



Report of the Vermont State Auditor

January 22, 2016

PUBLIC DEFENDER FEES

Judiciary's Efforts Yielded
Collections of Less Than One-
Third of Amounts Owed

Douglas R. Hoffer
Vermont State Auditor
Rpt. No. 16-01

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Douglas R. Hoffer
STATE AUDITOR



STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

January 22, 2016

The Honorable Shap Smith
Speaker of the House of Representatives

The Honorable John Campbell
President Pro Tempore of the Senate

The Honorable Peter Shumlin
Governor

The Honorable Brian Grearson
Chief Superior Judge

Ms. Patricia Gabel
State Court Administrator

Dear Colleagues,

The sixth amendment to the U.S. Constitution guarantees that criminal defendants have the assistance of counsel regardless of the defendant's ability to pay. Vermont statute states that a needy person who is detained without charge or who is charged with having committed a serious crime is entitled to be represented by an attorney, to be provided at public expense to the extent that the person is unable to provide for payment without undue hardship.

While Vermont assigns public defenders to needy defendants, the State expects defendants to pay a fee to help cover the cost of these services, unless the fee is waived due to defendants' lack of financial means. Parameters specified in statute help Vermont's 14 Superior Courts determine the amount, if any, that indigent defendants are capable of paying for public defender services. The Judiciary's Office of the Court Administrator provides administrative staff support to the courts to assist in the overall management of the court system, including calculating, assessing, and collecting public defender fees, which are intended to offset some of the cost of those services. Our objective was to assess the effectiveness of the State's processes for collecting court-ordered payments from defendants for public defender services.

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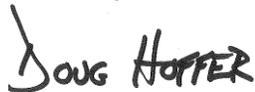
We found that the State's processes to collect court-ordered payments are not effective. The State has collected less than a third of the \$3.1 million in court-ordered assessments for public defender services due between January 1, 2012 and December 31, 2014. The courts have been remiss by not applying all available remedies for pursuing payment of outstanding fees for public defender services. In particular, the surest method available for increasing collection of fees—obtaining payments at the time fees are assessed from defendants that can afford it—has not been frequently utilized. Additionally, the courts did not utilize all collection methods available to them in statute or as recommended by the State's internal control guidance, or ensure that all eligible debt is referred for tax refund offset.

Moreover, the Judiciary removed outstanding public defender fee debt from their records once this debt was referred to the Department of Taxes for offset against personal income tax refunds and homestead property tax income sensitivity adjustments. As a result, the Judiciary ceased all efforts to collect these debts and they were not recorded as accounts receivable in the State's financial records.

More aggressive action on the part of the Judiciary could result in more effective collection of public defender fee debt. We make several recommendations to the Judiciary to enhance its efforts to collect court-ordered payments for public defender fees.

I would like to thank the management and staff at the Judiciary for their cooperation and professionalism during the course of the audit.

Sincerely,

A handwritten signature in black ink that reads "Doug Hoffer". The signature is written in a cursive, slightly slanted style.

Doug Hoffer
Vermont State Auditor

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Introduction

The sixth amendment to the U.S. Constitution guarantees that criminal defendants have the assistance of counsel regardless of the defendant's ability to pay. Since 1872, Vermont has recognized its responsibility to indigent defendants to provide counsel at the expense of the state. 13 V.S.A. §5231 states that a needy person who is detained without charge or who is charged with having committed a serious crime is entitled to be represented by an attorney, to be provided at public expense to the extent that the person is unable to provide for payment without undue hardship.

Parameters specified in statute¹ help Vermont's 14 Superior Courts determine the amount, if any, that indigent defendants are capable of paying for public defender services. The Judiciary's Office of the Court Administrator provides administrative staff support to the courts to assist in the overall management of the court system, including calculating, assessing, and collecting public defender fees, which are intended to offset some of the cost of those services. At the courts' discretion, fees may be waived. For the most part, those that can pay have been assessed a minimum of \$50 for the services of a public defender, as required by statute.²

13 V.S.A. §5258 authorizes the State Auditor to perform audits of the processes related to public defender services, including collections of fees. Our objective was to assess the effectiveness of the State's processes for collecting court-ordered payments from defendants for public defender services. Appendix I contains the scope and methodology we used to address this objective. Appendix II contains a list of abbreviations used in this report.

¹ 13 V.S.A. §5238(b)

² The \$50 minimum fee was effective July 1, 2012 (it had previously been \$25). For public defender fees due in calendar years 2012 – 2014, 83 percent were \$50 or less.

Highlights: Report of the Vermont State Auditor

Public Defender Fees: Judiciary's Efforts Yielded Collections of Less Than One-Third of Amounts Owed

(January 22, 2016, Rpt. No. 16-01)

Why We Did this Audit	While Vermont assigns public defenders to needy defendants, the State expects defendants to pay a fee to help cover the cost of these services, unless the fee is waived. Our objective was to assess the effectiveness of the State's processes for collecting court-ordered payments from defendants for public defender services.
Objective 1 Finding	<p>The State's processes for collecting court-ordered payments assessed for public defender services were not effective. By November 10, 2015, the State had collected less than a third of the \$3.1 million due from defendants from January 1, 2012 through December 31, 2014. If the courts find that a defendant has the means, the statute states that the courts are to seek an immediate payment of a portion of the public defender fee—called a co-payment—with any remaining amount to be paid within 60 days. This authority was infrequently utilized by the three Superior Courts we visited, thereby overlooking the most effective way to ensure collection. Court operations managers could not explain why up-front co-payments were not collected before public defender services were provided, as described in statute. One constraint is the Judiciary's concern over the constitutionality of the statute. According to the Court Administrator, a review by the Judiciary's general counsel concluded that the enforcement of the statute that makes the assignment of counsel contingent on a prior payment of a co-payment raises serious constitutional concerns.</p> <p>Once the debt is established the courts do not actively pursue collection from debtors. The Judiciary only (1) provides the defendant with the amount and due date of the fee and (2) submits overdue debt to the Department of Taxes (DOT) for offset against personal income tax refunds and homestead property tax income sensitivity adjustments. The Judiciary does not employ other collection methods for overdue public defender fees that it uses for other types of debt, such as referral to collection agencies. Moreover, 6 percent (about \$195,000) of the overdue debt was not included in the annual referral process to DOT because the records either lacked social security numbers—key to the ability of DOT to conduct a tax refund offset—or were debts from prior periods that the Judiciary's process did not ensure were included.</p> <p>Lastly, once the debt is referred to DOT, the Judiciary adjusts the defendant's record to show \$0 due, thereby removing the debt from the Judiciary's records. As a result, the Judiciary 1) makes no further effort to collect this debt, and 2) no longer records this debt as a receivable. Among the reasons cited by the Chief of Finance and Administration for removing outstanding debt from the Judiciary's records is that DOT does not return the revenue to the Judiciary nor does it provide data on the results of its offset efforts. While this reflects the Judiciary's current practices regarding public defender fee debts, the Judiciary does not treat other types of debt owed to another part of its organization in this manner, instead continuing to seek collection of debt that is also referred to DOT.</p>
What We Recommend	We make several recommendations for the Judiciary to enhance its efforts to collect court-ordered payments for public defender fees.

Background

For purposes of assigning a public defender, 13 V.S.A. §5201 defines a needy person as someone who is financially unable, without undue hardship, to provide for the full payment of an attorney and other necessary expenses of representation. Determination of need is based on written certification by the person when an application is completed for public defender services, subject to the penalties for perjury.

Clerks at the Superior Courts, or other judicial officers of the courts, make the determination of need by relying on self-attested data from defendants and may consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents. The clerks initially determine the amount to be paid using public defender payment tables. The tables provide guidance on the amount to be charged based on the type of case, income as a percentage of the federal poverty level, and the number of dependents. If the income of the person is at or above 125 percent of the federal poverty level, the defendant must pay a percentage of the average direct cost per case. At 200 percent of the federal poverty level, the defendant must pay all of the average direct cost per case. 13 V.S.A. §5238 states that any needy person assigned counsel is to pay a minimum payment of \$50, unless financially unable to pay.

Applications for public defender services are reviewed by judges, who make the final determination of whether such services are granted or denied. The judge signs a public defender order that includes the amount the defendant is to pay. Defendants can submit revised applications to request changes to this order to reduce the amount to be reimbursed.

Amounts collected for public defender fees are recorded in the Public Defender Special Fund in accordance with 13 V.S.A. §5239(a). The Office of the Defender General has the responsibility to assure that persons entitled to appointed counsel receive effective legal advocacy. The Public Defender Special Fund is used to offset the cost of the Office of the Defender General.

Objective 1: Collection Processes Not Effective

The State's processes to collect court-ordered payments were not effective. The State has collected less than a third of the \$3.1 million in court-ordered assessments for public defender services due between January 1, 2012 and December 31, 2014. The courts did not 1) often collect prompt payment of assessed fees, 2) utilize all collection methods available to them in statute or as recommended by the State's internal control guidance, or 3) ensure that all eligible debt is referred for tax refund offset. In addition, the Judiciary removed outstanding public defender fee debt from their records once this debt was referred to the Department of Taxes (DOT) for offset against personal income tax refunds and homestead property tax income sensitivity adjustments. As a result, the Judiciary ceased all efforts to collect these debts and they were not recorded as accounts receivable in the State's financial records. By not using all means available to them to collect payments for public defender services, the courts are missing opportunities to increase collection of outstanding debt.

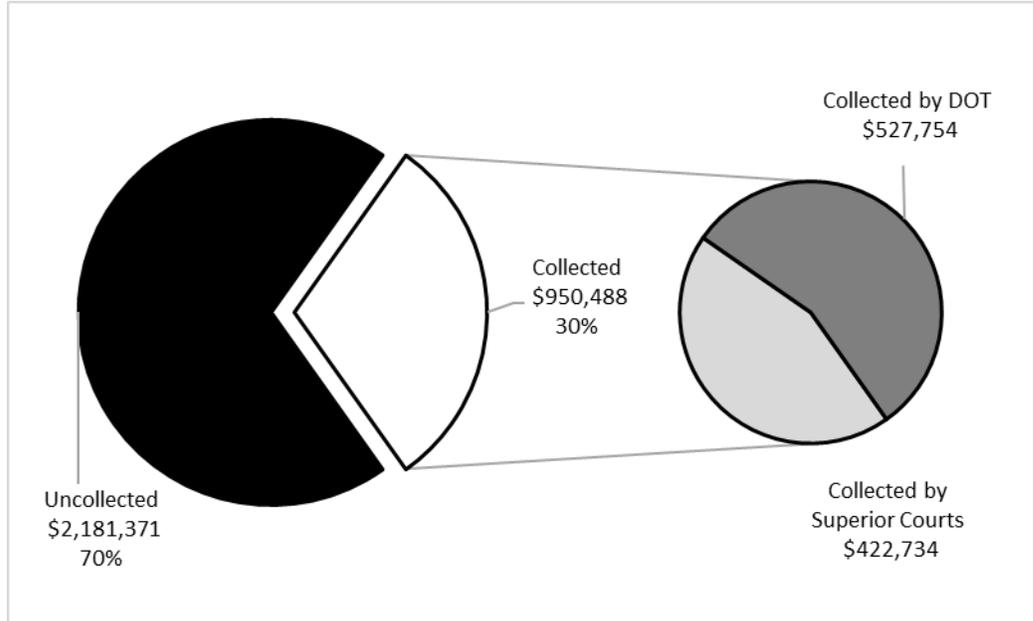
Less Than a Third of Assessments Were Collected

As shown in Figure 1, by November 10, 2015, the State had collected less than \$1 million of the \$3.1 million in public defender fees due in calendar years 2012 through 2014. Collections are made by the Superior Courts and through offsets of personal income tax refunds and homestead property tax income sensitivity adjustments³ by the DOT.⁴

³ For purposes of readability, this will be referred to as the tax refund offset process in the remainder of the report.

⁴ Public defender reimbursements, DUI enforcement surcharges, and public defender DWI surcharge fees are referred to the Tax Department for tax refund offsets. During the course of the audit, we found that the DUI enforcement surcharges that were offset were inappropriately recorded in the Public Defender Special fund. That issue was discussed in a separate communication to DOT.

Figure 1: Collection of Assessed Fees Due January 1, 2012 to December 31, 2014^a



^a The amounts collected were as of November 10, 2015.

Up-front Payments Not Collected

The ability of an agency to collect its debts will generally decrease as the debts become older. The relationship between increased collections and requiring up-front payment was stressed in a 2001 report of a Vermont Indigent Defense Task Force.⁵

According to Vermont law,⁶ the amount ordered to pay for public defender services by defendants upon whom a fee is assessed⁷ is to be divided between an up-front payment, called a co-payment, and an amount to be paid within 60 days, called a reimbursement. If the court finds that a person has income or assets to enable immediate payment of a co-payment, the statute states that the assignment of counsel is to be contingent upon the prior payment of the co-payment. Alternatively, the court has the authority to waive the fee altogether if it determines that the defendant does not have the financial

⁵ Report of the Indigent Defense Task Force (January 2001).

⁶ 13 V.S.A. §5238 (c) and (d).

⁷ In the case of a juvenile offender, the juvenile's guardian or parent is given the order to pay.

means to pay. In a November 24, 2015 e-mail, the Judiciary's legal counsel was quoted as saying that the statute appears to assume that there should be immediate payment of the up-front co-payment so that subsequent collection efforts would be unnecessary.

The Judiciary's application for public defender services (see Appendix III) includes a section in which the clerk, or designee, records the amount due and whether it is an immediate co-payment or reimbursement. This results in a public defender order (see Appendix IV) in which the applicant is told whether s/he has been assigned a public defender and how much is due immediately versus to be reimbursed within 60 days.

At the three courts we visited (Chittenden, Orleans, and Windsor), the Court Operations Managers (COMs) and clerks indicated that up-front co-payments are collected infrequently. Instead, these courts were generally recording the amount in the courts' case management system as being due 60 days from the date of the public defender order. This practice likely contributes to only 13 percent of assessed public defender fees having been collected by the courts for fees due in calendar years 2012 through 2014.

The COMs could not explain why up-front co-payments were not collected before public defender services were provided, as described in statute. One constraint is the Judiciary's concern over the constitutionality of the statute. According to the Court Administrator, a review by the Judiciary's general counsel concluded that the enforcement of the statute that makes the assignment of counsel contingent on a prior payment of a co-payment raises serious constitutional concerns.

Nevertheless, additional focus on collecting public defender fees up-front could improve the rate of collection of these fees. In particular, while the Judiciary's internal procedures pertaining to the assignment of public defenders address the application process, determining whether a defendant is needy, and assessing the amount to be reimbursed, these procedures do not address collecting an up-front co-payment, when applicable under Vermont statute. Instead, the procedures only include instructions on how to record payments made at the time a public defender counsel is assigned.

Active Collection Methods Not Used

The Department of Finance and Management's (F&M) guidelines on internal controls state that active efforts must be made to collect on accounts that are past due, such as generating billings and sending them to customers, which is

listed as one of the department's best practices for managing accounts that are due. It is critical for an agency to take action on a delinquent debt immediately to prevent the delinquency from becoming more serious.

The courts provide only one notification to defendants, which is the public defender order to pay provided at arraignment. The order states that if payment is not made within 60 days the debt will be referred to DOT for potential offset of any tax refund due the defendant. Since the transfer of outstanding debt to the tax department for tax refund offset is conducted only once a year, this could allow a defendant more than a year to pay the debt before being referred, depending upon when the defendant was ordered to pay.

In addition, an individual may not file a tax return or withhold enough money to generate a tax refund. Indeed, in commenting on a draft of this report, the Judiciary acknowledged that many defendants do not file tax returns, which means that using the tax refund offset process for such defendants would not be an effective method to collect public defender fee debt. This highlights the need to utilize other collection methods.

The Judiciary does not use other collection methods authorized by statute to collect public defender fee debts. This is in contrast with the Judiciary's practices for debts associated with other fees. Specifically, the Judicial Bureau, an office within the Judiciary, collects fees and fines related to civil violations, such as for traffic, alcohol and tobacco, or municipal violations using various methods. See Table 1 for a comparison of collection methods used for public defender debt to those utilized by the Judicial Bureau.

Table 1: Comparison of Collection Methods Used by the Judiciary (for Public Defender Fees and Fees Collected by its Judicial Bureau)

Methods Used to Collect Debt	Authorizing Statute	Superior Court - Public Defender fees	Judicial Bureau
Refer to collection agency	13 V.S.A. §7171(b) 4 V.S.A. §1109(c) & (d)	Method not used.	Refers outstanding debts of records that do not have a social security number (SSN). The debtor pays the collection agency contractor an additional 16.35 percent of the amount owed.
Refer to DOT for tax refund offset	32 V.S.A. subchapter 12	Refers debtors annually for those records that include a SSN. DOT charges the debtor an administrative fee (currently \$9).	Refers debtors with aggregate outstanding debt of \$50 or more annually when records include a SSN. DOT charges the debtor an administrative fee (currently \$9).
Assess additional fee for failure to pay timely	13 V.S.A. §7180(b), (c) & (e) ^a 4 V.S.A. §1109(b)	Method not used.	Assesses a fee of \$30 for failure to pay within 30 days.
Report to a credit bureau	13 V.S.A. §7180(c)	Method not used.	Collection agency reports to a credit bureau. ^b

^a Such fees would apply if the Judiciary initiated civil contempt proceedings pursuant to the procedures in this statute.
^b The collection agency used by the Judiciary has indicated that, as of 2016, it will no longer report outstanding debt to a credit bureau unless it is the result of a contract or agreement to pay.

According to the Judiciary’s Manager of Finance and Accounting, they do not use other collection methods for public defender fees because they use DOT as their collection agent.

The State could likely benefit by enhancing the collection efforts of the courts to collect public defender fees by using remedies already in place at the Judiciary, or other low-cost methods. For example, the public defender order states that uncollected debts will be reported to DOT for tax refund offset but does not indicate that an administrative fee will be added to the defendant’s debt if an offset is made. If defendants are made aware that late payments will result in increased costs to them, they may be more motivated to pay their fees or may do so on a more timely basis.

Eligible Debt Not Referred to DOT

The Judiciary did not ensure that all outstanding debt was included in the annual referral for tax refund offset. For fees due from January 1, 2012 to December 31, 2014, 1,452 records totaling \$195,000⁸ (6%) were not referred for tax refund offset due to a lack of social security numbers (SSN) and the exclusion of eligible debt from prior periods.

Social Security Numbers

The effectiveness of the process for referring records to DOT for collection is dependent on the accuracy of a defendant's SSN. Without a valid SSN, the tax department cannot match the records in order to offset a tax refund. Consequently, DOT does not accept records that do not have an SSN. Fees due in 2012 through 2014, totaling \$145,000 (959 records), had not been referred by December 2014 because the records in the Judiciary's case management system did not have SSNs.

Information on the defendants' applications for public defender services, including SSNs, are entered into the court's case management system. However, defendants do not always provide SSNs. Some court personnel use a web-based data warehouse called Vermont Case Access System (VCAS) to search for court case information on a statewide basis. If VCAS shows another case for the defendant that includes a SSN, the clerks update the defendant's record in the case management system.

While missing SSNs may be found in this manner, according to the Judiciary's Chief of Trial Court Operations the courts do not have mechanisms to verify SSNs nor to require defendants to provide them. She also stated that it is unclear whether the Court has the authority to compel defendants to provide SSNs or make it a condition for obtaining public defender services.

Vermont's internal control guidance cites verification as a control activity that helps to ensure the completeness and accuracy of information. Considering how critical the SSN is to subsequent collection of outstanding fees, the effectiveness of the courts' collection efforts is likely to be enhanced by implementing additional procedures to obtain SSNs and by developing a process to validate social security numbers.

⁸ Approximately 1,260 unique persons are represented by the 1,452 records. The actual number may differ if the defendant used an alias or their name is not spelled exactly the same on the records.

Eligible Debt from Prior Periods

The Judiciary's Research and Information Systems (RIS) analyst manages the annual referral of information to DOT and relies on the COMs in each of the 14 courts to review and verify the veracity of the records beforehand.

According to the written procedures for referrals, and reminder instructions provided to the COMs to review their records before transmittal, the COMs run a report of outstanding fees using a date range of no later than December 1 of the previous year to November 30 of the current year. The RIS analyst mirrors the dates selected by the COMs for their review when he selects the records to transfer to DOT.

This process can exclude eligible debts from prior periods that were not previously sent to DOT.⁹ Specifically, \$50,000 (493 records) of eligible debt from January 1, 2012 through November 30, 2013 was not transferred to DOT in 2014. This is because the instructions to the COMs did not require that they capture debts from earlier than December 1, 2013, and only five courts (Bennington, Chittenden, Orange, Orleans, and Windsor) ran the report of outstanding fees using an earlier beginning date.

Outstanding Debt Removed from Records

Once the unpaid debts are referred to DOT, the Judiciary's RIS analyst adjusts the individual's case management record to show that the payment due for public defender services is \$0. In this manner, the outstanding debt is removed from the Judiciary's records.

According to the Judiciary's Chief of Finance and Administration, removing defendants' debt from its records is appropriate, because:

- revenues collected by DOT via the income tax refund offset process are not returned to the Judiciary (i.e., DOT records the applicable entry into the State's financial system),
- DOT does not provide the Judiciary with data on the accounts in which the tax refund was offset so it does not have the information to continue to try to collect outstanding debt, and
- the annual transfer of records to DOT is akin to "selling" these debts to this department.

⁹ These debts may not have been sent to DOT because they either did not have a SSN on the record previously or they had not yet reached the due date when a prior transfer to DOT was made.

While the first two points reflect the Judiciary’s current practices regarding public defender fee debts, it is inconsistent with the Judiciary’s practices pertaining to other debt referred to DOT. Specifically, when the Judiciary refers debts from the Judicial Bureau to DOT for tax refund offset, it does not reduce those debts to \$0. Instead, Judiciary personnel input amounts that have been collected through the tax refund offset process after receiving notification by DOT of the offset amount. Additionally, the Judicial Bureau continues to attempt to collect these debts. These same practices could be applied to public defender fee debts. Regarding the chief’s statement that the Judiciary’s current practice is akin to “selling” the debts to DOT, there is no written agreement between the two organizations that transfers responsibility for overall debt collection from the Judiciary to DOT.

Moreover, the Judiciary chief’s reasoning does not address *why* public defender debt has to be treated differently than that of other debt sent to DOT for tax refund offset. Treating public defender debt referred to DOT in the current manner has two negative consequences. First, no further collection efforts are made by the courts on the referred debt. Indeed, any subsequent payments from defendants on amounts that have been referred to the tax department are either forwarded to DOT from the court or refused by the court with instructions given to the defendant to pay DOT. Second, about \$7 million in public defender fees that remained uncollected and referred to DOT were excluded from the State’s accounts receivable¹⁰ balance at the end of the fiscal year.¹¹

Conclusion

The courts have been remiss by not applying all available remedies for pursuing payment of outstanding fees for public defender services, resulting in the collection of less than a third of the assessed fees due from January 2012 through December 2014. In particular, the surest method available for increasing collection of fees—obtaining payments at the time fees are assessed from defendants that can afford it—has not been frequently utilized.

¹⁰ F&M guidance and generally accepted accounting principles state that if payment is not received when revenue is earned, then a receivable should be recorded. Judiciary officials erroneously believed that the public defender fee debts were reported as accounts receivable by DOT after they were referred for tax refund offset.

¹¹ For fiscal year 2015, the Judiciary reported \$1.1 million in accounts receivables pertaining to public defender fee debts that had not been transferred to DOT, less a valuation allowance for uncollectable accounts estimated to be approximately 65 percent.

More aggressive action on the part of the Judiciary could result in more effective collection of public defender fee debt.

Recommendations

We make the following recommendations to the Court Administrator and describe the related issues in Table 2.

Table 2: Recommendations and Related Issues

Recommendation	Report Pages	Issue
1. Modify the Judiciary’s internal procedures on the assignment of public defenders to emphasize the need to collect up-front payments at the time of arraignment whenever possible.	5-6	The Superior Courts only collected 13 percent of public defender fees due in calendar years 2012 – 2014. At the three courts we visited, the Court Operations Managers and clerks indicated that up-front co-payments are infrequently collected. Instead, these courts were generally recording the amount in the courts’ case management system as being due 60 days from the date of the public defender order.
2. Actively engage in efforts to collect accounts that are past due, such as: <ul style="list-style-type: none"> • Sending out a bill to overdue accounts, • Using a collection agency, • Assessing an additional fee in accordance with the procedures outlined in 13 V.S.A. §7180, and • Reporting overdue debt to a credit bureau. 	6-8	After providing defendants with a public defender order, the Judiciary undertakes no effort to collect the assessed fees before referring records to DOT for tax refund offset.
3. Modify the public defender order to include language that there will be additional fees assessed for additional collection actions, such as referring to DOT for tax refund offset.	8	The public defender order does not currently state that administrative fees can be added to the defendant’s debt if payment is not made.
4. Consider implementing additional procedures to ensure that social security numbers are obtained from defendants and validated.	9	The courts lack a process for ensuring that they obtain valid social security numbers.
5. Update the instructions provided to Superior Court staff to ensure that the annual transmittal of records to DOT includes previous periods.	10	The court’s process for referring debt to DOT does not ensure that all eligible records are included in the annual referral.

Recommendation	Report Pages	Issue
6. Cease the process of removing public defender debt from the court's records once it has been referred to DOT for tax refund offset and continue to attempt to collect these debts.	10-11	The Judiciary does not actively pursue collection of debt after referral for tax refund offset, as unpaid assessments that have been referred to DOT are adjusted to \$0 in the courts' records.
7. Ensure that all outstanding public defender fees are included as accounts receivable in the State's financial system.	10-11	As of June 30, 2015, about \$7 million in public defender fees referred to DOT that remained uncollected were not recorded as a receivable in the State's financial records.

Management's Comments and Our Evaluation

The State Court Administrator and Chief Superior Judge provided written comments on a draft of this report on January 19, 2016, which is reprinted in Appendix V along with our evaluation of their comments.

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In accordance with 32 V.S.A. §163, we are also providing copies of this report to the commissioner of the Department of Finance and Management and the Department of Libraries. In addition, the report will be made available at no charge on the state auditor's website, <http://auditor.vermont.gov/>.

Appendix I

Scope and Methodology

To address our objective, we reviewed the pertinent statutes¹² related to the Judiciary's collection of public defender fees and compared them to the collection efforts conducted by the courts and by the Department of Taxes (DOT). We looked at the Department of Finance and Management's (F&M) internal control guidance related to the collection of accounts receivable.

We interviewed officials at the Judiciary to gain an understanding of its collection procedures and to identify the entity's understanding of its responsibilities related to the collection process. We obtained copies of the Judiciary's internal procedures for referring records to DOT for potential tax refund offset and conducted site visits at three superior courts—Chittenden, Windsor and Orleans—to meet with Court Operations Managers and conduct a walk-through of the system and their control procedures and activities that pertain to the collection of fees for public defender services. These courts were chosen to represent courts that processed a large (Chittenden), moderate (Windsor), and smaller (Orleans) number of cases. We assessed the procedures implemented by these courts to determine if the procedures satisfied the criteria outlined in statute.

We interviewed officials at DOT regarding the Vermont Tax Offset program and to identify the entity's understanding of its responsibilities related to the collection process. We conducted a walk-through of the process for tax refund offset as it pertains to court-ordered payments. We assessed the procedures implemented by DOT to determine if they satisfied the criteria outlined in statute.

We obtained a list from the Judiciary of records with public defender fees due and referred to DOT since the inception of the Judiciary's implementation of their electronic transfer of records with outstanding public defender debt to DOT in 2012. We analyzed the lists to determine the amount of fees that were ordered, referred, paid at court, and still due and determined the reason for the records that are still due. We evaluated whether the Judiciary had a process for ensuring the completeness of record transfers and accuracy of the information that is key for collecting outstanding debt—i.e., social security numbers.

We obtained the accounts receivable worksheets for fiscal years 2014 and 2015 from F&M and determined whether all outstanding receivables were recorded in the worksheet. We reviewed generally accepted accounting

¹² 13 V.S.A. §§5201, 5231, 5236, 5238-5240, 5253, 5255, 5258, 7171, 7180; 32 V.S.A. §§5932-5938, 5941, 6064; 23 V.S.A. 1210, 1220a; 12 V.S.A. §§122-123

Appendix I

Scope and Methodology

principles and the criteria outlined at F&M for accounts receivable to determine whether the uncollected public defender fees referred to DOT each year by the Judiciary should be recorded on the State's records and which agency should record them.

We performed our audit work between July 2015 and December 2015 at the Court Administrator's and DOT offices in Montpelier, and the Chittenden Superior Court in Burlington, Orleans Superior Court in Newport, and Windsor Superior Court in White River Junction. We conducted this performance audit in accordance with generally accepted government auditing standards, which require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II

Abbreviations

COM	Court Operations Manager
DOT	Department of Taxes
F&M	Department of Finance and Management
RIS	Research and Information Systems
SSN	Social security number
VCAS	Vermont Case Access System

Appendix III

Application for Public Defender Services

APPLICATION FOR PUBLIC DEFENDER SERVICES - Criminal																																																																													
State of Vermont Vermont Superior Court	Division CRIMINAL	Unit	Type of Case	Docket Number																																																																									
Name	First	Last	Others Living with You (include adults and children)																																																																										
Street Address																																																																													
Town/City		State	Zip																																																																										
Telephone Number																																																																													
Date of Birth		Social Security Number		Total Number in Household (including Yourself)																																																																									
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Are you employed? Yes <input type="checkbox"/> No <input type="checkbox"/>		Employer(s) Name(s) and Address(es) :																																																																											
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INCOME			EXPENSES																																																																										
Do you receive Public Assistance? <small>(including TANF/Reach UP, SSI, General Assistance)</small>			If all adults living with you receive public assistance, it is not necessary to fill out the Expenses section below. Otherwise, enter your monthly household expenses																																																																										
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Cash Assets		Other Assets	
		Real Estate (Location)	Auto (Make, Model, Yr)
Cash On Hand	\$ _____		
Checking Account	\$ _____	Fair Market Value	\$ _____
Savings Account	\$ _____	Outstanding Mortgage/Loan	\$ _____
Total Cash Assets	\$ _____	Net Value	\$ _____

NOTICE: You will be ordered to pay a minimum fee of \$50.00 towards the cost of your legal services even if you are receiving public assistance. You may ask the court to reduce the amount you are ordered to pay.

Additional Assets:				
I have additional assets: Yes <input type="checkbox"/> No <input type="checkbox"/> If Yes, describe them below				
Vehicles	Make, Model, Year	Fair Market Value (FMV)	Amount Owed	Net value
		\$	\$	\$
		\$	\$	\$
		\$	\$	\$
		\$	\$	\$
Real Property	Description	FMV	Mortgage	Net Value
		\$	\$	\$
		\$	\$	\$
Other Assets e.g. tools, equipment, recreational vehicles, electronics, stocks, bonds, etc.	Description	FMV	Use additional sheets as necessary.	
		\$		
		\$		

Appendix III

Application for Public Defender Services

Other Employed Household Members		
Name of Household Member	Name of Employer	Employer's Address

Change in Monthly Income: If your current monthly income is significantly different from last year's income, please describe your current monthly income and the reasons why it changed.

My income last year (past 12 months) was \$ _____

The income from other household members last year was: \$ _____

The reason for the change is: (This section must be filled out if you have a change in income.)

I request the Court assign a lawyer to represent in this case because of my low income. I further ask that all necessary costs and expenses for legal services, as allowed by the court, be paid by the State of Vermont.
I make the above answers UNDER PENALTY OF PERJURY.

Signed and sworn before me:

Notary Public	Date	Applicant Signature	Date
---------------	------	---------------------	------

DETERMINATION OF FINANCIAL ELIGIBILITY

Applicant is **not a financially needy person** in that applicant has sufficient income to retain private counsel and/or has sufficient liquid or non-liquid assets which could provide collateral to borrow funds to retain private counsel.

Applicant is a **financially needy person** in that applicant does not have sufficient income to retain private counsel and does not have sufficient liquid or non-liquid assets which could provide collateral to borrow funds to retain private counsel.

Minimum Payment: Applicant's household income is under 125% of poverty. Applicant is ORDERED to pay the minimum payment of \$50 within 60 days unless this fee is waived by the Court.

Immediate Copayment: Applicant's annual household income is above 125% of poverty and applicant has income and assets available to support an immediate copayment to cover a part of the cost of services.

 Applicant shall pay \$ _____ to the clerk of the court.

Assignment of counsel to applicant is contingent on payment.

Reimbursement Order: Applicant's annual household income is above 125% of poverty and applicant has income and assets available to reimburse the state for the cost of services.

 Applicant shall pay \$ _____ to the clerk of the court within 60 days of the date of this Order.

NOTICE: If reimbursement is not fully paid within 60 days, any amount still due will be sent to the Tax Department for offset and collection.

	Signature of Clerk or Designee	Date
--	--------------------------------	------

FINDINGS AND ORDER

The court has reviewed the Information and Affidavit, and finds that:

The Applicant has been charged with a serious offense.

The Applicant has **not** been charged with a serious offense in that:

The maximum penalty for the offense for which the Applicant is charged does not include the possibility of a jail sentence or a fine in excess of \$1,000.00.

The court has determined at arraignment and stated on the record, that if the Applicant is convicted, the court will not sentence the applicant to a period of imprisonment or fine the Applicant more than \$1,000.00.

It is hereby ORDERED:

COUNSEL ASSIGNED in that Applicant is financially needy and is charged with a serious offense.

COUNSEL DENIED.

	Signature of Judge	Date
--	--------------------	------

NOTICE OF RIGHT TO APPEAL: You have the right to **appeal** this order to the Judge of this Court. Your appeal must be filed in writing with the clerk of this Court within 7 days of the date of this order.

Clear Form

Clerk records amount to be paid and when payment is due

Appendix IV

Public Defender Order

SUPERIOR COURT
Unit

STATE OF VERMONT

Docket No.

DIVISION

--

Public Defender Order

Applicant: _____

THE APPLICANT IS ELIGIBLE FOR PUBLIC DEFENDER SERVICES

The applicant is ordered to pay a total of \$ _____ for the services of counsel assigned by the Court.
[Agreement #26139]

The applicant is ordered to pay \$ _____ immediately to the State of Vermont as a down payment ("co-payment"). Payment shall be made to the Clerk of the Court.

The applicant is ordered to pay the balance of the total payment, \$ _____ ("reimbursement") to the Clerk of this Court by _____.

Any amount due after this date will be sent to the Vermont Tax Department for tax offset and collection.

NOTICE TO APPLICANT: If you feel you do not have the ability to pay the amount ordered, or if the circumstances of your case make the amount inappropriate, you may ask the Court to reduce the amount.

Attorney Assigned: _____

Dated

Superior Court Judge

Appendix V

Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

SUPREME COURT OF VERMONT
OFFICE OF THE COURT ADMINISTRATOR



Mailing Address
Office of the Court Administrator
109 State Street
Montpelier, VT 05609-0701

Telephone: (802) 828-3278
FAX: (802) 828-3457

www.vermontjudiciary.org

January 19, 2016

Douglas R. Hoffer
Vermont State Auditor

Dear Mr. Hoffer,

Thank you for the opportunity to respond to the draft report entitled *Public Defender Fees: Judiciary's Efforts Yielded Collections of Less Than One-Third of Amounts Owed*.

Executive Summary

- 1) **The Judiciary reiterates its concern regarding the enforcement of the statutory provision in 13 V.S.A. §5238.**

While the State Auditor's report acknowledges the Judiciary's concern regarding enforcement of the statutory provision in 13 V.S.A. §5238, we believe the significance of that concern has been marginalized. The ramifications of denying counsel for non-payment of a public defender fee are significant. To characterize this as a simple "constraint" is a serious understatement.

While the Vermont Supreme Court case has held that the requirement of *reimbursement* for assigned counsel fees passes constitutional muster (see *State v. Morgan* 173 Vt. 533 (2001)), there is other case law that a provision for an attorney "*contingent on prior payment* of the co-payment" violates the right to counsel [emphasis supplied]. A federal court has specifically held that such a procedure would violate the accused's Sixth Amendment right. In *Hanson v. Passer*, 13 F.3d 275 (8th Cir. 1993), the court explained:

"When the state court determines . . . that the defendant is not capable of retaining an attorney on his own and grants the defendant's application for a court-appointed attorney, the court cannot withhold the constitutionally mandated appointment until a sum of money is paid." *Id.* at 280.

To insist on payment before appointment of counsel will have a deleterious effect on the existing assigned counsel process in Vermont. In considering the options under the current statute, unless

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the individual reports that they have the \$50.00 co-payment in their possession at the time of assignment, the court has no choice but to assign counsel with an order of reimbursement.

2) The Judiciary maintains that its financial practices regarding collection of Defender General fees are appropriate, including its handling of associated accounts receivable.

In the Judiciary's view, the collection processes applied to these fees are appropriately calibrated toward the most effective means and maintain the access to justice issues in the preceding paragraphs. The collection rate, as highlighted by the State Auditor's Office, is primarily attributable to the circumstances of the individuals subject to the fees.

3) The Judiciary proposes an additional recommendation to the report, transferring responsibility for the collection of outstanding amounts due the Public Defender Special Fund from the Judiciary to the Defender General's Office.

Because the debt is due and owing exclusively to the Defender General's Office, the Judiciary recommends the debt be referred to that agency for collection. The Defender General, who provides counsel for many of these individuals, would potentially have better access and ability to gather and validate the necessary information to collect on this debt. Many fines may have administrative fees or surcharges attached that the legislature has specifically identified for use on specific projects or to provide funding for specific programs. When these programs are given responsibility for collection, the collection rate often increases. Act 57, for example, created a Restitution Fund and a centralized Restitution Unit attached to the Vermont Center for Crime Victim Services. A fifteen percent surcharge is now added to all criminal and traffic fines and a restitution judgment order sent to the Restitution Unit when the court orders restitution. The Restitution Unit operates as a collection agency and has an overall collection rate of 24%.

4) The Judiciary expresses disappointment concerning the overstated title of the State Auditor's report.

Given the correlation between the collection rate and the financial circumstances of the individuals subject to the fees, it is disingenuous to suggest that the lack of collections is due entirely to a lack of effort on the part of the Judiciary. While we do not discount the need to collect co-payment fees, we must balance that obligation against upholding the constitutional rights of indigent defendants.

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Response to the State Auditor's Recommendations

Regarding the State Auditor's specific collection recommendations, we offer the following responses:

Recommendation #1:

Modify the Judiciary's internal procedures on the assignment of public defenders to emphasize the need to collect up-front payments at the time of arraignment whenever possible.

The Judiciary will develop a clearer policy of how collection of co-payment occurs, with emphasis on the need to collect up-front payments at the time of arraignment whenever possible. This policy will need to include a mechanism for providing notice to those litigants who are cited into court so that they are aware of the possible need to pay a co-payment for any public defender fee established on the day of their arraignment. We do not believe there is a viable avenue to notice or expect that lodged defendants would be prepared in any way to produce a co-payment on the day of their arraignment; however, we agree that better attempts to request up-front payment at the time a PD assignment request is received and the defendant is released from custody should occur.

Recommendation #2:

Actively engage in efforts to collect accounts that are past due, such as:

- ***Sending out a bill to overdue accounts***
- ***Using a collections agency***
- ***Assessing an additional fee in accordance with the procedures outlined in 13 V.S.A. §7180, and***
- ***Reporting overdue debt to a credit bureau***

Regarding other steps proposed by the SAO to increase collections in this area, as a general statement the Judiciary is committed to using the tools at its disposal to diligently collect the revenues due under this statute. The Judiciary notes, however, that it has limited staff and resources for the collection function, which is ancillary to its primary judicial function. Regarding the SAO's specific collection recommendations, we offer the following responses.

- **Sending out a bill to overdue accounts/ using a collection agency:** The Judiciary will explore the SAO's recommendations to utilize referral to collection agencies and/or sending subsequent billing notices to the debtors. In doing so, the Judiciary will estimate the administrative time and cost of such activity relative to the estimated additional collections. The Judiciary notes that as a general rule, tax offsets are the most effective collection tool currently available. Past efforts in sending out bills for past due accounts has been labor intensive due to the Judiciary's case management system not being able to provide a method of tracking the overdue bill, create an invoice for the bill or provide a means to run reports of such overdue bills. Our past experience has found that the defendant population is often transient and our efforts to send out mass billings resulted in a multitude of returned mail due to bad addresses.

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Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

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- Imposition of a non-payment fee: Additional non-payment fees are likely to dissuade additional collections. The Judiciary's experience in the context of both civil and criminal collection is that the multitude of surcharges, including those for nonpayment, has had the effect of lowering collection patterns. The Judiciary is therefore unlikely to pursue this option.
- Referring Defender General obligation to credit bureaus: Our understanding is that recent legal settlement involving multiple state attorneys general prohibits reporting of judgments on individuals' credit reports. In light of this settlement, the Judiciary does not plan to send debt information directly to the credit bureaus, absent clear guidance that such referral would not be contrary to the settlement. Similarly, the collection agency that is used by the Judiciary may be unwilling to make such reporting to the credit bureaus, as the agency could be liable for violation of the settlement. Moreover, the Judiciary's circa-1990 case management system has no means of distinguishing between contractual debts (which can be reported to credit bureaus) and debts associated with penalties, surcharges, and fees – so we would have no means of separating the two categories in any electronic transmission of data, so such separation would have to be done manually. Finally, those individuals who owe Public Defender reimbursements are likely to have a variety of economic challenges, so that a negative item on their credit report is not likely to create a significant additional incentive to pay.

Recommendation #3:

Modify the public defender order to include language that there will be additional fees assessed for additional collection actions, such as referring to the Department of Taxes for tax refund offset.

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The Judiciary will modify the Public Defender Order to include language that there may be additional fees assessed for additional collection actions, such as referring to Tax Department for tax refund offset. The Judiciary disagrees with the SAO report, however, that this will produce any meaningful increase in collections. Any revision to the form should not identify the applicable Tax Department collection structure because the Judiciary does not control the level of those fees.

Recommendation #4:

Consider implementing additional procedures to ensure that social security numbers are obtained from defendants and validated.

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The Judiciary will explore opportunities to improve the collection and validation of Social Security Numbers (SSNs) in order to expand the universe for tax offsets and otherwise improve collections, however, these solutions will need to ensure and preserve the privacy rights of the defendant. The Judiciary notes that as a general rule, tax offsets are the most effective collection tool currently available. The ability to adequately validate SSNs, while being an excellent goal, is realistically an enormous challenge. Most defendants are not readily able to produce a Social Security card. Many do not file annual tax returns. Our understanding is that the Tax Department, due to reasons of confidentiality, is unable to provide correct numbers if we have in fact sent an incorrect number

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Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

that does not match up with the name and date of birth. If we withhold public defender assignment until such information becomes available, (if ever), then we are not fulfilling our mission of access to justice. The dilemma in asking the defendant to validate this information is that it could cause long delays in scheduling court hearings, creating backlogs and the need for additional follow up from court staff and judges. The initial collection of SSNs at the courthouse counters will continue to be challenging, given the nature and circumstances of the interactions with defendants.

Recommendation #5:

Update the instructions provided to Superior Court staff to ensure that the annual transmittal of records to Department of Taxes includes previous periods.

Regarding the instructions to Superior Court Clerks for the identification of Defender General collection referrals and the applicable time periods, we appreciate SAO identifying this issue. We intend to revise the instructions to ensure that the full universe of receivables is referred to the Tax Offset program.

Recommendations #6 and #7:

Cease the process of removing public defender debt from the court's records once it has been referred to Department of Taxes for tax refund offset and continue to attempt to collect these debts.

Ensure that all outstanding public defender fees are included as accounts receivable in the State's financial system.

The Judiciary disagrees with the SAO report's findings that the receivables associated with the Defender General collection are not handled appropriately, at least as regards the Judiciary's responsibilities. In explaining this objection, it is important be clear about current practice. The Judiciary refers these receivables to the Tax Department. The Tax Department collects any tax offsets and deposits them; it does not return those collections to the Judiciary for depositing and processing. At the time of the referral, the Judiciary identifies each individual debt as "referred to tax offset" and reduces the amount owed to zero. The Judiciary directs individuals to the Tax Department if they attempt to pay amounts owed after the referral of the debt to the Tax Department.

Given this established practice, there can be no other rational interpretation other than that the receivable has been transferred to the Tax Department. The SAO's statement that a transfer of receivables requires a technical transaction mandated by internal procedures may be true; but it does not change the fact that the Judiciary is handling those receivables properly based both on its internal processes (case management system reconciles to accounting system) and external processes (receivables follow collections/deposits).

The SAO's statement that the Judiciary treats civil violation debts, and the use of tax offsets for them, differently than Defender General fees is apparently intended to suggest that the Judiciary's process for Defender General fees is inappropriate. In fact, the two processes are intentionally different, and for good reasons. The civil collections that are recouped via tax offset are returned to the Judiciary for attribution to individual penalties and associated revenue distribution. This

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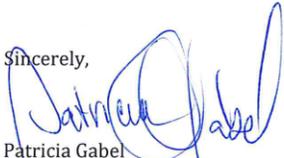
Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

process is cumbersome but important given the size of the receivables and the multiple revenue distribution streams. The receivables remain on the Judiciary's books until collections are made against them. In the case of the Defender General fees, any collections made by the Tax Department are credited directly to the special fund, saving time and effort. Because the collections are not returned to the Judiciary, it would make sense that the receivables would remain with the Tax Department.

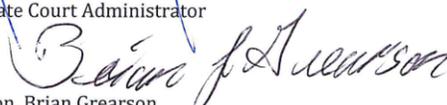
Regarding receivables that have already been sent to the Tax Department, the Judiciary believes that those receivables should remain with the Tax Department, with the opportunity for future year collections – and recordation of the associated receivables if that is not currently taking place. The Judiciary is willing to discuss with the Tax Department whether it makes sense to change practices for future debts – with the potential that any tax offset collections are returned to the Judiciary for processing. In that case, however, all parties – including the Defender General – should be aware that such a practice would likely create significant delays before the special fund revenue became available to the Defender General.

The Judiciary is dependent on other entities within state government who manage financial processes – the Department of Finance and Management; the Tax Department; etc. – to ensure that the technical transactions are consistent with proper financial practice. In this instance, the Judiciary is following proper financial practice. If the technical transactions are not consistent with that, then the Judiciary looks forward to working with the other entities in making form follow substance.

Sincerely,



Patricia Gabel
State Court Administrator



Hon. Brian Grearson
Chief Superior Judge

Appendix V

Comments from the Court Administrator and Chief Superior Judge and Our Evaluation

The following presents our evaluation of comments made by the Court Administrator and the Chief Superior Judge.

Comment 1	We believe that the report wording reflects the statutory language as well as the Judiciary's concerns as to its constitutionality, so we made no changes. In addition, we took the Judiciary's concerns about constitutionality into account in the wording of our first recommendation, which emphasizes the need for the Judiciary to make greater efforts to collect at time of arraignment but does not link payment to assignment of counsel. If the Judiciary believes that the language of the Vermont statute is unconstitutional, they should address their concerns to the Legislature.
Comment 2	The Judiciary's assertion that the collection rate is primarily attributable to the circumstances of the individuals who are subject to the fees and not their collection methods does not take into account that its courts have already judged these individuals to have the means to pay the amount assessed. Specifically, 13 V.S.A. §5238 allows the court to waive the public defender fee if the individual and cohabitating family members are found to be financially unable to pay. Accordingly, by ordering payment, the court had determined the defendant's ability to pay. Our recommendations are geared towards actions that the Judiciary is already authorized to take to more aggressively pursue collection of debt that it has determined to be within the means of the user of public defender services. We do not assert that any one of these actions will, by itself, improve collections, but taken collectively we believe that additional collections are likely to occur. Indeed, the Judiciary's acknowledgement that many defendants do not file annual tax returns bolsters our conclusion that its reliance on this collection method is not sufficient.
Comment 3	In 13 V.S.A. §5238(d) the statute specifies that co-pays are to be paid to the clerk of the court. In this manner, the Judiciary has been tasked with collecting fees assessed for public defender services. Additionally, 13 V.S.A. §5240 places the onus for referring debt for collection on the Court Administrator. Accordingly, we conclude that this is the responsibility of the Judiciary, not the Office of the Defender General.
Comment 4	In regards to the limitations of the current case management system, the Judiciary plans to implement a new case management system. It would be prudent to ensure that the development of the new system addresses the limitations of the current system referred to in the Judiciary's letter.
Comment 5	There is no written agreement between the Judiciary and the Department of Taxes regarding public defender fee receivables. It is the Judiciary's responsibility to ensure that these receivables are recorded in the state's financial records since that responsibility has not been transferred. The Judiciary's indication that it may be willing to change its processes for <i>future</i> public defender debts, but not for the debt already referred to DOT, appears to be a practical solution. We would agree that a change in the treatment of future public defender fee debts would address our recommendation, so long as the Judiciary obtains the written concurrence with DOT regarding the treatment of pre-existing receivables.