

# DEFENDING CLIENTS IN CASES WITH FINES, FEES, COSTS, ASSESSMENTS OR RESTITUTION

Courts may not incarcerate or revoke probation for nonpayment of a court-ordered financial obligation unless the court first holds a hearing and makes an express finding that the failure to pay was willful and not due to an inability to pay.

*Bearden v. Georgia*, 461 U.S. 660 (1983); *Berdin v. State*, 648 So.2d 73, 78 (Miss. 1994), *overruled on other grounds*, (1984).

## SENTENCING

The court CANNOT impose a “pay-or-stay” sentence on a defendant who **lacks the ability to pay**.

*Frazier v. Jordan*, 457 F.2d 726, 728–29 (5th Cir. 1972).

### YOU SHOULD ADVOCATE FOR

- the court to assess ability to pay at sentencing **before** imposing financial obligations, so that the amount due is within ability to pay;
- the court to provide a statement of the total fines, fees, costs, assessments and restitution owed, and applicable deadlines and payment plan terms; and
- the court to identify the procedures for informing the court of mailing address changes.

### YOU SHOULD ADVOCATE AGAINST

- the use of probation solely to collect money that a defendant cannot afford to pay in full on sentencing day;
- added fees for probation supervision or fees for payment alternatives for people who cannot pay on sentencing day.

### YOU SHOULD

- instruct your client to inform you of any difficulty meeting a payment obligation, so that you may request a court hearing.



## NOTICE OF NONPAYMENT – WHAT *SHOULD* HAPPEN

When the court seeks to collect a payment from a person accused of nonpayment, it **SHOULD** set a hearing date. The court should **NOT** issue a bench warrant as the first resort. The hearing could be called a “compliance,” “review,” or “probation revocation” hearing.

The court **SHOULD** also provide notice:

- of the hearing date and time, and the total amount due;
- to bring documentation the court should consider in determining ability to pay;
- that incarceration may result, but **ONLY IF** the court finds a willful failure to pay and that the person has the ability to pay;
- of the right to request counsel, and the right to appointment of counsel when the court seeks to jail an indigent person; and
- that a person who is unable to pay can request payment alternatives at the court hearing.



## HEARING TO DETERMINE ABILITY TO PAY

If the court seeks to impose jail, it must provide the defendant/respondent/probationer the opportunity to request counsel by completing an indigence affidavit.

***IF YOU ARE APPOINTED TO REPRESENT SOMEONE CHARGED WITH NONPAYMENT, YOU SHOULD ADVOCATE AGAINST INCARCERATION AND FOR REDUCED AMOUNTS THEY CAN AFFORD AND, IF APPROPRIATE, A PAYMENT PLAN/EXTENSION OF TIME.***

#1 FACTORS CONTRIBUTING TO INABILITY TO PAY	#2 ALTERNATIVES TO JAIL AND PAYMENT
<ul style="list-style-type: none"> <li>• Qualification for court-appointed counsel.</li> <li>• Income at or below 125% of the Federal Poverty Line</li> <li>• Receipt of needs-based, means-tested public assistance</li> <li>• The person is homeless, incarcerated, or resides in a mental health facility.</li> <li>• Consideration of financial resources, assets, obligations shows that payment will create manifest hardship for the person or dependents</li> <li>• Permanent or temporary limitations to secure paid work, including disabilities</li> <li>• Additional debts owed to other courts or in other cases</li> <li>• Need to cover basic living expenses</li> <li>• Medical expenses</li> <li>• Other special circumstances</li> <li>• Demonstrated efforts to acquire resources</li> </ul>	<p>The U.S. Supreme Court has recognized that “punishment and deterrence can often be served fully by alternative means” to incarceration. <i>Bearden</i>, 461 U.S. at 671–72.</p> <p>A court <b>must</b> to consider statutory alternatives to imprisonment for indigent people who are financially unable to pay a court-ordered financial obligation. <i>Lee v. State</i>, 457 So. 2d 920 (Miss. 1984).</p> <p>Alternatives include:</p> <ul style="list-style-type: none"> <li>• Reduction of amount due to amount that can be paid in full that day;</li> <li>• Extension of time to pay or Payment plan;</li> <li>• Revocation of the amount due;</li> <li>• Community service or completion of relevant court-approved program (e.g., education, job training, drug treatment, etc.), <b>as long as</b> the number of hours required can <b>REALISTICALLY</b> be completed in light of employment, child care responsibilities, job search needs, disability, limited access to transportation, and any other limitations.</li> </ul> <p><i>See Bearden</i>, 461 U.S. at 674 ; Miss. Code Ann. § 99-19-20.</p>