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TEN GUIDELINES ON COURT FINES AND FEES

Prepared by the ABA Presidential Task Force
on Building Public Trust in the American Justice System



The ABA TEN GUIDELINES ON COURT FINES AND FEES were prepared by the ABA Presidential Task Force on Building Public Trust in the American Justice System, appointed by Hilarie Bass, President of the American Bar Association (2017-2018).

The ABA TEN GUIDELINES ON COURT FINES AND FEES, black letter and commentary, were adopted by the American Bar Association House of Delegates, August 2018. The American Bar Association urges all federal, state, local, territorial, and tribal legislative, judicial, and other governmental bodies to apply the ABA TEN GUIDELINES ON COURT FINES AND FEES.

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INTRODUCTION

In July 2016, in the face of increasing racial tensions, retaliatory violence against police officers, and a growing public distrust of our nation's justice system, the ABA created the Task Force on Building Public Trust in the American Justice System. The Task Force Report, which the ABA Board of Governors received in February 2017, calls on the ABA and state and local bars to: (1) encourage the adoption of best practices for reforming the criminal justice system; (2) build consensus about needed reforms and work to carry them out; and (3) educate the public about how the criminal justice system work.[1] In August, 2017, incoming ABA President Hilarie Bass appointed a Working Group on Building Public Trust in the American Justice System to advance and to implement the Task Force recommendations. The Working Group, under President Bass' guidance, concluded that it could have the greatest impact by focusing on one critical issue – fines and fees imposed by courts. Excessive fines and fees, and the draconian measures courts have pursued to enforce and collect them, have burdened millions of Americans, particularly those too poor to pay. The alarming results, including jail time for unpaid traffic tickets, have effectively criminalized poverty and eroded public confidence in the justice system. After a year of study and broad-based consultation within and outside the ABA, the Working Group developed the Ten Guidelines on Court Fines and Fees to address this problem.

The Guidelines provide practical direction for government officials, policymakers and others charged with developing, reforming and administering court fines and fees. The Guidelines seek to ensure that fines and fees are fairly imposed and administered and that the justice system does not punish people for the "crime" of being poor.

Special thanks go to members of the Working Group, who drafted the Guidelines, reviewed and commented on successive drafts, and helped to solicit and incorporate feedback from a diverse range of individuals and institutions. The Working Group is grateful to the ABA entities that co-sponsored these Guidelines in the House of Delegates, including: the Section on Civil Rights and Social Justice, the Standing Committee on Legal Aid and Indigent Defendants, the Criminal Justice Section, the Section on State and Local Government Law, the Commission on Youth at Risk, the Massachusetts Bar Association, the King County Bar Association and the Washington State Bar Association. Their support was invaluable.

The Guidelines are the first, albeit critical, step in the Working Group's ongoing effort to build public trust in the justice system. The next step is in the works.

Robert Weiner

Chair, Working Group on Building Public Trust in the American Justice System

AMERICAN BAR ASSOCIATION TEN GUIDELINES ON COURT FINES AND FEES

August 2018

GUIDELINE 1: Limits to Fees

If a state or local legislature or a court imposes fees in connection with a conviction for a criminal offense or civil infraction, those fees must be related to the justice system and the services provided to the individual. The amount imposed, if any, should never be greater than an individual's ability to pay or more than the actual cost of the service provided. No law or rule should limit or prohibit a judge's ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.

COMMENTARY:

Many state and local legislatures have enacted mandatory surcharges and assessments, which seek to fund programs or services imposed when an individual is sentenced.¹ Courts in many states have also imposed a broad range of "user fees" on criminal defendants, ranging from supervision fees to drug testing fees.² Some fees are unrelated to the justice system or to the service provided.³ These surcharges, assessments, court costs, and user fees—collectively known as "fees"—have proliferated to the point where they can eclipse the fines imposed in low-level offenses.⁴ Many states even impose "collection fees," payable to private debt collection firms for the cost of collecting other fees, as well as fines.⁵ All such fees imposed in connection with a conviction or criminal offense or civil infraction should be eliminated because the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue.⁶

If imposed at all, fees should be commensurate with the service they cover, and consistent with the financial circumstances of the individual ordered to pay, so that the fees do not result in substantial hardship to the individual or his/her dependents.⁷ A judge should always be permitted to waive or reduce any fee if an individual is unable to pay. Fees that are legislatively mandated should be revised to permit such waiver or reduction based on inability to pay.

When an individual is unable to pay, courts should not impose fees, including fees for counsel, diversion programs, probation, payment

plans, community service, or any other alternative to the payment of money.⁸ An individual's ability to pay should be considered at each stage of proceedings, including at the time the fees are imposed and before imposition of any sanction for nonpayment of fees, such as probation revocation, issuance of an arrest warrant for nonpayment, and incarceration. The consideration of a person's ability to pay at each stage of proceedings is critical to avoiding what are effectively "poverty penalties," e.g., late fees, payment plan fees, and interest imposed when individuals are unable to pay fines and fees.

GUIDELINE 2: Limits to Fines

Fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge's ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship.

COMMENTARY:

Fines should be calibrated to reflect the financial circumstances of the individual ordered to pay,⁹ so that the fines do not result in substantial and undue hardship to the individual or his/her dependents.¹⁰

An individual's ability to pay should be considered at each stage of proceedings, including at the time fines are imposed and before any sanction for nonpayment, such as probation revocation, issuance of an arrest warrant for nonpayment, or incarceration.¹¹

GUIDELINE 3: Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver's License Suspensions.

A person's inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions.

COMMENTARY:

Despite the popular belief that "debtors' prisons" have been abolished in the United States, people are still incarcerated because they cannot pay court fines and fees, including contribution fees for appointed counsel.¹² In many states, people are incarcerated because they owe fines and fees

and are unable to pay. Such incarceration has been documented in at least thirteen states since 2010.¹³ As the Brennan Center has explained, there are four “paths” to debtors’ prison: (1) many courts may revoke or withhold probation or parole upon an individual’s failure to pay; (2) some states authorize incarceration as a penalty for failure to pay, such as through civil contempt; (3) some courts force defendants to “choose” to serve prison time rather than paying a court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals for failure to pay and to hold them while they await an ability-to-pay hearing.¹⁴

In the seminal 1983 *Bearden* decision, the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual’s ability to pay and making a finding that the failure to pay was “willful.”¹⁵ ABA policy reflects this principle.¹⁶ The *Bearden* case followed a line of cases in which the Supreme Court had attempted to make clear that individuals who are unable to pay a fine or fee should not be incarcerated for failure to pay.¹⁷ Unfortunately, the problem persists almost a half-century later.

Fines and fees that are not income-adjusted (i.e., are not set at an amount the person reasonably can pay) are regressive and have a disproportionate, adverse impact on low-income people and people of color.¹⁸ For these and other reasons, incarceration and other disproportionate sanctions, including driver’s license suspension, should never be imposed for a person’s inability to pay a fine or fee.¹⁹ The same principle applies with full force to restitution and forfeiture. Although restitution and forfeiture are beyond the scope of these Guidelines, at minimum it is clear that a person who is unable to pay any court-imposed financial obligation—including restitution or forfeiture—must not be incarcerated or subjected to other disproportionate sanction for failure to pay.

Just as a person’s ability to pay should be considered in imposing a fine or fee in the first place, and must be considered when imposing incarceration for failure to pay, the same principles apply to other disproportionate sanctions short of incarceration. A disproportionate sanction for nonpayment of court fines and fees includes any sanction with a substantial adverse impact on the life of the individual.

A common sanction used by courts in the vast majority of states for failure to pay a fine is the suspension of a driver’s license, often imposed without a hearing. People who are prohibited from driving often lose their ability to work or attend to other important aspects of their lives.²⁰ Suspending a driver’s license can lead to a cycle of re-incarceration, because many such individuals find themselves in the untenable position

of either driving with a suspended license or losing their jobs, and because driving on a suspended license is itself an offense that may be sanctioned with incarceration.²¹ Suspending a driver's license for nonpayment is therefore out of proportion to the purpose of ensuring payment and destructive to that end.²²

Nothing in this Guideline is intended to preclude a court from issuing an arrest warrant to secure the court appearance of a defendant who failed to appear if the court determines that the defendant received actual notice of the hearing. Courts should endeavor to ensure that any defendants arrested on failure-to-appear warrants are expeditiously brought before a judicial officer. In such circumstances, no person should be jailed without a hearing on ability to pay; in no event should bail or the bond amount on the warrant be set purposely to correspond with the amount of any fines and fees owed.

GUIDELINE 4: Mandatory Ability-To-Pay Hearings

Before a court imposes a sanction on an individual for nonpayment of fines, fees, or restitution, the court must first hold an “ability-to-pay” hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration.

COMMENTARY:

As set forth in Guideline 3, if a person is unable to pay a fine or fee, he or she should not be incarcerated or subjected to any other disproportionate sanction, including suspension of a driver's license. There must also be procedures to ensure protection of that right, including a hearing where a court determines whether an individual is able, or unable, to pay the fine or fee at issue. In other words, at minimum the procedures set forth in *Bearden* must precede any incarceration or imposition of any other sanction for nonpayment of a fine or fee.²³ These procedures must apply whenever a sanction is being sought for nonpayment of a fine or fee, including in connection with deferred sentencing, implementation of a suspended incarceration sentence, or extension or revocation of probation, parole, or other form of supervision.

Courts must also provide adequate and meaningful notice of an ability-to-pay hearing to people alleged to have failed to pay, including notice of the hearing date, time and location, the subject matter to be addressed, and advisement of all applicable rights, including any right to counsel.²⁴

GUIDELINE 5: Prohibition against Deprivation of Other Fundamental Rights

Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote.

COMMENTARY:

Payment of court fines and fees should never be tied to a person's ability to exercise fundamental rights,²⁵ which include the right to vote and the right to the care, custody, and control of one's children.²⁶ Yet, in certain states, the exercise of these fundamental rights is conditioned on the payment of court fines and fees by statute or through court practice.

For example, court fines and fees can effectively serve as a poll tax because certain states, including Georgia, require payment of all outstanding court fines and fees before a person convicted of a felony can regain his or her ability to vote.²⁷ In other states, reported nonpayment or willful nonpayment of fines and fees can lead to a revocation of voting rights.²⁸ And researchers have found that in states where people are prohibited from voting "while incarcerated or under other forms of criminal justice supervision," people can suffer from voting restrictions as a result of "additional sanctions associated with or triggered by nonpayment," such as violation of conditions of supervision and revocation of probation.²⁹ Although not required by state statute, there are also troubling reports that parents have been denied contact with their children until they have made payment on outstanding court fees—a deprivation of their fundamental right to make decisions concerning the care, custody, and control of their children.³⁰

The deprivation of fundamental rights, such as the right to vote, or to the care, custody, and control of one's children, should never result from inability to pay or even a willful failure to pay by a person with means. No government interest in collecting court fines and fees, or in achieving punishment and deterrence through such collection, warrants the deprivation of such fundamental rights.

GUIDELINE 6: Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties

For people who are unable to pay fines or fees, courts must consider alternatives to incarceration and to disproportionate sanctions, and any alternatives imposed must be reasonable and proportionate to the offense.

COMMENTARY:

Fines seek to punish and deter—goals that can often be served fully by alternatives to incarceration and disproportionate sanctions like driver's license suspension. Reasonable alternatives include: an extension of time to pay; reduction in the amount owed; and waiver of the amount owed.³¹ Frequently, the most reasonable alternative to full payment of a fine that a person cannot afford is reduction of the fine to an amount that an individual can pay.

As addressed above, fees seek to recoup court costs, generate revenue for programs through surcharges or assessments, or cover the cost of services related to the justice system. Fees should only be imposed if, among other things, the individual is able to pay. If a person who has been required to pay a fee subsequently cannot afford to pay, the fee should be waived entirely or reduced to an amount the person can pay.³²

Judges must have the authority to waive any or all fines and fees if the person has no ability to pay. Any non-monetary alternatives to payment of a fine, such as community service, treatment, or other social services, should be developed in line with the individual's circumstances.³³ Participation in these alternatives should never be conditioned on the waiver of due process rights, such as the right to a hearing or to counsel. Nor should additional fees be imposed as a condition of participating in the alternative ordered.³⁴

Any non-monetary alternatives should be reasonable and proportional in light of the individual's financial, mental, and physical capacity, any impact on the individual's dependents, and any other limitations, such as access to transportation, school, and responsibilities for caregiving and employment. Non-monetary alternatives should also be proportional to the offense and not force individuals who cannot pay to provide free services beyond what is proportional.

GUIDELINE 7: Ability-to-Pay Standard

Ability-to-pay standards should be clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person's ability to pay; and whether payment would result in manifest hardship to the person or dependents.

COMMENTARY:

Courts should apply a clear and consistent standard to determine an individual's ability to pay court fines and fees.³⁵

All court actors, including judges, prosecutors, probation officers, and defenders, should be trained in the standards used in their jurisdiction to determine ability to pay and the constitutional protections for people who cannot afford to pay court-ordered financial obligations.

GUIDELINE 8: Right to Counsel

An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences.

COMMENTARY:

No indigent person should be incarcerated without being offered the assistance of court-appointed counsel to ensure that due process standards are met and that all potential defenses are considered. Such counsel should be provided in all proceedings "regardless of their denomination as felonies, misdemeanors, or otherwise."³⁶ Moreover, counsel should be offered whenever eventual incarceration is a possible result regardless of whether the proceeding at issue is denominated "criminal" or "civil."³⁷ The cost to the court of providing counsel is not a legitimate justification for the failure to provide counsel when it is required by law.³⁸

It is longstanding ABA policy that, "[n]o waiver of counsel be accepted unless the accused has at least once conferred with a lawyer."³⁹ This ensures that an individual who intends to waive counsel has a full understanding of the assistance that counsel can provide.⁴⁰ Judges have the primary responsibility for ensuring that counsel is appointed, that individuals receive effective assistance of counsel,⁴¹ and that any waivers of counsel are knowing and voluntary.⁴² Judges should never encourage unrepresented persons who qualify for public defense services to waive counsel.⁴³ "An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's

comprehension of the offer and capacity to make the choice intelligently and understandingly has been made.”⁴⁴ Accordingly, prosecutors should not seek waivers of the right to counsel from unrepresented accused persons.⁴⁵ Only after the defendant has properly waived counsel may a prosecuting attorney “engage in plea discussions with the defendant,” and “where feasible, a record of such discussions should be made and preserved.”⁴⁶

GUIDELINE 9: Transparency

Information concerning fines and fees, including financial and demographic data, should be publicly available.

COMMENTARY:

Courts should track and timely⁴⁷ make available to the public data documenting: a) court revenue and expenditures, including the aggregate amount of fines and any fees imposed, the aggregate amount of fines and any fees collected, and the aggregate cost of collecting fines and fees; b) the amount of fines and fees imposed, waived, and collected in each case; c) any cost to the court of administering non-monetary alternatives to payment, including community service and treatment programs;⁴⁸ and d) demographic data regarding people ordered to pay fines and fees.⁴⁹ The need for transparency is especially compelling with respect to private probation companies.⁵⁰

GUIDELINE 10: Collection Practices

Any entities authorized to collect fines, fees, or restitution, whether public or private, should abide by these Guidelines and must not directly or indirectly attempt to thwart these Guidelines in order to collect money; nor should they ever be delegated authority that is properly exercised by a judicial officer, such as the authority to adjudicate whether a person should be incarcerated for failure to pay. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should include some mechanism for monitoring compliance with these prohibitions.

COMMENTARY:

Many jurisdictions have awarded contracts to private companies to collect fines and fees, for diversion programs, or to supervise probation. Others have created a public agency or office responsible for collections of fines and fees. Often these entities, and especially those that are “for-profit” companies, have an interest in maximizing collections, and thus face inherent conflicts of interest when charging fees for diversion or probation, seeking to collect fines and fees, and informing probationers of their right to counsel in probation revocation hearings concerning charges of probation violation due to nonpayment of fines and fees.⁵¹ Often these entities have imposed additional fees when people cannot immediately pay fines and fees, have misinformed indigent people facing incarceration for nonpayment of their right to counsel in such proceedings, and have failed to help courts identify people whose debts should be waived, reduced, or converted to carefully thought-out non-monetary alternatives.⁵²

The integrity of the criminal justice system depends on eliminating such conflicts of interest. These conflicts thwart the fair and neutral provision of justice that is integral to due process and must be the hallmark of our justice system.⁵³ Therefore, courts and state and local governments ensure that all entities that collect fines and fees or administer diversion or probation, including for-profit companies, abide by these Guidelines.

Courts should only forward for collection those cases in which an individual has been found to have willfully failed to pay following a court hearing in adherence to these Guidelines. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should also include some mechanism for monitoring compliance with these prohibitions.

ENDNOTES

- [1] Report of the Task Force on Building Public Trust in the American Justice System (January 2017), available at https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_building_trust_in_american_justice_system.authcheckdam.pdf. Following the issuance of the Report, the Task Force focused on creating dialogue around the issues of distrust in the justice system, developing a Toolkit for holding forums on safety and justice. The Toolkit is available at https://www.americanbar.org/groups/leadership/office_of_the_president/publictrust.html.
- 1 For example, Michigan requires judges to impose on people convicted of traffic and misdemeanor offenses a minimum state assessment in addition to any fines and costs. Hon. Elizabeth Hines, *View from the Michigan Bench*, National Center for State Courts 36, <http://www.ncsc.org/~media/Microsites/Files/Trends%202017/View-from-Michigan-Bench-Trends-2017.ashx>. The minimum assessment in Michigan misdemeanor cases is \$125. *Id.* See also *id.* 36 & n.2 (“When James W. pleads guilty to ‘Driving Without a Valid Operator’s License on His Person,’ it is unlikely anyone is aware that a portion of the fines and costs he is ordered to pay may be used to support libraries, the Crime Victims’ Rights Fund, retirement plans for judges, or, in one state, construction of a new law school.”).
- 2 For an illustrative catalog of fees imposed in just a single case, see Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, The Brennan Center for Justice at New York University School of Law (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (“*Criminal Justice Debt*”), at 9 (snapshot of Case Financial Information sheet from a criminal case in the Court of Common Pleas of Cambria County, Pennsylvania. See also Human Rights Watch, *Profiting from Probation America’s “Offender-Funded” Probation Industry (2014)*, <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> (“*Profiting from Probation*”), at 27-31 (discussing “pay only” probation arrangements). See also Michelle Alexander, *The New Jim Crow* (2012), at 153-54 (describing the many types of “preconviction service fees,” such as jail book-in fees and public defender application fees, and post-conviction fees, including parole or probation service fees, that are imposed in states around the country).
- 3 For example, the vast majority of revenue collected from mandatory driver’s license reinstatement fees in Arkansas goes to the Arkansas State Police. Ark. Code Ann. § 27-16-808. In California, a \$4 fee is imposed for every criminal conviction, including traffic infractions, for Emergency Medical Air Transportation. Cal. Govt. Code § 76000.10(c)(1).
- 4 *Profiting from Probation* at 14.
- 5 *Criminal Justice Debt* at 17.
- 6 The National Task Force on Fines, Fees and Bail Practices was established by the Conference of Chief Justices and the Conference of State Court Administrators. In December 2017, the Task Force issued its “Principles on Fines, Fees, and Bail Practices” (the “National Task Force Principles” or “NTF Principles”) which are available at <http://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>. Principle 1.5 states, “Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges.”
- 7 NTF Principle 1.6 states that fees should only be used for a narrow scope of “administration of justice” purposes and that “in no case should the amount of such a fee or surcharge exceed the actual cost of providing the service.” See also *The Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland*, The Job Opportunities Task Force (Jan. 2018), http://www.jotf.org/Portals/0/jotf/publications/COP%20report%20013018_FINAL.pdf (“*The Criminalization of Poverty*”) at 53.
- 8 See Amer. Bar Ass’n, Resolution 110 (2004 AM), *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*, Guideline 2 (“An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford.”).
- 9 *Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing*, Standard 18-3.16 (d) (“The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.”). NTF Principle 2.3 states, “States should have statewide policies that set standards and provide for processes courts must follow when doing the following: assessing a person’s ability to pay; granting a waiver or reduction of payment amounts;

- authorizing the use of a payment plan; and using alternatives to payment or incarceration.” NTF Principle 6.2 urges that state law and court rules “provide for judicial discretion in the imposition of legal financial obligations.”
- 10 See Amer. Bar Ass’n, Resolution 111B (2016 AM), cmt. at 13 (urging the abolition of user-funded probation systems supervised by for-profit companies based on a detailed explanation of the Supreme Court’s decision in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), and the problem of debtors’ prisons—the unlawful incarceration of people too poor to pay court fines and fees); Council of Economic Advisers Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* (Dec. 2015) (“CEA Brief”), at 5-6, available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.
 - 11 *Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing*, Standard 18.3.22(e) (“Non-payment of assessed costs should not be considered a sentence violation.”)
 - 12 The ABA opposes incarceration for inability to pay contribution fees for appointed counsel. E.g., Amer. Bar Ass’n, Resolution 110 (2004 AM), *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*, Guideline 4 (“Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.”); Amer. Bar Ass’n, Resolution of the House of Delegates 111B (Aug. 2016) (commentary on Bearden and debtors’ prisons); Amer. Bar Ass’n, Resolution of the House of Delegates 112C (Aug. 2017) (urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay”). The reasoning underlying Resolution 112C’s principle against pretrial incarceration for inability to pay also applies to any stage of court proceedings that could lead to incarceration for inability to pay. NTF Principle 6.3 states that courts should make an ability-to-pay determination before ordering incarceration or probation revocation for failure to pay. Principle 4.3 states that courts should make an ability-to-pay determination before ordering license suspension for failure to pay.
 - 13 American Civil Liberties Union, *In For A Penny: The Rise Of America’s New Debtors’ Prisons* (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf. (documenting incarceration for unpaid fines and fees in Michigan, Ohio, Georgia, Louisiana, and Washington); ACLU of Louisiana, *Louisiana Debtors’ Prisons: An Appeal To Justice* (2015), https://www.laaclu.org/sites/default/files/field_documents/2015_Report_Louisiana_Debtors_Prisons_0.pdf; ACLU of New Hampshire, *Debtors’ Prisons In New Hampshire* (2015), <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf>; ACLU of Ohio, *In Jail & In Debt: Ohio’s Pay-To-Stay Fees* (2015), <http://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf>; ACLU of Ohio, *The Outskirts Of Hope: How Ohio’s Debtors’ Prisons Are Ruining Lives And Costing Communities* (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf; ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* (014), <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf>; Alison Beyea, *Legislature Has a Chance to End Debtors’ Prisons in Maine*, ACLU of Maine blog (Mar. 8, 2016), <https://www.aclumaine.org/en/news/legislature-has-chance-end-debtors-prisons-maine>; Debtors’ Prisons, ACLU of Colorado, <http://aclu-co.org/court-cases/debtors-prisons> (compiling 2013 letters to municipalities of Westminster, Northglenn, and Wheat Ridge concerning illegal jailing of people unable to pay fines and fees); Press Release, ACLU of Colorado, Colorado Legislature Approves Ban on Debtors’ Prisons (Apr. 23, 2014), <http://aclu-co.org/colorado-legislature-approves-ban-debtors-prisons>; Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/field_document/2015.01.29_filed_thompson_complaint.pdf; Complaint, *Fuentes v. Benton County*, Washington, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County Oct. 6, 2015), https://www.aclu.org/sites/default/files/field_document/fuentes_v_benton_county_-_complaint.pdf; Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), <https://www.aclu.org/kennedy-v-city-biloxi-complaint>; Complaint for Superintending Control, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court County of Macomb Jul. 9, 2015), <http://www.aclumich.org/sites/default/files/Motion%20for%20Class%20Cert%20as%20filed.pdf>.
 - 14 *Criminal Justice Debt* at 20-26. See also *Profiting from Probation* at 51-52. This “harsh reality” of people being incarcerated for failure to pay impossible-to-pay fees and fines “harks back to the days after the Civil War, when former slaves and their descendants were arrested for minor violations, slapped with heavy fines, and then imprisoned until they could pay their debts. The only means to pay off their debts was through labor on plantations and farms. . . . Today, many inmates work in prison, typically earning far less than the minimum wage.” Alexander, *The New Jim Crow*, at 157.

- 15 *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).
- 16 Amer. Bar Ass'n, Resolution 111B (2016 AM). *See also* Amer. Bar Ass'n, Resolution 112C (2017 MY) (urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay”). The rationale for Resolution 112C’s principle against pretrial incarceration for inability to pay also applies to any stage of court proceedings that could lead to incarceration for inability to pay. *See also* Amer. Bar Ass'n, *Standards for Criminal Justice: Sentencing* 18-3.22 (Sentencing courts should consider an individual’s ability to pay before determining whether to assess fines or fees and how much to assess).
- 17 *See, e.g., Williams v. Illinois*, 399 U.S. 235 (1970) (holding that an Illinois law requiring that an individual who was unable to pay criminal fines “work off” those fines at a rate of \$5 per day violated the Equal Protection Clause because the statute “works an invidious discrimination solely because he is unable to pay the fine”); *Tate v. Short*, 401 U.S. 395 (1971) (“Imprisonment in such a case [of an ‘indigent defendant without the means to pay his fine’] is not imposed to further any penal objective of the State. It is imposed to augment the State’s revenues but obviously does not serve that purpose [either]; the defendant cannot pay because he is indigent.”).
- 18 Studies show that the imposition and enforcement of fines and fees disproportionately and regressively affect low-income individuals and families. *See, e.g., CEA Brief*, at 5-8. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. *See Back on the Road California, Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, at 27 (2016) (hereinafter “Stopped, Fined, Arrested”), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. *See Legal Aid Justice Center, Driven by Dollars: a State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt* (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>. Such racial disparities in the adverse impact of the imposition and enforcement of court fines and fees also contribute to tension between law enforcement and courts on the one hand and the communities of color they serve on the other, as documented in a devastating 2015 report by the U.S. Department of Justice. *See U.S. Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department*, at 79-81 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (detailing evidence of how municipal court and policing practices related to court fine and fee collection erode community trust in law enforcement).
- 19 NTF Principle 4.3 states that, “Courts should not initiate license suspension procedures until an ability to pay hearing is held and a determination has been made on the record that nonpayment was willful. . . . Judges should have discretion to modify the amount of fines and fees imposed based on an offender’s income and ability to pay.” *See also Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at *8 (M.D. Tenn. Oct. 5, 2017) (“No person . . . can be threatened or coerced into doing the impossible, and no person can be threatened or coerced into paying money that she does not have and cannot get.”).
- 20 *See Fowler v. Johnson*, No. 17-11441, 2017 WL 6540926, at *2 (E.D. Mich. Dec. 17, 2017) (finding that “the loss of a driver’s license, particularly in a state like Michigan lacking an efficient and extensive public transportation system, hinders a person’s ability to travel and earn a living” and preliminarily enjoining Michigan’s system for suspending driver’s licenses upon non-payment of traffic tickets).
- 21 *See Department of Justice “Dear Colleague” Letter* (March 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> (“*Department of Justice Guidance*”), at 6 (“In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant’s driver’s license to compel the payment of outstanding court debts. If a defendant’s driver’s license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay.”). *See also Criminal Justice Debt* at 24-25 (explaining the consequences of driver’s license suspensions).
- 22 In *Robinson*, a federal court in Tennessee ordered the restoration of driver’s licenses for individuals’ whose licenses had been suspended for nonpayment finding that a license suspension is “not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end.” 2017

- WL 4418134, at *7. The court held that “taking an individual’s driver’s license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.” *Id.* at *9.
- 23 See *Bearden*, 461 U.S. at 667-69 (incarceration for failure to pay a fine and restitution); *Turner v. Rogers*, 564 U.S. 431, 449 (2011) (incarceration for failure to pay child support); *Robinson*, 2017 WL 4418134, at *8-9 (driver’s license suspension). See also *Department of Justice Guidance* at 3 (“Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful. . . . Further, a court’s obligation to conduct indigency inquiries endures throughout the life of a case.”).
- 24 In connection with the NTF Principles, the National Task Force on Fines, Fees and Bail Practices also published a “Bench Card for Judges” entitled *Lawful Collection of Legal Financial Obligations*, available at http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx. The Bench Card explains the importance of affording “Adequate Notice of the Hearing to Determine Ability to Pay,” and recognizes that such notice “shall include” notice of: the hearing date and time; the total amount due; that the court will evaluate the person’s ability to pay at the hearing; that the person should bring any documentation or information the court should consider in determining ability to pay; that incarceration may result only if alternative measures are not adequate to meet the state’s interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused; the right to counsel; and that a person unable to pay can request payment alternatives, including, but not limited to, community service and/or reduction in the amount owed. See also *Department of Justice Guidance* at 5 (“Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases.”).
- 25 The term “fundamental right” as used in this principle does not include freedom from incarceration, which is addressed in Guidelines 3 and 4.
- 26 See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to “the political franchise of voting” as “a fundamental political right, because [it is] preservative of all rights”); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (collecting cases recognizing “the fundamental right of parents to make decisions concerning the care, custody, and control of their children”).
- 27 Alexes Harris, et al., *Monetary Sanctions in the Criminal Justice System: A review of law and policy in California, Georgia, Illinois, Minnesota, Missouri, New York, North Carolina, Texas, and Washington* 14, <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf>.
- 28 *Id.* (“In Washington, failure to make three payments in a twelve-month period can lead to a revocation of voting rights. The court can also revoke voting rights if they determine that a person has willfully failed to comply with the terms of payment.”).
- 29 *Id.* (“In Missouri, Illinois, and New York, nonpayment of legal financial obligations can be considered a violation of conditions of supervision which can potentially lead to an extension of supervision or revocation of probation and parole. In Minnesota, probation can be extended for up to five years for unpaid restitution and probation can be revoked for failure to pay for mandatory conditions of probation.”).
- 30 In 2017, a Youth Court Judge in Mississippi entered an order prohibiting a mother from having contact with her four-month-old baby until she paid her court fees in full, and was reported to have taken similar action with respect to other parents. The University of Mississippi School of Law, *MacArthur Justice Center Initiated Demands that Led to Mississippi Youth Court Judge Resigning* (Oct. 26, 2017), <https://law.olemiss.edu/macarthur-justice-center-initiated-demands-that-led-to-mississippi-youth-court-judge-resigning>.
- 31 *Bearden*, 461 U.S. at 672.

32 NTF Principle 6.5 provides:

Courts should not charge fees or impose any penalty for an individual's participation in community service programs or other alternative sanctions. Courts should consider an individual's financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.

- 33 *Bearden*, 461 U.S. at 667-69; *Report on the Future of Legal Services in the United States*, ABA Commission on the Future of Legal Services (2016), <http://abafuturesreport.com>, at 62 (endorsing the principle that courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees). See also Amer. Bar Ass'n, Resolution 102C (2010 MY) (recommending local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal codes, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal sanctions).
- 34 NTF Principle 6.8 provides that courts should never charge interest on payment plans.
- 35 The National Task Force's "Bench Card" (http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx), a step-by-step guide for state and local judges to use to protect the rights of people who cannot afford to pay court fines and fees, includes a set of factors judges should consider when making an ability-to-pay determination.
- 36 Amer. Bar Ass'n, Resolution 114 (MY 2018), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/114.html (urging federal, state, local, territorial and tribal governments "to provide legal counsel as a matter of right at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated or prosecuted by a government entity."). See also Amer. Bar Ass'n, *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings* (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf; Amer. Bar Ass'n, *Standards for Criminal Justice: Providing Defense Services* 5-5.1 (3d ed. 1992), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html.
- 37 See Amer. Bar Ass'n, *Standards for Criminal Justice: Providing Defense Services* 5-5.2 cmt. (3d ed. 1992), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf, at 65 ("[T]he line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such 'quasi-criminal' matters[.]"); Amer. Bar Ass'n, Resolution 114 (MY 2018) at 6 (reiterating that commentary about the blurring between criminal and civil proceedings).
- 38 NTF Principle 4.4 states that indigent defendants should be provided with court-appointed counsel at no charge.
- 39 Amer. Bar Ass'n, *Standards for Criminal Justice: Providing Defense Services* 5-8.2(b) (3d ed. 1992), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#8.
- 40 *Id.* cmt., https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf, at 105 ("An accused who expresses a desire to proceed without counsel may sometimes fail to understand fully the assistance a lawyer can provide. Accordingly, this standard recommends that '[n]o waiver should be accepted unless the accused has at least once conferred with a lawyer.' Some courts have recognized that counsel may be assigned by the court for this limited purpose. Such a practice helps to counter the argument that any waiver of counsel by a layperson must be the result of insufficient information or knowledge.").
- 41 *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("[W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.")

- 42 *Id.*, See also *Johnson v. Zerbst*, 304 U.S. 458, 465 (1947) (“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court[.]”).
- 43 See Model Code of Judicial Conduct, Rule 2.6 (providing that a judge must “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law,” and should not “act in a manner that coerces any party into settlement”).
- 44 Amer. Bar Ass’n, *Standards for Criminal Justice: Providing Defense Services* 5-8.2. See also *id.* (“A waiver of counsel should not be accepted unless it is in writing and of record.”).
- 45 Amer. Bar Ass’n, *Standards for Criminal Justice: Prosecution Function* 3-5.1(e) (“The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents.”). See also Model Rules of Professional Conduct, Rule 3.8(c) (Prosecutors shall not “seek to obtain from an unrepresented accused a waiver of important pretrial rights.”); Rule 3.8(b) (Prosecutors “shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel”); Rule 4.1 (providing that officers of the court should not fail to disclose material facts when dealing with persons other than clients).
- 46 Amer. Bar Ass’n, *Standards for Criminal Justice: Prosecution Function* 3-4.1(b) (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (“A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so.”).
- 47 “Timely” means as soon as feasible after the information is collected.
- 48 The cost to the court of administering any non-monetary alternative to payment should never be imposed on the defendant or respondent.
- 49 See National Center for State Courts, *Principles for Judicial Administration* 11 (2012) (requiring transparency and accountability through the use of performance measures and evaluation at all levels of the court system). See also Amer. Bar Ass’n, Resolution 302 (MY 2011) (urging state and local governments to identify and engage in best practices for court funding to insure protection of their citizens, efficient use of court resources, and financial accountability). NTF Principle 3.2 provides that “[a]ll courts should demonstrate transparency and accountability in the collection of fines, fees, costs, surcharges, assessments, and restitution, through the collection and reporting of financial data and the dates of all case dispositions to the state’s court of last resort or administrative office of the courts.”
- 50 *Profiting from Probation*, at 18 (“A good place for state governments to start would be to require basic transparency about the revenues probation companies extract from probationers. No state does this now.”).
- 51 *Department of Justice Guidance at 8; Profiting from Probation at 42-44.*
- 52 See *Rodriguez v. Providence Community Corrections*, 155 F. Supp. 3d 758, 771 (M.D. Tenn. Dec. 17, 2017) (finding that a for-profit collection company’s failure to inquire into ability to pay before stacking fees, effectively revoking probation, raised due process and equal protection concerns).
- 53 See Amer. Bar Ass’n, Resolution 111B (2016 AM) and Report (condemning the use of for-profit companies for user-funded probation with reasoning that supports the principle against the use of for-profit companies to collect court fines and fees).

