Accessing Justice: Ohio's New Mandatory Waiver of Court Costs

By Elizabeth Zak

Low-income litigants in civil matters have one less barrier to justice thanks to Ohio's new mandatory waiver of court costs. In December 2018, the Ohio General Assembly enacted multiple changes to our legal system through House Bill 595, including the creation of R.C. 2323.311, titled "Indigent litigants."

Effective March 22, 2019, Ohio courts must follow a mandatory, objective test of income and expenses when considering civil litigants' requests for fee waivers. R.C. 2323.311 instructs all state courts and clerks of court as follows:

- When a litigant initiates a civil action or proceeding accompanied with an Affidavit of Indigency, "the clerk of the court shall accept the action or proceeding for filing." (B)(3). Clerks may not reject a filing for failure to tender filing fees.
- The judge or magistrate "shall review" the Affidavit of Indigency and "shall approve or deny" it. (B)(4). Courts may not disregard the fee waiver request.
- Courts "shall approve" a fee waiver for a litigant whose income is at/below 187.5 percent of the Federal Poverty Level and whose expenses are at/above their income. (B)(4).

This new statute promotes the interests of justice for all by taking into account the marginal utility of filing fees for litigants with low income.

Consider this story: Two homeowners incur damage to their plumbing following a contractor's shoddy remodeling work on their respective homes. Homeowner A earns $2,000/month and would have to spend 30 percent of her monthly income to file a complaint and jury demand fees in Hamilton County Court of Common Pleas to sue the contractor. Homeowner B earns $8,000/month and would only spend seven percent of her income to file the same complaint and jury demand fees. Both homeowners were wronged; both should be able to pursue compensation from the contractor. But Homeowner A, with less money to devote to filing fees, is also less likely to sue the contractor.[1] Under R.C. 2323.311, low-income litigants will hopefully find Ohio's courts more accessible.

In addition to the new mandatory fee waiver, the statute explicitly allows courts, at their discretion, to waive fees for litigants whose income is *above* 187.5% of the FPL or whose expenses do not exceed their income. *See* R.C. 2323.311(B)(6). Since two parents earning less than $10/hour can surpass 187.5% FPL ($3,333 for a household of three), this is an important discretionary power for our courts to exercise.[2]

Unlike the criminal justice system, wherein a criminal defendant's indigency is determined by the public defender[3] and the defendant's financial information is confidential and subject to attorney-client privilege,[4] civil litigants are not afforded the same privacy. An Affidavit of Indigency is subject to inquiry by the court and, upon motion, by opposing party. *See* R.C. 2323.311(B)(5).

There is not yet a statewide uniform Affidavit of Indigency. Until the Ohio Supreme Court issues a form, civil litigants may file an affidavit that includes the statutory elements of income and expenses. *See* R.C. 2323.311(B)(1).

R.C. 2746.10 applies this new mandatory fee waiver to "any court of record." All Municipal Courts and Common Pleas Divisions, including Juvenile and Probate, are subject to R.C. 2323.311.

Before R.C. 2323.311 became effective in March 2019, Ohio courts considered litigants' motions for fee waivers on a case-by-case basis without objective standards. Practice varied from county to county and courtroom to courtroom, despite the Ohio Supreme Court's admonition that "[d]ue process cannot be sacrificed on the altar of cost." *State ex rel. Blevins v. Mowrey*, 45 Ohio St.3d 20, 23, 543 N.E.2d 99 (1989).

Ohio's new mandatory waiver of court costs for low-income civil litigants arrives at a time when state courts, nationwide, are reflecting on how their fines, fees and bail practices may have a disparate impact on the poor and on racial and ethnic minorities and their communities.[5]

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1 "[T]he 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… 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." Martin D. Beier, Economics Awry: Using Access Fees for Caseload Diversion, 138 U. PA. L. REV. 1175, 1193-94 (1990).

2 U.S. Department of Health & Human Services, Office of Assistant Secretary for Planning and Evaluation, Poverty Guidelines, https://aspe.hhs.gov/poverty-guidelines

3 "The determination of indigency shall be made by the state public defender, subject to review by the court." R.C. 120.05(A).

4 "All information obtained by a public defender when determining if a person is indigent, shall be held confidential within the ethical standards of attorney-client communications, unless previously on public record, or made available to the court as provided in section 120.05 of the Revised Code." R.C. 120.38(A).

5 National Task Force on Fines, Fees and Bail Practices, Principles on Fines, Fees and Bail Practices, https://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide.aspx; see also National Task Force on Fines, Fees and Bail Practices, Trends in State Courts, Fines, Fees, and Bail Practices: Challenges and Opportunities (2017) https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx.