

***TWO WRONGS DIDN'T MAKE IT RIGHT:
THE CONTINUING SAGA OF COLLECTION SERVICE CONTRACTS***

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What the legislature started in 2001, it failed to correct by the passage of SB 782 in 2003. More specifically, SB 782, effective June 18, 2003, amends Article 103.0031 of the Texas Code of Criminal Procedure by expanding the collection services for which a county and municipality can contract, as well as establishing new procedures. This memo does not purport to address all the issues presented by the newly enacted legislation; rather, this is but a brief purview into the morass that is Article 103.0031. The author recommends that each governmental body critically review the legislation, and any proposed contract, with legal counsel and judicial representatives to ensure the governmental interests are protected and the appropriate procedures implemented.

The most notable amendment, and perhaps the most controversial, is the ability to contract for the collection of amounts in unadjudicated cases, *i.e.*, cases where the defendant has failed to appear in compliance with a lawful summons, a lawful order of a court, as specified in a citation, summons or other authorized notice. In order to so charge the defendant, the amount to which the thirty percent applies must be communicated to the accused in a manner acceptable under the court's standard policy for resolution of the case. The accused may then voluntarily agree to pay that amount. If the accused does not agree, the amount to be paid will be that ordered by the court after plea or trial. The vendor's communication, in a form acceptable to the court under the court's standard policy for resolution of the case, must include a notice of the individual's right to enter a plea or go to trial on any offense charged.

SB 782 clarified that the amount of the collection fee is thirty percent on each allowable item that is sixty days past due and referred to an attorney or vendor for collection. An amount is past due if the amount remains unpaid on the 61st day after the date on which the debt, fine, fee, forfeited bond, or court cost must be paid in full or the date by which the accused promised to appear, or was notified, summoned, or ordered to appear. A defendant remains not liable if the court determines the individual to be indigent, has insufficient resources, or is otherwise unable to pay all or part of the underlying fine or costs. SB 782 further provides that the collection fee does not apply if the case is dismissed or to any part of the fine or cost which is satisfied by time-served credit or community service. Any balance remaining after such credit is given, however, may be subject to the thirty percent collection fee if the balance is more than sixty days past due. If a partial payment is allowed by the court, there must be a proportionate distribution allocated to the Comptroller, the city or county and the vendor. If the contract does not provide the appropriate allocation, the legislation requires that the court calculate the amount of any collection fee due the governmental entity or the private attorney or vendor performing the collection services and receive all fees, including the collection fee.

It was also made clear by SB 782 that the collection fee may only be used to compensate the private attorney or private vendor who earns this fee. Although the legislature authorized a municipality with a population of more than 1.9 million to authorize the addition of the thirty percent collection fee for a collection program performed by employees of the governing body, this authorization conflicts with the provision that limits the collection fee to compensation of private attorneys and vendors.

Remaining Conundrums

1. In the event of a trial by jury, is the fee assessed as part of the court costs imposed after the jury finds the defendant guilty and assesses the fine? If the judge does not so assess the Defendant, is the governmental entity liable for the amount to be paid the collection contractor?
2. What is the court's standard policy on the resolution of the case? This is generally articulated by the court's standard order. What happens if the court refuses to generate a standing order for the imposition of the fee? If the fee is not part of the judgment, is it enforceable or otherwise collectable against the defendant?
3. How may the defendant enter the plea? How is a reduction in the amount to be paid, through community service or jail credit, communicated to the defendant? How and when is a partial payment acceptable? What is the procedure for a reduction or modification of the judgment?
4. Should the court or vendor notify the defendant of alternative methods to discharge the fine?
5. How do you ensure against violations of the defendant's civil rights, Judicial Code of Conduct or any other applicable state or federal debt collection acts?
6. The definition of past due is any item that remains unpaid on the 61st day after a person failed to appear. This purports to make a failure to appear a strict liability offense. If a person pleads not guilty to a failure to appear, and is subsequently adjudicated and found guilty, is the thirty percent collection fee immediately imposed or must there be an additional 60 day period and subsequent non-payment prior to the imposition of the fee.
7. Inasmuch as a defendant is not required to pay, nor otherwise liable for, the additional 30% fee, if the defendant has been declared indigent or been found to have insufficient income or an inability to pay, when does this determination occur?

Each governing body must determine the ultimate goal of outsourcing the collection of delinquent accounts and unadjudicated offenses. The outsourcing contract should reflect the purpose and provide a procedure for attaining the stated goal. Based upon the above, it is clear that the cooperation among the various branches of local government is essential to a viable collection service contract.