

FINAL REPORT AND RECOMMENDATIONS

June 2019

*CHIEF JUDGES'
SUBCOMMITTEE
ON JAIL FOR
NONPAYMENT
OF LEGAL
FINANCIAL
OBLIGATIONS*

Executive Summary of the Final Report and Recommendations of the Subcommittee on Jail for Nonpayment of Legal Financial Obligations

The Chief Judges' Subcommittee on Jail for Nonpayment of Legal Financial Obligations (Committee) reviewed the statutes, policies, and practices related to how legal financial obligations (LFOs) are imposed, collected, and enforced across the state of Wisconsin. The Committee reviewed the Constitutional implications of jailing a person or restricting a person's driving privileges for failing to pay LFOs and considered alternative means of enforcing an order to pay LFOs. The Committee studied the practical considerations of collecting LFOs and reviewed collection data to determine the most effective means of imposing and collecting LFOs. The Committee further relied on a study conducted by the Office of Court Operations, in collaboration with the National Center for State Courts¹, which analyzed how LFOs are imposed and collected in Wisconsin.

The Committee found that Wisconsin's statutes provide adequate Constitutional protections but that the policies and practices employed in some courts may not be optimal. Additionally, the Committee found that current collection practices do not yield the highest rates of collection but that courts and clerks of court have an increasing number of options to maximize collections. The Committee makes the following recommendations for how circuit and municipal courts may impose, collect, and enforce orders to pay, LFOs.

The Committee recommends that, **before imposing an LFO, a court should use an ability-to-pay calculator and/or a list of questions to understand a defendant's entire financial circumstances.** The Committee finds that doing so will enable the court to impose an LFO that is appropriate for each defendant. If the defendant has limited ability to pay, the Committee recommends considering imposing **community service** as an alternative to some of all of the legal financial obligation.

The Committee found that municipalities and counties employ a variety of practices related to collecting LFOs and recommends several best practices for courts and clerks of court. The Committee recommends that a defendant be allowed to pay his or her LFOs on a **payment plan**, which has been personalized to his or her financial situation by use of an ability- to- pay calculator.

The Committee recommends that clerks of court discontinue the practice of charging a fee to establish a payment plan and either establish or continue a method for sending payment reminders to defendants, either via email or text messages. The Committee encourages the

¹ Legal Financial Obligations in Wisconsin Wisconsin Director of State Courts' Office, Tyler Brandt, National Center for State Courts, Cynthia G. Lee, Scott E. Graves, 2018
<https://www.wicourts.gov/publications/reports/docs/studylegalfinobligation.pdf>

use of the State Debt Collection program within the Department of Revenue to collect legal financial obligations if a defendant fails to pay his or her LFOs in a timely manner.

The Committee acknowledged that defendants may fail to pay an LFO, regardless of the amount imposed or how reasonable a payment plan is established and that courts are often required to enforce an order to pay LFOs. The Committee reviewed how courts across the state impose consequences for failure to pay LFOs and recommends best practices for municipal and circuit courts.

The Committee recommends eliminating jail as a consequence for failure to pay, or limited it to the most egregious circumstances. Similarly, the Committee recommends eliminating suspension of a defendant's driving privileges for failure to pay, except in the most egregious circumstances.

The Committee found that these sanctions are not particularly effective, cost money, and risk violating a defendant's Constitutional rights. Therefore, the Committee recommends courts enforce their orders to pay LFOs in another manner, such as by reducing the LFO debt to a civil judgment and referring the debt for collection via the SDC program. The Committee found that this is an efficient and cost-effective means of enforcing an order to pay LFO when a defendant fails to pay.

However, the Committee acknowledged that, in certain egregious circumstances, jail or a driving privilege suspension may be an appropriate sanction. The Committee recommends that, if a court is considering imposing one of these sanctions, the court conduct a hearing to take into consideration a defendant's entire financial and other life circumstances and consider creating a new payment plan, reducing or eliminating a portion of the legal financial obligation. If the court believes that jail or a driving privilege suspension is the most appropriate sanction, the Committee recommends that court make a specific finding, on the record, that the defendant is able to pay but willfully refuses to do so.

The Committee recommends each circuit and municipal court read its Final Report and Recommendations and the Report on Legal Financial Obligations in Wisconsin, referenced in footnote 1, in order to incorporate its recommendations as best practices for imposing, collecting, and enforcing orders for LFOs.

FINAL REPORT AND RECOMMENDATIONS OF THE CHIEF JUDGES' SUBCOMMITTEE ON JAIL FOR NONPAYMENT OF LEGAL FINANCIAL OBLIGATIONS

Committee members: Chief Judge Maxine White, chair, Chief Judge Jenifer Dorow, Chief Judge William Hanrahan, Municipal Court Judge Todd Meurer, District Court Administrator Don Harper, District Court Administrator Tom Schappa, and District Court Administrator Holly Szablewski²

Introduction and formation of the Jail for Nonpayment Committee

In 2016, members of the Committee of Chief Judges voted to form the Jail for Nonpayment Subcommittee (the Committee) to study Wisconsin's laws and practices surrounding legal financial obligations (LFOs).

The Committee, consisting of three chief judges, three district court administrators, and a municipal court judge, established the following definition for an LFO: "A 'legal financial obligation' includes a fine, forfeiture, court fee, cost, surcharge, restitution order, or other monetary obligation a defendant must pay as a result of his or her violation of an ordinance or statute."

The Committee recognized that, nationally, concern over the impact of LFOs and sanctions imposed for failure to pay them was growing. The Committee wished to ensure that in Wisconsin's circuit and municipal courts, the policy and practices informing LFOs was consistent with Constitutional guarantees and met best practice guidelines.

At its first meeting, the Committee adopted as its mission statement: "To clarify statutory and constitutional obligations for imposing and collecting court-imposed financial obligations, to identify alternatives to jailing and license suspension for failure to pay, and to establish recommended practices for imposing and collecting these financial obligations in circuit and municipal court."

To accomplish its mission, the Committee began its holistic review of how LFOs are imposed and collected, and what consequences are enforced against a person who fails to pay an LFO.

² The Committee thanks former Chief Judge Randy Koschnick and former Chief Judge James Daley for their service on, and contributions to, the Committee.

United States Department of Justice and Ferguson, Missouri

The topic of LFOs generally, and how failure to pay an LFO is enforced specifically, is a topic of great concern across the country. Much discussion of the topic was generated by a report, issued in March 2015 by the United States Department of Justice Civil Rights Division, entitled “Investigation of the Ferguson Police Department.”³ The report focused on two areas of concern in Ferguson, Missouri: the practices and policies of the Ferguson Police Department and the practices and policies of the Ferguson Municipal court. In its analysis of the practices and policies of the Ferguson Municipal court, the Department of Justice found systemic failure and a routine denial of civil rights and basic fairness.

Specifically, the Department of Justice found “substantial evidence that the court’s procedures are constitutionally deficient and function to impede a person’s ability to challenge or resolve a municipal charge, resulting in unnecessarily prolonged cases and an increased likelihood of running afoul of court requirements. At the same time, the court imposes severe penalties when a defendant fails to meet court requirements, including added fines and fees and arrest warrants that are unnecessary and run counter to public safety. These practices both reflect and reinforce an approach to law enforcement in Ferguson that violates the Constitution and undermines police legitimacy and community trust.”⁴

After issuing its Report, the United States Department of Justice in March 2016 distributed letters across the country to court administrators and justices on states’ highest courts, asking the recipients to review their own states’ laws and practices regarding the imposition and collection of legal financial obligations. The Department urged the recipients to “review court rules and procedures within your jurisdiction to ensure that they comply with due process, equal protection, and sound public policy.”

In response to the issues raised by the Ferguson report and in light of increasing concern over the impact of LFOs on citizens, particularly indigent citizens, other states and organizations interested in our justice system have taken a closer look at how LFOs are imposed and collected. The Committee reviewed the reports and recommendations issued by the Conference of State Court Administrators⁵ and by the Arizona Supreme Court.⁶ The Committee found those reports helpful in framing the issues for study and setting forth

³ [Investigation of the Ferguson Police Department](#), United States Department of Justice (2015)

⁴ [Investigation of the Ferguson Police Department](#), United State Department of Justice Civil Rights Division, March 4, 2015, page 42

⁵ [The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations](#) 2016-16 Position Paper, Conference of State Court Administrators
<http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>

⁶ [Justice for All, Report and Recommendations of the Task For on Fair Justice for All](#), State of Arizona Supreme Court <http://www.azcourts.gov/LinkClick.aspx?fileticket=bmEC0PU-FD8%3D&portalid=74>

evidence-based recommendations along with a clear policy preference away from imposing harsh consequences for failure to pay LFOs.

The Ferguson report and the other reports reviewed by the Committee raise areas of concern regarding due process and equal protection. Generally speaking, when a defendant who does not pay an LFO faces sanctions such as suspension of an operating privilege or confinement in jail, great potential exists for denial of due process, equal protection, or both.

The Committee recognizes that financial obligations are not borne equally by each member of our society, and LFOs can pose a much greater burden on the poor or indigent. Great care must be taken to ensure that any sanction, but particularly a serious sanction such as suspension or jail, is not being imposed simply because the defendant is not able to pay an LFO. The Committee undertook its charge with an understanding that “jail for poverty” is a denial of due process and of equal protection.

Simultaneous study on LFOs in Wisconsin

At the same time the Committee began its review of Wisconsin’s policies and procedures, Tyler Brandt of the Office of Court Operations received a grant to study, in conjunction with the National Center for State Courts, how LFOs are imposed and collected in Wisconsin. The study analyzed data generated by Wisconsin’s circuit courts to determine how LFOs are imposed on defendants and whether, how, and when, LFOs are paid. The study also analyzed the effect on collections of two common consequences for failure to pay an LFO: issuance of a warrant for a person’s arrest and suspension of a person’s motor vehicle operating privilege. The Committee determined that it would incorporate the study’s findings and report⁷ into its own recommendations for how LFOs are imposed, collected, and enforced in the state.

Committee process

After establishing its mission statement, the Committee conducted a thorough review of relevant statutes and found that Wisconsin’s statutes, as written and as interpreted in case law, provide for adequate due process and equal application of the law with regard to the imposition of, collection of, and consequences for failure to pay, LFOs. The Committee first looked at the statutes governing municipal courts and forfeitures imposed thereby, and the case laws interpreting those statutes.

⁷ Legal Financial Obligations in Wisconsin Wisconsin Director of State Courts’ Office, Tyler Brandt, National Center for State Courts, Cynthia G. Lee, Scott E. Graves, 2018
<https://www.wicourts.gov/publications/reports/docs/studylegalfinobligation.pdf>

Statutes governing LFOs imposed for municipal ordinance violations

Wisconsin statutes chapter 800 is devoted to municipal courts. Section 800.09(1b) sets forth possible sanctions for violating a municipal ordinance: generally, a municipal court may impose a forfeiture plus costs, fees, and surcharges, or community service. For certain violations involving the use of a motor vehicle, or for juvenile offenders, a sanction against the offender's driving privilege may be imposed. Section 800.09(1g) requires the court to inform each defendant of the possible consequences for failure to pay a judgment and requires the judge to inform each defendant that if he or she is indigent, he or she may request community service in lieu of part or all of the judgment.

Under that statute, the judge may, in any case, defer payment of a judgment or to allow the defendant to pay the judgment in installments, but if the judge finds that the defendant is indigent, the judge must allow the defendant to pay the judgment in installments, taking into account the defendant's income, or to perform community service in lieu of payment of the judgment.

Wisconsin law, s. 800.093, also requires the court to consider the financial resources of the defendant, the present and future earning ability of the defendant, and the needs and earning ability of the defendant's dependents before determining whether and how much restitution to impose.

The Committee determined that these statutes governing the imposition in municipal court of LFOs and tailoring collection practices to the financial circumstances of the defendant protect the constitutional rights of defendants and incorporate sound public policy.

The Committee looked at the statutes governing sanctions for failure to pay an LFO imposed by a municipal court and found that municipal courts have several options and important statutory duties. Under s. 800.095, a municipal court may simply employ a collection agency to collect the judgment, obtain payment through one of two cooperative programs with the Wisconsin department of revenue that either sets off the amount owed from the defendant's tax return⁸ or collects the money owed through a consolidated debt collection service⁹, or enforce the judgment in the same manner as any other civil judgment, such as through wage or property garnishment.

Section 800.095 does allow a municipal court to suspend a defendant's operating privilege, but only if the defendant's municipal ordinance violation was related to the operation of a motor vehicle or if the LFO was imposed against a juvenile. Additionally, the suspension may not exceed one year and if the defendant requests the court to reconsider because the

⁸ The Tax Refund Interception Program, or TRIP, is authorized for use by local governmental agencies under s. 71.935, Wis. Stats.

⁹ The State Debt Collection Program, or SDC, is authorized for use by state governmental agencies under s. 71.93, Wis. Stats. The statute has been interpreted to allow for use by local governmental units; the Municipal Judge Bench book identifies the SDC program as a collection agency for the purposes of unpaid municipal LFOs.

defendant is indigent, the municipal court must consider the request. If the court finds that the defendant is indigent, he or she must lift the suspension and either allow more time to pay, order community service in lieu of the LFO, or opt for another collection mechanism.

Similarly, s. 800.095 allows a municipal court to order a defendant who does not pay an LFO to be committed to the county jail, but under strict limits. First, the judge must make a finding, either at the time the LFO was imposed or thereafter, that the defendant has the ability to pay the judgment within a reasonable time but refuses to do so, or that the defendant has failed to attend an indigency hearing offered by the court to provide the defendant with an opportunity to determine whether he or she has the ability to pay the judgment.

Even upon making one of those findings, a municipal court may not order the defendant to serve more than 90 days for any one judgment and the defendant earns a credit against his or her LFOs at the rate of at least \$50 per day he or she serves in jail.

The Committee determined that the statutes governing sanctions for failure to pay an LFO imposed by a municipal court provide adequate due process and equal protection to all defendants, particularly because the court must consider a defendant's indigency and must tailor the court's order for repayment to the defendant's financial situation.

Statutes governing LFOs imposed in criminal cases

Next the Committee reviewed the statutes and case law surrounding the imposition of, and sanctions for, failure to pay LFOs in criminal cases. In most criminal cases, the court has great discretion in determining whether to impose a fine and the amount of the fine. There are no minimum fines for classified criminal violations in the Wisconsin statutes,¹⁰ although the statutes do set forth several surcharges that accompany a conviction. The Committee noted that, although the statutes state, in many instances that a court "shall" impose a surcharge upon conviction, circuit court judges remain divided as to whether they may waive or reduce a surcharge in the interest of justice.

The Committee considered the recent United States Supreme Court cases of *Timbs v. Indiana*,¹¹ which relied on an earlier case, *Austin v. United States*,¹² for its position that a civil *in rem* forfeiture falls within the due process clause's protection when the forfeiture is at least partially punitive. The *Austin* court looked at civil *in rem* forfeitures and noted that the forfeiture was "tied directly to the commission of drug offenses." The court also noted that when Congress passed legislation allowing for civil forfeiture of items used in crimes, it sought to "deter or punish" activity in the drug trade and characterized the forfeiture of real

¹⁰ Sanctions for classified felonies and misdemeanors are set forth in s. 939.50 (3) and s. 939.51 (3), respectively. The statutes establish the maximum period of imprisonment and the maximum amount of a fine, but do not establish any minimum amount.

¹¹ *Timbs v. Indiana*, 586 U.S. ____ (2019)

¹² *Austin v. United States* 509 U.S. 602 (1993)

property as a "powerful deterrent." The Court found that this indicated that civil forfeiture was intended to be at least partially punitive. Applying *Austin*, the *Timbs* court looked at the circumstances of that case and found that this particular *in rem* forfeiture was excessive.

The Committee also considered *State v. Williams*,¹³ in which the Wisconsin supreme court rejected the idea that the DNA surcharge is punitive, using the "intent-effects" test. The Court found specifically that the intent of the DNA surcharge was not punitive, but was intended instead to fund the DNA databank and its associated costs. The *Williams* court also found that the DNA surcharge did not have a punitive effect, weighing seven factors that could indicate a punitive effect.

While the *Williams* case is dispositive as to the DNA surcharge, the other cases considered by the Committee may stand for the proposition that a civil "penalty" may be considered punitive, and therefore subject to a due process analysis, if its imposition is at least partially punitive. Additionally, the Committee is unaware of any case that considers the cumulative effect of surcharges and other LFOs. Recognizing that opinions differ on the ability of judges to waive surcharges, the Committee next examined the manner in which other LFOs are imposed in circuit court.

Under s. 973.05, which governs the imposition of LFOs in criminal cases, a judge may order a defendant to pay an LFO immediately, within 60 days, or if a judge orders restitution, according to a payment plan.¹⁴ The statutes allow a judge to stay all or part of the LFO and order, instead, the defendant to perform community service. Finally, under s. 973.20, which governs the imposition of an order for the defendant to pay restitution, the judge may opt to impose an order for no restitution or for less than full restitution if the court finds that imposing full or partial restitution will create an undue hardship on the defendant or victim and describes the undue hardship on the record.

The Committee determined that, much like the statutes governing municipal courts, the statutes governing imposing LFOs in criminal cases provide due process and equal protection for defendants. The Committee acknowledged that the question of whether surcharges are waivable at the discretion of the court is a significant one, especially because surcharges may comprise a great percentage of the total LFOs a defendant is ordered to pay. However, the Committee found that the statutory language allowing a judge to impose no or a minimal fine, to offer community service in lieu of part or all of a fine, and to waive restitution if imposing it would cause a hardship to a defendant or to his family, provides powerful protections to defendants in the way LFOs are imposed in criminal cases.

The Committee next reviewed sanctions for failure to pay an LFO in a criminal case. Under s. 973.05, if a defendant was placed on probation, payment of the LFO may be a condition

¹³ *State v. Williams*, 2018 WI 59 (2018)

¹⁴ In *Will v. State*, 84 Wis. 2d 397 (1978), the Wisconsin supreme court held that, in the exercise of their inherent authority, courts may extend time for payment beyond 90 days.

of the probation and failure to pay could, pursuant to s. 973.09, Wis. Stats., result in an extension of probation. Additionally, a defendant who fails to pay an LFO in a criminal case may have the amounts reduced to a civil judgment and collected via the SDC or TRIP programs, as discussed in the municipal courts section, by means of wage or property garnishment, or, pursuant to s. 973.05 (4), Wis. Stats., by wage assignment. However, pursuant to that statute, a court may not order wage assignment if doing so is likely to cause the defendant “irreparable harm.”

A court may order a defendant who fails to pay an LFO (or fails to perform court-ordered community service) to a period of imprisonment in the county jail. Section 973.07, Wis. Stats., states that: “If the fine, plus costs, fees, and surcharges ... are not paid or community service ... is not completed 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, or the community service work ... is completed, for a period fixed by the court not to exceed 6 months.”

The Committee noted that, unlike the statutes authorizing a municipal court to order imprisonment for failure to pay an LFO imposed in municipal court, s. 973.07, Wis. Stats. does not, on its face, require the court to find that the person has the ability to pay or has missed an indigency hearing. However, court cases challenging the constitutionality of that statute have determined that, in order to be constitutional, the statute must be read as requiring the court to find that the defendant has the ability to pay the LFO but is willfully refusing to do so.¹⁵

The Committee determined that the statutory options provided to courts for sanctions for failure to pay an LFO and the requirement under case law that imprisonment be imposed only upon a finding of willful failure to pay provide adequate statutory protection to defendants. The Committee acknowledged, however, that while the statutes appear to provide adequate constitutional protections, harm can still be done to individual defendants and the justice system at large if statutory requirements are not carried out in practice or if they are applied in an unfair or discriminatory manner.

Accordingly, the Committee endeavored to review how the statutes are being applied across the state. The Committee wished to assess practices surrounding how LFOs are imposed, how they are collected, and what consequences courts impose for failure to pay them.

Committee members assessed the practices of circuit and municipal courts within their judicial districts and found a variety of practices around the state and even within counties and judicial districts. Some circuit courts and municipal courts appeared to rely heavily on the sanctions of issuing warrants for nonpayment, while other courts had moved away from

¹⁵ See *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286 (1972), and *In re attorney fees in State v. Helsper*, 206 WI App 243 (2006)

that sanction entirely. The Committee found that the same disparate practices exist with regard to license suspensions for failure to pay: while some circuit courts and municipalities rely relatively heavily on this sanction, others never or rarely impose it.

National Center for State Courts/ Director of State Courts' Office of Court Operations Study

In addition to conducting their own survey of practices within their judicial districts, Committee members relied on information regarding municipal court and circuit court practices provided by the National Center for State Courts (NCSC) and Tyler Brandt, of the Director of State Courts' Office of Court Operations.

In 2017, NCSC deployed a survey to assess attitudes and practices surrounding LFOs. The survey was sent to circuit court judges, judicial officers, clerks of circuit court, and clerk's office staff. Mr. Brandt sent the same survey to municipal court judges and municipal clerks. The web-based survey asked participants to assess practices for imposing, monitoring, and enforcing compliance with, LFOS.

Additionally, Mr. Brandt visited twelve Wisconsin counties and conducted interviews with judges and one court commissioner and with eight clerks of circuit court and various staff members of the clerks of court's offices. Finally, NCSC analyzed data related to LFOs imposed by Wisconsin circuit courts¹⁶ in felony cases, misdemeanor cases, non-traffic forfeiture cases, and traffic-related forfeiture cases in the years 2010-2016. NCSC wished to determine what LFOs are being imposed, to what extent they are being paid, and how quickly they are paid.

The work done by NCSC and Mr. Brandt culminated in a report, "Legal Financial Obligations in Wisconsin," (the Report) cited at footnote 5, and the Committee commends the authors for this important work. As discussed in this section and the next, the Report informs many of the policy proposals set forth by the Committee.

As a starting point, the Report noted the number of surcharges increased from 9 in 1987 to 35 today, while the revenue collected by the circuit courts rose from \$10.8 million in 1987 to \$93.2 million in 2017. Additionally, fees and surcharges imposed on a typical \$50 forfeiture have increased from \$26 in 1984 to \$150.50 in 2018. The fees and surcharges on a typical \$100 misdemeanor fine have increased from \$52 in 1984 to \$479 in 2018.

The Report revealed that, when courts impose LFOs, they often adjust the total amount owed downward in order to take into account a defendant's ability to pay or other circumstances. Most commonly, courts will impose a zero-dollar fine, thus eliminating any percentage-based surcharge and limiting the total LFO obligation to non-percentage-based surcharges and court costs.

¹⁶ NCSC analyzed data provided by Wisconsin's Circuit Court Automation Program (CCAP), which is the case management system used for circuit courts. Cases in the municipal court are not managed by CCAP, so data relating to LFOs imposed or collected by municipalities were not available for analysis.

The Report and Mr. Brandt's interviews found that, after an LFO is imposed, circuit courts and municipal courts routinely use an array of collection tools; the most commonly used is a payment plan. Generally, a defendant agrees to a payment plan proposed by a clerk of circuit or municipal court, although some judges inquire as to what the defendant thinks he or she is able to pay per month in order to establish a payment plan at sentencing.

Under state law, clerks of circuit court are allowed to charge a fee for creating and administering a payment plan;¹⁷ clerks of municipal court may not charge such a fee.¹⁸ Practice varies around the state as to whether a defendant must pay a fee to establish or continue a payment plan: some courts require a defendant to pay a percentage of the total LFO upfront; some courts charge a flat fee, and others do not charge at all.

The next most commonly used collection method is to obtain a civil judgment for unpaid LFOs, either immediately after the initial payment period runs or after a defendant misses a number of payments. In criminal cases, if the department of corrections is handling collections for a person in its custody, a clerk may obtain a civil judgment once the person is discharged from custody. Increasingly, judges are including in their Judgment of Conviction forms notice that, if a defendant is released from custody with outstanding LFOs, or if the person fails to pay an LFO, a civil judgment will be issued and the defendant will be subject to collection proceedings. An example of a Judgment of Conviction containing this language is attached as Appendix 1.

Once the judgment is obtained, clerks use collection agencies, referrals to the department of revenue for tax interception, and, increasingly, referrals to the department of revenue for state debt collection.

Judges reported using sanctions for failure to pay as allowed by statute. Municipal court judges reported ordering operating privilege suspensions for traffic related violations, and both municipal courts and circuit courts reported issuing warrants for arrest after an LFO goes unpaid. The Report indicates wide variance in the use of these sanctions, with some courts relying relatively heavily on them and other courts having abandoned them entirely or imposing them only in extreme circumstances. In areas where these sanctions were largely abandoned, clerks relied heavily on payment plans and referral to the department of revenue for collection.

Looking to the effectiveness of legal sanctions, as analyzed in the report, the Committee learned that incarceration and suspension of operating privileges for failure to pay LFOs had either a minimally positive effect, no discernible effect, or a detrimental effect on collections.

¹⁷ See s. 59.40(5)(b), Wis. Stats, which expressly allows clerks to charge the fee.

¹⁸ Under s. 814.65(4)(a), Wis. Stats., clerks of municipal court may charge only those fees and costs expressly authorized by statute or directly chargeable to the municipality as a disbursement.

According to the report, issuing a warrant for failure to pay has a slightly positive effect in misdemeanor and criminal traffic cases, but very little effect in other types of cases. Suspension of operating privileges was shown to have a detrimental effect on collection efforts.

After reviewing the full report, the Committee incorporated much of its data and analysis in its policy recommendations.

Policy recommendations

The Committee recognizes that LFOs are an integral part of the justice system in that they are comprised of fines and forfeitures that serve as penalties for misconduct, surcharges that fund important programs and initiatives, and court costs and fees that fund vital court functions. The Committee recognizes additionally, however, that ever-increasing LFOs can impose a burden on a defendant disproportionate to the offense and/or to the defendant's ability to pay. The Committee makes its recommendations in furtherance of its commitment to ensuring due process and equal protection for every person who comes before our courts and to executing the courts' core functions in the interests of justice.

Endorsement of studies and reports

The Committee appreciates the study, analysis, and presentations done on LFOs by other organizations. The Committee endorses the analysis and conclusions regarding LFOs and sanctions for failure to pay them as presented by the United States Department of Justice in its report titled "Investigation of the Ferguson Police Department," cited as footnote 1, by the Conference of State Court Administrators in its position paper, titled "The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations," cited as footnote 3, and by the Arizona Supreme Court's Task Force on Fair Justice for All, in its report titled "Justice for All, Report and Recommendations of the Task Force on Fair Justice for All," cited as footnote 4.

While each of the studies and reports contained material not particularly relevant to Wisconsin and its statutes or practices, the Committee believes that the work done by these organizations shows a strong preference away from uniformly imposed high LFOs, and away from sanctions such as imprisonment, or operating privilege suspensions for failure to pay. The clear trend in these reports is toward tailoring LFOs imposed to an individual's ability to pay, providing clear and simple plans for payment, and imposing severe sanctions for failure to pay in only the most extreme circumstances.

Additionally, the Committee relied heavily on the information presented in the Legal Financial Obligations in Wisconsin Report, cited as footnote 6. The Committee recommends that Report be read as a companion to this Report, as the findings contained in that Report relating to how LFOs are imposed and collected had a great influence on the Committee's best practices recommendations.

Legislative initiatives

Moratorium on surcharges

The Committee acknowledges that statutory changes may be necessary in order to affect the total LFO picture. The Committee further recognizes that the judicial branch has no direct control over the number of fees and costs created by the legislature or the amount of those fees and costs, or over the type, number, and amount of surcharges the legislature asks or requires courts to impose on defendants. The Committee notes that it would like to see a moratorium on surcharges, which as noted in the discussion of the Report, have grown at an aggressive rate in Wisconsin.

The Report did not separate out surcharges from the entire LFO obligation imposed on defendants, but the Committee notes that the offenses associated with the highest surcharge totals and the highest potential fines have the lowest rate of collection. The Committee acknowledges that surcharges fund important programs and initiatives but note that an overly burdensome LFO obligation can make it nearly impossible for a person who is at or near indigency to successfully complete his or her sentence by paying the LFOs in full.

Moreover, the Committee wishes to discourage the legislature from using courts as a fundraising apparatus. The court system should be used to accomplish its core mission of administering justice and should be fully funded by the state, not dependent on placing financial burdens on individuals in order to achieve its core functions.

Increasingly, the courts are finding that mandatory surcharges and ever-increasing costs and fees are inhibiting, rather than enhancing, its ability to promote justice. Therefore, the Committee would urge the legislature to refrain from creating new surcharges and from increasing the amount of currently existing surcharges and fees.

Allowance for discretion in imposition of LFOS

The Committee notes that **there is no consensus on whether judges have the inherent authority to decline to impose a surcharge, or to reduce the amount of the surcharge, if the legislature has stated that the court "shall" impose the surcharge in a certain amount.** The Committee's preference is for all or most LFOS to be imposed as justice dictates, in the discretion of the court. The Committee acknowledges that many surcharges are tied closely to their intended purpose and that imposing surcharges is generally appropriate.

However, the Committee notes that some courts, in an effort to impose a reasonable total LFO obligation for a particular offender or violation, opt to impose a zero-dollar fine to offset the surcharges and costs the court believes are non-discretionary. The Committee

notes that doing so deprives the educational fund of revenue¹⁹ and allows judges only limited means of tailoring a sentence to the particular circumstances of an offender.

As discussed by the Committee, some circuit court judges believe that they have discretion to impose or not impose any surcharge or to reduce the amount a defendant is ordered to pay. Some courts believe that a particular surcharge may be imposed once per case, regardless of whether the statute states that it must be imposed for each count on which a defendant is convicted.

The Committee notes that, due to a lack of clarity and consensus on the subject, there are a variety of practices throughout the state, creating uncertainty and the potential for defendants to face vastly different consequences for the same violation, depending on in whose courtroom the defendant appears. The Committee states its preference for a clear legislative statement of discretion in the imposition of surcharges.

Imposition of LFOs

Determining a defendant's ability to pay

As discussed above, many courts try to tailor the LFO obligation to a particular offense or offender, but are constrained in their ability to do so. The Committee believes that courts should continue and expand their efforts to ensure that the LFOs imposed are not unduly burdensome as to set up a defendant for failure. The statutes allow for certain accommodations for defendants who are indigent, but offer little guidance as to what indigency means beyond adherence to federal poverty income guidelines. While the Committee acknowledges that those guidelines are helpful, the Committee recommends courts inquire beyond income and family size in order to understand a defendant's total financial situation.

To that end, the Committee urges each court to develop or adopt an ability to pay calculator and look at a defendant's entire financial circumstances before determining an appropriate financial penalty. The Committee does not endorse any particular ability to pay calculator, but notes that Washington State's Minority and Justice Commission, working with Microsoft, developed an on-line calculator currently in testing and available for public use.²⁰

An ability to pay calculator, on-line or on paper, need not be complicated, but it should provide a comprehensive look into an individual's total financial circumstances. The Committee offers for consideration the following list of sample questions, contained in the

¹⁹ Under Article X, section 2 of the Wisconsin Constitution, the clear proceeds of all fines (interpreted by case law to include forfeitures) are paid into the school fund and used for educational purposes. Revenues from surcharges are not deposited into the school fund.

²⁰ Washington State LFO Calculator, beta.lfocalculator.org

Washington State Judicial Bench Guide,²¹ as an example of how a court may determine an individual's ability to pay:

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

The Committee encourages courts, whenever possible, to undertake the task of determining an individual's financial situation. If a defendant is available for sentencing (i.e., the court is not imposing a default sentence), the court should have this conversation with the defendant.

The Committee recommends use of a standardized questionnaire or form in order to promote usage and consistency. The Committee would like to have a form developed by the Forms Committee for circuit and municipal courts to use in determining a defendant's ability to pay. The Committee notes that, until such a form is available for statewide use, each county or judicial district could develop its own form or procedure to ensure that it is imposing an appropriate LFO obligation in a manner consistent with other courts in the county or judicial district.

Community service

The Committee encourages expanded use of the community service option in circuit and municipal courts. Wisconsin law allows municipal courts to order community service as an alternative to certain LFOs in all cases and requires courts order either a payment plan or community service if a defendant is unable to pay his or her LFOs because of poverty.²² In

²¹ "WA State Courts of Limited Jurisdiction (CLJs): 2019 Reference Guide on Legal Financial Obligations (LFOs) in Criminal Cases" <http://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf>

²² Section 800.09(1g), Wis. Stats., states, in relevant part: "If the defendant is present and the court, using the criteria in s. 814.29 (1) (d), determines that the defendant is unable to pay the judgment because of poverty, the court shall provide the defendant with an opportunity to pay the judgment in installments, taking into account the defendant's income, or to perform community service in lieu of payment of the judgment."

circuit court, for criminal violations, Wisconsin law allows the court to order community service in lieu of part or all of a fine,²³ or as a condition of probation.²⁴

The Committee recognizes that ordering community service has several advantages over ordering an LFO in appropriate circumstances. Community service allows a defendant to, quite literally, give back to his or her community, which can encourage civic engagement and is a goal of restorative justice. Additionally, community service is widely perceived as an equal opportunity consequence for misbehavior: unlike an LFO, community service is not necessarily something borne more heavily by a poorer person and paid off easily by a wealthier person. The Committee recognizes that community service can be more burdensome to certain offenders, given their life circumstances and time commitments, but if a court requires a wealthier person to essentially perform the same service as a poorer person, the court avoids the perception that the wealthier person is simply paying his or her way out of a consequence.

The Committee acknowledges that community service options are limited in many counties and municipalities. Many jurisdictions lack the infrastructure necessary to identify appropriate community service programs, keep track of hours served, and credit them appropriately toward a defendant's sentence. The Committee encourages judges to work with their municipalities, counties, or judicial district administrators and chief judges to establish or expand community service options. Community service opportunities may be coordinated with law enforcement agencies and city or county service departments, as well as with nonprofit agencies or charitable organizations.

Collection of LFOs

Ability to pay calculators and payment plans

As discussed earlier, in many counties, after a court imposes an LFO, clerks of court work with the defendant establish a payment plan. While this is generally working well, the Committee urges courts to adopt the following best practices in order to maximize collections and avoid default or delayed payments which can lead to more significant consequences for failure to pay.

First, the Committee urges courts to use the ability to pay calculators or colloquy, discussed above, in order to establish a reasonable monthly payment for each defendant. If the court has undertaken this task, a clerk may simply use the numbers established in order to create the payment plan. If the court entered a default judgment and a defendant asks for a payment plan, or if the court otherwise did not determine a monthly payment amount, the clerk of court may use the same ability to pay calculator and make his or her own determination.

²³ Section 973.05(3), Wis. Stats.

²⁴ Section 973.09(7m), Wis. Stats.

The Committee also encourages clerks to discontinue the practice of charging a fee to establish a payment plan. While clerks of circuit court are entitled to charge a fee, many clerks are instead applying monies that would have been paid as a fee to establish a payment plan toward the first payment. The Committee encourages the practice of sending payment reminders to defendants, either via email or text messages. The Committee notes that, according to the Report, the majority of LFO collections occur within the first few months after imposition. The Committee encourages clerks to make continued efforts to engage defendants to promote compliance with payment plans.

The Committee acknowledges that if a defendant is under the supervision of the department of corrections (DOC), DOC is responsible for collecting certain LFOs. Clerks have expressed frustration with DOC collection efforts and the Committee urges cooperation and coordination between counties and DOC in order to either allow clerks to take over collections entirely or to ensure that DOC is collecting LFOs in a consistent manner.

Referral to State Debt Collection

The Committee notes that a growing number of municipalities and counties are utilizing the department of revenue's (DOR) state debt collection program (SDC) to collect LFOs. While some clerks refer the LFO to DOR immediately after a civil judgment is rendered for the LFO, others do so when a defendant defaults on a payment plan or otherwise fails to pay an LFO.

The Committee encourages courts to notify defendants that if the defendant fails to pay an LFO, the outstanding balance may be reduced to a civil judgment and collection efforts may be initiated against the defendant. A sample Judgment of Conviction, attached as Appendix 1, contains model language to this effect. If the court is in a county that has enacted an ordinance authorizing the use of SDC, the Judgment of Conviction may additionally indicate that the civil judgment will be collected via the SDC program.

The Committee encourages the use of the SDC program to collect LFOs. The Committee notes that the SDC model bundles all of an individual's state-related debts (e.g., LFOs, child support, income taxes) and allows an individual to make one payment that DOR distributes according to statutory priority. The Committee recognizes that this "one stop shopping" makes it easier for a defendant to keep on top of his or her debt obligations and, if a defendant owes LFOs in more than one county, allows the counties to be paid at equal rates.

The Committee recognizes that DOR has recently created an interface with circuit courts, in addition to the one it created for municipal courts, allowing LFOs to be referred to the SDC program easily and efficiently. The Committee urges courts to take advantage of the SDC program but acknowledges that courts may differ as to whether to refer the LFO immediately or to enter into a payment plan and use SDC if the payment plan founders.

Enforcement and consequences for failure to pay

Reduce or eliminate operating privilege suspension

The Committee recognizes that, while several courts have eliminated their use of this sanction, operating privilege suspensions may be an effective and appropriate sanction in certain circumstances. The Committee's review of the Report revealed that judges reported that operating privilege suspensions are generally of short duration, because a defendant whose operating privilege is suspended will often get back on track with his or her payment plan in order to have the suspension lifted.

However, the Committee accepts the findings in the Report indicating that operating privilege suspension is not particularly useful in collecting LFOs and may, in fact, be counter-productive.²⁵ Moreover, the Committee recognizes that operating privilege suspension may fall disproportionately on the poor or indigent, particularly in jurisdictions that do not implement the recommended practices for imposing and collecting LFOs. Finally, suspending a defendant's operating license may easily lead to additional violations for operating while suspended, which incurs additional LFOs and involvement in the criminal justice system.

The Committee acknowledges that, if a defendant is able to pay an LFO but refuses to do so, the sanction of operating license suspension may be appropriate. The Committee would urge each court to ensure, before it imposes this sanction, that full due process under our laws is granted. The Committee notes that the law allows for operating privilege suspension if a defendant does not appear at an indigency hearing, but urges as a best practice that the court impose the sanction only if the court holds a hearing and makes the specific finding that the person is able to pay but willfully refuses to do so.

In addition to ensuring that a person's due process rights are protected, holding a hearing before imposing this sanction allows the court to take into consideration a defendant's entire financial and other life circumstances. The court is then able to determine whether another recommended practice, such as creating a new payment plan, reducing or eliminating a portion of the LFO, or referring the LFO to DOR for collection, is more appropriate.

The Committee believes that the best practice is to reserve the sanction of operating privilege suspension for the most egregious situations where the court has made the specific finding that a person is able to pay an LFO but refuses to do so and that license suspension is the most appropriate sanction for the individual.

Reduce or eliminate jail for failure to pay

²⁵ Legal Financial Obligations in Wisconsin, pp. 42 to 43

The Committee makes a similar recommendation for issuing a warrant and jailing a person for failure to pay an LFO. Like the sanction of operating privilege suspension, judges interviewed reported a positive effect on LFO payment in response to issuing a warrant for arrest. The Report bears out this impression in some cases, but not all.²⁶

The Committee acknowledges that jail for nonpayment can motivate a defendant to pay his or her LFOs. However, the Committee believes that the potential for constitutional impropriety and societal harm outweigh the benefits to this sanction except in the most egregious circumstances.

The Committee notes that it is expensive to place and keep a person in jail and, in municipal court cases where a defendant may “earn” money against his or her LFOs by serving time in jail, a municipality using this sanction is doubly penalized. Even when a county is using its own jail to house defendants for failure to pay LFOs, the Committee believes that arresting, processing, and housing these persons is rarely the best use of a county’s limited resources.

In addition to the purely financial considerations, the Committee is troubled by the potential for deprivations of a defendant’s constitutional rights when courts jail a person for failure to pay LFOs. As the United States Supreme Court set forth in *Bearden v. Georgia*,²⁷ equal protection and due process both require courts to make an inquiry into a defendant’s ability to pay and to impose the sanction of imprisonment for failure to pay only upon a finding of willful refusal.

The Committee’s analysis and recommendations for imposing the sanction of jail for nonpayment is similar to those discussed above for suspension of an operation privilege. The Committee acknowledges that, in extreme circumstances, jail for nonpayment may be an appropriate sanction. However, the Committee wishes to ensure that a defendant who faces this sanction is afforded full due process before the sanction is imposed and that defendants across the state are treated equally with regard to this sanction.

While the Wisconsin supreme court has held that a defendant in a criminal case has the burden of proving his or her inability to pay in order to avoid the sanction of jail for failure to pay a criminal fine,²⁸ the Committee urges as a best practice to hold a hearing whenever a judge is considering this sanction. At the hearing, the judge will have the opportunity to utilize an ability to pay calculator or engage in a colloquy regarding the defendant’s financial and other circumstances. At a hearing, the judge may determine whether to establish or re-establish a payment plan, forgive or adjust all or some of the LFOs, refer the debt to DOR for collection, or substitute community service for some or all of the LFOs.

²⁶ *Legal Financial Obligations in Wisconsin*, pp. 39 to 41

²⁷ *Bearden v. Georgia*, 461 U.S. 660, 671 to 672 (1983)

²⁸ *State Ex Rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 288 (1972)

If the judge finds, however, that the defendant has the means to pay the LFO but willfully refuses to do so, committing the defendant to may be an appropriate sanction. The Committee urges the courts to use this option exceedingly rarely.

Conclusion

The Committee believes that its comprehensive review of LFOs, and its effort to establish best practices for how LFOs are imposed, collected, and enforced, will promote consistent, fair, and effective application of the law across the state.

The Committee's recommendations are intended to promote thoughtful imposition of LFOs in a manner that tailors the total LFO obligation to each individual offense and offender, as justice dictates. By allowing judges to impose applicable fines, fees, surcharges, costs, and fees in amounts that are reasonable under the circumstances of each case, LFOs can be an effective and just means of punishment.

By promoting the use of ability to pay calculators and using the figures produced by those calculators to determine which LFOs to impose and how to collect them effectively, courts and clerks of court will be able to maximize collection efforts while ensuring a just result for the defendant. By establishing a robust community service infrastructure, courts may offer an alternative to LFOs that satisfy its punitive and restorative goals without placing an undue financial burden on poorer citizens.

If a defendant fails to pay all or part of an LFO, the Committee's recommendations are intended to maximize compliance while protecting each person's right to due process and equal protection. By referring a defaulted judgement to DOR for collection, courts and clerks of court opt away from the more severe sanctions of suspension of operating privileges or jail for nonpayment. The SDC program, in particular, is an efficient and effective way to achieve collections and frees clerks of court to use their resources in ways unrelated to collections of LFOs.

By recommending that courts hold an in-person hearing and make a specific finding of a willful failure to pay in order to impose the more severe sanction of either operating privilege suspension or jail, the Committee intends to ensure that these sanctions are reserved for the most recalcitrant offenders.

The Committee has been ever mindful of the potential for due process and equal protection violations in the ways LFOs are imposed, collected, and enforced across the state. The Committee undertook its mission in response to a request from the United States Department of Justice that each state review its laws and its practices to ensure the rights of every citizen are upheld. The Committee acknowledges and appreciates Wisconsin's strong commitment to equal protection and to ensuring that every defendant is treated fairly and accorded full process and believes that its recommendations for best practices will continue and strengthen this tradition.

