

Legal Financial Obligations: A Ball and Chain

By Judge Theresa Doyle

Just three small letters. But such an overwhelming burden.

You can't get a job or apartment because of your criminal record. The legal financial obligations (LFOs) ordered as part of your sentence remain unpaid, making matters worse. An employer's or landlord's background check shows not just your conviction, but that your case is still active because of the unpaid LFOs. And the unpaid LFOs have damaged your credit, making housing harder to find, even if you could afford the rent.

Now there is a warrant for your arrest for the unpaid LFOs. If you are picked up and jailed, you will miss the job interview and mental health treatment appointment next week. If you remain in jail too long, you will lose your temporary housing. Then you could lose custody of your children.

These are common consequences for people with LFOs that they are too poor to pay.

Facts about LFOs

In Washington, superior court judges at sentencing are required to impose, on most convictions, a \$500 victim penalty assessment, \$100 DNA fee and any restitution owing to the victim. This LFO debt accrues interest at 12 percent under state law.

There are a host of other discretionary LFOs — costs, fees and fines that judges can, but are not required to, impose.

The average LFO amount imposed in criminal cases statewide by Washington superior courts between 2010 and 2012 was \$995. For indigent defendants, that is a huge sum. A person paying \$20 monthly, at 12 percent interest, togeth-

er with the annual surcharge assessed by most courts, after three years would still owe \$797.

There is geographical disparity among counties across the state in imposing LFOs. It ranges from \$600 in King County Superior Court, to more than \$7,000 in Whitman County, according to a 2008 report prepared for the Washington Minority and Justice Commission (MJC).

How did we get here?

Mass Incarceration

Mass incarceration played a part. From 1973–2009, federal and state prison populations rose from 200,000 to 1.5 million. Today there are nearly 6 million persons in the United States

FINANCIAL OBLIGATIONS

continued on page 12

FINANCIAL OBLIGATIONS

continued from page 1

with felony convictions.

There is dramatic racial and ethnic disproportionality in those numbers. Blacks are incarcerated at six times the rate of non-Hispanic whites; Hispanics at three times the rate.

More people with convictions means more people burdened with LFO debt. Most are poor. Approximately half were jobless at the time of arrest. Of those who were employed, about half reported income of \$1,200 per month or less.

Adding insult to injury, LFO debt itself is disproportionately imposed. A recent MJC study revealed that in Washington, Hispanic males incur higher LFOs than non-Hispanic white defendants.

Inadequate Court Funding

Part of the problem has been inadequate trial court funding. Washington places dead last in the nation for state funding of trial courts. That means the counties must pick up the slack.

But there also is disparity among the counties in their ability and willingness to fund trial courts. In civil cases, this has resulted in more court user fees, as the civil bar is well aware, threatening access to justice.

In criminal cases, many counties rely on LFOs for trial courts to “self-fund.” This was one of the issues in Ferguson, Missouri. But the problem is nationwide and rests with the way we fund trial courts.

Here in Washington, many judges feel pressure to impose and collect any and all LFOs authorized by statute. These include recoupment of the cost of a public defender, jury fees, jail costs, costs of serving bench warrants, court costs and crime lab fees. The list goes on.

Effect on Defendants

What is the practical effect on the

defendant/debtor of high LFOs? To begin with, these are people who, because of a criminal record, already have difficulty securing employment, housing, and certain state licenses.

High LFO debt just makes matters worse. There is the constant tension between paying court debt and paying for basic necessities such as food and rent. Defendants remain under the court’s jurisdiction until LFOs are paid; outstanding obligations show up in background checks by employers and landlords. If the debtor falls behind in payments, wage garnishment and damaged credit can result. Many jurisdictions, such as Benton County until recently, enforce LFO obligations with jail.

King County Superior Court judges have chosen not to use jail to collect non-restitution LFO debt. Rather, our clerk’s office arranges payment plans that defendants can afford. On the front end, the general practice of our bench has been to impose only the mandatory LFOs on defendants who have qualified for a public defender because of indigency. That is at least 90 percent of our defendants.

Effect on Reentry

As a society, we need to ask whether high LFOs make penological sense. Do they serve any of the purposes of sentencing? If LFOs are additional punishment, at what point has the person suffered enough?

Do our LFO policies, because they make getting a job and housing more difficult, have the unintended effect of promoting recidivism? Are we creating a permanent underclass of the jobless, homeless and disenfranchised?

Effect on Perceptions of Justice

High LFOs imposed on sentenced defendants can negatively affect the perception of the fairness of the justice system. According to a recent MJC report, persons of color report much lower confidence in the fairness of the criminal justice system than do non-

Hispanic whites. Our LFO policies may be contributing to that perception.

The equity issue with LFOs is obvious. These fees are imposed regardless of income. Poor defendants drag high LFO debt around like a ball and chain. Wealthier defendants can just write a check.

Financial Costs

Finally, there is the question of whether high LFOs make financial sense. Studies show that much of LFO debt is uncollectable. For example, the MJC report found that for three-fourths of the sentenced cases in the first two months of 2004, less than 20 percent of LFOs had been paid three years after sentencing.

The costs of enforcement are high. A recent New York Times article reported that New Hampshire spent \$176,000 in jail costs to collect \$67,000 in LFOs.

To ascertain the true cost of LFOs, the Superior Court Judges Association (SCJA) has requested the MJC to commission a study of what the LFO system actually costs — from enforcement hearings, judge and prosecutor time, bailiff and clerk time, serving bench warrants, and jail officer costs, to the cost of jail.

Education

LFO law is arcane and confusing. To help judges, the MJC created bench cards for trial judges.

Available to defenders and prosecutors as well, the bench cards outline the restrictions on imposition of LFOs at sentencing, describe when judges can reduce, waive or convert LFOs to alternatives such as community restitution, and clarify the due process requirements of a hearing and right to counsel before a person can be jailed for willful nonpayment.

LFO Case Law

The appellate courts have begun to address LFOs. Last year, in *State v. Blazina*, Chief Justice Barbara Madsen wrote for a unanimous court that before

imposing discretionary costs, trial judges must conduct an individualized inquiry on the record about the defendant’s ability to pay. The case law is developing regarding the reach of that case.

LFO Reform Legislation

The Legislature will consider LFO reform again in the 2016 session. This past session, House Bill 1390, authored by Rep. Roger Goodman (D-45), passed 94–4 in the House only to die without a hearing in the Senate.

HB 1390 would have:

- prioritized collection of restitution;
- eliminated interest on non-restitution LFOs;
- made the \$100 DNA fee one-time only;
- given judges more discretion to convert LFOs to community restitution;
- required optional payment plans;
- codified the due process requirements of a hearing and counsel before incarcerating for failure to pay, and;
- provided that nonpayment by an indigent person is presumed to be not willful.

Similar legislation is expected in the 2016 session.

What can attorneys do? Consider joining SCJA and MJC in supporting LFO reform legislation. Request WSBA and minority, plaintiff trial, defense trial, prosecutor, and criminal defense bar associations to get involved. KCBA has already jumped in by hosting a session on LFOs at its recent Bench-Bar Conference.

Lawyers are considered community leaders, whether we realize it or not. Together we can change the world, tackling one issue at a time. ■

Judge Theresa Doyle has been a King County Superior Court judge since 2005, and served on Seattle Municipal Court from 1998 to 2004. She is a member of the Washington Minority & Justice Commission and the Washington Interpreter Commission, and serves on the SCJA education, criminal law and sentencing committees.