



Broad Reform: Ability to Pay, Payment Plans and Community Service

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Review: The difference between fines and fees

Fines

- Fines are meant to punish individuals for breaking the law and act as a deterrent for others to break the law.



Range of Fines in NM

- Traffic Misdemeanor: up to \$300
- Petty Misdemeanor: up to \$500
- Misdemeanor: up to \$1,000
- 4th D Felony: up to \$5,000
- 3rd D Felony: up to \$5,000
- 2nd D Felony: up to \$10,000
- 1st D Felony: up to \$15,000

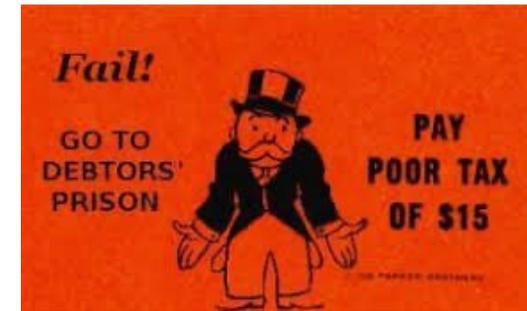
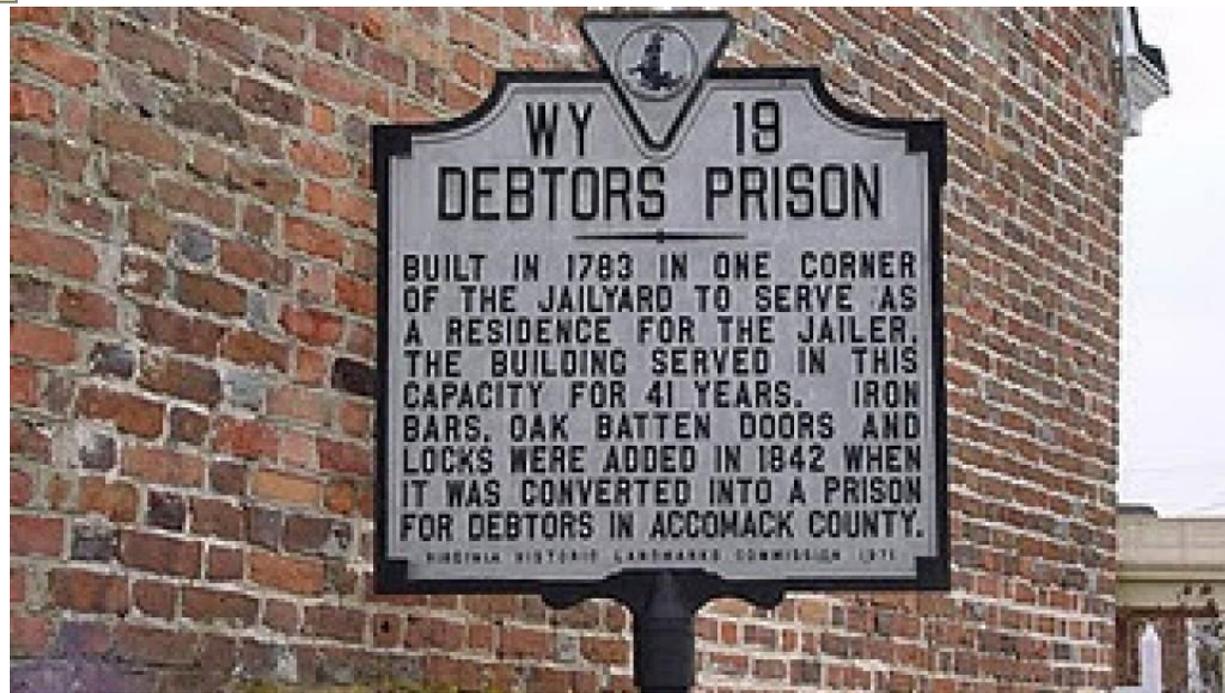
*Certain crimes have increased or mandatory financial penalties.

Review: The difference between fines and fees

Fees

- Fees by contrast, are intended to raise revenue and are NOT punitive in nature, nor are they part of the sentence.
 - They are taxes that are present in EVERY part of the criminal justice system, including traffic-even pre-adjudication.
 - Using fee revenue to fund the justice system can create perverse incentives with the potential to distort the fair administration of justice.
- When criminal courts become responsible for their own financing they may prioritize the imposition of significant fee and fine amounts and dedicated substantial staff to collecting these sums





- Through the mid-19th century, debtor's prisons (similar to locked workhouses), were a common way to deal with unpaid debt in Western Europe and in the US (1600-1833).
- Abolished in the US in 1833.
- 1983 SCOTUS affirmed that incarcerating indigent debtors was unconstitutional under the 14th Amendment's = Protection Clause via the **Bearden v. Georgia, 461 U.S. 660 (1983)**.
 - Held that local gov's can only imprison or jail someone for not paying a fine if it can be shown, by means of a hearing, that the person in question could have paid it but "willfully" chose not to do so. =**Ability to Pay Inquiry**
- 1998 SCOTUS indicated that a person's wealth or income is relevant to the Excessive Fines Clause of the 8th Amendment, **US v. Bajakajian, 524 U.S. 321 (1998)**.
 - Held that "the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."
- 2019 **Timbs v. Indiana**-SCOTUS held that the Excessive Fines Clause applied to States.

Ability to Pay in NMRA

- Municipal Court: NMRA 8-206
- Metro Court: NMRA 7-207.1
- Magistrate Court: NMRA 6-207.1



NM Ability to Pay Inquiry in Rule

- The court shall assess the D's ability to pay fines, fees, and the costs at the time of sentencing.
 - Defendants who can pay, shall be required to pay in accordance with the financial sentence imposed by the court.
 - Defendants who cannot pay, the court shall permit community service.
- Before the issuance of a warrant for failure to pay, the court shall issue a summons to appear or pay.
 - At hearing, the court may modify the payment agreement or convert the payment to community service.
 - The court must afford adequate procedural due process before jail is imposed.



NM Ability to Pay Inquiry in Rule

NMRA 6-207.1. Payment of fines, fees, and costs.

A. **Payment arrangements.** The court shall assess the defendant's ability to pay any fines, fees, or costs at the time of sentencing and shall consider the following types of payment arrangements in the order of priority set forth below.

(1) **Full payment at time of sentencing.** If the defendant is able to pay the full amount at the time of sentencing, the court shall require the defendant to do so.

(2) **Full payment within thirty (30) days of sentencing.** If the defendant cannot pay the full amount at the time of sentencing but will be able to pay within thirty (30) days, the court shall require the defendant to do so.

(3) **Agreement to pay.** If the defendant cannot pay the full amount within thirty (30) days after the date of sentencing, the court may permit the defendant to enter into an agreement to pay in installments. The court shall retain the authority to enforce an agreement to pay regardless of whether the defendant remains on probation or whether the defendant was placed on probation at all. An agreement to pay shall

(a) be based on the defendant's individual circumstances;

(b) require the largest possible payment amounts that the judge determines the defendant can make successfully;

(c) require the first installment to be due no later than thirty (30) days after the date of sentencing;

(d) schedule subsequent installments in intervals of thirty (30) days or less; and

(e) schedule all payments to be made within the shortest practicable period of time.

Recommendations: Ability to Pay Presumptions

- Ability to pay polices should include a rebuttable presumption that some individuals **will not have the ability to pay any fine or fee.** For example:
 - Eligibility for a public defender (Correct the conflict in law and apply the indigency standard appropriately-more on this later);
 - Current receipt of any needs-based public assistance/benefits;
 - Residence in a mental health facility within the last 6 months;
 - Developmental or permanent physical disability;
 - Minor;
 - Experiencing homelessness in the previous 12 months;

Ability to Pay: If a presumption does NOT apply/Traffic Offenses

- If a presumption doesn't apply, calculate total monthly income, including wages and excluding any child support or SSI and consider dependents.
- The amount owed should be assessed according to the following guidelines:
 1. 101-200% of the HUD very low income limit: waive all fees and pay 25% of the standard fine.
 2. 201-300% of the HUD standard: waive all fees and pay 50% of the standard fine.
 3. 301-400% of the HUD standard: waive all fees and 75% of the standard fine.
 4. Over 400% of the HUD standard: no waiver, full fine.

The Indigent Defense Act NMSA 31-16-1

NMSA 31-16-2. Definitions.

As used in the Indigent Defense Act [[31-16-1](#) NMSA 1978]:

- A. "detain" means to have in custody or otherwise deprive of freedom of action;
- B. "expenses", when used with reference to representation, includes the expenses of investigation, other preparation and trial;
- C. "needy person" means a person who, at the time his need is determined by the court, **is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets; and**
- D. "serious crime" includes a felony and any misdemeanor or offense which carries a possible penalty of confinement for more than six months.

History: 1953 Comp., § 41-22-2, enacted by Laws 1968, ch. 69, § 59; 1973, ch. 210, § 1.

The Indigent Defense Act NMSA 31-16-1

NMSA 31-16-5. Determination of indigency.

A. The determination of whether a person covered by Section 60 [[31-16-3](#) NMSA 1978] of the Indigent Defense Act is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 66 [[31-16-9](#) NMSA 1978] of the Indigent Defense Act, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

B. In determining whether a person is a needy person and **the extent of his inability to pay**, the court concerned may consider such factors as income, property owned, outstanding obligations and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record material factors relating to his ability to pay as the court prescribes.

C. To the extent that a person covered by Section 60 of the Indigent Defense Act is able to provide for an attorney, the other necessary services and facilities of representation and court costs, the court may order him to provide for their payment.

Right to Representation: The Indigent Defense Act NMSA 31-16-1

NMSA 31-16-3. Right to representation.

A. A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation. **The attorney, services and facilities and expenses and court costs shall be provided at public expense for needy persons.**

B. A needy person entitled to representation by an attorney under Subsection A is entitled to be:

- (1) counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney;
- (2) represented in any appeal or review proceedings; and
- (3) represented in any other postconviction proceeding that the attorney or the needy person considers appropriate unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.

C. A needy person's right to a benefit under this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

Power to Determine Indigency and Court Adoption

- NMSA 31-15-7(B)12 Chief Public Defender; general duties and powers grants the chief the authority to **“adopt a standard to determine indigency.”**
- This standard is used/adopted by all courts when determining indigency:
 - NMSA 34-6-46 District court; indigency standard; fee schedule; reimbursement.
 - NMSA 34-8A-11 Metropolitan court; indigency standard; fee schedule; reimbursement.
 - NMSA 35-5-8 Magistrate court; indigency standard; fee schedule; reimbursement.



Recommendations: Ability to Pay

- Ability to pay policies should include a rebuttable presumption that some individuals **will not have the ability to pay any fine or fee.**
 - Eligibility for a public defender: Correct the conflict in law and apply the indigency standard appropriately
- If a presumption doesn't apply, calculate total monthly income, including wages and excluding any child support or SSI and consider dependents. The amount owed should be assessed according to the following guidelines:
 1. 101-200% of the HUD very low income limit: waive all fees and pay 25% of the standard fine.
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Recommendations: Payment Plans

KEEP
CALM
WE HAVE
PAYMENT
PLANS!

- **Make payment plans mandatory.**
- **Cap the monthly payment at no more than 2% of an individual's monthly net income, or \$10--whichever is greater.**
- **Consider an early release provision that forgives the remaining balance, IF a person makes 12 payments within 15 months.**
- **If a person is sentenced to a period of incarceration, AND the court costs and fine are not converted to run concurrent with jail time, defer payment.**

Recommendations: Community Service



- Limit the amount of hours that can be assigned per month.
- Increase the conversion rate from the federal minimum wage per hour to no less than twice the state or local (whichever is higher) minimum wage.
- Implement a cap on community service hours required to fulfil the entire sentence.
- Expand the type of activities that qualify as community service:
 - School attendance, job training, work readiness, life skills training, rehab including AA/NA, other social service programs, etc.

Ability to Pay, payment plans, and community service in Criminal Procedure

NMSA 31-12-3. Paying fines, fees or costs in installments; community service option.

A. Any person sentenced to pay a fine or to pay fees and costs in any criminal proceeding against him, either in addition to or without a term of imprisonment, may in the discretion of the court be allowed to pay such fine, fees or costs in installments of such amounts, at such times and upon such conditions as the court may fix. The defendant may also be required to serve a period of time in labor to be known as "community service" in lieu of all or part of the fine. If unable to pay the fees or costs, he may be granted permission to perform community service in lieu of them as well. The labor shall be meaningful, shall not be suspended or deferred and shall be of a type that benefits the public at large or any public, charitable or educational entity or institution and is consistent with Article 9, Section 14 of the constitution of New Mexico. Any person performing community service pursuant to court order shall be immune from civil liability arising out of the community service other than for gross negligence, shall not be entitled to wages or considered an employee for any purpose and shall not be entitled to workers' compensation, unemployment or any other benefits otherwise provided by law. Instead, a person who performs community service shall receive credit toward the fine, fees or costs at the rate of the prevailing federal hourly minimum wage. Unless otherwise provided, however, the total fine, fees and costs shall be payable forthwith.

B. The court may at any time revise, modify, reduce or enlarge the amount of the installment or the time and conditions fixed for payment of it.

C. When a defendant sentenced to pay a fine in installments or ordered to pay fees or costs defaults in payment, the court, upon motion of the prosecutor or upon its own motion, may require the defendant to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that he made a good faith effort to obtain the funds required for the payment. If the defendant's default was contumacious, the court may order him committed until the fine or a specified part of it or the fees or costs are paid. The maximum term of imprisonment for such contumacious nonpayment shall be specified in the order of commitment.

D. If it appears that a defendant's default in the payment of a fine, fees or costs is not contumacious, the court may allow the defendant additional time for payment, reduce the amount of the fine or of each installment, revoke the fine or the unpaid portion in whole or in part or require the defendant to perform community service in lieu of the fine, fees or costs.