

Public Defense Fees and Use of Bail (updated 1/11/2021)

Indiana law contains three statutes that address when a defendant may be ordered to reimburse the county for public defense counsel: Indiana Code Sections 35-33-7-6, 33-40-3-6, and 33-37-2-3. A fourth statute provides that the bail a defendant posts can also be used to pay fines, costs, fees and publicly paid costs of representation.

Before public defense counsel is assigned, each of the statutes require that a defendant be found indigent. The judicial officer may then assign counsel. Section 35-33-7-6 limits a public defender fee to \$100 for a felony and \$50 for a misdemeanor, while the other two statutes allow trial courts to impose representation fees higher than \$100 against a defendant. All costs imposed must be reasonable and must not be more than the cost of defense representation. *See* Section 33-40-3-6. Furthermore, a trial court does not have the authority to order an indigent defendant to pay public defense fees based on possible future earnings or other prospective wealth. *See Davis v. State*, 843 N.E. 2d 65, 68-69 (Ind. Ct. App. 2006).

Under Section 35-33-7-6(c), an indigent defendant may be ordered to pay designated portions of the cost of representation. The statute provides that where “the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay” a fee of \$100 for a felony action or a fee of \$50 for a misdemeanor action. This Section contemplates that trial courts will order the fee at the initial hearing and after a determination of indigency, but it does not prohibit imposing the fee at other stages of the proceeding. *See Davis*, 843 N.E.2d at 68.

Reimbursement for public defense fees may also be assessed and ordered, after a determination of ability to pay, under Section 33-40-3-6. This Section allows recovery “at any stage” of the prosecution. *Jackson v. State*, 968 N.E.2d 328, 333 (Ind. Ct. App. 2012). The statute allows recovery of reasonable attorney’s fees and costs incurred by the county due to appointed counsel. If a child is alleged to be a delinquent child and an attorney is appointed by the court for the child, the court must make a finding of the parent’s ability to pay the costs of representation.

Indiana Code Section 33-37-2-3 provides that when a court imposes costs, the court must conduct a hearing to determine whether the person is indigent (except when costs are suspended, after which a hearing must be held). This is the only statute requiring an indigency *hearing* before imposing costs; the two sections above merely require the trial court to “make a finding on whether the defendant can pay for part or all of his representation from a public defender.” *Cleveland v. State*, 129 N.E.3d 227, 237 (Ind. Ct. App. 2019)). If the trial court conducts the hearing and determines that an individual is not indigent, it may order the person to pay the entire amount of the costs at sentencing or a later date, or specified parts at designated intervals. A hearing need not be conducted if the court imposes costs but suspends payment or suspends payment of all or part of the costs until the defendant has completed all or part of the sentence. If the court so chooses to suspend payment of costs, the court shall conduct a hearing at the time costs are due to determine whether the defendant is indigent. If a defendant defaults on repayment of public defense fees, the court may commence proceedings against the defendant for unpaid debt, or may remand the defendant to be committed to county jail and credited toward payment at the rate of twenty dollars for each twenty-four hour period.

Finally, Indiana Code Section 35-33-8-3.2(a)(1) provides in relevant part that where the trial court “requires the defendant to deposit cash or cash and another form of security as bail, the court may require the defendant and each person who makes the deposit on behalf of the defendant to execute an agreement that allows the court to retain all or a part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.” Subsection (a)(2) provides that “[t]he clerk shall also retain from the deposit under this subdivision fines, costs, fees, and restitution as ordered by the court [and] publicly paid costs of representation.” Unlike Section 33-37-2-3, no hearing is required: “While a determination of indigency is necessary when a court imposes costs, an indigency hearing is not required in order to apply cash bond money to these costs.” *Holder v. State*, 119 N.E.3d 621, 624 n.1 (Ind. Ct. App. 2019).