

Ability to Pay

Webcast
2016

Honorable James Brady, 47th District Court
Honorable John Hallacy, 37th Circuit Court

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Ability to Pay Report

- Workgroup established June 2014
- Published April 2015
- Tools and Guidance for courts
 - Check lists/scripts
 - Case Law summary
 - Suggestions for payment alternatives
- Report is online at courts.mi.gov

The Basics of Ability to Pay

- Bearden v Georgia, 461 US 660 (1983)
- People v Jackson, 483 Mich 271 (2009)
- Ability to Pay court rules

New Court Rules

- ADM 2015-12 adopted, effective 9/1/2016
- New section MCR 6.425(E)(3) provides the court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.
- Provides criteria to determine "manifest hardship."

Who Makes the Ability to Pay Determination?

- The Judge, not Staff
- Staff can assist the judge by gathering information to help in the judge's determination

When to Determine ATP?

- Must at Enforcement – each time defendant is before you
- Enforcement happens at ...
 - Show cause hearing
 - Probation violation hearing
 - At time conditional sentence is enforced
- Review flowcharts

Enforcement- Show Cause

- Use of show cause dockets to enforce orders
- At the hearing, defendant may say he can't pay
- Determine ATP
- Make the record
- NOTE: Recommended that a show cause for failing to pay issue; if Defendant is a no-show, then issue bench warrant for failure to appear.

What about Contempt?

- Can a judge use contempt for failure to pay?
 - Not a best practice.
 - If you are going to incarcerate, the judge would need to appoint counsel.
 - Still required to create a record and that should include all the factors in MCR 6.425(E)(3).

Right to Counsel?

- **APPOINTMENT OF COUNSEL at Time of Enforcement?**
- What if the defendant waived counsel when plea was entered?
 - Does this waive the right to counsel when it is time to enforce the sentence?
- Does Judge need to again advise the defendant of his **right to counsel and determine that the waiver is knowing, voluntary and intelligent** following a colloquy?
- Does the Judge need to appoint counsel **at no cost for any indigent defendant – respondent - probationer** facing incarceration for non-payment?

Enforcement – Probation Violation Hearing

- Failure to pay court ordered assessments is a violation of the terms of probation
- At PV hearing, the defendant may contest the violation because of inability to pay the assessments
- Determine ATP
- Make the record

What about MCL 769.3?

- Conditional Sentencing
- Statute provides for a time period to pay and, if payments default, sentence as provided by law
- If you are enforcing the incarceration portion of the conditional sentence, court must determine ATP
- If defendant cannot pay, don't send him to jail

Enforcement Alternatives

- Time to pay/payment plan
- Payment alternatives for discretionary assessments
 - Community service, GED
- Incentives and waivers for discretionary assessments
- Inactivate/discharge debt
 - Model Policy
 - Forgive and forego collections on discretionary assessments

How do I know if an assessment is Required or Discretionary?

CRIMINAL/TRAFFIC ASSESSMENTS

Assessment	Authority (MCL)	Required or Discretionary	Amount Requirements	Waivable ¹	Distribution
Minimum State Cost	600.8381(4) 769.1j(1) 769.1k(1)(a) 771.3(1)(g)	Required if two other assessments are ordered	Minimum amounts assessed per count, based upon conviction: \$50 – misdemeanor \$68 – felony	No ²	Justice System Fund
Attorney Fees	MCR 6.005(C) 769.1k(1)(b)(iv)	Discretionary		Yes	Funding Unit
Crime Victim's Rights Assessment	771.3(1)(f) 780.905	Required for felony or misdemeanor convictions	One assessment per case, based upon conviction: \$75 – misdemeanor \$130 – felony	No	90% Crime Victim's Rights Fund 10% Funding Unit
Restitution	769.1a(2) 769.3 771.3(1)(3) 780.826(2)	Required	Required to order each defendant to make full restitution. Since each defendant is required to pay full restitution but should not pay more than the full amount of restitution, the defendants are jointly and severally liable for the entire restitution amount.	No	Victim or Crime Victim's Rights Fund if victim cannot be located or refuses to claim restitution ⁶

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Fines, Fees, Costs and Rates link

Incarceration

- Enforcement of court ordered financial obligations by incarceration should only occur when the court has determined the defendant:
 - has the ability or resources to pay and
 - has not made a good faith effort to do so
- Make a record of the ATP determination
- At show cause or PV hearing, if court is considering incarceration as a penalty for violating the court's order or violating probation, the court must offer legal representation to defendant

Summary

- Judge determines ATP
- ATP determination each time a defendant is before the court for failure to pay
- Review the individual's circumstances
- Make a determination about defendant's ATP
- Make the record
- Judges may see or weigh the circumstances differently

What can I do?

- Review sentencing practices
- Inquire at enforcement- each time
- Make a record of the finding of ability to pay – each time
- Use the scripts provided in the Report
- Educate staff
- Payment Alternatives

FAQs

- 1) Can a defendant be sent to jail for a civil infraction?
- 2) Can bond on a bench warrant be "cash only"?
- 3) If the defendant is discharged from probation with fines/costs owing, does the court lose jurisdiction?
- 4) Can I just send someone to jail and forget the monetary assessments?
- 5) How does this work with the \$10 and \$30 per day jail credit allowed in MCL 257.908(5) and MCL 600.8729, 600.8829?

Hypotheticals

Scenario 1

Defendant is sentenced under the conditional sentence statute, MCL 769.3. The terms of his sentence are to pay \$1000 in 30 days and if he defaults in payment, then serve 10 days in jail. Defendant leaves the courtroom and over the next 30 days, does not make a payment. The court issues a bench warrant for failing to pay and defendant is brought before the judge after spending the night in jail on the bench warrant. The defendant tells the judge he lost his job and cannot pay.

Scenario 2

Defendant is on probation. The court finds that there is probable cause to believe that the probationer has violated the probation condition requiring him to pay the financial assessments, so the court issues a summons for the probationer to appear for arraignment on the alleged violation. At the violation hearing, defendant claims that he has no money and cannot pay. Before the hearing began, your clerk told you that she saw the defendant pull into the court's parking lot in a brand new car.

Scenario 3

Defendant was sentenced to fines and costs, no jail time. She asks the court for a payment plan and the court refers her to its collections clerk. The defendant is supposed to pay \$200 a month starting the 1st of the month. Defendant fails to pay so the court issues a show cause. Defendant appears for the show cause and talks to the collections clerk and tells the clerk she cannot pay and shows the clerk copies of her bills and eviction paperwork. The clerk says the judge doesn't want to see any of that paperwork and the clerk tells the judge that she thinks the defendant is lying and has the ability to pay.

For more information ...

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