

Linda K. ... of
2/2/2016

Appendix V

Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

SUPREME COURT OF VERMONT
OFFICE OF THE COURT ADMINISTRATOR



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January 19, 2016

Douglas R. Hoffer
Vermont State Auditor

Dear Mr. Hoffer,

Thank you for the opportunity to respond to the draft report entitled *Public Defender Fees: Judiciary's Efforts Yielded Collections of Less Than One-Third of Amounts Owed*.

Executive Summary

- 1) The Judiciary reiterates its concern regarding the enforcement of the statutory provision in 13 V.S.A. §5238.

While the State Auditor's report acknowledges the Judiciary's concern regarding enforcement of the statutory provision in 13 V.S.A. §5238, we believe the significance of that concern has been marginalized. The ramifications of denying counsel for non-payment of a public defender fee are significant. To characterize this as a simple "constraint" is a serious understatement.

While the Vermont Supreme Court case has held that the requirement of *reimbursement* for assigned counsel fees passes constitutional muster (see *State v. Morgan* 173 Vt. 533 (2001)), there is other case law that a provision for an attorney "*contingent on prior payment* of the co-payment" violates the right to counsel [emphasis supplied]. A federal court has specifically held that such a procedure would violate the accused's Sixth Amendment right. In *Hanson v. Passer*, 13 F.3d 275 (8th Cir. 1993), the court explained:

"When the state court determines ... that the defendant is not capable of retaining an attorney on his own and grants the defendant's application for a court-appointed attorney, the court cannot withhold the constitutionally mandated appointment until a sum of money is paid." *Id.* at 280.

To insist on payment before appointment of counsel will have a deleterious effect on the existing assigned counsel process in Vermont. In considering the options under the current statute, unless

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the individual reports that they have the \$50.00 co-payment in their possession at the time of assignment, the court has no choice but to assign counsel with an order of reimbursement.

- 2) **The Judiciary maintains that its financial practices regarding collection of Defender General fees are appropriate, including its handling of associated accounts receivable.**

In the Judiciary's view, the collection processes applied to these fees are appropriately calibrated toward the most effective means and maintain the access to justice issues in the preceding paragraphs. The collection rate, as highlighted by the State Auditor's Office, is primarily attributable to the circumstances of the individuals subject to the fees.

- 3) **The Judiciary proposes an additional recommendation to the report, transferring responsibility for the collection of outstanding amounts due the Public Defender Special Fund from the Judiciary to the Defender General's Office.**

Because the debt is due and owing exclusively to the Defender General's Office, the Judiciary recommends the debt be referred to that agency for collection. The Defender General, who provides counsel for many of these individuals, would potentially have better access and ability to gather and validate the necessary information to collect on this debt. Many fines may have administrative fees or surcharges attached that the legislature has specifically identified for use on specific projects or to provide funding for specific programs. When these programs are given responsibility for collection, the collection rate often increases. Act 57, for example, created a Restitution Fund and a centralized Restitution Unit attached to the Vermont Center for Crime Victim Services. A fifteen percent surcharge is now added to all criminal and traffic fines and a restitution judgment order sent to the Restitution Unit when the court orders restitution. The Restitution Unit operates as a collection agency and has an overall collection rate of 24%.

- 4) **The Judiciary expresses disappointment concerning the overstated title of the State Auditor's report.**

Given the correlation between the collection rate and the financial circumstances of the individuals subject to the fees, it is disingenuous to suggest that the lack of collections is due entirely to a lack of effort on the part of the Judiciary. While we do not discount the need to collect co-payment fees, we must balance that obligation against upholding the constitutional rights of indigent defendants.

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Response to the State Auditor's Recommendations

Regarding the State Auditor's specific collection recommendations, we offer the following responses:

Recommendation #1:

Modify the Judiciary's internal procedures on the assignment of public defenders to emphasize the need to collect up-front payments at the time of arraignment whenever possible.

The Judiciary will develop a clearer policy of how collection of co-payment occurs, with emphasis on the need to collect up-front payments at the time of arraignment whenever possible. This policy will need to include a mechanism for providing notice to those litigants who are cited into court so that they are aware of the possible need to pay a co-payment for any public defender fee established on the day of their arraignment. We do not believe there is a viable avenue to notice or expect that lodged defendants would be prepared in any way to produce a co-payment on the day of their arraignment; however, we agree that better attempts to request up-front payment at the time a PD assignment request is received and the defendant is released from custody should occur.

Recommendation #2:

Actively engage in efforts to collect accounts that are past due, such as:

- *Sending out a bill to overdue accounts*
- *Using a collections agency*
- *Assessing an additional fee in accordance with the procedures outlined in 13 V.S.A. §7180, and*
- *Reporting overdue debt to a credit bureau*

Regarding other steps proposed by the SAO to increase collections in this area, as a general statement the Judiciary is committed to using the tools at its disposal to diligently collect the revenues due under this statute. The Judiciary notes, however, that it has limited staff and resources for the collection function, which is ancillary to its primary judicial function. Regarding the SAO's specific collection recommendations, we offer the following responses.

- **Sending out a bill to overdue accounts/ using a collection agency:** The Judiciary will explore the SAO's recommendations to utilize referral to collection agencies and/or sending subsequent billing notices to the debtors. In doing so, the Judiciary will estimate the administrative time and cost of such activity relative to the estimated additional collections. The Judiciary notes that as a general rule, tax offsets are the most effective collection tool currently available. Past efforts in sending out bills for past due accounts has been labor intensive due to the Judiciary's case management system not being able to provide a method of tracking the overdue bill, create an invoice for the bill or provide a means to run reports of such overdue bills. Our past experience has found that the defendant population is often transient and our efforts to send out mass billings resulted in a multitude of returned mail due to bad addresses.

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- **Imposition of a non-payment fee:** Additional non-payment fees are likely to dissuade additional collections. The Judiciary's experience in the context of both civil and criminal collection is that the multitude of surcharges, including those for nonpayment, has had the effect of lowering collection patterns. The Judiciary is therefore unlikely to pursue this option.
- **Referring Defender General obligation to credit bureaus:** Our understanding is that recent legal settlement involving multiple state attorneys general prohibits reporting of judgments on individuals' credit reports. In light of this settlement, the judiciary does not plan to send debt information directly to the credit bureaus, absent clear guidance that such referral would not be contrary to the settlement. Similarly, the collection agency that is used by the Judiciary may be unwilling to make such reporting to the credit bureaus, as the agency could be liable for violation of the settlement. Moreover, the Judiciary's circa-1990 case management system has no means of distinguishing between contractual debts (which can be reported to credit bureaus) and debts associated with penalties, surcharges, and fees – so we would have no means of separating the two categories in any electronic transmission of data, so such separation would have to be done manually. Finally, those individuals who owe Public Defender reimbursements are likely to have a variety of economic challenges, so that a negative item on their credit report is not likely to create a significant additional incentive to pay.

Recommendation #3:

Modify the public defender order to include language that there will be additional fees assessed for additional collection actions, such as referring to the Department of Taxes for tax refund offset.

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The Judiciary will modify the Public Defender Order to include language that there may be additional fees assessed for additional collection actions, such as referring to Tax Department for tax refund offset. The Judiciary disagrees with the SAO report, however, that this will produce any meaningful increase in collections. Any revision to the form should not identify the applicable Tax Department collection structure because the judiciary does not control the level of those fees.

Recommendation #4:

Consider implementing additional procedures to ensure that social security numbers are obtained from defendants and validated.

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The Judiciary will explore opportunities to improve the collection and validation of Social Security Numbers (SSNs) in order to expand the universe for tax offsets and otherwise improve collections, however, these solutions will need to ensure and preserve the privacy rights of the defendant. The Judiciary notes that as a general rule, tax offsets are the most effective collection tool currently available. The ability to adequately validate SSNs, while being an excellent goal, is realistically an enormous challenge. Most defendants are not readily able to produce a Social Security card. Many do not file annual tax returns. Our understanding is that the Tax Department, due to reasons of confidentiality, is unable to provide correct numbers if we have in fact sent an incorrect number

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that does not match up with the name and date of birth. If we withhold public defender assignment until such information becomes available, (if ever), then we are not fulfilling our mission of access to justice. The dilemma in asking the defendant to validate this information is that it could cause long delays in scheduling court hearings, creating backlogs and the need for additional follow up from court staff and judges. The initial collection of SSNs at the courthouse counters will continue to be challenging, given the nature and circumstances of the interactions with defendants.

Recommendation #5:

Update the instructions provided to Superior Court staff to ensure that the annual transmittal of records to Department of Taxes includes previous periods.

Regarding the instructions to Superior Court Clerks for the identification of Defender General collection referrals and the applicable time periods, we appreciate SAO identifying this issue. We intend to revise the instructions to ensure that the full universe of receivables is referred to the Tax Offset program.

Recommendations #6 and #7:

Cease the process of removing public defender debt from the court's records once it has been referred to Department of Taxes for tax refund offset and continue to attempt to collect these debts.

Ensure that all outstanding public defender fees are included as accounts receivable in the State's financial system.

The Judiciary disagrees with the SAO report's findings that the receivables associated with the Defender General collection are not handled appropriately, at least as regards the Judiciary's responsibilities. In explaining this objection, it is important be clear about current practice. The Judiciary refers these receivables to the Tax Department. The Tax Department collects any tax offsets and deposits them; it does not return those collections to the Judiciary for depositing and processing. At the time of the referral, the Judiciary identifies each individual debt as "referred to tax offset" and reduces the amount owed to zero. The Judiciary directs individuals to the Tax Department if they attempt to pay amounts owed after the referral of the debt to the Tax Department.

Given this established practice, there can be no other rational interpretation other than that the receivable has been transferred to the Tax Department. The SAO's statement that a transfer of receivables requires a technical transaction mandated by internal procedures may be true; but it does not change the fact that the Judiciary is handling those receivables properly based both on its internal processes (case management system reconciles to accounting system) and external processes (receivables follow collections/deposits).

The SAO's statement that the Judiciary treats civil violation debts, and the use of tax offsets for them, differently than Defender General fees is apparently intended to suggest that the Judiciary's process for Defender General fees is inappropriate. In fact, the two processes are intentionally different, and for good reasons. The civil collections that are recouped via tax offset are returned to the Judiciary for attribution to individual penalties and associated revenue distribution. This

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process is cumbersome but important given the size of the receivables and the multiple revenue distribution streams. The receivables remain on the Judiciary's books until collections are made against them. In the case of the Defender General fees, any collections made by the Tax Department are credited directly to the special fund, saving time and effort. Because the collections are not returned to the Judiciary, it would make sense that the receivables would remain with the Tax Department.

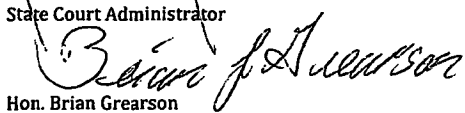
Regarding receivables that have already been sent to the Tax Department, the Judiciary believes that those receivables should remain with the Tax Department, with the opportunity for future year collections – and recordation of the associated receivables if that is not currently taking place. The Judiciary is willing to discuss with the Tax Department whether it makes sense to change practices for future debts – with the potential that any tax offset collections are returned to the Judiciary for processing. In that case, however, all parties – including the Defender General – should be aware that such a practice would likely create significant delays before the special fund revenue became available to the Defender General.

The Judiciary is dependent on other entities within state government who manage financial processes – the Department of Finance and Management; the Tax Department; etc. – to ensure that the technical transactions are consistent with proper financial practice. In this instance, the Judiciary is following proper financial practice. If the technical transactions are not consistent with that, then the Judiciary looks forward to working with the other entities in making form follow substance.

Sincerely,



Patricia Gabel
State Court Administrator



Hon. Brian Grearson
Chief Superior Judge

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