To: Joanna Landau
From: Melinda Dee
Re: Recoupment Fees Case Review by State

ASSIGNMENT

You have asked me to research what reported decisions say about the issue of defendant's having to pay or apply for, or who can be ordered to pay for their public defenders

RESEARCH

Generally, there are many cases where the constitutionality of recoupment statutes was challenged, but as long as the statutes complied with the standards set forth in *Fuller v. Oregon*, 417 U.S. 40 (1974), the challenges were unsuccessful. There standards consist of:

1- Only convicted defendants may be required to pay a recoupment fee; "those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal" are not required. *Fuller*, at 45.
2- The court can only require a convicted defendant to pay a recoupment fee if "he 'is or will be able to pay them.'" This requires the court to take the defendant's financial resources into account and the nature of the burden the fee will cause. *Id*. (citation omitted).
3- A defendant may petition the court at any time to remit the recoupment fee. The court is "empowered to remit" if the recoupment fee will cause "'manifest hardship on the defendant or his immediate family.'" *Id*. (citation omitted).
4- A defendant cannot "be held in contempt for failure to repay" if he did not intentionally refuse to pay or if he made a good faith effort to pay. *Id*.

I highlighted some cases that stood out as far as challenging the state statutes on grounds other than constitutionality or provisions related to the statute. Some states had few cases that challenged the statute. Some statutes included additional provisions in the recoupment statute and those are included; other states had these provisions in separate statutes. Some states appear to only have statutes related to private appointed counsel and the cases were related to challenging the compensation rate. I excluded the portions of the statues and cases that dealt with juvenile public defense.

Alabama

Statutes: Ala. Code § 15-12-25, Ala. R. Crim. P. 6.4

"A court may require a convicted defendant to pay the fees of court appointed counsel," including "any attorney's fees or expenses." Ala. Code § 15-12-25(a)(1). "The court shall not order a defendant to pay the fees…unless the defendant is or will be able to pay them." *Id*. § 15-12-25(a)(2). "In determining the amount…the court shall take into account the financial resources of the defendant and the nature of the burden that payment of the fees will impose." *Id*. § 15-12-25(a)(2). If the payment "will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment." *Id*. § 15-12-25(a)(2). The payment may be paid in installments

or be a condition of probation. *Id*. § 15-12-25(b). If the defendant does not pay they may be subject to contempt of court. *Id*. § 15-12-25(c).

"If the court finds that a defendant for whom counsel has been appointed had, at the time counsel was appointed, or subsequent thereto has acquired, financial resources" to pay for that counsel, "the court shall order that defendant to pay the state or to the appointed attorney…such amount as the court finds the defendant is able to pay without incurring substantial hardship." Ala. R. Crim. P. 6.4(f). "Failure to obey…shall not be grounds for contempt or grounds for withdrawal by the appointed counsel," but will be an order "assessed as part of the court costs." *Id*. 6.4(f).

***Taylor v. State*, 808 So.2d 1148 (Ala. Crim. App. 2000)**

When the defendant challenged his recoupment fee the court determined that there was "no evidence in the record that [the defendant] was so indigent that he is incurring a substantial hardship as a result of this ordered court cost or is financially unable to pay for part of his appointed attorney's fees and expenses, or that he has ever petitioned the court to be relieved of his obligation." *Id*. at 1205.

***Reese v. State*, 717 So.2d 412 (Ala. Civ. App. 1998)**

When the defendant was arrested he had $316 on him and the State alleged that amount should be applied to reimbursement for the attorney fees. *Id*. at 412. However, since the proceeding was for forfeiture, civil not criminal, the recoupment statute did not apply. *Id*. The judgement was reversed. *Id*.

Alaska

Statutes: Alaska Stat. § 18.85.120, Alaska R. Crim. P. Rule 39

Rule 39 requires the court to advise an indigent "defendant they will be ordered to repay the prosecuting authority…if the defendant is convicted of an offense." Alaska R. Crim. P. Rule 39(b)(2). Additionally, the court can enter an order to "prevent the defendant from dissipating assets to avoid payment of this cost." *Id*. At the time of entry of judgment the "court shall inquire whether there is good cause why the court should not enter judgment for the cost of appointed counsel." *Id*. 39(c)(1)(A). Rule 39(d) has the schedule of costs for each degree of offense.

***State v. Albert*, 899 P.2d 103 (Alaska 1995)**

The state statute allowed a court to "enter a civil judgment against 'a person for whom counsel is appointed…for services of representation and court costs'" when that person was convicted. *Id*. at 104. The statute allowed for a schedule to reduce the fees "'for good cause shown' by either the prosecuting authority or the defendant." *Id*. at 105. The fee "has the same force and effect as a judgment in a civil action." *Id*. Therefore, it "is not enforceable by contempt, payment of the judgment may not be a condition of the defendant's probation, and failing to pay the judgment does not affect the services available to the defendant from appointed counsel on appeal" or other phases of the case. *Id*. However, the right to counsel did not apply to proceedings to enter the judgment or to collect the fee. *Id*.

The appellate court determined that it is not a deprivation of the right to counsel when an indigent chooses "whether or not to accept appointed counsel" based on the possibility that they will have to pay a recoupment fee because nonindigent defendants have to make this choice. *Id*. at 112-13. The court acknowledged that if "a significantly higher rate" of indigents refused counsel because of recoupment it "could indicate…that the system is imposing unfairly coercive choices," but in *Albert* it was not the case and the statute was valid. *Id*. at 113.

***Alexiadis v. State*, 369 P.3d 561 (Alaska Ct. App. 2016)**

The defendant was notified that the clerk "intended to enter judgement against him for attorney's fees." *Id*. at 562. The appellate court noted that AS 18.85.120(c) applies only to "defendants who have been *convicted* of a crime," while Alaska Criminal Rule 39(c) "authorizes trial courts to impose attorney's fees on indigent defendants only if the trial court proceedings results in the entry of judgment against the defendant or…the re-affirmation of a previously entered judgment." *Id*. The court then acknowledged that it was unclear whether AS 18.85.120(c) applied to "appellate litigation before any judgment of conviction." *Id*. at 563. In an interlocutory petition for review, the "Court should hold the petition open for an indefinite period of time…until we finally know (1) whether the defendant was convicted, and (2) whether the defendant's conviction became final." *Id*. Therefore, "[i]ndigent defendants should not pay an additional attorney's fee if the court-appointed attorney or law firm who is representing them in the trial court chooses to pursue an interlocutory petition for review in the middle of the trial court proceedings." *Id*. at 564.

<u>Arizona</u>

Statutes: Ariz. Rev. Stat. Ann. § 13-4013, § 11-584

"If counsel is appointed by the court and represents the defendant in…a criminal proceedings…, counsel shall be paid by the county…, except that in those matters in which a public defender is appointed." Ariz. Rev. Stat. Ann. § 13-4013(A).

A court may "[r]equire that the defendant…who is appointed counsel…repay to the county a reasonable amount to reimburse the county for the cost of the person's legal services." A.R.S. § 11-584(c)(3). The court must "take into account the financial resources of the defendant and the nature of the burden that the payment will impose." *Id*. 11-584(d).

State v. Moreno-Medrano, 185 P.3d 135

Prior to ordering reimbursement for attorney fees "the court is required to make specific factual findings that the defendant has the ability to pay the fees imposed and that the fees will not cause a substantial hardship. *Id*. ¶ 9. The court must make a finding regarding the cost and it "may only be enforced as a civil judgment," not for contempt. *Id*. The defendant must "show that the trial court did not consider his financial ability in imposing those fees." *Id*. ¶ 14.

***Espinoza v. Superior Court In and For County of Pima,* 804 P.2d 90 (Ariz. 1991)**

Indigent means a person is not able to employ their own counsel. *Id*. at 94. A "quasi-indigent" defendant means a person "has some financial resources available to pay a portion of the legal expenses at or near the time they accrue." *Id*. The court recognized similarities in

requiring an indigent and quasi-indigent defendant to "contribute to the defense costs." *Id*. If a quasi-indigent defendant does not pay the attorney's fees they face civil judgment, and their "[c]ounsel cannot withdraw, and they defendant does not face potential imprisonment." *Id*. at 94-95.

***State v. Taylor*, 166 P.3d 118 (Ariz. Ct. App. 2007)**

The appellate court noted that the statutes for recoupment "refers to financial resources in the present tense." *Id*. ¶ 21. Therefore, a "defendant's lack of employment, which largely accounts for his indigence in the first place, must be viewed as showing a lack of financial resources." *Id*. ¶ 24. "A court may not create financial resources by imputing income when a defendant's income from employment is not supported by evidence in the record, or is merely speculative." *Id*. Finally, "before a court can order an indigent defendant to pay to offset the cost of legal services, the court must make factual findings" first. *Id*. ¶ 25.

Arkansas

Statute: Ark. Code Ann. § 16-87-218

"At the time of final disposition of any charges pending against a defendant represented by a public defender, the public defender shall ask the court to enter a judgment against the defendant…for legal services rendered by the public defender." Ark. Code Ann. § 16-87-218(b). Section (c) has a fee schedule based on the degree of charge and disposition. *Id*. § 16-87-218(c). There was no case that challenged this statute.

California

Statute: Cal. Penal Code § 987, § 987.5, § 987.8

If a defendant cannot afford counsel, the "court may require a defendant to file a financial statement or other financial information…to make an inquiry into the ability of the defendant to employ his or her own counsel." Cal. Penal Code § 987(c). The court shall make a determination "on the record." *Id*. "Every defendant shall be assessed a registration fee not to exceed fifty dollars" when they are appointed counsel, but "no fee shall be required of any defendant that is financially unable to pay the fee." *Id*. § 987.5(a). If a defendant cannot employ counsel "the court may hold a hearing…to determine whether the defendant owns or has an interest in real property or other assets." *Id*. § 987.8(a). "The court may impose a lien" on that property and can "enforce its lien for the payment of providing legal assistance." *Id*. § 987.8(a). After "conclusion of criminal proceedings…the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." *Id*. § 987.8 (b).

***People v. Verduzco*, 149 Cal.Rptr.3d 200 (Cal. Ct. App. 2012)**

"If the attorney fees award is in error, remand is permissible for the purpose of determining whether the defendant has the ability to pay attorney fees." *Id*. at 210. The court emphasized a "present" ability to pay. *Id*. When considering a defendant's "'reasonably discernible' financial position over the subsequent six months" the court can consider "the likelihood of employment during that time, and '[a]ny other factor or factors which may bear

upon the defendant's financial capability.'" *Id*. Additionally, courts must consider the defendant's resources, including their assets. *Id*.

There is "a presumption that those sentenced to prison do not have the ability to pay" so "the court must make an express finding of unusual circumstances before ordering a state prisoner to reimburse his or her attorney." *Id*. at 210-11.

***People v. Polk*, 118 Cal.Rptr.3d 876 (Cal. Ct. App.)**

"While the ownership of attachable real property is certainly evidence of an ability to repay, it is not conclusive." *Id*. at 899. Also, "if the attached property supports an income-producing asset, such as a personal business, seizure of the real property…could compromise the defendant's livelihood and jeopardize his or her rehabilitation. *Id*. Thus, a hearing is required to inquire into the "impact of the seizure" of the defendant's real property "on the defendant's family, life, or livelihood, the nature of the asset, or the defendant's other personal and financial circumstances." *Id*.

Colorado

Statute: Colo. Rev. Stat. § 21-1-103

"The determination of indigency shall be made by the state public defender, subject to review by the court." Colo. Rev. Stat. § 21-1-103(3). When a defendant claims indigency they "shall submit an appropriate application…signed under oath and under the penalty of perjury" with a "nonrefundable processing fee of twenty-five dollars." *Id*. The fee may be waived "if the court determines, based upon the financial information submitted by the party…, that the person does not have the financial resources to pay the fee." *Id*. The prosecuting attorney can review the application and "upon request, the court shall hold a hearing on the issue of the eligibility for appointment of the public defender's officer." *Id*.

***People v. Schupper*, 353 P.3d 880 (Colo. App. 2014); *cert. denied*, 2015 Colo. LEXIS 594 (Colo. 2015)**

A trial court can consider a "'defendant's complete financial situation, including real and personal property, dependency obligations, and the necessary expenses and debts, and then basic assets against liabilities and income against basic living expenses.'" *Id*. at 888 (quoting *People v. Nord*, 790 P.2d 311, 316 (Colo. 1990)). Additionally, a court can "consider whether a defendant has secreted assets." *Id*. In the court's findings a judge can assess a defendant's credibility and the evidence presented. *Id*. In *Schupper* the trial court did not abuse its discretion by holding several hearings to determine whether the defendant sold assets, spent substantial money on trips, and owned expensive jewelry. *Id*. at 889. The appellate court concluded that the defendant failed to prove his indigency when he only presented "self-serving email statements to the collections investigator" and these were not sufficient to rebut the prosecution's evidence that the "defendant had assets well above the guidelines." *Id*. at 891.

***Vela v. District Court In and For Arapahoe County*, 664 P.2d 243 (Colo. 1983)**

The appellate court noted that a public defender could be appointed in habeas corpus proceeding because they "are a step in the criminal process." *Id*. at 245. The recoupment statute does not apply to "defendants in civil contempt proceedings." *Id*.

Connecticut

Statute: Conn. Gen. Stat. § 51-297

"A public defender…shall make such investigation of the financial status of each person he has been appointed to represent or who has requested representation based on indigency, as he deems necessary. Conn. Gen. Stat. § 51-297(a). The defendant shall "complete a written statement under oath or affirmation setting forth his liabilities and assets, income and sources thereof and…other information." *Id*. If a defendant "intentionally falsifies [the] written statement… [they] shall be guilty of a class A misdemeanor." *Id*. § 51-297(b). If a public defendant "subsequently determines that the person is ineligible for assistance" they "shall promptly inform the person in writing and make a motion to withdraw." *Id*. § 51-297(c). "If the withdrawal is granted by the court, the person shall reimburse the commission for any assistance which has been provided for which the person is ineligible." *Id*. Reimbursement for appointed counsel "shall be made in accordance with a schedule of reasonable charges." *Id*. § 51-297(d). A defendant can be required "to execute and deliver…written authorizations" in compliance with "an investigation into the[ir] financial status" so allow "access to [their] records of public or private sources." *Id*. § 51-297(e).

***State v. Flemming*, 976 A.2d 37 (Conn. Ct. App. 2009)**

In Connecticut, the "public defender's office is required to investigate the financial status of individuals requesting representation on the basis of indigency." *Id*. at 45. The public defender office "'is the *only* entity upon which a statutory duty is imposed to investigate a claim of indigency.'" *Id*. (quoting *State v. Guitard*, 765 A.2d 30, 35 (Conn. Ct. App. 2001)). Based on the statutory language of § 51-297 after the public defender's office conducts an indigency hearing and the defendant appeals their determination "the court [is] under no obligation to conduct" a further hearing." *Id*. at 46.

Delaware

Statutes: Del. Code Ann tit. 10, § 8601, Del. Super. Ct. Crim. R. 44

"A court may require a convicted defendant who has utilized court-appointed attorneys or the Office of Defense Services to pay the costs of defense in that court." Del. Code Ann tit. 10, § 8601(a). Some costs that are excluded "include expenses inherent in providing a constitutionally guaranteed jury trial." *Id*. § 8601(b). If a defendant "is, or will be, [un]able to pay" the costs the court cannot require them to pay. *Id*. § 8601(c). A defendant may petition the court to reduce or eliminate the fee if "payment of the amount due will impose manifest hardship on the defendant or immediate family." *Id*. § 8601(d).

"Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned." Del. Super. Ct. Crim. R. 44(a); *see also* 11 Del. C. § 5103 ("The Court may assign counsel to any person in any criminal prosecution"). Subsection (g) allows the court to "order recoupment of defense costs." *Id*. 44(g).

***Potter v. State*, 547 A.2d 595 (Del. 1988)**

"The defendant has the burden of establishing a right to counsel at public expense, but he is entitled to a hearing on the issue of indigency." *Id*. at 598. In Delaware, "it is error for a trial court to presume that a defendant is not entitled to counsel from a silent record." *Id*. The court is required to inquire into a defendant's financial obligations. *Id*. at 600. "After conducting reasonable inquiry…it is essential to fairness and to any meaningful form of appellate review that specific findings of fact be entered to support the determination of nonindigency and the denial of appointed counsel." *Id*. The court applied § 8601 to "nonindigent defendants with marginal financial ability." *Id*. at 601.

District of Columbia

Statute: D.C. Code §11-2603

"If at any time after the appointment of counsel the court finds that the person is financially able to obtain counsel or to make partial payment…it may terminate the appointment of counsel or authorize payment…, as the interests of justice may dictate. D.C.Code § 11-2603. "If at any stage of the proceedings, including an appeal, the court finds that the person is financially unable to pay counsel whom such person retained, it may appoint counsel…, and authorize payment…, as the interest of justice may dictate." *Id*. § 11-2603.

There has been no case to challenge the recoupment portion of the statute.

Florida

Statute: Fla. St. § 938.29, § 27.52

"A defendant who is convicted of a criminal act or a violation of probation or community control and who has received the assistance of the public defender's office…shall be liable for payment of the assessed application fee under § 27.52 and attorney's fees and costs." Fla. St. § 938.29(1)(a). A defendant seeking for court appointed counsel must submit an application to determine indigency along with a $50 application fee. *Id*. § 27.52(1)(a)-(b). "A person found to be indigent may not be refused counsel…for failure to pay the fee." *Id*. § 27.52(1)(c). The clerk then determines indigency, but a "court shall make a final determination…by reviewing the information provided in the application" against statutory criteria. *Id*. § 27.52(2), (4).

"The court may set a higher [reimbursement] amount upon showing of sufficient proof of higher fees or costs incurred." *Id*. § 938.29(1)(a). The reimbursement amount is due "in full after the judgment of conviction becomes final" and is assessed based on the "defendant's present ability to pay." *Id*. § 938.29(1)(b). The reimbursement may be ordered "as a condition of probation, of suspension of sentence, or of withholding the imposition of a sentence." *Id*. § 938.29(c). Unpaid costs may be enforceable as a lien. *Id*. § 938.29(2).

***Milhouse v. State*, 673 So.2d 911 (Fla. Dist. Ct. App. 1996) (per curiam)**

When the fee for the public defender was "not individually announced as sentencing" the lump sum was stricken on appeal. *Id*. at 912. Before that cost could be imposed again "the trial

court need not ascertain that the [defendant] has the ability to pay." *Id*. This is "only necessary when the state seeks to enforce collection of the fee." *Id*.

There are a number of cases discussing the public defender's recoupment fee. A trial court's order is reversed when it is excess of the statutory minimum and "done without notice and a hearing, and without factual findings supporting the higher amount of fees." *Whittaker v. State*, 223 So.3d 270, 276 (Fla. Dist. Ct. App. 2017). The trial court erred when it "merely stated at the sentencing hearing that certain costs, including public defender fees, would be imposed," but "did not state the amount of those fees at the hearing" or notify the defendant "or his right to contest the charges." *Brooks v. State*, 199 So.3d 974, 977 (Fla. Dist. Ct. App. 2016). Additionally, previous forms informed the defendant he would be required to pay those fees, but did not have an amount. *Id*. The "Public Defender fee should be struck because the trial court did not advice [the defendant] of his right to contest the fee when it was orally imposed." *Kirkland v. State*, 106 So.3d 4, 5 (Fla. Dist. Ct. App. 2013).

Georgia

Statute: Ga. Code Ann. § 17-12-51

"When a defendant who is represented by a public defender…enters a plea of nolo contendere, first offender, or guilty or is otherwise convicted the court may impose as a condition of probation repayment of all or a portion of the cost[s]." Ga. Code Ann. § 17-12-51(a). That cost will depend on whether it "impose[s] a financial hardship upon the defendant or the defendant's dependent or dependents." *Id*. These provisions also apply to defendants in a municipality, *Id*. § 17-12-51(b), and defendants whose public defenders are "entirely paid for the state." *Id*. § 17-12-51(c). The court determines financial hardship from on factors in section 17-14-10. *Id*. § 17-12-51(d). "The public defender may provide the court with an estimate of the cost[s]" and "the court shall hold a hearing to determine the amount to be paid." *Id*.

***State v. Pless*, 646 S.E.2d 202 (Ga. 2007); *aff'g*, 648 S.E.2d 752 (Ga. Ct. App. 2007)**

When a defendant challenged attorneys' fees as a condition for probation the court used statutory authority for section 17-12-51 from section 42-8-35. *Id*. at 204. Section 42-8-35, which defines conditions of probation, grants a "sentencing court with general power to impose reasonable conditions of probation." *Id*. Although there was no express authority to grant authority, there was also no statute to "expressly prohibit" that authority. *Id*. Therefore, the general authority was sufficient. *Id*.

Hawaii

Statutes: Haw. Rev. Stat. § 802-2, § 802-4, § 802-5, § 802-6

In every criminal case or proceeding…the judge shall advise the person of the person's right to representation by counsel and also if the person is financially unable to obtain counsel, the court may appoint one at the cost to the State." Haw. Rev. Stat. § 802-2. "A person shall waive the person's right to counsel by refusing to furnish pertinent to the determination of indigency." *Id*. § 802-4.

The compensation statute appears to only address when private counsel is appointed. *Id*. § 802-5(a). However, there is a fee schedule that sets an hourly rate, and cap on offenses based on the degree of the charge. *Id*. § 802-5(b). If a payment is in excess of that cap a defendant may be still required to pay if it "is necessary to provide fair compensation and the payment is approved by the administrative judge of that court." *Id*. § 802-5(b). Additionally, another statute states that "after counsel is appointed" if a court is "satisfied that the defendant is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of counsel, unless the person…is willing to pay thereof." *Id*. § 802-6. "If appointed counsel continues the representation, the court shall direct payment for such representation." *Id*.

Two cases directly apply the compensation statute to court appointed private counsel. *In re Attorney's Fees of Mohr*, 32 P.3d 647, 651 (Haw. 2001) ("HRS § 802-5 provides that court-appointed private counsel shall receive reasonable compensation for fees"); *State v. Przeradzki*, 709 P.2d 105 (Haw. Ct. App. 1985) (HRS § 802-5 "authorizes the trial court to pay court-appointed private attorneys" compensation).

Idaho

Statutes: Idaho Code § 19-852, § 19-854

"An indigent person…is entitled (b) To be provided with the necessary services and facilities of representation." Idaho Code § 19-852(1)(b). The "costs shall be provided at public expense to the extent that the person is…unable to provide for their payment. *Id*. § 19-852(1)(b). A "person shall, subject to the penalties for perjury, certify…such material factors relating to his ability to pay as the court prescribes by rule." *Id*. § 19-854(5). "To the extent that a person…is able to provide for an attorney…the court may order him to provide for their payment." *Id*. § 19-854(6). Upon conviction [or other similar dispositions]…an indigent person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those service…unless the requirement would impose a manifest hardship on the indigent person." *Id*. § 19-854(7).

***State v. Wilson*, 40 P.3d 129 (Idaho Ct. App. 2001)**

The § 19-854(c) was amended in 2001 "to allow for orders of reimbursement of public defender fees regardless of whether the defendant has the present ability to pay." *Id*. at 132.

***State v. Bowcutt*, 620 P.2d 795 (Idaho 1980)**

A trial court may consider a defendant's bond in determining whether the defendant qualifies for public defense. *Id*. at 797.

Illinois

Statutes: 725 Ill. Comp. Stat. 5/113-3; 725 Ill. Comp. Stat. 5/113-3.1

A defendant is required to sign an affidavit that contains "sufficient information to ascertain the assets and liabilities of that defendant." 725 Ill. Comp. Stat. 5/113-3(b). Any false information on that affidavit could result in the defendant is liable. *Id*. 5/113-3(b).

When the court appoints counsel "the court may order the defendant to pay…a reasonable sum to reimburse either the county or the State for such representation." *Id*. 5/113-

3.1(a). "In a hearing to determine the amount of payment, the court shall consider the affidavit prepared by the defendant…and any other information pertaining to the defendant's financial circumstances." *Id*. 5/113-3.1(a). This hearing must occur any time between "the appointment of counsel [and] no later than 90 days after the entry of a final order disposing of the case at the trial level." *Id*. 5/113-3.1(a). Subsection (b) has payment caps depending on the degree of the charge. *Id*. 5/113-3.1(b). "The court may give special consideration to the interests of relatives or other third parties who may have posted a money bond on the behalf of the defendant to secure his release." *Id*. 5/113-3.1(c). Prior to full payment the court may alter the amount due in a hearing and with notice to all parties. *Id*. 5/113-3.1(c). If a defendant fails to pay the amount he "may be punished for contempt of court." *Id*. 5/113-3.1(g).

There are two cases that are not published yet: ***People v. Adame*, No. 2-15-0769, 2018 Ill. App. LEXIS 8 (Ill. App. Ct. Jan. 9, 2018); *People v. Hardman*, No. 121453, 2017 Ill. LEXIS 1289 (Ill. Nov. 30, 2017)**

People v. Moore, 45 N.E.3d 696 (Ill. Ct. App. 2015) (disagreed with by *People v. Hardman*, No. 121453, 2017 Ill. LEXIS 1289 (Ill. Nov. 30, 2017))

When "the trial court imposed the public defender fee of $150 without holding a sufficient hearing to determine defendant's financial circumstances and his ability to pay," the proper remedy was to vacate the order, not remand for a proper hearing. *Id*. ¶¶ 28, 32. The appellate court emphasized that "a hearing is mandatory, not discretionary, and the court should not only consider a defendant's financial circumstances but his foreseeable ability to pay." *Id*. ¶ 31. If the trial court had complied with these provisions the proper remedy would be a remand for proper hearing. *Id* ¶ 33. Having "some sort of hearing" is insufficient if it does not comply with these provisions. *Id*. ¶ 40-41. The court also noted that a remand as a remedy "would be of no practical purpose" because another hearing with appointed counsel would be required and that would incur monetary costs by the taxpayers, "during a period of severe budgetary stress, couple with the usually stressed court docket." *Id*. ¶ 42.

***People v. Love*, 177 Ill.2d 550 (Ill. 1997)**

First, the court held that the statute requires a hearing to determine the defendant's ability to pay recoupment fees. *Id*. at 559-60. The language and legislative history of the statute, and case law support this finding. *Id*. at 555-59. Second, if a defendant pays a bail bond that "does not allow the trial court to dispense with the hearing required by [statute]." *Id*. at 560. A trial "court may order that the reimbursement be paid out of the bond" and the court can consider "whether the bond money was posted by a third party" so the bond will not be counted against a defendant. *Id*. at 562.

Indiana

Statues: Ind. Code § 35-33-7-6, § 33-40-3-6, § 33-37-2-3

"Prior to completion of the initial hearing" a court shall determine if a defendant is indigent and if they are indigent the court "shall assign counsel." Ind. Code § 35-33-7-6(a). "If the court finds that a person is able to pay part of the cost of representation by the assigned

counsel" then they shall be ordered to pay one hundred dollars for a felony case and fifty dollars for a misdemeanor case. *Id*. § 35-33-7-6(c). A person's indigency status may be reviewed "at any time during the proceedings." *Id*. § 35-33-7-6(d).

"If at any stage of a prosecution for a felony or misdemeanor the court makes a finding of ability to pay the costs of representation…the court shall require payment by the person…of…(1) Reasonable attorney's fees if an attorney has been appointed for the person by the court." *Id*. § 33-40-3-6(a).

A court "shall conduct a hearing to determine whether the convicted person is indigent." *Id*. § 33-37-2-3(a). A court may "suspend payment of all or part of the costs until the convicted person has completed all or part of the sentence." *Id*. § 33-37-2-3(b). But if "the convicted person is not indigent, the court shall order the convicted person to pay the costs." *Id*. § 33-37-2-3(b).

***Wright v. State*, 949 N.E.2d 411 (Ind. Ct. App. 2011)**

The defendant "entered into a cash bail bond agreement pursuant to Indian Code Section 35-33-8-3.2(a)(2), in which she agreed to deposit a cash bail bond of $1000 and gave the trial court the authority, in the event she…was convicted, to use that money to pay fines, costs, and fees." *Id*. at 413. Since the defendant "entered into a contract, the terms of which are specifically authorized by statute, and she is bound by terms of that contract." *Id*. at 414-15. The court order to pay a public defender out of the bail bond was correct. *Id*. at 415. Further, "the indigency hearing required of Indian Code Section 33-37-2-3(a) does not apply when a defendant has entered into a case bail bond agreement pursuant to Section 35-33-8-3.2(a)(2)." *Id*. at 416.

***Banks v. State*, 847 N.E.2d 1050 (Ind. Ct. App. 2006)**

There must be an explicit finding on the record whether the defendant can pay a public defender fee. *Id*. at 1052. When there was none the case was remanded to do so. *Id*.

***Wooden v. State*, 757 N.E.2d 212 (Ind. Ct. App. 2001)**

If a reimbursement fee is in excess of the statute the order should be remanded to correct the amount. *Id*. at 218.

Iowa

Statute: Iowa Code § 815.9

§ 815.9(1) has guidelines to determine indigency based on a person's income. Iowa Code § 815.9(1). The court makes a determination of indigency from "an affidavit of financial status submitted at the time of the person's initial appearance or at such later time as a request." *Id*. § 815.9(2).

"If a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided," including "the expense of the public defender or an appointed attorney." *Id*. § 815.9(3). "If the appointed attorney is a public defender, the attorney shall submit a report to the court specifying to total hours of service plus expenses….unless the court has ordered that the cost of legal assistance is not required to be

reimbursed to the state." *Id*. § 815.9(4)(a). This "report shall be submitted within a reasonable period of time after the date of sentencing, acquittal, or dismissal." *Id*. § 815.9(4)(a).

If that person is convicted "the court shall order the payment…as restitution, to the extent to which the person is reasonably able to pay, or order the performance of community service in lieu of such payments." *Id*. § 815.9(5). If the person is acquitted "the court shall order the payment of all or a portion of the total costs and fees…to the extent the person is reasonably able to pay, after an inquiry which includes notice and reasonable opportunity to be heard." *Id*. § 815.9(6). The payment for appointed counsel can be paid in "reasonably installments," have "the entire amount due," or be "execute[d] an assignment of wages." *Id*. § 815.9(7)-(8). Any unpaid balance will be subject to a judgment entered and can be enforced as a civil judgment. *Id*. § 815.9(7).

***State v. Hill*, 682 N.W.2d 82 (Iowa Ct. App. 2004)**

When read with Section 910.2, Section 815.9 "the legislature, by its plain language, intended to require a defendant to reimburse the State for all attorney fees incurred, whether the case ends in a guilty adjudication or not." *Id*. at *2. In *Hill* the defendant was required to pay attorney's fees for a mistrial. *Id*.

***State v. Johnson*, 662 N.W.2d 370 (Iowa Ct. App. 2003); *aff'd on other grounds*, 705 N.W.2d 107 (Iowa Ct. App. 2005))**

A defendant can be "order[ed] to pay restitution for attorney fees and costs of prosecution incurred during his first trial [when] his resulting convictions were reversed on appeal." *Id*. at *5.

***State v. Sluyter*, 763 N.W.2d 575 (Iowa 2009)**

Section 815.9 "does not provide that a defendant's reimbursement obligation is enforceable by contempt." *Id*. at 581. Even though contempt is enforceable under other statutes the legislature did not "incorporate[e] a contempt remedy in section 815.9 or [make] a cross-reference to" an applicable statute. *Id*. at 584.

Kansas

Statute: Kan. Stat. Ann. 22-4513

"If the defendant is convicted, all expenditures…to provide counsel…to such defendant or the amount allowed by the board of indigents' defense reimbursement tables…and amendments thereto, whichever is less." Kan. Stat. Ann. 22-4513(a). This payment "shall be taxed against the defendant and shall be enforced as judgments for payment of money in civil cases." *Id*. 22-4513(a). The "court shall take account of the financial resources of the defendant and the nature of the burden that payment…will impose." *Id*. 22-4513(b). If a defendant cannot afford the payment he "may at any time petition the court" to modify the order. *Id*. 22-4513(b). If the court finds it will result in "manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment." *Id*. 22-4513(b). Any action filed to recover the payment must be "filed within two years after the date of the expenditure." *Id*. 22-4513(c).

***State v. Robinson*, 132 P.3d 934 (Kan. 2006)**

In Kansas, the recoupment statute has four distinct provisions: (1) court appointed counsel must be reimbursed and unpaid fees are subject to civil judgment, (2) a defendant's finances are taken into account when payment is ordered, (3) a defendant may apply for a waiver of fees after his finances are assessed, and (4) after a waiver is filed, the court may waive or modify the payment if payment will result in "manifest hardship" on a defendant or their family. *Id*. at 939. The appellate court stated that the language of the recoupment statute was "in no way conditional" as there "is no indication that the defendant must first request that the sentencing court consider his or her financial circumstances or that the defendant must first object to the prosed…fees to draw the sentencing court's attention to those circumstances." *Id*. at 939. Additionally, even though the statute "permits a defendant to petition for waiver does not change the mandatory language or mean the waiver procedure is intended as a substitute for the sentencing court's initial consideration of a defendant's finances." *Id*. The appellate court made three points. First, when a sentencing court assesses a defendant's finances they "must consider the financial resources of the defendant" and the burden must be explicitly stated on the record. *Id*. at 940. Second, if the court fails to include a "defendant's financial circumstances in the record" it does not make the sentence illegal. *Id*. at 546-47. Third, consideration of a defendant's finances must occur and sentencing proceedings are the proper venue to address recoupment fees. *Id*. at 547.

<u>Kentucky</u>

Statute: Ky. Rev. Stat. Ann. § 31.110, § 453.190

"A needy person…is entitled: (a) To be represented by an attorney…; and (b)…to be provided with the necessary services and facilities of representation." Ky. Rev. Stat. Ann. § 31.100(1). "A needy person who is entitled" to court appointed counsel is entitled to have counsel "at all stages" of the trial proceeding, "including revocation of probation and parole;" on appeal; and "other post-conviction" proceeding, including "any appeal from a post-conviction or post-disposition action." *Id*. § 31.110(2).

"A court shall allow a poor person" to have counsel to "defend any action or appeal." *Id*. § 453.190(a). "A 'poor person' means a person who has an income at or below one hundred percent…or is unable to pay the costs and fees…without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." *Id*. § 453.190(2).

***Donovan v. Commonwealth*, 60 S.W.3d 581 (Ky. Ct. App. 2001)**

After the defendant was found not guilty at trial the court imposed a $2000 recoupment fee, which was later reduced to $1250 from a motion that it was the maximum amount the defendant could pay. *Id*. at 582. The defendant argued that he could not pay the fee because he lost his job from his charges, was incarcerated and did not work, filed bankruptcy, had other debts, and had no property or assets. *Id*. The trial court held a hearing and evidence included that the defendant had a job prior to release from jail and at trial, the defendant had his own business that was solvent, and his girlfriend assisted with finances. *Id*. at 582-83. The court concluded the defendant had the ability to pay the recoupment fee and the defendant appealed. *Id*. at 583. Kansas' recoupment statute "permits the imposition of a recoupment fee by a trial court 'to the

extent that [the defendant]…is able to provide for an attorney, the other necessary services and facilities of representation and court costs.'" *Id*.

The appellate court determined that a "recoupment fee may only be found unconstitutional if it arbitrarily discriminates against indigents, or encourages the indigent person to do without counsel." *Id*. This protected against "concealment of assets, or fraudulent claims of indigency." *Id*. Since the statute treated all defendants equally based on the ability to pay it differed from other unconstitutional recoupment statutes that required defendants to pay based on their case disposition. *Id*. at 584. Additionally, the fee was not a penalty, rather it was deemed to be a "civil cost" that "is merely a partial recoupment of the costs expended by the state to protect those in need. *Id*. at 584-85.

***Smith v. Commonwealth*, 370 S.W.3d 871 (Ky. 2012); *rev'd denial of post-conviction relief*, No. 2015-CA-000135-MR, 2017 Ky.App.Unpub. LEXIS 454 (Ky. Ct. App. June 23, 2017)**

"The proper inquiry for assessing court costs is not whether a defendant is 'indigent' as defined in KRS 31.110(1)(b), but whether…he is a 'poor person' as defined in KRS 453.190(2)." *Id*. at 882. The court erred in assessing a defendant no longer indigent because he had a jail account of one dollar because a defendant must be a "poor person" under KRS 453.190(2). *Id*.

Louisiana

Statute: La. Stat. Ann. § 15:175; La. Code Crim. P. art. 887

If a defendant certifies "that he is financially unable to employ counsel and request[s] representation…[he] shall pay a nonrefundable application fee," unless he is determined to "not have the financial resources to pay the application fee based upon the financial information submitted, the fee may be waived or reduced." La. Stat. Ann. § 15:175A(1)(f). To determine indigency "the court shall consider whether the person is a needy person and the extent of his ability to pay. *Id*. § 15:175B(1). Nothing in the statute "shall prevent a criminal defendant from obtaining representation through the board at no charge." *Id*. § 15:175C. This depends a couple factors: if "the defendant receives any form of public assistance," the defendant's "occupational status…and income," if "the payment of legal fees would deprive the defendant or his dependents of necessities of life," and if "the defendant is eligible for indigent defender services." *Id*. § 15:175D.

"In the event of…nonpayment of a fine and costs, within sixty days after the sentence is imposed, and if no appeal is pending, the court…may sign a judgment against the defendant in a sum equal to the fine…plus judicial interest." La. Code Crim. P. art. 887(A). Additional costs may be added on for the "costs of the criminal proceedings and subsequent proceedings necessary to enforce the judgment." *Id*. "Collection of the judgment may be enforced…in the same manner as a money judgment in a civil case." *Id*.

***State v. Rideau*, 943 So.2d 559 (La. Ct. App. 2006)**

A defendant needs to be notified of the recoupment amount "owed *at the sentencing stage* of proceeding" for two reasons. *Id*. at 565 (emphasis in original). First, there is a statutory period, sixty days, for the defendant to pay the fee. *Id*., *see* La. Code Crim. P. art. 887. If the defendant doesn't pay in that time period, they are subject to a civil judgment. *Id*. Second, the

defendant must have "time to file a motion to reconsider the sentence within thirty days, to contest the amount of costs based on excessiveness of sentence or abuse of discretion and to timely preserve the issues for appeal." *Id*. at 566.

Maine

Statutes: Me. Stat. tit. 15, § 810; Me. R. Crim. P. 44

"Before arraignment, competent defense counsel shall be assigned by the…Court, unless waived by the accused after being fully advised of his rights by the court, in all criminal cases charging a felony, when it appears to the court that the accused has not sufficient means to employ counsel." Me. Stat. tit. 15, § 810. In all other criminal cases the court may "appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel." *Id*. The court "shall order reasonable compensation to be paid to counsel" by the court or "out of the state appropriation for such services." *Id*.

"If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel." Me. R. Crim. P. 44(a)(1). "Counsel initially assigned by the court shall remain counsel of record unless the [Maine Commission on Indigent Legal Services] does not accept the assignment and provides notice…and counsel files a notice of withdrawal…, or counsel is otherwise granted leave to withdraw." *Id*. 44(a)(1). If the court concludes that "a sentence of imprisonment will not be imposed" counsel will not have to be assigned. *Id*. 44(a)(1). Counsel may be assigned after the court determines indigency after the verdict. *Id*. 44(a)(2). The court may examine a defendant under oath regarding their financial resources. *Id*. 44(b). "Counsel appointed to represent a defendant shall receive compensation for services performed and expenses incurred as assigned counsel pursuant to rates and standards" in Me. Stat. tit. 4, § 1804(2)-(3). *Id*. 44(c). In Advisory Committee Note- July 2010, the committee stated, "If the court finds that a defendant has sufficient means with which to bear a portion of the expense of representation and conditions of assignment of counsel the court can order a recoupment fee." *Id*. 44.

***State v. Lowden*, 2014 ME 142, 106 A.3d 1134**

Based on the court's finding that a defendant was "partially indigent" allowed the court to require the defendant "to pay to the court all or part of his attorney fees and to condition the order of appointment on that obligation." *Id*. ¶ 8. "Therefore, the trial court's order that [the defendant's] bail money be applied to his attorney fees was proper." *Id*. Even the fact that the defendant was eventually acquitted of one charge and had the rest dismissed did not relieve him "from any obligation to pay the ordered portion of his attorney fees." *Id*. ¶ 9.

Maryland

Statute: Md. Code Ann., Crim. P. § 16-211

"If it appears that an indigent individual has or reasonably expects to have means to meet some of the expenses for services rendered, the indigent individual shall reimburse" the Public Defender "in the amount that the indigent individual can reasonably be expected to pay." Md. Code Ann., Crim. P. § 16-211(a)(1). "A default or failure by an indigent individual to make a payment may not affect the rendering of services to the indigent individual." *Id*. § 16-211(a)(2).

In a criminal case the reimbursement can be "a term or condition or a sentence, judgment, or probation imposed by the court." *Id*. § 16-211(c)(1). The payment can be waived if the court "affirmatively finds that the defendant cannot make the reimbursement; and…waives the term or condition." *Id*. § 16-211(c)(1).

There is no case that challenged this statute.

Massachusetts

Statute: Mass. Sup. Jud. Ct. R. 3:10

An indigent defender who is able to contribute (1) makes between 125% to 150% according to the poverty guideline; (2) "is charged with a felony," makes more than 250% of poverty guideline, and does not have available funds sufficient to pay for counsel; or (3) is over 18 and claimed as a dependent by parents or guardians who are not indigent. Mass. Sup. Jud. Ct. R. 3:10(1)(h)(ii).

"If a judge determines that a party is indigent, the judge may not order, require, or solicit the party to make any payment toward the cost of counsel, except for the indigent counsel fee." *Id*. 3:10(10)(a). "The indigent counsel fee shall be waived" when a judge "determines that the party is unable without substantial financial hardship to pay the indigent counsel fee within 180 days." *Id*. 3:10(10)(a). If the fee is not waived, "the judge may authorize the party to perform community service in lieu." *Id*. 3:10(10)(a). "If a judge determines that a party is indigent but able to contribute, the judge shall order the party to pay the indigent counsel fee plus a contribution fee based on the financial circumstances of the party" as long as the "contribution fee shall not cause substantial financial hardship." *Id*. 3:10(10)(b). A defendant "shall be given an opportunity to be heard and to present information, including witness affidavits or testimony regarding whether the contribution fee would cause substantial financial hardship." *Id*. 3:10(10)(b). If a defendant is over 18 but "is claimed as a dependent for tax purposes by a parent or guardian who is not indigent," then the parent or guardian's indigency is used to determine whether the contribute fee is waived and the parent or guardian is "solely responsible for pay any contribute fee." *Id*. 3:10(10)(c).

Failure to pay the indigent counsel fee "shall not be grounds for withholding or revoking appointed counsel," nor shall a defendant "be subject to incarceration for failing to pay an indigent counsel fee or a contribution fee." *Id*. 3:10(11)(c), (e).

***Commonwealth v. Mortimer*, 971 N.E.2d 283 (Mass. 2012)**

Based on the language in the statue, S.J.C. Rule 3:10, an individual retirement account (IRA) is not income because accounts become income when "payments are disbursed." *Id*. at 288. However, when defendants have "substantial savings in IRAs, accessible after forfeiting an early withdrawal penalty," and those funds are available, then those accounts should be used to pay for representation "before the Commonwealth expends its limited resources." *Id*. at 290. In this case, the judge shall make findings as to how much the defendant is expected to pay out of those funds. *Id*. at 290-91.

Michigan

Statutes: Mich. Ct. R. 6.005; Mich. Comp. Laws § 775.16

At arraignment the court must inform a defendant of the right to counsel and if he cannot afford one the court must determine "whether the defendant is financially unable to retain one." Mich. Ct. R. 6.005. Section (B) has the criteria to determine indigency. *Id*. 6.005(B). If a defendant is partially indigent, meaning they are "able to pay part of the cost of a lawyer, the court may require contribution to cost of providing a lawyer and may establish a plan for collecting the contribution." *Id*. 6.005(C). In the editor's notes it states that subsection (C) "pertains to contribution and should not be construed as authorizing subsequent reimbursement." *Id*. 6.005.

When a defendant "appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed." Mich. Comp. Laws § 775.16. If the defendant is "unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the Michigan indigent defense commission act." *Id*. This provision appears to apply exclusively to private court appointed counsel; cases that cite this statute apply it to those instances. *See Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 503 N.W.2d 885 (Mich. 1993)

***People v. Nowicki*, 539 N.W.2d 590 (Mich. Ct. App. 1995) (per curiam)**

The application for court appointed counsel included an acknowledgement that the defendant was obligated to the costs and fees of his defense and he agreed to reimburse the attorney's fees. *Id*. at 591. The court stated, "The ability of courts to require defendant's to repay expenses of court-appointed counsel has been recognized by the Michigan Supreme Court." *Id*. at 591-92. In analyzing MCR 6.005(C) and the editor's note, the court determined that subsection (C) "does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel." *Id*. at 591 n. 3.

***People v. Jose*, 896 N.W.2d 491 (Mich. Ct. App. 2016)**

"[T]here is a difference between an order for contribution to the cost of a court-appointed attorney by a defendant who is only partially indigent as a condition for the appointment of the attorney and reimbursement of the cost of an appointed attorney following a defendant's conviction." *Id*. at 495. The difference is "an order for 'contribution'" "suggests an ongoing obligation during the term of the appointment" and "'reimbursement'" "suggests an obligation arising after the term of appointment as ended." *Id* at 496. Therefore, MCR 6.005 (C), which applies to contribution, is different than reimbursement. *See*, *Id*.

Minnesota

Statutes: Minn. Stat. § 611.14, § 611.17, § 611.20

People who are "charged with a felony, gross misdemeanor, or misdemeanor" or appealing a conviction or "pursing a postconviction proceeding" and "are financially unable to obtain counsel are entitled to be represented by a public defender." Minn. Stat. § 611.14. "Each judicial district must screen requests for representation by the district defender." *Id*. § 611.17(a). The defendant "shall submit a financial statement under oath or affirmation setting forth the applicant's assets and liabilities." *Id*. § 611.17(b). When counsel is appointed through the public

defender services they shall pay "a $75 co-payment…unless the co-payment is, or has been, reduced in part or waived by the court." *Id*. § 611.17(c). If an indigent defendant later has the ability to pay the appointment of a public defender will terminate. *Id*. § 611.20(1). The court may then "investigate the financial status of the defendant…and may act to collect payments." *Id*. § 611.20(1). "If the court determines that the defendant is able to make partial payment, the court shall direct" the defendant to make that payment." *Id*. § 611.20(2). For an employed defendant, a court may order reimbursement and if the defendant does not pay the "court may order the defendant's employer to withhold" the defendant's pay. *Id*. § 611.20(4)(a).

***State v. Craig*, 807 N.W.2d 453 (Minn. Ct. App. 2011); *aff'g,* 826 N.W.2d 789 (Minn. 2013)**

Minn. Stat. § 611.17 "does not require specific findings regarding the defendant's financial circumstances." *Id*. at 472. If a "defendant is financially able to make a partial payment" the court may order a partial payment in addition to the co-payment. *Id*.

***State v. Cunningham*, 663 N.W.2d 7 (Minn. Ct. App. 2003)**

"Section 611.17(c) mandates imposition of the co-payment upon disposition of a case, but affords the court discretion to waive the requirement." *Id*. at 11. However, the "statute provides no guidance as to when a court should exercise its discretion to waive the co-payment requirement." *Id*. So, the appellate court concluded that the statute must be "narrowly construe[d]" "to waive the co-payment when a defendant is indigent or when the co-payment would cause a defendant to suffer manifest hardship." *Id*.

Mississippi

Statutes: Miss. Code Ann. § 25-32-9; Miss. R. Crim. P. 7.3; Miss. Code Ann. § 99-15-17

When a defendant is arrested and charged "the arresting authority shall" allow that person "to sign an affidavit stating that such person is an indigent and unable to employ counsel." Miss. Code. Ann. § 25-32-9(1). The affidavit, executed under oath, shall "list[] all assets available to the indigent for the payment of attorney's fees, including the ownership of any property real or personal." *Id*. § 25-32-9(1). This affidavit shall be part of the court record and subject to review. *Id*. § 25-32-9(1).

A defendant "may complete an affidavit" with their financial resources, or "may be examined under oath" by a judge." Miss. R. Crim. P. 7.3(b). The court may reconsider a "determination of indigency or non-indigency, if there has been a material change." *Id*. 7.3(c). In the editor's notes it says, "Rule 7.3(h) is consistent with existing law regarding the compensation of appointed counsel" and references Miss. Code Ann. § 99-15-17, the statute for private appointed counsel. *Id*. 7.3.

There are no cases challenging Miss. Code. Ann. § 25-32-9.

Missouri

Statute: Mo. Rev. Stat. § 600.090

If a defendant is eligible for appointed counsel and he is determined to be "able to provide a limited cash contribution toward the cost of his representation without imposing a

substantial hardship upon himself or his dependents, such contribution will be required as a condition of his representation." Mo. Rev. Stat. § 600.09(1)(1). If a defendant later "becomes financially able to meet all or some part of the cost of services…he shall be required to reimburse" an amount "he can reasonably pay." *Id*. § 600.090(1)(2). The court may put a lien on the defendant's property if the defendant owes over $150.

There were no cases challenging the statute for attorney's fees.

Montana

Statute: Mont. Code Ann. § 46-8-113

A "court shall determine whether a convicted defendant should pay the costs of counsel assigned to represent" him. Mont. Code. Ann. § 46-8-113(1). "If the defendant pleads guilty prior to trial" there is a set fee based on the degree of the case. *Id*. § 46-8-113(1)(a). "If the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial." *Id*. § 46-8-113(1)(b). The court shall inquire into "the defendant's ability to pay those costs" and inform the defendant that purposely providing "false or misleading statements…may result in criminal charges." *Id*. § 46-8-113(3). "The court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay the costs." *Id*. § 46-8-113(4). The court will consider "the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id*. § 46-8-113(4). A defendant can petition the court "for remission of the payment of costs or of any unpaid portion of the costs." *Id*. § 46-8-113(5). If the court determines that the payment "will impose manifest hardship on the defendant or the defendant's immediate family, the court may reduce all or part of the amount…or modify the method of payment." *Id*. § 46-8-113(5).

***State v. Hirt*, 2005 MT 285, 124 P.3d 147**

In order for a court to order a defendant to pay the cost of court-appointed counsel the court must make a "meaningful inquiry into the [defendant's] financial status and a subsequent finding of [sic] the record that he has sufficient resources to repay costs of legal counsel." *Id*. ¶ 22 (quoting *State v. Farrell*, 676 P.2d 168, 173 (Mont. 1984)). The sentencing court "recognized that [the defendant] did not have any financial resources," so when it required a recoupment fee without any "articulated [] basis for this determination" the court "did not comply with the statutory requirements." *Id*. ¶ 23.

***State v. Farrell*, 676 P.2d 168 (Mont. 1984)**

Similarly, when there is "nothing in the transcript of the record or in the judgment of the trial court to indicate how or if the court took cognizance of [a defendant's] financial resources and the burden that recoupment would impose on him" then a "judgment cannot stand." *Id*. at 173. There does not need to be a "full-fledged adversarial inquiry" but the court must consider any reasons the defendant cannot pay. *Id*. at 173-74.

Nebraska

Statutes: Neb. Rev. Stat. § 29-3902, § 29-3908

When a felony defendant appears in court "the court shall make a reasonable inquiry to determine his or her financial condition" and may require an affidavit." Neb. Rev. Stat. § 29-3902. If the felony defendant is indigent then the court shall appoint a public defender. *Id*. § 29-3902. "The same procedure shall be followed by the court in misdemeanor cases punishable by imprisonment." *Id*. § 29-3902. "Whenever any court finds subsequent to its appointment of the public defender…to represent a felony defendant that its initial determination of indigency was incorrect or that…the felony defendant has become no longer indigent, the court may order" the defendant to reimburse all or part of the costs. *Id*. § 29-3908.

***State v. Wood*, 511 N.W.2d 90 (Neb. 1994)**

The court found that the statutes "require that when a defendant is appointed counsel after a finding of indigence, a determination that the defendant is no longer indigent is necessary before the court can require reimbursement of fees for the court-appointed attorney as a condition of probation." *Id*. at 94. Without a determination that a defendant is no longer indigent an "abuse of discretion takes place" because "the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result." *Id*. at 95.

Nevada

Statutes: Nev. Rev. Stat. § 7.165, § 7.125, § 178.3975

"The court may order a defendant to pay all or any part of the expenses incurred…in providing the defendant with an attorney." Nev. Rev. Stat. § 178.3975(1). "The court shall not order a defendant to make such a payment unless the defendant is or will be able to do so." *Id*. § 178.3975(2). When making a payment determination, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment will impose." *Id*. § 178.3975(2). A defendant may petition the court "for remission of the payment or of any unpaid portion." *Id*. § 178.3975(3). Then, if the court determines that the payment "will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due or modify the payment." *Id*. § 178.3975(3). If the defendant requests and the court deems it suitable, "the court may allow the defendant" to pay "by performing supervised community service for a reasonable number of hours, the value of which would be commensurate with such expenses incurred." *Id*. § 178.3975(5).

After the appointment of counsel if the court determines that a "defendant is financially able to obtain private counsel or to make partial payment" the court may terminate the appointment or direct that the defendant pay. *Id*. § 7.165. Section 7.125 applies to appointed private counsel and has guidelines for hourly and caps for compensation. Section 7.135 gives courts the authority to reimburse appointed private counsel.

***Taylor v. State*, 903 P.2d 799 (Nev. 1995); *overruled for other reasons by* Gama v. State, 920 P.2d 1010 (Nev. 1996)**

Statutes "grant district courts discretion to condition probation on the repayment of attorney's fees." *Id*. at 809.

New Hampshire

Statute: N.H. Rev. Stat. Ann. § 604-A:9

A defendant who is appointed counsel "shall be ordered by the court…to repay the state through the unit of cost containment, the fees and expenses paid by the state on the defendant's behalf." N.H. Rev. Stat. Ann. § 604-A:9(I). The order may be "consistent with the defendant's present or future ability to pay." *Id*. § 604-A:9(I). The defendant may be charged "a service charge of up to 10 percent of the total amount of fees and expenses." *Id*. § 604-A:9(I). The payment may be a paid through probation. *Id*. § 604-A:9(I).

If a "defendant is financially unable to make such payment" the defendant "may petition the court for relief" in the form of "a new repayment order at any time within 6 years from the date of the original order." *Id*. § 604-A:9(I-b). "If the court does not order full payment" there shall be "an investigation to determine the defendant's present financial condition and his ability to make repayment." *Id*. § 604-A:9(I-b).

A defendant's wages or salary may be deducted to fulfill the payment. *Id*. § 604-A:9(III). The payment may be a condition of probation when the defendant's sentence does not include incarceration. *Id*. § 604-A:9(IV). If a defendant is incarcerated the payment may be a condition of parole. *Id*. § 604-A:9(V).

"At any time within 6 years of the disposition of an action" when the court finds the defendant is not able to pay, "the state may petition the court for an order of repayment." *Id*. § 604-A:9(VI). "The court shall order such repayment in whole or in partial payments, unless the court finds the defendant is unable to pay, in whole or in partial payments." *Id*. § 604-A:9(VI).

***State v. Haas*, 927 A.2d 1209 (N.H. 2007)**

The court used the rational basis test for the state's recoupment statute. *Id*. at 1210. The defendant did not meet their burden. *Id*. The court determined that "the statutory scheme…is rationally related to this purpose [of recouping fees for public defense] in that it inquires into a defendant's ability to pay and outlines procedures for recoupment orders, collection and appeal of such orders." *Id*.

New Jersey

Statutes: N.J. Stat. Ann. § 2A:158A-16, § 2A:158A-17; § 2A:158A-15.1

When "it appears that the defendant has or reasonably expects to have means to meet some part, though not all, the cost of" counsel "he shall be required to reimburse the office…in such amounts as he can reasonably be expected to pay." N.J. Stat. Ann. § 2A:158A-16. Payment due for appointed counsel may be subject to "a lien on any and all property to which the defendant shall have or acquire an interest." *Id*. § 2A:158A-17. "The Public Defender shall effectuate such lien whenever the reasonable value of the services rendered to a defendant appears to exceed $!50.00 and may effectuate such lien where the reasonable value of those services appears to be less than $150.00." *Id*. § 2A:158A-17(a). There shall be a designated person to investigate "the financial status of each defendant requesting" appointed counsel, they shall make a determination, and that determination is subject to review. *Id*. § 2A:158A-15.1.

***Stroinski v. Office of Public Defender*, 338 A.2d 202 (N.J. Super. Ct. App. Div. 1975)**

The recoupment statute vests *discretion* to the public defender officer "to effectuate a lien on the defendant's property whenever the reasonable value of the services rendered appears to be less than $150 and *requires* the lien to be effectuated when such value appears to exceed $150." *Id* at 209 (emphasis added). The mandatory provision "is more protective of indigent defendants than the statute considered in Fuller." *Id*.

New Mexico

Statutes: N.M. Stat. Ann. § 31-16-7, § 31-15-12

When a person receives legal assistance they may be subject to payment or reimbursement. N.M. Stat. Ann. § 31-16-7(A). The district attorney may recover payment or reimbursement if the defendant "is financially able to pay or reimburse the state…but refuses to do so. *Id*. § 31-16-7(B). In order to recover a "[s]uit must be brought within three years after the date on which the benefit was received." *Id*. § 31-16-7(B).

"A person shall pay a non-refundable application fee of ten dollars ($10.00) at the time the person applies with the public defender for representation." *Id*. § 31-15-12(C). "The public defender shall determine if the person is indigent and unable to pay the fee." *Id*. § 31-15-12(C). "When a person remains in custody and is unable to pay the fee, the court may waive payment of the fee." *Id*. § 31-15-12(C).

***State ex rel. Quintana v. Schnedar*, 855 P.2d 562 (N.M. 1993)**

In New Mexico there are separate sections for the Public Defender Act (PDA) and Indigent Defense Act (IDA). *Id*. at 564. The court determined that "two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals." *Id*. at 564-65. The court distinguished IDA as giving the right to counsel and PDA as providing an agency to accomplish this objective. *Id*. at 565. The statutes under the IDA determine indigency and the statutes under PDA define the statutory duties of public defenders. *Id*. ¶¶ 7-9. Therefore, "[c]ourts should ordinarily follow the Department's standards and defer to its recommendations in their independent evaluation of whether a defendant is 'needy.'" *Id*. ¶ 11.

Although Section 31-15-12 addresses the recoupment fee, it should be read in conjunction with Section 31-16-7.

New York

Statute: N.Y. County Law § 722-d

"Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation…counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate. N.Y. County Law § 722-d.

***People v. Alessi*, 584 N.Y.S.2d 275 (N.Y. Sup. Ct. 1992)**

When the judge learned the defendant posted a $10,000 bail he relieved the public defense from their assignment and ordered the defendant to find private counsel. *Id*. at 276. The defendant claimed his father posted the bail and would not pay for counsel. *Id*. He attempted to

find a lawyer but could not afford one for $2700.00, the amount he had. *Id*. The judge ordered the public defense to represent him and the defendant to pay them the $2700.00. *Id*.

The appellate court stated that § 722-d, "appears to be a grossly under-utilized weapon in the battle of balancing a defendant's right to counsel, and the exploding financial burden to the State of providing free representation to those who are not fully able to afford private counsel." *Id*. The court then ordered the defendant for a full payment of $2700.00 in weekly installments. *Id*. at 277.

North Carolina

Statute: N.C. Gen. Stat. § 7A-455

"If…an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for that person by assigned counsel, the public defender, or the appellate defender, and other necessary expenses of representation, the court shall order the partially indigent person to pay such portion." N.C. Gen. Stat. § 7A-455(a). This fee shall be included in a judgment by the court. *Id*. § 7A-455(b). "The money value of services rendered by the public defender…shall be based upon the factors normally involved in fixing the fees of private attorneys…and that fee usually charged in similar cases." *Id*. § 7A-455(b). Only convicted defendants are required to pay the reimbursement fee and due on the date of conviction or the end of probation. *Id*. § 7A-455(c). When a defendant has a judgment for the reimbursement, there needs to be "a social security number or certification" including on the fee application. *Id*. § 7A-455(d).

***State v. Jacobs*, 648 S.E.2d 841 (N.C. 2007); *remanded to* 668 S.E.2d 346 (N.C. Ct. App. 2008); *decision vacated for other reasons,* 681 S.E.2d 339 (N.C. 2009)**

"The Court of Appeals majority vacated the trial court's taxing of attorney fees against defendant because it concluded that the trial court could not properly enter judgment for attorney fees without giving defendant notice and an opportunity to be heard on that issue." *Id*. at 842. However, the reviewing appellate court "conclude[d] that because there was no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue." *Id*. The record only showed "that the trial judge merely indicated his intention to enter a future order assessing attorney fees." *Id*.

North Dakota

Statute: N.D. Cent. Code § 29-07-01.1

"Lawyers provided to represent indigent persons must be compensated at a reasonable rate." N.D. Cent. Code § 29-07-01.1(1). "For an application for indigent defense services…a nonrefundable application fee of thirty-five dollars must be paid at the time the application is submitted." *Id*. § 29-07-01.1(1). The court has discretion to "extend the time for payment of the fee or may waive or reduce the fee if the court determines the defendant is financially unable to pay all or part of the fee." *Id*. § 29-07-01.1(1).

When counsel is appointed "the court shall advise the defendant of the defendant's potential obligation to reimburse" the attorney's fees, "[u]nless it finds that there is no likelihood that the defendant is or will be able to pay attorney's fees and expenses." *Id*. § 29-07-01.1(2)(b).

The court also "shall notify the defendant of the right to a hearing on the reimbursement amount" and the "actual amount…must be shown." *Id*. § 29-07-01.1(2)(b). In determining reimbursement "the court shall consider the financial resources of the defendant and the nature of the burden that reimbursement of costs and expenses will impose." *Id*. § 29-07-01.1(2)(b).

A defendant can "at any time petition the court to waive reimbursement of all or any portion" and the court will determine whether the payment "will impose undue hardship on the defendant or the defendant's immediate family." *Id*. § 29-07-01.1(2)(c). If the court is satisfied the payment will result in undue hardship "the court may waive reimbursement of all or any portion of the amount due or modify the method of payment." *Id*. § 29-07-01.1(2)(c).

***State v. Kottenbroch*, 319 N.W.2d 465 (N.D 1982)**

A court may revoke probation when "a probation is capable, but unwilling, to repay the costs of his defense." *Id*. at 473. This is proven in a hearing where "the prosecution must establish by a preponderance of the evidence that a violation of a condition of probation occurred." *Id*. In this case, that the defendant "was capable, but unwilling to, repay the costs of his court-appointed counsel." *Id*. Finally, although the statute does not specifically impose payment of recoupment fees as a condition of probation, a sentencing judge has "wide discretion in imposing conditions for a deferred imposition of a sentence." *Id*. at 474. There are many reasons, including educating a defendant about the costs and responsibilities of being in the criminal justice system and to deter future illegal activity. *Id*.

Ohio

Statutes: Ohio Rev. Code Ann. § 2941.51, § 120.36

Appointed counsel "shall be paid for their services by the county the compensation and expenses that the trial court approves." Ohio Rev. Code Ann. § 2941.51(A). "Each request for payment shall include a financial disclosure form completed by the indigent person." *Id*. § 2941.51(A). The financial disclosure requires a twenty five dollar application fee "unless the application fee is waived or reduced." *Id*. § 120.36(A)(1). There is a schedule of hourly fees based on the type of case for compensation. *Id*. § 2941.51(B).

***State v. Kloeker*, 73 N.E. 3d 1167 (Ohio Ct. App. 2016)**

The appellate court agreed with the defendant that "the trial court ha[d] no authority to enforce monetary obligations in the judgment entry, absent civil enforcement mechanisms." *Id*. ¶ 12. Although a trial court has authority through contempt proceedings, "an order to pay court costs is essentially a judgment on a contractual debt where the court is the creditor and the party ordered to pay court costs is the debtor," making it a civil judgment. *Id*. ¶ 13 (quotations and citations omitted).

Oklahoma

Statute: Okla. Stat., tit. 19, § 138.10

"The court shall order any person represented by a county indigent defender to pay the costs of representation." Okla. Stat., tit. 19, § 138.10(A). To assess the cost, "the court shall take into consideration the ability of the defendant to pay and any likely hardship which would

result." *Id*. § 138.10(A). It may be paid in the total amount or installments. *Id*. § 138.10(A). Any court order for the "costs of representation shall be a lien against all real and personal property of the defendant and may be filed against such property and foreclosed as provided by law for such liens." *Id*. § 138.10(D).

There are no cases that challenge this statute.

Oregon

Statutes: Or. Rev. Stat. § 151.487, § 135.050, § 151.485

"If in determining that a person is financially eligible for appointed counsel…the court finds that the person has financial resources that enable the person to pay in full or in part…the costs of the legal and other services [for appointed counsel] the court shall enter a limited judgment requiring that person to pay…the amount that it finds the person is able to pay without creating substantial hardship in providing basic economic necessities to the person or the person's dependent family." Or. Rev. Stat. § 151.487(1). This determination "is subject to review at any time by the court." *Id*. § 151.487 (5). "Failure to comply…is not grounds for contempt or grounds for withdrawal by the appointed attorney." *Id*. § 151.487(2).

"Suitable counsel for a defendant shall be appointed…if: (d) It appears to the court that the defendant is financially unable to retain adequate representation without substantial hardship in providing basic economic necessities to the defendant or the defendant's dependent family." *Id*. § 135.050(1).

The defendant is required to provide "a written and verified financial statement." *Id*. § 135.050(1)(c), (4). To be eligible for appointed counsel a "person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person's dependent family." *Id*. § 151.485(1). Or, a defendant can be financially eligible if the "court finds, on the record, substantial and compelling reasons why the defendant is financially unable to retain adequate representation without substantial hardship…despite the fact that the defendant does not meet the financial eligibility standards." *Id*. § 135.050(2)(d)(B).

***Johns v. Johnson*, 996 P.2d 1013 (Or. Ct. App. 2000)**

The Oregon statue, 151.487(1), "authorizes a trial court to order a petitioner to repay court-appointed attorney fees only at the time that the court determines that the petitioner is indigent and qualifies for court-appointed counsel." *Id*. at 1014.

Pennsylvania

Statute: Penn. R. Crim. P. 706

The court will determine through a hearing whether a "defendant is without the financial means to pay the fine or costs immediately or in a single remittance." Penn. R. Crim. P. 706(B). The court shall, "insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparation." *Id*. 706(C). If the defendant's finances change he "may request a hearing…when the defendant is in default of a payment or when the defendant advises the court such default is

imminent." *Id*. 706(D). The defendant as the burden "to prove that his or her financial condition has deteriorated to the extent that the defendant is without the means to meet the payment schedule." Id. "Where there has been default and the court finds the defendant is not indigent, the court may impose imprisonment as provided by law for nonpayment." *Id*.

***Commonwealth v. Riveria*, 95 A.3d 913 (Pa. 2014)**

A fine to reimburse the public defenders is not a "fine" for probation purposes. *Id*. at 916. To call the reimbursement a fine for probation would mean it would punish a defendant, which was not the intention of the probation statute. *Id*. The reimbursement also did not fall under "any other conditions" of the probation statute. *Id*. Additionally, the reimbursement could not be deemed a "cost" because costs are "merely incident to the judgment" and not part of the sentence. *Id*. at 917.

There was a statute, 19 Pa. Cons. Stat. § 793, that "required criminal defendants to reimburse the county for the expenses of court-appointed counsel." *Id*. However, that statute was repealed in 1984 and "[t]here has been no new legislation…mandating payment for court-appointed counsel." *Id*.

***Commonwealth v. Pride*, 380 A.2d 1267 (Pa. Super. Ct. 1977)**

The court would not allow a reimbursement fee to be characterized as a fine or probation condition to comply with the recoupment statute because it was "an attempt to transform a statutorily unauthorized repayment into a permissible order." *Id*. at 1270.

Rhode Island

Statutes: R.I. Gen. Laws § 12-21-20, § 12-30-30, § 12-15-9. § 12-5-11; R.I. R. Crim. P. 44

In Rhode Island there is not a specific provision for recoupment fees. The most applicable statute states, "If….the defendant shall be ordered to pay a fine….he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law." R.I. Gen. Laws § 12-21-20(a). A judge shall then "make a preliminary assessment of the defendant's ability to pay immediately after sentencing" by "standardized procedures including a financial assessment instrument." *Id*. § 12-21-30(b)-(d). The amount may be modified after a hearing. *Id*. § 12-21-30(e). The court "may require a further financial statement, may require relevant documents, and may conduct any investigation he or she deems appropriate." *Id*. §12-15-9. If a defendant lies about his indigency he can be fined up to $300 and/or be incarcerated up to 30 days. *Id*. § 12-5-11. If a defendant is charged with an offense that is "punishable by imprisonment for a term of more than six months or by a fine in excess of $500" the court shall appoint counsel if the defendant is indigent. R.I. R. Crim. P. 44.

There were no cases regarding recoupment fees for public defenders.

South Carolina

Statute: S.C. Code Ann. § 17-3-10, § 17-3-30, § 17-3-40, § 17-3-50

There does not appear to be a statute for recoupment fees for a public defender; there is a statute to compensate a private appointed counsel. "[I]f it is determined that the person is

financially unable to retain counsel then counsel shall be provided." S.C. Code Ann. § 17-3-10. "The fact that the accused may have previously engaged and partially paid private counsel…shall not preclude a finding that he is financially unable to retain counsel." *Id*. § 17-3-10. When counsel is appointed the defendant "shall execute an affidavit that he is financially unable to employ counsel and that affidavit must set forth all his assets." Id. § 17-3-30(A). If they have "some assets but they are insufficient to employ private counsel, the court, in its discretion, may order the person to pay these assets to the general fund of the State." *Id*. § 17-3-30(A). Along with the affidavit a defendant must pay a "forty dollar application fee" or apply "for a waiver or reduction in the application fee." *Id*. § 17-3-30(B). The fee goes into an account "only to provide for indigent defense services." *Id*. When counsel is appointed it "creates a claim against the assets and estate of" the defendant. *Id*. § 17-3-40(A). This claim may become a lien if the court, in its discretion, reduces the claim to a judgment and a defendant will have "at least thirty days' notice that judgment will be entered." *Id*. § 17-3-40(B).

"When private counsel is appointed…he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court." *Id*. § 17-3-50(A). Depending on the degree of the crime charged there is a cap on the amount of compensation. *Id*. § 17-3-50(A).

The cases regarding recoupment fees that cite to § 17-3-50 refer to private appointed counsel.

South Dakota

Statutes: S.D. Codified Laws §23A-40-6, § 23A-40-10

"In any criminal…action, if it satisfactorily shown that the defendant or detained person does not have sufficient money, credit, or property to employ counsel…the judge of the circuit court or the magistrate shall, upon the request of the defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation." S.D. Codified Laws §23A-40-6. "If the court finds that funds are available for payment from or on behalf of a defendant" for appointed counsel, "the court may order that the funds be paid, as court costs or as a condition of probation, to the court for deposit with the county or municipal treasurer, to be placed in the county or municipal general fund or in the public defender fund." *Id*. § 23A-40-10. "The court may also order payment to be made in the form of installments or wage assignments…regardless of whether the defendant has been acquitted or the case has been dismissed." *Id*. This "reimbursement is a credit against any lien" to reimburse for appointed counsel "against the property of the defendant." *Id.*, see also *Id*. §23A-40-11 ("The services rendered and expenses incurred are a claim against the person and that person's estate" for a person "whom legal counsel or a public defender [was] appointed").

***State v. Huth*, 334 N.W.2d 485 (S.D. 1983)**

"Nonpayment of court appointed counsel fees and a revocation of a suspended sentence is not an imprisonment for debt but is a sanction imposed for an intentional refusal to obey the order of the court." *Id*. at 490. The defendant argued that the sentence and judgment of incarceration "deprive[d] him of the defense of inability to pay the indigent costs and fees." *Id*. However, the court determined that in order for the judgment and sentence to be enforceable the

defendant "must have the ability to repay said amount…before repayment can be ordered." *Id*. "If [the defendant] cannot truly make the repayment his probation will not be revoked for failure to do so." *Id*. at 490-91.

Tennessee

Statute: Tenn. Code Ann. § 40-14-202

"In all felony cases, if the accused…is an indigent person who has not competently waived the right to counsel, the court shall appoint to represent the accused either the public defender…or…a competent attorney licensed in this state." Tenn. Code. Ann. § 40-14-202(a). A court has a duty "to conduct a full and complete hearing" for indigency. *Id*. § 40-14-202(b). If "the court has reasonable cause to believe the accused has financial resources to employ counsel, the court shall order [a social service agency that services the court] to conduct an investigation into the financial affairs of the accused, and report its findings directly to the court." *Id*. § 40-14-202(d). If the defendant is "financially able to defray a portion or all of the cost of [their] representation, the court shall enter an order directing the party to pay…any sum that the court determines the accused is able to pay." *Id*. § 40-14-202(e). This payment is "subject to execution as any other judgment and may also be made a condition of a discharge from probation," and can be modified "when there has been a change in circumstances." *Id*.

***State v. Dubrock*, 649 S.W.2d 602 (Tenn. Crim. App. 1983)**

"[W]henever a criminal defendant claims that he is financially unable to retain counsel" the court is required to hold "an indigency hearing." *Id*. at 605. This is applicable when a defendant "previously retained an attorney," then is "unable to pay for a lawyer." *Id*. The court rejected the State's argument "that the defendant waived his right to counsel by failing to obtain an attorney when he was financially able to do so" and this did "not negate the waiver." *Id*.

Texas

Statute: Tex. Code Crim. Proc. Ann. Art. 26.05[494a]

"If the judge determines that a defendant has financial resources that enable that defendant to offset in part or in whole the costs of the legal services…the judge shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that the judge finds the defendant is able to pay." Tex. Code Crim. Proc. Ann. Art. 26.05[494a](g). If a defendant "at the time of sentencing to confinement or place on community supervision…did not have the financial resources to pay the maximum amount" and "the judge determines that the defendant is indigent or demonstrates an inability to pay" the "judge may amend an order." *Id*. Art. 26.05[494a](g-1).

***Sikalasinh v. State*, 321 S.W.3d 792 (Tex. Ct. App. 2010)**

Attorney's fees for a court appointed attorney "should not [be] included in the Judgment [when] there is no record evidence indicating [a defendant] is 'able to pay.'" *Id*. at 795.

***Dieken v. State*, 432 S.W.3d 444 (Tex. Ct. App. 2014)**

A defendant's financial circumstances may change where he may be initially indigent, then "receives a financial windfall before the judgment is signed." *Id*. at 448. Or, the defendant may be initially "found able to pay for retained counsel ('not indigent'), but suffers a serious financial setback." *Id*. In these instances the State or defendant "may move for reconsideration" and the trial court can reevaluate indigency. *Id*.

Vermont

Statute: Vt. Stat. Ann. § 5238

"The court shall require any person" who is indigent and "assigned counsel…to pay for all or part of the cost of representation based upon his or her ability to pay." Vt. Stat. Ann. § 5238(b). The ability to pay includes the person's "cohabitating family members." *Id*. There is a $50.00 required assignment fee that "shall be paid within 60 days of assignment of counsel." *Id*. The statute includes a chart to determine how much a defendant will owe in addition to the assignment fee. *Id*. This amount will be "divided by the court between a co-payment and reimbursement amount." *Id*. § 5238(c). If there are multiple charges "the court may impose one payment amount calculated based on the category of case for the offense with the highest possible punishment." *Id*. The co-payment is derived from the person's "income or assets" available immediately. *Id*. § 5238(d). The remainder is "paid in a reimbursement order." *Id*. § 5238(e). Upon a petition to the court the payments may be remitted or reduced if it "will impose manifest hardships on the defendant or the defendant's immediate family or that the circumstances of case disposition and interests of justice so require." *Id*. § 5238(f).

***State v. Bailey*, 682 A.2d 1387 (Vt. 1996)**

"The public defender statute sets forth a two-step procedure for assignment of counsel." *Id*. at 1387. First, the court "determine[s] whether a person is needy." *Id*. Second, the court orders "co-payment and reimbursement." *Id*. In the second step, when the court determines the amount of co-payment and reimbursement is where the court considers the income of the defendant and any cohabitating family members." *Id*.

***State v. Morgan*, 789 A.2d 928 (Vt. 2001)**

Specific to the Vermont statute, "before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute." *Id*. at 931.

Virginia

Statute: Va. Code Ann. § 19.2-163.4:1

When a defendant who was represented by a public defender is convicted "the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall be taxed against the person defended." Va. Code Ann. § 19.2-163.4:1. "An abstract of such costs shall be docketed in the judgment lien docket and execution book of the court." *Id*. § 19.2-163.4:1.

***Ohree v. Commonwealth*, 494 S.E.2d 484 (Va. Ct. App. 1998)**

The appellate court stated that "[u]nder the Virginia recoupment statutes, the defendant is given the opportunity at any time to demonstrate that any default was not attributable to any refusal to make a good faith effort to obtain the funds necessary for payment." *Id*. at 491. The court has discretion to grant "additional time," "reduce the amount…on each installment," or "remit the unpaid portion in whole or in part." *Id*. The statute allows for a defendant to provide evidence that they are "unable to pay the costs" at the time of sentencing. *Id*. Alternatives in the statute include "an installment plan or other program created…to repay the debt," or to seek relief from the plan. *Id*.

Washington

Statutes: Wash. Rev. Code § 10.01.160, R.C.W. § 10.73.160, Wash. R. App. P. 14.2

"The court may require a defendant to pay costs." Wash. Rev. Code § 10.01.160(1). These costs are "limited to expenses specially incurred by the state in prosecuting the defendant." *Id*. 10.01.160(2). "They cannot include expenses inherent in providing a constitutionally guaranteed jury trial." *Id*. "Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration." *Id*.

"Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with procedures in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence." Wash. § 10.73160.

"When a trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect…unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." Wash. R. App. P. 14.2. "In a criminal case involving an indigent adult offender, an award of costs will apportion the money owed between the county and the State." *Id*. If a party is a nominal party they "will not be awarded costs and will not be required to pay costs." *Id*. "A 'nominal party' is one who is named but has no real interest in the controversy.'" *Id*.

***In re Dove*, 381 P.3d 1280 (Wash. Ct. App. 2016); *rev. denied,* 398 P.3d 1070 (Wash. 2017)**

"Court-appointed attorney fees and defense costs are specially incurred by the State in prosecuting the defendant and therefore constitute costs under R.C.W. 10.01.160." *Id*. ¶ 14. The "trial court has discretion whether to impose costs under that statute." *Id*. In order to determine if a "defendant is or will be able to pay" the court must "make an individualized inquiry" by doing "more than 'sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.'" *Id*. ¶ 15 (quoting R.C.W. § 10.01.160(3)). If there is boilerplate language in the judgment there must be "substantial evidence in the record to support the boilerplate finding in the judgment." *Id*. ¶ 27.

***State v. Wimbs*, 847 P.2d 8 (Wash. Ct. App. 1993); *declined to follow for other reasons*, 864 P.2d 912 (Wash. 1993) (en banc)**

"The court may order an indigent defendant to pay attorney fees only under certain conditions: (1) repayment cannot be mandatory; (2) the order may only be impose on convicted defendants; (3) the defendant must presently or in the future be able to repay; (4) financial resources of the defendant must be examined; (5) no repayment obligations may be imposed if there is no likelihood of the indigence ending; (6) the defendant must be permitted to petition the court for remission of all or part of the fees; and (7) the defendant cannot be held in contempt if failure to pay was unintentional or not done in bad faith." *Id*. at 13.

***State v. Blank*, 930 P.2d 1213 (Wash. 1997)**

The state statute "provide[d] for recoupment of appellate costs from a convicted defendant," including "fees for court appointed counsel." *Id*. at 1216. The defendant argued that the features of the statute differed from those in *Fuller* and *Curry* the statute was unconstitutional under equal protection and right to effective counsel. *Id*. at 1217. Specifically, Washington's statute did not include provisions that stated repayment may be ordered if the "defendant is or will be able to pay;" defendant's financial resources "must be taken into account;" and repayment "may not be imposed if it appears there is no likelihood the defendant's indigency will end." *Id*. at 1218. However, the appellate court determined that the statute must only "adhere to those requirements" and the absence of the feature does not make the statute unconstitutional. *Id*. The court also determined that although "it is nearly impossible to predict ability to pay over a period of 10 years or longer" there must be some inquiry before an "enforced collection or any sanction is imposed for nonpayment." *Id*. at 1220. Next, the defendants argued that the statute was "fundamentally unfair because when they were advised of their right to appeal their convictions, they were not informed that they might have to repay costs." *Id*. at 1221. The court determined that it was not fundamentally unfair to not provide "notice [or] an opportunity to be heard prior to the decision to appeal" as long as there is an opportunity "before enforced payment or sanctions imposed." *Id*. Finally, the defendants argued that the statute could not be applied retroactively, as it was in their case. *Id*. at 1223. The court disagreed because the statute was triggered by the disposition of a defendant's appeal, a present event. *Id*.

West Virginia

Statute: W.Va. Code § 29-21-9

There does not appear to be a recoupment statute for public defense; there is a statute for compensation for panel attorneys. If a court appointed public defendant is "not appropriate due to a conflict of interest or…the public defender corporation board of directors or the public defender, with the approval of the board, has notified the court that the existing caseload cannot be increased without jeopardizing the ability of the defenders to prove to effective representation," then the "court shall appoint one or more panel attorneys." W.V. § 29-21-9(b)(1).

Wisconsin

Statutes: Wis. Stat. § 977.07, § 973.06, § 973.07

"If a person is found to be indigent in full or in part, the person shall promptly be informed of the state's right to payment or recoupment…and the possibility that payment of

attorney fees may be made a condition of probation." Wis. Stat. § 977.07(2m). If the person is found to be "indigent in part, the person shall be promptly informed of the extent to which he or she will be expected to pay for counsel, and whether the payment shall be in the form of a lump sum payment or periodic payments." *Id*. § 977.07(2m). This "payment may be adjusted if his or her financial circumstances change by the time of sentencing." *Id*. § 977.07(2m). "The payment and payment schedule shall be set forth in writing." *Id*. § 977.07(2m).

"If the fine, plus costs, fees, and surcharges…are not paid…as required by the sentence, the defendant may be committed to the county jail until the fine, costs, fees, and surcharges are paid or discharged. *Id*. § 973.07. This statue includes attorney fees. *Id*. § 973.06(1)(e). An indigent defendant shall pay attorney fees "[i]f the court determines at the time of sentencing that the defendant's financial circumstances are changed," then "the court may adjust the amount in accordance with § 977.07(1)(a)," which determines indigency. *Id*. § 973.06(1)(e).

***In re Attorney Fees in State v. Helsper*, 724 N.W.2d 414 (Wis. Ct. App. 2006)**

"A defendant who lacks a hearing, notice of the right to request one, or representation is likely to be committed regardless of ability to pay the attorney fee obligation." *Id*. ¶ 11. Therefore, as a "minimum safeguard" "only an affirmative finding of ability to pay, at a hearing where the defendant has an opportunity to respond" is required prior to a commitment order being issued. *Id*. ¶¶ 10, 24. This hearing requires "notice and an opportunity to be heard." *Id*. ¶ 16.

Wyoming

Statutes: Wyo. Stat. Ann. § 7-6-106, § 7-6-108

When a defendant is indigent "the presiding judge shall determine whether the person…has a legal obligation of support, is able to provide any funds towards payment of part or all of the cost associated with [his defense] services." Wyo. Stat. Ann. §7-6-106(c). If a defendant is unable to pay "the court shall enter a specific finding on the record" or "shall state on the record the reasons why an order for reimbursement was not entered." *Id*. If a person is initially appointed counsel then "subsequently retains private counsel, the court may order the person to reimburse the state for the services already provided." *Id*.

"Within six (6) years after the date the services were rendered, the attorney general may sue on behalf of the state to recover payment or reimbursement from each person who has received legal assistance." *Id*. §7-6-108(a).

***King v. State*, 780 P.2d 943 (Wyo. 1989)**

Before ordering reimbursement the court must "first determin[e] the defendant's ability to pay" at sentencing. *Id*. at 957. It is not sufficient to refer a subsequent inquiry "for the purpose of determining whether the court should certify appellant's indigency for purposes of providing counsel on appeal." *Id*. at 958. The court "failed to consider the [defendant's] ability to pay in ordering reimbursement of defense expenses." *Id*.

***Burke v. State*, 746 P.2d 852 (Wyo. 1987)**

Without statutory authority a trial court cannot use their discretion to assess costs for attorney fees as a condition of probation. *Id*. at 858-59. The statute only allowed for that cost to be categorized as a civil debt. *Id*. at 860.

Tribal Courts

The Indian Civil Rights Act (ICRA) applies certain constitutional rights to Indian tribes. *See* 25 U.S.C. § 1301-1304. The ICRA states, "No Indian tribe in exercising powers of self-government shall…deny to any person in a criminal proceeding…at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(7). Thus, right to counsel as a constitutional right at the government's expense for indigent defendants does not apply to Indian tribes under the ICRA. However, tribal codes may enact their own indigent defense statutes. *See Crow Tribe v. Big Man*, 2000 ML 4986, ¶ 57 (Crow Ct. App. 2000) ("indigent Tribal defendants must be informed that they are entitled to free legal counsel only to the extent that the Tribe funds the public defender's office"); *see In re Dupree v. Fort Peak Tribes*, Appeal No. 173, 1993 Mont. Fort Peck Tribe LEXIS 8, at *7 (Fort Peck Ct. App. Feb. 26 1993) ("our lopsided system of justice does not provide the services of a pro bono public defender" for indigent defendants).