 U.S.C. § 407(a).

Sanctions for Non-payment

Issuing or Warrant for Non-payment: A court must find that a defendant is willfully defaulting on required payments prior to issuing a warrant. “A defendant sentenced to pay any fine, penalty, assessment, fee, or costs who *willfully* defaults in the payment thereof or of any installment is in contempt of court as provided in chapter 7.21 RCW.” *RCW 10.01.180(1)* (emphasis added). The court may then issue a warrant of arrest for his or her appearance. *Id.*

Willful Failure to Pay: Before issuing sanctions, the court must find that a defendant “willfully refused to pay” LFOs. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). A failure to pay is willful if the defendant has the current ability to pay but refuses to do so. *RCW 10.01.180(3)(a)*. Mentally ill and homeless defendants cannot be held in willful contempt. *RCW 10.01.180(3)(c)*.

Assistance of Counsel: A defendant is entitled to assistance of counsel when facing a contempt proceeding that could result in incarceration, and counsel must be appointed if the defendant is indigent. *Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wn.2d 98, 113 (2002).

Factors the Court Must Consider before Sanctioning a Defendant for Non-payment: A defendant may not be jailed for non-payment of a fine unless there is a finding, following a hearing on the record, that the failure to pay is willful. *RCW 10.01.180(3)(a)*. Any defendant who is indigent as defined by *RCW 10.101.010(3)(a)-(c)*, is presumed to be unable to pay. *RCW 10.01.180(3)(b)*. The court must inquire into a defendant’s ability to pay, and consider income, assets, basic living costs and other liabilities, including child support and other LFOs, as well as the defendant’s bona fide efforts to acquire additional resources (see sample questions). *Id.* The defendant may bear the burden of proving inability to pay, but the court still has a duty to inquire. *Smith*, 147 Wn.2d at 112.

Alternatives to Incarceration for Non-payment: Only if “no reasonable or effective alternatives are available,” should the court use its contempt power to incarcerate for non-payment. *Smith*, 147 Wn.2d at 113. *See also Bearden*, 461 U.S. at 672. As an alternative to incarceration, the court can reduce the amount of LFOs, modify its previous orders regarding payment of LFOs, or convert LFOs to community restitution at a rate of no less than the state minimum wage. *RCW 10.01.180(5)*.

Post-Sentencing LFO Relief

Interest Relief: As of June 7, 2018, interest does not accrue on non-restitution LFOs. *RCW 10.82.090*. To address interest that accrued on non-restitution LFOs prior to that date, the defendant, upon release from total confinement, may petition the court for waiver of the non-restitution interest. The court shall grant this motion. *RCW 10.82.090(2)(a)* (“[t]he court shall waive all interest on the

portions of the legal financial obligations that are not restitution that accrued prior to the effective date of this section”) (emphasis added). The court may reduce interest on the restitution portion only if the principal has been paid in full. *RCW 10.82.090(2)(b)*.

Remission of Discretionary Costs: A defendant, after release from total confinement, may petition the court for remission of costs. *RCW 10.01.160(4)*. The defendant must show that he/she is not in “contumacious default” in payment of the costs and that the costs will impose “manifest hardship” on the defendant or his/her immediate family. *Id.* If so, the court may 1) remit all or part of the amount due in costs; 2) modify the method of payment under *RCW 10.01.170*, or 3) convert the costs to community restitution hours (if the jurisdiction operates such a program) at a rate of no less than the state minimum wage. **Manifest hardship** exists where the defendant is indigent as defined in *RCW 10.101.010(a) – (c)*. *Id.*

Other Options for Conversion, Modification or Waiver: If the court finds that a defendant is not in willful contempt for failing to pay LFOs, it may enter an order 1) allowing the defendant more time for payment; 2) reducing the amount of each installment; 3) revoking the LFOs in whole or in part; or 4) converting the LFOs to community restitution hours at a rate of no less than the state minimum wage. *RCW 10.01.180(5)*. If the defendant is indigent as defined in *RCW 10.101.010(3)(a) – (c)*, the court shall enter an order addressing the LFOs through one of the above-listed options. *Id.*

Sample Questions: Determining Ability to Pay

- **Income:** What is your monthly take-home income before taxes? Do you receive any government benefits (SSI, disability benefits, TANF, food stamps, or veteran’s benefits)?
- **Employment History:** Are you working? When did you last work? What have you done to find work? Do you have any medical or other conditions that limit your ability to work? Have previous periods of incarceration limited your ability to work?
- **Monthly Expenses:** How much does your household spend on basic living costs, including housing and utilities, food, health care or medical costs, transportation, clothing, payment of LFOs/fines to other courts, child support, and other necessities?
- **Assets and Other Financial Resources:** Do you own property that you could use to pay LFOs? Do you have any credit or ability to borrow money?
- **Other Debts:** Do you have other debts, including other LFOs, healthcare/medical care/hospital costs, education loans?

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