

Ohio's Affidavit of Indigency & Access to Justice

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Agenda

1. Why fight court costs?

Access. To. Justice.

2. What is the current law on cost waivers?

R.C. 2323.311 = Mandatory Waiver

3. Practical Considerations

How to file

How local courts previously handled waivers

How to persuade courts when waivers are discretionary



1. Why fight court costs?

Access. To. Justice.



Access to Justice

**“Individuals face really high stakes
in the civil justice system.
You can lose your children,
you can lose your home,
you can lose your livelihood
without having legal help to get you through
complicated legal proceedings.”**

- Martha Bergmark, executive director of Voices for Civil Justice, quoted by Bryce Covert in
“Poor People Don’t Stand a Chance in Court,” Think Progress, May 11, 2016.

Access to Justice

- **Justice Gap**: difference between Americans' legal need versus available legal resources. The gap has grown not just because of decreased congressional appropriations in real terms to the Legal Services Corporation, but because the purchasing power of low-income families has shrunk significantly.
- **Income Inequality**: growth in income inequality helps explain why less low-income Americans are able to pay for legal services.
 - Frank, Robert H. "How Rising Income Inequality Threatens Access to the Legal System," *Daedalus* (Winter 2019: Access to Justice).

Filing Fee Comparison: 2019

	Clinton Co. Muni.	Clinton Co. CP	Clermont Co. Muni.	Clermont Co. CP
Complaint	\$110	\$250	\$104	\$250
Jury Demand	\$300 at filing; \$100 14 days before trial	\$200	\$215	\$300 deposit; \$400 "view"

Access to Justice

“[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.”

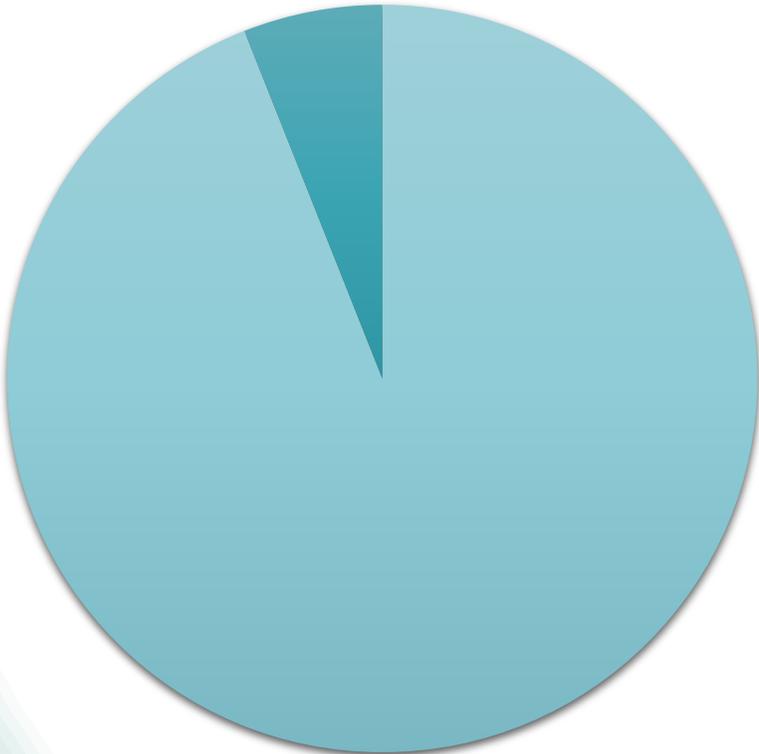
- Martin D. Beier, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1193-94 (1990).

Marginal Utility:

Filing a Counterclaim & Jury Demand in Clinton Co. Muni. Ct.

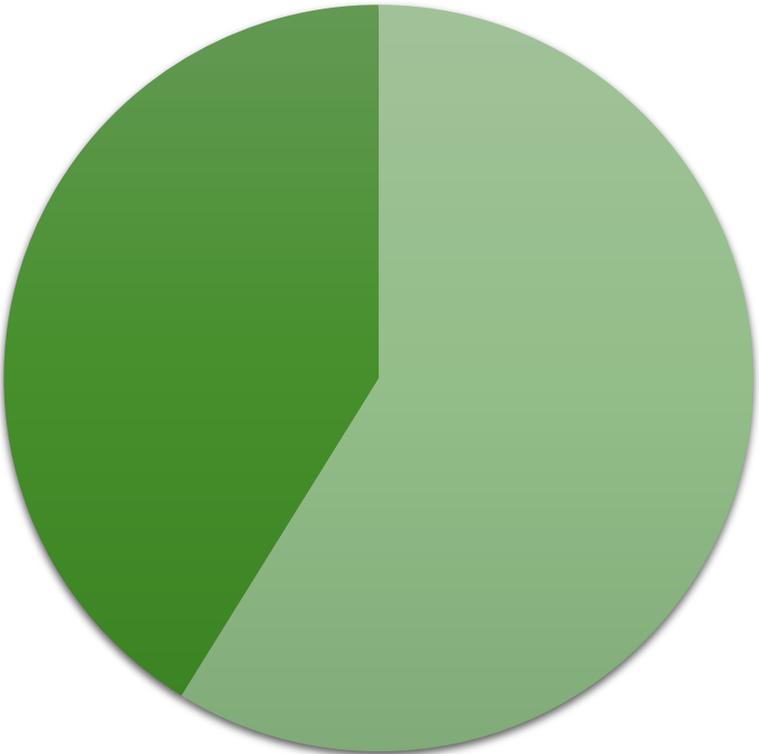
Mr. Big Shot: **6%** monthly income

- Monthly Income: \$8,000
- Counterclaim & Jury: \$510



Mr. Minimum Wage: **39%** monthly income

- Monthly Income: \$1,300
- Counterclaim & Jury: \$510



2. What is the current law on cost waivers?

Mandatory Waiver = R.C. 2323.311



Ohio's Mandatory Waiver

R.C. 2323.311 Indigent litigant determination; procedure

- **Under Title [23] XXIII COURTS - COMMON PLEAS**
- **H.B. 595 passed into law Dec. 13, 2018; included court costs reform, among other features**
- **Effective March 22, 2019**

Ohio's Mandatory Waiver

(B)(1) In order to qualify as an indigent litigant, the applicant shall file with the court in which a civil action or proceeding is filed an **affidavit of indigency in a form approved by the supreme court**, or, until that court approves such a form, **a form that requests substantially the same financial information as the financial disclosure and affidavit of indigency form used by the public defender** for the appointment of counsel in a criminal case.

Ohio's Mandatory Waiver

(B)(2) The applicant's **attorney**, or if the litigant is proceeding pro se, the **applicant** shall file the affidavit of indigency with the court in which the civil action or proceeding is filed.

(B)(3) Upon the filing of a civil action or proceeding and the affidavit of indigency under division (B)(1) of this section, the **clerk of the court shall accept the action or proceeding for filing.**

Ohio's Mandatory Waiver

(B) (4) A **judge or magistrate of the court shall review** the affidavit of indigency as filed pursuant to division (B)(2) of this section and **shall approve or deny** the applicant's application to qualify as an indigent litigant. The judge or magistrate shall approve the application if the applicant's gross income does not exceed **one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines** as determined by the United States department of health and human services for the state of Ohio **and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets** as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision....

2019 FEDERAL POVERTY LIMIT (FPL)

Persons in family/household	100% Poverty	100% Poverty Monthly Gross Income	187.5% Poverty	187.5% Poverty Monthly Gross Income
1	\$12,490	\$1,040.83	\$23,419	\$1,951.58
2	\$16,910	\$1,409.17	\$31,706	\$2,642.17
3	\$21,330	\$1,777.50	\$39,994	\$3,332.83
4	\$25,750	\$2,145.83	\$48,281	\$4,023.42
5	\$30,170	\$2,514.17	\$56,569	\$4,714.08
6	\$34,590	\$2,882.50	\$64,856	\$5,404.67
7	\$39,010	\$3,250.83	\$73,144	\$6,095.33
8	\$43,430	\$3,619.17	\$81,431	\$6,785.92

Ohio's Mandatory Waiver

(B) (4) ...If the application is **approved**, the clerk shall **waive** the advance deposit or security and the court shall proceed with the civil action or proceeding. If the application is **denied**, the **clerk shall retain the filing of the action or proceeding**, and the court shall issue an order granting the applicant whose application is denied **thirty days to make the required advance deposit or security, prior to any dismissal or other action on the filing of the civil action or proceeding.**

Ohio's Mandatory Waiver

(B) (5) Following the filing of the civil action or proceeding with the clerk, the judge or magistrate, at any time while the action or proceeding is pending and **on the motion of an applicant, on the motion of the opposing party, or on the court's own motion, may conduct a hearing to inquire into the applicant's status as an indigent litigant....**

Ohio's Mandatory Waiver

(B) (5)... If the court finds that the applicant **qualifies** as an indigent litigant, the **court shall proceed** with the action or proceeding. If the court finds that the applicant does not qualify as an indigent litigant or **no longer qualifies** as an indigent litigant if previously so qualified as provided in division (B)(4) of this section, the **clerk shall retain the filing of the action or proceeding, and the court shall issue an order granting the applicant whose motion is denied thirty days to make a required deposit or security**, prior to any dismissal or other action on the filing or pendency of the civil action or proceeding.

Ohio's Mandatory Waiver

(B) (6) Nothing in this section shall prevent a court from approving or affirming an application to qualify as an indigent litigant for an applicant whose gross income exceeds one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines

- R.C. 2323.311

Ohio's Mandatory Waiver

(B) (7) Any **indigency finding** by the court under this section shall excuse the indigent litigant from the obligation to prepay any subsequent fee or cost arising in the civil case or proceeding unless the court addresses the payment or nonpayment of that fee or cost specifically in a court order.

- R.C. 2323.311

Ohio's Mandatory Waiver

(C) If the **indigent litigant as the prevailing party** proceeds with an execution on the court's judgment as set forth in Chapter 2327., 2329., 2331., or 2333. of the Revised Code, in order to provide for the recovery of applicable costs, any **payment on any execution of the judgment in favor of the indigent litigant** shall be made through the clerk of the court. **The clerk shall apply that payment to any outstanding costs prior to any disbursement of funds to the indigent litigant....**

- R.C. 2323.311

Ohio's Mandatory Waiver

(C) ... The requirement described in this division may be waived upon entry of the court by the judge or magistrate.

The remedy set forth in this division shall not be the exclusive remedy of the clerk of court for the payment of costs. The clerk shall have all remedies available under the law.

Ohio's Mandatory Waiver

Summary of R.C. 2323.311

- ***Before the ruling:*** Clerk SHALL accept the filing
- ***The ruling:*** Litigants who are at/below 187.5% FPL and whose expenses equal/exceed their income **SHALL** have their Affidavits of Indigency approved by the Court
- ***After the ruling:*** Judge or Opposing Party can review eligibility again

Ohio's Mandatory Waiver

R.C. 2323.311 Cross-References: All Courts

R.C. 2746.10 If with respect to the **filing of any civil action or proceeding** or of a responsive action by a defendant **in any court of record**, a party **qualifies as an indigent litigant as set forth in section 2323.311** of the Revised Code, the clerk of the court shall receive and file the civil action or proceeding or the defendant's responsive action and the court shall waive any advance deposit or security for filing of the civil action or proceeding or the defendant's responsive action, any payment in advance for any taxable costs, including fees for publication or service of process by other means....

Ohio's Mandatory Waiver

R.C. 2323.311 Cross-References: Jury Demand

R.C. 1901.26(3) When a **jury trial is demanded in any civil action or proceeding**, the party making the demand may be required to make an advance deposit as fixed by rule of court, **unless the court determines that the party qualifies as an indigent litigant as set forth in section 2323.311** of the Revised Code. If a jury is called, the fees of a jury shall be taxed as costs.

3. Practical Considerations

How to file

How local courts have handled waivers previously

How to persuade courts when waivers are discretionary



Affidavit of Indigency

- **Affidavit** → If Court does not have its own form, and until Ohio Supreme Court releases its form, draft an affidavit that includes:
 1. income,
 2. statement that income is at/below 187.5% FPL,
 3. expenses, and
 4. statement that expenses are at/above income.
(See handout provided in materials)
- **Motion to Proceed In Forma Pauperis** → Traditionally, this was the motion under which the Court considered a Poverty Affidavit. Good practice to file when client is above 187.5% FPL.

*Note: "In Forma Pauperis" means "In the character or manner of a pauper."
Describes permission given to a poor person to sue without liability for costs.*

Previous Standard for Waiving Costs

Before R.C. 2323.311 became effective on March 22, 2019, it was the practice of Ohio courts to:

**“[T]raditionally waive filing fees and costs for indigent persons in order to promote the interests of justice....”
But the decision to do so was within the court's discretion.**

- *Nelson v. Rodriguez*, 3rd Dist. No. No. 5–10–20, 2011-Ohio-996, ¶15 (2011); citing to *Guisinger*, 166 Ohio App.3d at 730 and *Wilson v. Dept. of Rehab. & Corr.*, 138 Ohio App.3d 239, 243, 741 N.E.2d 152 (10th Dist.2000).

Expired Rules in our Local Courts

Hamilton Co. Municipal, Footnote to Local Civil Rule XVIII:

“In accordance with R.C. 1901.26(A)(1) the court *may* waive the requirement for advance deposit [of filing fees] upon affidavit or other evidence that a party is unable to make the required deposit....”

Clermont Co. Common Pleas, Rule 2:

RULE 2 SECURITY FOR COSTS

2.1 No civil action or proceeding shall be accepted for filing by the Clerk unless there is deposited as security for costs the amount required as set forth in Appendix A.

R.C. 2323.311 removes discretion from the Court in instances where the applicant shows income at/below 187.5% FPL and expenses at/above income.

Expired Rules in our Local Courts

Clermont Co. Municipal, Rule 30 Deposits for Costs:

“Unless waived by this Rule, no civil action or proceeding shall be accepted for filing by the Clerk of the Court unless there is deposited a sum of money set forth in the Schedule of Deposits as amended by this Court... In the event that a party wishing to file an action in this Court is indigent, the party or his counsel shall file an Affidavit of Indigency. **The Clerk shall submit such affidavit to a magistrate or judge for review before accepting any pleadings for the filing.** Upon finding that such indigency does exist, the deposit by that party shall be waived.”

R.C. 2323.311(B)(3) requires clerks to accept an applicant's filing at the same time the applicant files the Affidavit of Indigency.

Re-Cap: Mandatory v. Discretionary Waivers

- If client is eligible under R.C. 2323.311 →
direct Court to new statute;
eligibility for waiver is mandatory
- If client's income is over 187.5%FPL →
file Motion to Proceed In Forma Pauperis;
eligibility for waiver is discretionary

Discretionary Waivers: Persuading the Court

The U.S. Supreme Court reasoned that imposing legal requirements and procedures on residents necessitates access to the legal forum:

“Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.”

- *Boddie v. Connecticut*, 401 U.S. 371, 383, 91 S.Ct. 780, 789, 28 L.Ed.2d 113 (1971)

Discretionary Waivers: Persuading the Court

As the U.S. Supreme Court observed in *In re Sindram*:

“The Court waives filing fees and costs for indigent individuals in order to promote the interests of justice.”

- *State ex rel. Forsyth v. Brigner*, 86 Ohio St.3d 585, 586, 715 N.E.2d 1164, 1999-Ohio-191 (1999), citing to *Sindram* (1991), 498 U.S. 177, 179-180, 111 S.Ct. 596, 112 L.Ed.2d 599

Discretionary Waivers: Persuading the Court

“The determination of indigence for purposes of whether a plaintiff should be required to pay filing fees and court costs is typically **granted *liberally*** in order to **preserve the due process rights of litigants and guarantee an access to judicial process and representation.”**

- *Guisinger v. Spier*, 166 Ohio App.3d 728, 730, 2006–Ohio–1810, 853 N.E.2d 320, citing to U.S.C.A. Const. Amend. 14 and R.C. 2323.31; see also *Evans v. Evans*, 10th Dist. Franklin Nos. 04AP–816 and 04AP–1208, 2005–Ohio–5090, ¶ 23.

Discretionary Waivers: Persuading the Court

The Ohio Supreme Court liberally construed the pre-2019 standard for affidavits of indigency:

“This burden pales when compared with the alternative that poor litigants, unable to locate their spouses [and pay publication fees], would be denied access to our courts. Due 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)

Discretionary Waivers: Persuading the Court

National Center for State Courts – National Task Force on Fines, Fees and Bail Practices

- 2011-2012 Policy Paper: Courts Are Not Revenue Centers
- Principles on Fines, Fees and Bail Practices

Principle 4.1. Disparate Impact and Collateral Consequences of Current Practices.
Courts should adopt policies and follow practices that promote fairness and equal treatment. Courts should acknowledge that their **finances, fees, and bail practices** may **have a disparate impact on the poor and on racial and ethnic minorities and their communities.**

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