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Courts Are Not Revenue Centers

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Conference of State Court Administrators

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If the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general welfare through charges assessed to those who would utilize our courts.

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I. INTRODUCTION

A quarter of a century ago the Conference of State Court Administrators adopted a set of standards[1] (hereinafter referenced as the "1986 Standards") related to court filing fees, surcharges and miscellaneous fees in response to a burgeoning reliance upon courts to generate revenue to fund both the courts and other functions of government. The issue of court revenue - and the relationship of that revenue to funding the courts - remains fresh and relevant and warrants a renewed examination and restatement of the previously adopted standards, couched here as "principles."

The intersection of court revenues and court funding is complex and includes constitutional, statutory and case law mandates and restraints governing access to justice, governmental revenues, and appropriate uses of court-generated revenue:

- A variety of vehicles to deliver court revenue that are difficult to define consistently and that present different problems or issues depending upon the type of case (civil, criminal or traffic);
- The tension between the public benefit courts provide to society as a whole and the private benefit which inures to individual litigants; and
- The economic and fiscal pressures and practical realities that face legislative bodies and court leadership.

Court leaders must navigate among the particular historical, political and budgetary realities that face the courts and legislative bodies and serve as the backdrop to every new and increased fee or cost in their individual states. For revenue sources attached to civil cases, court leaders must advocate for the principles of access to justice, the balance of public good and private benefit in establishing court fees, and restricting revenue generation to court purposes only. In criminal cases, court leaders have a responsibility not only to ensure that judicial orders are enforced - *i.e.*, fees and fines are collected[2] - but also to ensure that the system does not impose unreasonable financial obligations assessed to fund other governmental services. In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation.

Court leaders must work toward uniformity across their state and be the experts on the typically complex scheme of fees and costs that currently exists, while seeking a more principled and transparent approach.

II. TERMINOLOGY AND DEFINITIONS

There is wide variation among the states (and sometimes within a state) as to the terms used to describe court revenue vehicles and the particular meaning associated with the term in differing circumstances. This paper re-adopts the definitions from the 1986 Standards as listed below, with an additional definition for "Fines and Penalties." These terms, as they appear in this paper, are therefore consistent with the following definitions, with the exception of the civil and criminal case law discussions where the terms are used within the context of their meaning in the particular state in which the case arose.

> **Fees**: Amounts charged for the performance of a particular court service and that are disbursed to a governmental entity. These fees are specified by an authority at a fixed amount.

[1] Standards Relating to Court Costs: Fees, Miscellaneous Charges and Surcharges and A National Survey of Practice, Conference of State Court Administrators, June, 1986. NCSC KF 8995 C6 1986 C.4

[2] "As State Courts Face Cuts, a New Push to Squeeze Defendants," New York Times, April 6, 2009; available at http://www.nytimes.com/2009/04/07/us/07collection.html ; last visited Dec. 30, 2010.

Miscellaneous Charges: Amounts assessed that ultimately compensate individuals or non-court entities for services relating to the process of litigation. These amounts often vary from case to case based on the services provided.

Surcharges: Amounts added to fines, fees, or court costs that are used for designated purposes or are deposited into the general fund.

Court Costs: Amounts assessed against a party or parties in litigation. Such amounts are determined on a case-by-case basis and vary in relation to the activities involved in the course of litigation. Court costs include fees, miscellaneous charges and surcharges.

Fines and Penalties: Amounts assessed to penalize an individual or organization for violating a provision of law or rule following conviction or other adjudicatory decision by a judicial officer.

III. RELEVANT CASE LAW – FILING FEES

Access to the courts is a fundamental right. In *Boddie v. Connecticut*, the Supreme Court of the United States held unconstitutional a state statute requiring payment of fees before commencing a divorce action. The Court found that barring access of indigent persons through the imposition of a filing fee was inconsistent with the obligations imposed under the due process clause of the Fourteenth Amendment.[3]

Beyond this basic precept, the thrust of the case law concerning civil filing fees is that such fees may be imposed only to fund programs directly involving judicial services. When the connection between fees imposed and judicial services administered is slight, courts generally find that an unreasonable burden is placed upon the litigant, particularly in those states that have a constitutional "open courts" provision.[4]

Thirty-eight states currently have open courts provisions within their constitutions.[5] The general purpose of such provisions is to ensure that citizens are not "arbitrarily deprived of effective remedies designed to protect basic individual rights."[6] In most of these states, the open courts provision is interpreted to prohibit "filing fees that go to fund general welfare programs, and not court-related services."[7]

For example, in a Texas Supreme Court case, *LeCroy v. Hanlon*, the court held that "filing fees that go to state general revenues . . . are unreasonable impositions on the state constitutional right of access to the courts. Regardless of its size, such a filing fee is unconstitutional for filing fees cannot go for non-court-related purposes."[8] The court in *LeCroy* based its analysis on an Illinois Supreme Court case that examined whether a $5 fee charged for divorce proceedings could go to finance a statewide domestic violence shelter program. The Illinois high court had held that such a fee was unconstitutional because it "had no relation to the judicial services rendered and was assessed to provide general revenue."[9] The court explained that

> [c]ourt filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the court . . . Dissolution-of-marriage petitioners should not be required as a condition to filing, to support a general welfare program that relates neither to their litigation nor to the court system. If the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general welfare through charges assessed to those who would utilize our courts . . . [I]f domestic violence services are deemed sufficiently court related to validate the funding scheme, countless other social

[3] Boddie v. Connecticut, 401 U.S. 371 (1971)

[4] E.g., Oklahoma Constitution, Article II § 6, states: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered with sale, denial, or prejudice."

[5] Erin K. Burke, *Note: Utah's Open Courts: Will Hikes in Civil Filing Fees Restrict Access to Justice?*, 2010 UTAH L. REV. 201, 201 n.1; *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 674 (Utah 1985).

[6] *Berry*, 717 P.2d at 675; *State v. Saunders*, 25 A. 588, 589 (N.H. 1889) ("The incidental right to an adequate remedy for the infringement of a right derived from the unwritten law, is coeval with the right of which it is an incident.")

[7] *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986) ("Nearly all states with similar open courts provisions have held that filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional.")

[8] Id. at 342.

[9] Id. at 341.

> welfare programs would qualify for monies obtained by taxing litigants.[10]

The Louisiana Supreme Court reached a similar conclusion in *Safety Net for Abused Persons v. Segura,* invalidating a statute that imposed filing fees in all civil suits to fund a family violence program.[11] The court held that fees assessed must be for services that bear a "logical connection to the judicial system."[12] If a program is not "part of the judicial branch, serves no judicial or even quasi-judicial function, and is not a program administered by the judiciary, [then] it is not a link in the chain of the justice system."[13] The court elaborated that "clerks of courts should not be made tax collectors for our state, nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature."[14]

The Supreme Court of Oklahoma has also held that its open courts provision[15] is violated if portions of court costs are deposited into accounts to fund non-judicial programs with "no relation to the services being provided or to the maintenance of the courts."[16] In that case, the challenged fee assessments included costs in adoption cases deposited for the Voluntary Registry and Confidential Intermediary program and the Mutual Consent Voluntary Registry, costs in civil cases deposited for the Child Abuse Multidisciplinary Account, and a cost credited to the Office of the Attorney General Victim Services Unit.[17] Because the programs were "not for the maintenance or support of the court system, nor [meant to] defray [the] expenses of the [judiciary]," the court concluded: "they do not serve a judicial or even a quasi-judicial function."[18] The programs were "social welfare programs under the operation of the executive branch of government;" and "the funding of these programs through the use of fees imposed on litigants [is] impermissible."[19]

The Oklahoma court clarified that the imposition of court costs on a litigant does not violate the open courts provision if they are "uniform, reasonable and related to the services provided,"[20] explaining that

> [T]he purpose of the court fees is to reimburse the state for money that otherwise would have to be appropriated for the maintenance of the courts. The legislature may impose court costs and not violate the open access or sale of justice clause when such costs are in the nature of reimbursement to the state for services rendered by the courts. The connection between filing fees and the services rendered by the courts or maintenance of the courts is thus established.[21]

A number of state courts agree that directing civil filing fees into general welfare funds violates the open courts provisions. There are, however, exceptions to this trend. The Alabama Supreme Court[22] declined to invalidate a statute that imposed a $50 civil jury trial fee, a portion of which was directed into a general state fund. The court held that "neither the jury trial fee, nor that portion of it that is paid directly into the general fund, is an unconstitutional tax on the right to litigate or on the right to a jury trial in a civil case."[23] The court reasoned that "[t]he guarantee of a right to trial by jury is not a guarantee of the 'right to litigate without expense'; therefore, requiring the payment of a reasonable jury fee is not an infringement on the right to a trial by jury."[24]

The Florida Supreme Court has also upheld statutes directing portions of civil filing fees to a general revenue fund. There, the court held that "[d]irecting a portion of the filing fees to the general revenue fund for further appropriation is an accounting mechanism reasonably related to the governmental purpose of funding the administration of justice."[25] Specifically, the court found that "the Legislature would be using the filing fees to fund the administration of justice if it funds the justice system

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[10] Id. at 1351.
[11] Id. at 1042. The invalidated statute also provided for the imposition of a $3.00 cost on all criminal cases. (See LA R.S. 13:1906 B.)
[12] *Safety Net for Abused Persons v. Segura*, 692 So.2d 1038, 1044 (La. 1997).
[13] Id.
[14] Id. at 1042.
[15] See fn. 9.
[16] *Fent v. State ex. Rel. Dept. of Human Services*, 236 P.3d 61, 70 (Okla. 2010).
[17] Id. at 64.
[18] Fent at 69.
[19] Id.
[20] Id at 66.
[21] Id.
[22] "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Alabama Const. Art. I, Sec. 13.
[23] *Fox v. Hunt*, 619 So. 2d 1364, 1367 (Ala. 1993).
[24] *Fox*, 619 So. 2d at 1366.
[25] *Crist v. Ervin*, No. SC10-1317, 2010 Fla. LEXIS 1858, at *4 (Fla. Nov. 4, 2010).

at a level at least equal to the amount of filing fees that is commingled with other state money in the general revenue fund."[26]

Variations are also found in those courts whose state constitutions do not include open courts provisions, such as Arizona. There, a state court of appeals upheld a statute requiring parties in a marriage dissolution action to pay fees that went towards funding a domestic violence shelter and a child abuse prevention and treatment group.[27] When the appellant argued that the statute was unconstitutional, the court responded, "Arizona has no comparable [open courts] provision" that relates to an individual's "right to obtain justice freely,"[28] nor a requirement that such court "fees be used only for court-related programs."[29]

As a policy matter, some commentators have raised concerns related to the impact of mounting filing fees. Such fees, for example, may be seen as thwarting the judicial function as a viable alternative to less civilized dispute resolution:

> the costs to the justice system may be higher if the alternative to resolution of disputes through the courts ... [is] illegal forms of dispute resolution ... [such as] self-help or street justice. Indeed, the Open Courts Provision itself seeks to secure a basic principle of justice that will, in the end, deter persons wronged by others from resorting to self-help and the inevitable violence that ensues when people take the law into their own hands rather than seeking judicial remedies. We ought to remember that access to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society.[30]

Critiques of civil filing fees in federal court may also be analogous, as one writer describes a potential consequence of using access fees as a means of caseload diversion:

> It is reasonable to assume that the more money one has, the lower the value, or utility, she will ascribe to each particular dollar; thus, the marginal utility of dollars declines as the amount involved increases. Access fees, therefore, constitute a decidedly inefficient gauge to determine the utility of a suit to the litigant. The use of access fees as entry barriers could very well press litigants with "high utility value" stakes out, while leaving those with lower utility values in.[31]

Policy implications aside, it is clear that a number of state courts carefully scrutinize the use and allocation of filing fees to determine their constitutionality. Many courts, as shown, require that such fees be directed in large part, if not entirely, to court-related purposes. And yet, it is not always clear what exactly "court-related purposes" entail.

The Louisiana Supreme Court offered a broad definition in *Safety Net*, requiring that fees assessed be for services that have a "logical connection to the judicial system," or that bear a "relationship to the nature of the filing against which it is assessed."[32] Similarly, the Texas Supreme Court held that "[c]harging litigants that are able to pay a reasonable fee for judicial support services does not violate the open courts provision. [T]hey are permitted because they go for court-related purposes."[33]

In a more recent decision, the Louisiana high court relied on the state Judicial Council's General Guidelines Regarding the Evaluation of Requests for Court Costs and Fees (promulgated in 2004) to determine what might fall under "court costs" and "court-related operational costs."[34] Under those guidelines (further discussed in Part VI), a fee is

> a charge or cost . . . that is used to defray the operational costs of the courts or the court-related operational costs of the clerks of court or other court-related functions, and that has been authorized by state law to be collected from a person either filing a document in any civil or criminal proceeding with the clerk of court, appearing in a civil matter before a court, failing to fulfill a condition of

[26] *Crist*, 2010 Fla. LEXIS 1858, at *10.
[27] *Browning v. Corbett*, 734 P.2d 1030, 1031-1032 (Ariz. App. 1986).
[28] Id. at 1033.
[29] Id.
[30] Burke, 2010 UTAH L. REV. at 220 (quotations omitted).
[31] Martin D. Beier, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1193-94 (1990).
[32] *Safety Net*, 692 So. 2d at 1044.
[33] *LeCroy*, 713 S.W.2d 335, 342-43 (citations omitted).
[34] *State v. Lanclos*, 980 So. 2d 643, 653 (La. 2008).

> release, or meeting a condition of probation or other court order.[35]

This definition is consistent with a number of other courts' interpretations of "court-related purposes":

- the Illinois Supreme Court held that "court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts";[36]
- the Supreme Court of Oklahoma explained that the purpose of court costs is "to reimburse the state for the expenses incurred in providing and maintaining all of the officers and other facilities of the court, and is intended as compensation to the state for services rendered, not by the clerk only, but by the entire court";[37] and
- the Florida Supreme Court held that directing portions of filing fees to the law library qualified as a judicial purpose, because "the law library fulfills an important and growing need of practitioners, judges, and litigants. It is essential to the administration of justice today, and it is appropriate that its costs be assessed against those who make use of the court systems of our state."[38]

Fees dedicated for services such as family violence prevention,[39] counseling, marriage preservation, or victim services[40] are suspect, as they are unrelated to the maintenance and operation of the courts. While states like Florida allow for a *portion* of the fees to go to a general revenue fund,[41] other states, like Texas, do not permit even bifurcated allocation of court fees.[42]

IV. RELEVANT CASE LAW – CRIMINAL COURT COSTS

Most courts agree that court costs imposed in criminal proceedings must bear a reasonable relationship to the expenses of prosecution. However, courts vary widely in their determination of whether such costs must defray the expenses of defendants' particular prosecutions, or whether those costs might go into a larger fund, the purpose of which is to remedy the cause of the offenses.

In Michigan, Wyoming, and Louisiana, costs may be assessed only against a defendant if used to defray the expenses of the defendant's particular prosecution. An early case from the Michigan Supreme Court found that a $250 court cost imposed on a defendant for violating the "prohibitory liquor law" was excessive because it bore "no reasonable relation to the expenses actually incurred in the prosecution.[43] The Michigan Court of Appeals upheld this reasoning in reference to a more recent statute in *People v. Brown*.[44] In that case, the court held that "expert witness costs were 'expenses specifically incurred in prosecuting the defendant'" and were thus properly assessed. As summarized in a law review article on Michigan court costs,

> Michigan cases indicate that state courts have consistently adhered to the position that where assessed costs are to be paid to the state for public expenditures, the amount assessed must arise out of the particular case before the court and be directly or indirectly related to that particular case.[45]

[C]lerks of court should not be made tax collectors for our state, nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature.

– Supreme Court of Louisiana

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[35] "General Guidelines Regarding the Evaluation of Requests for Court Costs and Fees," available at http://www.lasc.org/la_judicial_entities/Judicial_Council/CourtCostGuidelines.pdf.
[36] *Crocker*, 459 N.E.2d 1346, 1351.
[37] *In re Lee*, 168 P.53, 56 (Okla. 1917).
[38] *Farabee v. Board of Trustees*, 254 So.2d 1, 5 (Fla. 1971).
[39] *Safety Net*, 692 So.2d at 1044; *Crocker*, 459 N.E.2d at 1351.
[40] *Fent*, 236 P.3d at 70.
[41] *Crist*, 2010 Fla. LEXIS 1858, at *4 (Fla. Nov. 4, 2010).
[42] *LeCroy*, 713 S.W.2d at 342.
[43] *People v. Wallace*, 222 N.W.698, 699 (Mich. 1929).
[44] *People v. Brown*, 755 N.W.2d 664, 681 (Mich. Ct. App. 2008).
[45] Elizabeth Campbell, Tanya Marcum, and Patricia Morris, *Study: The Rationale for Taxing Costs*, 80 U. DET. MERCY L. REV. 205, 209 (2003).

The Wyoming Supreme Court has held that "[c]osts of prosecution do not include the general expense of maintaining a system of courts and administration of justice."[46] The Louisiana Supreme Court, guided by its decision in *Safety Net*, invalidated a statute assessing costs against traffic offenders that went into the Greater New Orleans Expressway Commission.[47] The court held that the statute "bears no relation to an individual's particular offense and does not help defray the costs of prosecuting that particular individual."[48] Similarly, the Texas Court of Criminal Appeals has held that assessments of costs for the establishment and maintenance of a law library were invalid, because "costs in criminal cases are assessed as a part of the punishment for the commission of the offense charged."[49]

In a somewhat less restrictive approach, the Supreme Court of Virginia sustained an assessment of $5 against all traffic offenders used to defray the costs of administration of the Division of Motor Vehicles.[50] The court noted that the Division was statutorily required to maintain records to supply evidence in such cases, and to forward abstracts of these records to the Division Commissioner. As such, the assessment was "directly related to convictions for traffic offenses" and "needed to defray, or to defray partially the expense incurred by the State as a result of a conviction for a traffic offense."[51]

Other states permit directing court costs into more general funds to an even greater extent than that permitted for civil filing fees. As the Arkansas Supreme Court noted, "[t]he decisions elsewhere are not unanimous in deciding to what extent the costs in a criminal case must be directly related to that particular prosecution."[52] For example, the Florida Supreme Court has specifically rejected the argument "that costs must be expenses incident to case prosecution."[53]

This line of cases generally holds that as long as a criminal assessment is *reasonably related to the costs of administering the criminal justice system*, its imposition will not render the courts "tax gatherers" in violation of the separation of powers doctrine,[54] and that costs may be imposed without a precise relationship to the actual cost of the particular prosecution.[55] For example,

- the Arizona Supreme Court upheld a statute requiring defendants convicted of driving while impaired to pay a cost that would go into the Highway Safety Program and the Alcohol and Drug Safety Fund;[56]
- the Oklahoma Court of Criminal Appeals upheld a statute requiring that costs assessed against criminal defendants be paid into a victims' compensation fund, [57] as well as a statute requiring that costs assessed against defendants convicted of drug trafficking be forwarded to the Drug Abuse Education and Treatment Fund;[58] and
- the Florida Supreme Court upheld a $1 cost assessed against all convicted criminal defendants to be deposited in the state general revenue fund, stating "It is not unreasonable that one who stands convicted of such an offense should be made to share in the improvement of the agencies that society has had to employ in defense against the very acts for which he has been convicted."[59]

Other courts have held that costs assessed against criminal defendants may be directed into funds that generally address the problem or offense of which the defendant was convicted "[I]t is only fair that those who help create the problem should bear some of the costs of trying to alleviate it in themselves or others."[60]

In other words, no general principle defines the validity of court costs in criminal cases, and such determinations are instead dependent on state-specific holdings. Despite the existence of decisions requiring more restrictive assessment of costs, those courts that permit the direction of funds into victim compensation and drug treatment seem to allow greater latitude than their civil counterparts, which appear less likely to permit the direction of filing fees into such "non-judicial" uses.

There is a further issue in the criminal context: the differential assessment of costs by locality. Courts

[46] *Arnold v. State*, 306 P.2d 368 , 463 (Wyo. 1957).
[47] *State v. Lanclos*, 980 So. 2d 643, 645 (La. 2008).
[48] *Lanclos*, 980 So. 2d at 653.
[49] *Ex parte Carson*, 159 S.W.2d 126, 129 (Tex. Crim. App. 1942).
[50] *Carter v. Norfolk*, 147 S.E.2d 139, 140-44 (Va. 1966).
[51] *Carter*, 147 S.E.2d at 144.
[52] *Broyles v. State*, 688 S.W.2d 290, 291 (Ark. 1985).
[53] *State v. Champe*, 373 So. 2d 874, 880 (Fla. 1978).
[54] *State v. Claborn*, 870 P.2d 169, 173 (Okla. Crim. App. 1994) (emphasis added).
[55] *Broyles v. State*, 688 S.W.2d at 292.
[56] *Broyles*, 688 S.W.2d 290, 291 (Ark. 1985).
[57] *Claborn*, 870 P.2d at 174.
[58] *State v. Ballard*, 868 P.2d 738, 741 n.1 (Okla. Crim. App. 1994).
[59] *State v. Young*, 238 So. 2d 589, 590 (Fla. 1970).
[60] *Ballard*, 868 P.2d at 741 n.1.

have found that "any law which makes the punishment for an offense in one or more counties greater than the punishment of other counties for the same offense is void"[61] because it violates the equal protection and due process clauses of federal and state constitutions. "A law which should prescribe death as the punishment of murder in one county, and imprisonment as the penalty for the same crime in other parts of the State, would be void, because not operating equally upon all inhabitants of the State."[62] Equal protection requires that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In 1877, a Missouri Court of Appeals found unconstitutional the fact that one county prescribed longer jail time for the crime of abortion than other counties. "The law highly regards the liberty of the citizen, and the organic law of the State forbids the Legislature to enact that the term of imprisonment for the same offense shall vary in different localities."[63]

In *Ex parte Ferguson*, the Texas Court of Criminal Appeals invalidated a statute that assessed a varying fee upon criminal defendants based upon certain county population brackets. The court reasoned that because the statute failed to "give equal protection to all . . . citizens alike," it deprived them of equal protection and due process.[64] In *Ex parte Sizemore,* the same court invalidated a portion of a local road law that provided convicts a work allowance (to be credited against their fines and costs) at a rate of $0.50 per day because it differed from a statewide law providing that such an allowance be $3.00 per day, [65] and in *Ex parte Carson*, the court invalidated a statute that provided for a $1.00 assessment in criminal cases only in counties having eight or more district courts.[66]

More recently, in *State v. Gregori*, the Supreme Court of Missouri rejected a statute that devised varying punishments for the same criminal offense throughout the counties.[67] The statute provided that 17 year-old children in counties with a population of 50,000 or more were subject to the Juvenile Court Act, while 17 year-old children in counties with a population less than 50,000 were subject to criminal penalties.[68] The court explained that the provision denied constitutional protection because it failed to operate "equally upon all inhabitants of the state."[69]

The Supreme Court of North Carolina invalidated a similar statute that subjected criminal defendants from five particular state counties to a fine, while criminals elsewhere, who committed the same offense, were subject to a fine or imprisonment.[70] The court reasoned that criminal punishment schemes should "operate uniformly upon persons and property, giving to all under like circumstances equal protection and security."[71]

V. PRINCIPLES WITH COMMENTARY

In adopting the following principles, the Conference clearly acknowledges the tension, and at times, direct conflict, that exists between the themes embodied in the principles and the realities of government, governance, politics, the economy and fiscal practices and policies in each individual state. The principles are intended to serve as guideposts that will direct reasoned and constructive thinking and conversations leading toward balance among the many competing interests and forces that result in the establishment of various revenue vehicles within the court system.

> *<u>Principle 1:</u> Courts should be substantially funded from general governmental revenue sources, enabling them to fulfill their constitutional mandates. Court users derive a private benefit from the courts and may be charged reasonable fees partially to offset the cost of the courts borne by the public-at-large. Neither courts nor specific court functions should be expected to operate exclusively from proceeds produced by fees and miscellaneous charges.*

It is axiomatic that the core functions of our government are supported from basic and general tax revenues. Government exists and operates for the common good based upon a common will to be

[61] *Ex parte Carson*, 159 S.W.2d 126, 130 (Tex. Crim. App. 1942).
[62] *In re Jilz*, 3 Mo. App. 243, 246 (Mo. Ct. App. 1877).
[63] *Jilz*, 3 Mo. App. at 246.
[64] *Ex parte Ferguson*, 132 S.W.2d 408, 410 (Tex. Crim. App. 1939).
[65] *Ex parte Sizemore*, 8 S.W.2d 134 ,135 (Tex. Crim. App. 1928).
[66] *Ex parte Carson*, 159 S.W.2d 126, 127 (Tex. Crim. App. 1942).
[67] *State v. Gregori*, 2 S.W.2d 748 (Mo. 1928).
[68] *State v. Gregori*, 2 S.W.2d 748 (Mo. 1928).
[69] *State v. Gregori*, 2 S.W.2d 749 (Mo. 1928).
[70] State v. Fowler, 136 S.E. 709, 711 (N.C. 1927).
[71] Id. at 710.

governed, and the expense thereof is borne by general taxation of the governed. Courts, as a core function of government, should be substantially funded by general government revenues. It is as illogical to expect the judiciary to be self-supporting through user fees as it would be to expect the executive or legislative branches of government to be funded through user fees.

However, it is clear that courts also provide a direct private benefit to users of the court system and it is reasonable to expect that they shoulder a portion of the general cost of the litigation, particularly so because certain users are high frequency. Historically, court-related fees have consisted primarily of the fee to initiate a case before the court. These "filing fees" traditionally have been viewed as offsetting the basic cost of case initiation: creating and maintaining the paper file of the court action. Court fees are generally nominal in comparison to the actual cost of providing court services. In an economically efficient system of court fees, the fees would reflect the long-run marginal cost of having a system in place that is capable of processing all cases, and actually litigating at least some small portion.[72]

In more recent times, courts and legislatures have provided or mandated additional "services" that extend beyond the traditional adversarial adjudicatory model. Courts now frequently offer or mandate mediation services, parenting classes in marriage dissolutions, and procedural assistance to *pro se* litigants, for which the litigant is assessed a miscellaneous charge. These ancillary programs and services are often primarily or wholly supported by the miscellaneous charges assessed against the litigants. This is not inappropriate where the services provided are not precedent to the resolution of a case or where simple fee waiver processes are in place for litigants. However, in determining whether to set a fee and the amount of the fee, the cumulative cost of court fees and the total cost of the service must be thoughtfully balanced.

> *Principle 2: Fees and miscellaneous charges cannot preclude access to the courts and should be waived for indigent litigants.*

The need for governmental revenues must be carefully counterbalanced with the public's access to the courts. By increasing the financial burden of using the courts, excessive fees or miscellaneous charges tend to exclude citizens who have neither the monetary resources available to the wealthy nor the governmental subsidies for the poor. Excessive fees and miscellaneous charges can effectively deny this middle economic income group such fundamental rights as the right to a trial by a jury of one's peers and the right of equal access to the court system. The Supreme Court of Washington enacted General Rule 34 in response to the growing number of charges litigants face, clearly providing for "a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer . . ."[73] This clear standard implicitly acknowledges that, while fees may be appropriate, they cannot serve as a bar to judicial relief.

> *Principle 3: Surcharges should only be used to fund justice system purposes and care must be exercised to ensure the cumulative cost of litigation does not impede access to justice and that the fee and cost structure does not become too complex.*[74]

Surcharges are sometimes used for purposes clearly related to the courts, and sometimes are used for purposes that have no relationship to the operation of the courts or justice system. The latter is inappropriate and the former must be instituted sparingly. If taxation is a prerogative of the legislative branch of government, the practice of earmarking funds escapes the priority-setting process existing in most progressive governmental entities. Neither use should escape the appropriations' review process nor should the amount of a public good to be provided by such funds be necessarily limited to the amount of revenue generated by a surcharge for the purpose. If the purpose funded by a surcharge is for the greater public good, it should be worthy of consideration of funding from a broader general revenue source through the normal appropriation process.

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[72] Cabrillo, Francisco, and Sean Fitzpatrick, 2008. *The Economics of Courts and Litigation*. Northhampton, Massachusetts: Edward Elgar.

[73] Washington Court Rules, General Rule 34 (http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr34)

[74] See also http://www.courts.state.tx.us/oca/debts/pdf/TexasFinancialObligationsInterimReport.pdf and Justice Center at Council of State Governments, Repaying Debts: http://www.reentrypolicy.org/jc_publications/repaying_debts_full_report

The benefit derived from the efficient administration of justice is not limited to those who utilize the system for litigation, but is enjoyed by all those who would suffer if there were no such system -- the entire body politic. Society as a whole benefits from the very existence of a trusted dispute resolution system with the capability to process all cases timely and bring some fraction of them to trial and continue to develop the common law, or the price of a given crime.

As one commonly adopted surcharge suggests, it can be appropriate to include a surcharge on filing fees to generate revenue that allows the court to provide for the safety and security of litigants in court facilities. In this instance the litigant is a clear direct beneficiary of the service and the tangential public good, while present, is distant.

There is no bright line rule for policymakers to rely upon in determining whether a particular surcharge is appropriate. A balance must be struck, giving consideration to

- The extent to which a surcharge supports a court-related function;
- The cumulative cost of litigation;
- The overall complexity of the cost and fee structure; and
- Where the service being funded falls on the private good/public good spectrum.

In addition to the general discussion above, increasing attention must be given to the impact of criminal fees and charges on the population re-entering society from incarceration. As part of the reentry movement, the Council of State Governments Justice Center points out that "people released from prisons and jails typically have insufficient resources to pay their debts to their children, victims, and the criminal justice system."[75] Other groups have also highlighted this issue:

> States have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support. States now charge defendants for a wide range of activities including booking fees, probation supervision, jail stays, and the post-conviction collection of DNA samples. Every stage of the criminal justice process, it seems, is now chargeable to the criminal defendant as a cost. These "user fees" differ from other kinds of court-imposed financial obligations. Unlike fines, whose [*sic*] purpose is to punish, and restitution, whose [sic] purpose is to compensate victims, user fees are explicitly intended to raise revenue. Sometimes deployed as an eleventh hour maneuver to close a state budget gap, the decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.[76]

The proliferation of these fees and costs as chargeable fees and costs included in the judgment and sentence issued as part of the legal financial obligation of the defendant has recast the role of the court as a collection agency for executive branch services.

> *Principle 4: Fees and costs, however set, should be determined in consultation with the appropriate judicial body, and reviewed periodically to determine if they should be adjusted.*

Policy considerations such as types of fee structures and public access are matters of concern to the judiciary, and legislative review of fees and miscellaneous charges must involve the judicial branch as an integral part of the process. Because legislative bodies may be primarily concerned with public funding policies, the judiciary must assume the responsibility for protecting the public's access to the courts.

Periodic, coordinated review by the legislative and judicial branches should ensure a reasonable level of fees and miscellaneous charges that does not unduly restrict access to the courts but is reflective of the current economy. The review should permit sufficient time to evaluate the impact of previous revisions (if any); to allow the collection and analysis of cost of living and other economic data to

[75] "Repaying Debts," Council of State Governments Justice Center, 2007. report summary at p. 2, available at: http://www.reentrypolicy.org/jc_publications/repaying_debts_summary/RepayingDebts_Summary_v18.pdf

[76] "Criminal Justice Debt: A Barrier to Reentry," Brennan Center for Justice, 2010; available at http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf . See also the ACLU report http://www.aclu.org/files/assets/InForAPenny_web.pdf and the Brennan Center report http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf

determine actual and projected changes in these factors; to prepare a documented report and recommendation regarding the existing fee schedule; and to provide advance notice of rate proposed increases to judicial offices, the practicing bar, and the public. Proposed changes in fees should be subject to public review and commentary.

Attention should be given to the reduction of fees and miscellaneous charges when improved procedures have resulted in certain economies. Annual reviews do not allow sufficient time to complete a thoughtful, deliberate process. However, reviews occurring in a time span of every three to five years would allow collection of data and necessary consideration for the decision-making process.

The importance of regular reviews cannot be overstated as it is this process that prevents the erosion of the basis for the fee and miscellaneous charges structure and insures the durability of the system.[77]

> *Principle 5: Fees and miscellaneous charges should be simple and easy to understand with fee schedules based on fixed or flat rates, and should be codified in one place to facilitate transparency and ease of comprehension.*

In many states the only people who fully understand the array of court costs and fees are in the Administrative Office of the Courts, and in some (but possibly not all) clerks' offices. The complexity of statutory drafting tends to exacerbate the complexity of the fees themselves, so that legislators are hard-pressed to grasp either the need for, or cumulative impact of, new proposals for costs and fees. When the system includes surcharges that are event specific, different fees for different case types, local fee options, etc., even the clerk may lack the information or expertise needed to determine accurately and to assess the costs or fees called for by statute in a given case.

A flat or fixed rate is one that consolidates all of the fees itemized for each of the different transactions involving court services into one fee. The flat or fixed fee may vary for different types of cases but should not vary between cases of the same type. There are substantial differences between case processing services provided for a small claims case, a municipal case, a criminal case or a civil case filed in the general trial jurisdiction. In contrast, an appellate fee providing access to the appellate process may not vary in amount by type of case if the court support service is basically the same for each case filed.

In the first half of the 20th century, most courts used a "step" fee system, which provided various fees for each activity undertaken in a case. In 1943, the Director of the Administrative Office of the U.S. Courts noted the importance of "simplicity" and "uniformity" to any schedule of fees.[78] A major problem with a "step" fee system is that as the number of fees for different activities increases, calculation of the correct fees becomes more complex, requiring substantial expenditures of effort from all concerned. For that reason, a fixed or flat rate system is recommended.

All schedules of court fees and miscellaneous charges should be set forth in a single location in the laws or court rules of the body having appropriate authority. While each level of court may have its own applicable costs and fees statutes, these should be consistently and uniformly codified within a chapter or a section of the statutes or rules setting out the entire structure of fees and charges in the courts. Establishing court fees or miscellaneous charges without codifying them into one section is confusing and inefficient. Often, statutory enactments or rule revisions go unnoted by clerks who may be isolated and ill equipped to search for new or revised fees and charges. Administrative costs rise with a proliferation of court fee statutes spread over many volumes of law. Revenue for governmental entities is lost as a result of oversight or failure to keep abreast of new enactments.

> *Principle 6: Optional local fees or miscellaneous charges should not be established.*

If a court is established by state constitution and governed by laws passed by the state legislature, it is appropriate that some state funding be provided to fund the court. Local financing contributes to a fragmented court system where "services vary dramatically according to the locality's ability to pay."[79] Fees and miscellaneous charges should be consistent within a state. Allowing court fees to be

[77] Op cit., Stott and Ross, p. 39

[78] U.S. Congress house Committee on the Judiciary. "Fees and Costs in the United States Courts." Hearings before Subcommittee No. 4 of the Committee on the Judiciary. Public Document No. 20, 78th Congress, First Session, November 1943.

[79] A.B.A., Standards Relating to Court Organization 99 (1974).

established by local governing bodies or by local judges risks the formulation of inconsistent practices among courts of similar jurisdictions. There may be a tendency for locally-funded courts to prioritize local fees over legislative fees, and there is an appearance of conflict when fees fund local programs and the judges order defendants to use those programs. Finally, a judge could use the threat of waiving fees to force local entities to conform to practices or fees schedules that the judge thinks are appropriate.

Courts should have uniform processes and litigants should receive consistent treatment regardless of the court's locality. The amount of fees and miscellaneous charges should be established on a rational basis throughout a state and should not be more or less costly for a litigant simply as a result of venue and jurisdiction.[80]

In criminal cases, differential treatment in different localities by statue is clearly subject to equal protection challenges.

Discretionary charges or local levy charges should be eliminated. If the court is governed by state law, local fees should be prohibited from creating inconsistent costs in different locales. Superfluous charges, which are not easily understood and accepted by the public, erode confidence and should be eliminated.

> *Principle 7: The proceeds from fees, costs and fines should not be earmarked for the direct benefit of any judge, court official, or other criminal justice official who may have direct or indirect control over cases filed or disposed in the judicial system. All funds collected from fees, costs and fines should be deposited to the account of the governmental source providing the court's funding.*

The due process clause of the Fourteenth Amendment guarantees the right to a trial before a disinterested and impartial judicial officer.[81] Consequently, any judicial officer who has control over the processing of cases may be disqualified for holding a pecuniary interest in fees payable by litigants.

For example, in *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 60 (1972), an ordinance authorized the mayor, who also had wide executive powers, to preside as a judge over certain traffic offenses. A large portion of the Monroeville income was derived from fees, costs, fines, and forfeitures imposed by the mayor in his traffic court. The mayor convicted the petitioner of two offenses and fined him $100. The petitioner appealed his conviction, arguing that because the mayor was interested in securing revenue, the petitioner was denied his right to a fair and impartial trial. The Supreme Court of the United States agreed, setting out a standard for determining whether due process of law has been denied.

> [Every procedure] which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.[82]

The Court, applying this standard, concluded that a possible temptation "exist[s] when [a judicial officer's] responsibilities for village finances may make him partisan to maintain the high level of contribution from the … court."[83] Similarly, an unconstitutional temptation may be created by the practice of earmarking revenue from costs and fees for the direct or indirect benefit of judicial officers that control the disposition of criminal cases.

There is also tension between this principle and the acceptance that surcharges that support court activities are permissible. Arguably, a judge who denies the waiver of a surcharge that funds court security benefits from that security. Again, policymakers must weigh competing values along a continuum when assessing the propriety of surcharges that support court operations. In particular, consideration must be given to the degree to which it appears that an individual judge or court official would benefit from the assessment of the surcharge.

[80] Ibid., p.10
[81] Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927)
[82] Ward v. Monroeville, 409 U.S. 57, 93 S. Ct. 60 (1972)
[83] Id.

VI. THE WAY FORWARD

According to a 2010 study by the National Center for State Courts, it is "unlikely that there is any single state that could be held out as a model for a budgeting and revenue structure that provides access, adequacy, stability, equity, transparency, and simplicity."[84] Addressing these issues is a state-by-state matter – this is one problem that does not lend itself to a national summit – and a national paper can only go so far in prescribing a particular approach.

COSCA advocates that its members:

1. *Make the current system visible.*
   Promote accountability and transparency regarding fees and costs within each state by developing and maintaining accurate and understandable information about the current laws, structures and amounts for fees and costs. Once developed, this information should be routinely shared with legislators, the executive branch, and the public. For example, the Texas OCA provides extensive guidance on the state court website, specifically for clerks but available to the public,[85] and the court administrator used a blog post to provide information on the various bills in 2011 that would increase costs on conviction, advising, for example, that if all seven bills passed, the total for most tickets would increase from $98 to $137.[86]

2. *Advocate for a principled approach.*
   The factual information regarding fees and costs must be presented within the context of a principled framework that accounts for fiscal realities. The seven principles provide a solid base from which individual states may craft a set of policy principles to frame their unique fee and cost discussions and dialogues. Development of a set of principles that work within the context of each state can best be undertaken by involvement of a workgroup or task force. That also takes into account all the constituencies that are dependent on the current array of dedicated funding streams, and strive to ensure that those services maintain necessary funding, even if future funding is not through court fees.

Consider the legislative perspective. The dedication of court fees and costs to particular programs raises the same issues that state legislatures confront, on a larger scale, with the practice of earmarking taxes. The National Conference of State Legislature's report, "Evaluation of Earmarking,"[87] suggests that the arguments in favor of earmarking tend to be of limited application to the real world of state taxes and budgets, and that the arguments against earmarking are more powerful. Earmarking hampers legislators' budgetary control, distorts the distribution of funds among programs, and reduces the flexibility of the revenue structure (which increases the difficulty of adapting budgets to changing conditions). These arguments apply with equal force to the practice of dedicating costs and fees to specific programs. Although many legislators may seek new fees and costs for projects, they should be made cognizant of the inherent problems of dedicating court costs and fees.

Louisiana provides one case study of the effort to take a principled approach.[88] In 2003, that state's Judicial Council formed a Court Cost/Fee Committee of its Judicial Council, pursuant to a state statute passed that year requiring consideration by the Council of any proposals for court costs and fees.[89] The evaluation guidelines developed by that committee include determination of the financial need for the new assessment, analysis of the probable yield, and, most important, a determination of the propriety of the cost or fee.

Among the appropriate purposes for which court costs or fees may be requested are

> to support a court or the court system or help defray the court-related operational costs of other agencies;
> to support an activity in which there is a reasonable relationship between the fee or court cost imposed and the costs of the administration of justice.[90]

[84] State of Oregon, Report to the Joint Interim Committee on State Justice System Revenues (National Center for State Courts 2010), on file with author.
[85] See http://www.courts.state.tx.us/pubs/pubs-home.asp.
[86] See http://courtex.blogspot.com/2011/03/costs-on-conviction.html.
[87] Id.
[88] There is legislative activity pending that may affect Louisiana's system.
[89] See press release at: http://www.lasc.org/press_room/press_releases/2003/2003-14.asp; last viewed May 12, 2011.
[90] "General Guidelines Relating to the Evaluation of Requests for Court Costs and Fees." At: http://www.lasc.org/la_judicial_entities/Judicial_Council/CourtCostGuidelines.pdf ; last viewed May 12, 2011.

Each state should strive for a revenue structure that provides access, adequacy, stability, equity, transparency and simplicity. Each state's court leadership must moderate or staunch the legislative impulse (and sometimes its own) to add additional and higher fees. On the civil side, court leaders must advocate for the principles of reasonable access to justice, comprehensible and defensible fees, and restricting revenue generation to court purposes only. On the criminal side, court leaders have a responsibility to ensure that judicial orders are followed, but also to ensure that the system is not overloaded with unreasonable financial obligations to fund other governmental services. For both criminal and civil cases, court leaders must work toward uniformity across the state and be the experts on whatever structure currently exists, while seeking a more principled and transparent approach.

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