

REPORT
of the
COMMISSION ON PUBLIC DEFENDERS
of the
INDIANAPOLIS BAR ASSOCIATION

June 20, 1991

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Table of Contents

	Page
Introduction	
Mission statement	
Overview	
Composition and Activity of the Commission	
Current Indigent Defense Services	
The West Proposal	
Findings and Recommendations of the Commission	
I. Delivery of Public Defender Services	
II. Compensation and Workload for Trial Public Defenders and Support Staff	
III. Determination of Indigency	
IV. Appeals and Death Penalty Appeals	
A. Appeals	
B. Death Penalty Appeals	
Conclusion	

Appendices

Appendix A --	American Bar Association Section of Criminal Justice Report to the House of Delegates -- Chapter 5: Providing Defense Services (1990)
Appendix B --	Proposed City-County Council Ordinance
Appendix C --	House Enrolled Act No. 1963 (County Public Defender Boards)
Appendix D --	Public Defender Caseloads in Marion Superior Courts, 1984-1990
Appendix E --	Indiana Supreme Court Approved Schedule of Minimum Fees for Legal Services of the Public Defender of Indiana (1990)

- Appendix F -- Recommended Current Fee Schedule Maximums for Public Defender Services
- Appendix G -- Recommended Support Staff to Attorney Ratio for Public Defenders
- Appendix H -- Municipal Court Public Defender Office Indigency Screening Form
- Appendix I -- I.C. 33-9-11.5 (County Supplemental Public Defender Services Fund)
- Appendix J -- I.C. 35-33-8-3.1 (Cash Deposit Bond Forfeiture)
- Appendix K -- Report of ABA Criminal Justice Standards Committee (1990)
- Appendix L -- Recommended Criteria for the Determination of Indigency
- Appendix M -- ISBA Legal Ethics Committee, Opinion No. 2 of 1990
- Appendix N -- National Advisory Commission on Criminal Justice Standards and Goals Recommended Public Defender Caseload Standards
- Appendix O -- Statistics Regarding Racial Composition of Death Row Prisoners and Marion County Homicide Indictments
- Appendix P -- Indiana Supreme Court Proposed Criminal Rule 24

INTRODUCTION

In July, 1990, the Board of Managers of the Indianapolis Bar Association, upon the recommendation of its then President, Donald W. Buttrey, and its then President-Elect, Thomas Q. Henry, created the Commission on Public Defenders of the Indianapolis Bar Association to conduct an in-depth study of indigent defense services in the Marion County Superior and Municipal Courts.

The Commission was formed as a Special Committee of the Indianapolis Bar Association and directed to present its report to President Henry and the Board of Managers of the Association by October 1, 1991. However, in early 1991, The Honorable Stephen R. West, a Member of the City-County Council of the City of Indianapolis and of Marion County, Indiana (the "Council") introduced before the Council a proposed General Ordinance establishing a new public defender system for Marion County (the "West Proposal"). At the request of the Commission, the Council deferred action on the West Proposal and the Commission accelerated its schedule so as to complete its work by June 30, 1991, to permit the Council to have the benefit of the Commission's Report. This Report sets forth the work of the Commission, its findings and recommendations.

MISSION STATEMENT

The Mission Statement of the Commission is as follows:

A primary responsibility of the legal profession is to assure the fair and impartial administration of justice to all persons who come before the courts. The provision of effective independent counsel, without charge, for those unable to retain private legal assistance is an indispensable element in cases where the right to counsel has been established by law. The Commission on Public Defenders of the Indianapolis Bar Association will examine and evaluate the organization and administration of the public defense system in Marion County, and recommend and effectuate those changes determined to be appropriate.

Concerns about indigent defense services in Marion County prompted the appointment of the Commission by the Association. Those concerns include:

- Independence from the judge who employs the public defender
- Adequacy of compensation
- Caseload
- Economic disincentives to effective representation
- Availability of support services
- Late entry into cases
- Availability of systematic supervision and training
- Requirements that the judge approve requests for:
 - Depositions
 - Expert witnesses
 - Investigators
 - Transcripts
- Adequacy of screening for indigency eligibility

The Association believed that the issues of independence of the public defenders and the effectiveness of representation of indigents required that indigent defense services in Marion County be examined with a view toward determining necessary and desirable changes.

While the Commission's Mission Statement provides the Commission is to "recommend and effectuate" changes, the Association recognized that examination of indigent defense services in Marion County would likely lead to suggestions for reform which might require action by the Courts, the Indiana Legislature and/or the Council, and that submission of this Report to the Indianapolis Bar Association will complete the work of the Commission.

OVERVIEW

The Mission Statement originally adopted by this Commission included the affirmation that "the provision of effective independent counsel, without charge, for those unable to retain private legal assistance is an indispensable element in cases where the right to counsel has been established by law."

It was not the function of this Commission to determine the legal or ethical foundations of the right to counsel. Those have been established by both statutory and case law. It is the obligation of all branches of government to implement constitutional guarantees. In this instance it is the obligation of the executive, legislative and judicial branches of county government. This Commission, after hearing from a wide variety of witnesses and reviewing available statistics and other documentation, has arrived at a unanimous conclusion that the present fragmented system of delivery of public defender services to the indigent in Marion County is seriously deficient.

We would hasten to add that these deficiencies, as outlined in this report, are systemic and not attributable to personnel or personality. There have been and continue to be dedicated public defenders struggling to deliver competent services without adequate staff, support service or time available to prepare their cases. We do not question that those judges who appeared before our Commission protesting against any undue control over their public defender employees were completely sincere in those protests. Nevertheless, the ancient adage that "a servant cannot serve two masters" remains a truism. Any system where the judge employs counsel, authorizes his or her paycheck and then, as he or she must, sits in judgement on the defense services rendered by that counsel to an indigent defendant, will always be suspect. Neither the selfless dedication of the public defender nor the ironclad self-restraint of the judge can eliminate that cloud.

This is not to say that progress has not been made in Marion County during the past few years. We particularly commend The Honorable Evan Goodman, Presiding Judge of the Marion County Municipal Court, and the changes he has brought about in the Marion County Municipal Court public defender system. We would also commend the City-County Council for its willingness to support Judge Goodman in his efforts to continue the upgrading of this system. Yet, having acknowledged that progress, much remains to be done. Some of the improvements in the Municipal Court system will no doubt aid the Marion County Public Defender as he or she establishes a county-wide system.

Although it is difficult to determine accurately the present expenditures for indigent defense services in Marion County because of the lack of adequate data and separate budgets for public defender services, the caseloads of public defenders clearly indicate that indigent defense services are seriously underfunded. The public defenders

presently handle two-to-three times the number of cases recommended in national standards for public defender caseloads.

In addition, a comparison of funding and staffing for the prosecution and defense also indicates there is a disparity of resources allocated for these two functions. The fiscal year 1991 budget for the Marion County Prosecutor's Office (excluding the child support division) is approximately \$5 million, while the total county expenditures for indigent defense services will be approximately \$2.4 million in fiscal year 1991. The disparity in resources is particularly acute in the Superior Court where 70% of all defendants are represented by public defenders. There are forty-one full time prosecutors with support staff assigned to these courts and only thirty part-time (fifteen full time equivalent) public defenders who operate with no support staff.

This Commission has not attempted to translate its recommendations into cost estimates. There are various reasons for our decision not to do so.

First and foremost, we recognize that the recommended system will not come into being immediately. Under even the most optimistic scenario it will take a year of transition to get a new system firmly in place. Until a Marion County Public Defender has been appointed and had the opportunity to make a complete review of the total Marion County public defender situation, it will be impossible for an intelligent cost estimate to be made. There is no utility in costing out a perfect system which, at best, cannot come about for a number of years. Nor is there any utility in costing out a very minimal system which would, by its very definition, continue to underserve persons in Marion County who require public defender services to protect their constitutional rights.

We also recognize that fiscal restraints, including state control over property tax increases, all have direct relevance to expansion of the scope of public defender services in Marion County.

We do not, therefore, propose any spending level at this time. Rather, we have incorporated in this report the requirements which we think are prudent and necessary for the proper operation of a system reasonably calculated to provide constitutionally mandated services for the indigent of Marion County. We would strongly urge the City-County Council to create the county-wide Marion County Public Defender Board as outlined herein, which in turn would appoint the Marion County Public Defender.

Accountability of the Marion County Public Defender to the Marion County Public Defender Board will be a critical concern. The Board should be diligent in its oversight of the operation of the public defender system. Annual reports should be required by the Board from the Marion County Public Defender. Such aggressive oversight will be important both to the effectiveness with which the public defender is

operating the office and the credibility with the general public as to the effectiveness that services to the indigent are being delivered.

While the Commission hopes for an early implementation of all of its recommendations, its greatest sense of urgency underscores the importance of immediate change in the Superior Trial Court system. Whereas the problems of caseload, continuity of service and appointing authority have been partially addressed in the Municipal Court, they have not been addressed significantly in the Superior Courts. In addition, the felony jurisdiction and its attendant longer sentences renders the threat of inadequate representation in the Superior Trial Courts of more critical importance than representation in the Municipal Court system.

This Commission's obligation is to report to the Board of Managers of the Indianapolis Bar Association its recommendations. It is the hope and expectancy of this Commission that the Indianapolis Bar Association will proceed to take all those steps necessary to encourage the City-County Council, the Courts, and other government officials who may be involved, to implement these recommendations. The members of this Commission, should it be the pleasure of the Board of Managers of the Indianapolis Bar Association, stand ready to continue to work with the appropriate authorities toward that implementation.

COMPOSITION AND ACTIVITY OF THE COMMISSION

The membership of the Commission includes a broad representation of the legal community, including former public defenders, criminal defense lawyers, lawyers with prosecution experience, business lawyers, and representatives of the Indiana University School of Law - Indianapolis. The Commission membership also includes several non-lawyers, including legislators, members of the clergy and representatives of minority communities in Indianapolis.

The Chair of the Commission, The Honorable Leslie Duvall, is an attorney and a former five term member of the Senate of the Indiana General Assembly where he chaired the Judiciary Committee. Larry A. Landis, who has served as the Executive Director of the Indiana Public Defender Council for eleven years, acted as a Special Consultant to the Commission.

The Commission held its first meeting on August 16, 1990, and met at least monthly thereafter. The actions of the Commission at each of its meetings were electronically recorded, all of which recordings were transcribed.^{1/} Minutes of each meeting were prepared and circulated to the members for approval. Copies of the transcriptions and the minutes, along with the various other materials of the Commission, have been delivered to the Association offices for retention. Chairman Duvall appointed various subcommittees to deal with the various topics examined by the Commission, which subcommittees met as required and prepared and submitted written reports and recommendations to the full Commission for discussion and revision as appropriate.

The Commission reviewed the work of earlier studies of indigent defense services in Marion County, including the following:

◦Report on Defense Services in Indianapolis, Indiana, June, 1976^{2/}

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- 1/ All of the November and part of the December transcriptions were lost through inadvertent erasure.
- 2/ Submitted to the Indianapolis Lawyers' Commission; prepared by Norman Lefstein, Esq., then a Professor of Law at the School of Law at the University of North Carolina, Chapel Hill, North Carolina, Louis O. Frost, Jr., Esq., Public Defender, 4th Judicial Circuit, Jacksonville, Florida, and John D. Shullenberger, Esq., then Supervising Attorney, Juvenile Litigation Office, Legal Assistance Foundation, Chicago, Illinois.

- Report of the Public Defender Committee of the Indianapolis Bar Association, August 1979^{3/}
- Report No. 80-8: The Public Defender System, Marion County, Indiana: Current and Projected Cost^{4/}
- The Minutes of the Indianapolis Bar Association Public Defender Study Committee, 1985^{5/}
- Comparative Review of the ABA Standards and the Marion County Municipal Court Public Defender System^{6/}
- Overview of Marion County Public Defender Services, May, 1990^{7/}
- American Bar Association Section of Criminal Justice Report to the House of Delegates-Chapter 5: Providing Defense Services (1990)^{8/}
- American Bar Association Resolutions Regarding Indigent Defense Services (1990)^{9/}

The Commission also familiarized itself with the current status of indigent defense services in Marion County, summarized below, and received written materials from the National Center for State Courts. Lastly, the Commission solicited and received the opinions of several judges of the Marion County Courts, several present and former public defenders and numerous other interested persons.

In order, the following persons were interviewed by the Commission in support of this study: The Honorable Roy Jones, then Judge of the Superior Court of Marion County, Criminal Division; The Honorable John Tranberg, then Judge of the Superior Court of Marion County, Criminal Division; Steven Spence, Esq., a former Public

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- 3/ Chaired by William P. Wooden, Esq.
 - 4/ Prepared by ABT Associates, under a contract awarded by the Law Enforcement Assistance Administration, United States Department of Justice.
 - 5/ Chaired by D. William Cramer, Esq.
 - 6/ Prepared by Larry A. Landis, Esq.
 - 7/ Prepared by Larry A. Landis, Esq.
 - 8/ Adopted by the ABA House of Delegates in \, 19\.
 - 9/ Adopted by the ABA House of Delegates in \ 19\.

Defender; John Commons, Esq., Deputy Prosecutor of Marion County; The Honorable Norman Lefstein, Dean of the Indiana University School of Law-Indianapolis; The Honorable James W. Payne, Judge of the Superior Court of Marion County, Juvenile Division; Richard Gilroy, Esq., Chairman, Criminal Appeal Panel; Monica Foster, Esq., a former member of the Criminal Appeal Panel; The Honorable Stephen West, member of the City-County Council, Roberta Ross, Esq., a former Chief Public Defender for the Municipal Court; The Honorable Evan Goodman, Chief Judge of the Municipal Court of Marion County; Eric Koselke, Esq., Municipal Court Chief Public Defender; The Honorable John Barney, Judge of the Superior Court of Marion County, Criminal Division No. 3; The Honorable Patricia Gifford, Judge of the Superior Court of Marion County, Criminal Division No. 4; The Honorable Paula Lopossa, Judge of the Superior Court of Marion County, Criminal Division No. 1; The Honorable Barbara Collins, Commissioner, Municipal Court of Marion County, Title IV-D Court.

The Commission was also provided a copy of a report prepared by Andreas Gerling, a student intern, on behalf of The Honorable John von Arx, Marion County Auditor.

CURRENT INDIGENT DEFENSE SERVICES

Under current procedures, each of the six Marion County Superior Court Criminal Division judges hires five lawyers who serve as part-time public defenders, each of whom is paid an annual stipend of \$19,000 plus \$60 per month for office overhead. The attorneys work out of their private offices. There is no centralized public defender office for the Superior Courts. Cases are assigned to the five public defenders at the time the information is filed based on the last digit of the cause number. Each of the five public defenders is assigned two numbers from 0-9 and is appointed to all cases filed with one of their numbers as the last digit of the cause number. There is no adjustment mechanism for the seriousness of the offense or the complexity of the case, such as death penalty cases. Each public defender is assigned 70-80 cases per year.

Indigent appeals from the criminal division are currently handled by a panel of twelve part-time appellate public defenders who are paid an annual stipend of \$18,000. Each Superior Court judge appoints two lawyers to the panel. The lawyers are assigned appeals by numerical rotation from all six courts.

Indigent defense services are currently provided in the Marion County Municipal Courts through the Municipal Court Public Defender Office. This Office was created in 1974 by Court rule and has been maintained since under the Office of the Presiding Judge. The Municipal Court Public Defender Office has gone through a major transformation in the past two years in the course of its conversion from an all part-time to a primarily full-time staff. The Office presently has twenty-one full-time lawyers, one part-time lawyer, and fourteen support staff. The Office handles approximately 12,000 misdemeanor cases and 2,800 felony cases each year.

Indigent defense services in the Juvenile Court Division of the Marion Superior Court are presently provided by a Public Defender Office appointed by the Court and located at the Juvenile Court Complex at 25th St. and Keystone Avenue, in Indianapolis. The Office has four full-time public defenders, two part-time public defenders, one part-time paralegal and one secretary.

All indigent defense services provided at trial and on direct appeal in Indiana are presently organized and funded entirely at the county level. By statute, judges of the courts of criminal jurisdiction in Indiana are authorized to contract with any attorney or group of attorneys for the defense of indigents, except counties with a population of 400,000 or more (Marion and Lake Counties). There is currently no statutory authority for the public defender programs existing in Marion and Lake counties. These programs are operated by the courts in those counties under their inherent authority to do those things necessary to effectively operate.

Although the Circuit Court in Marion County has both civil and criminal jurisdiction, it does not exercise its criminal jurisdiction, and has no indigent public

defender program. The Superior Court has 16 elected judges and is organized into three divisions: Civil, Criminal and Juvenile. The Criminal Division has six courts and has original jurisdiction in all felony cases except Class D felonies, for which it has concurrent jurisdiction with the Marion County Municipal Court. The Criminal Division does not have a blind filing system. Instead, 50 cases are filed in Court No. 1, then the next 50 cases are filed in Court No. 2, etc. The six Criminal Division courts handle 2500-3000 felony cases per year. The Marion County Juvenile Division operates as one court under one of the 16 judges of the Superior Court and exercises the exclusive and original juvenile jurisdiction vested in the Marion Superior Courts by statute. It handles 3,000 delinquency cases per year.

The Marion County Municipal Court has 16 judges appointed by the Governor selected from candidates submitted by the Municipal Court Judicial Nominating Commission. The Municipal Court has original jurisdiction in all misdemeanor, infraction and ordinance cases, and concurrent jurisdiction with the Marion County Superior Courts in Class D felony cases. These courts handle approximately 43,000 misdemeanor cases and 6,500 Class D felony cases per year.

THE WEST PROPOSAL

The West Proposal would establish a Marion County Public Defender Agency and a Marion County Public Defender Board "for the purpose of providing legal representation to indigent defendants in criminal, juvenile and child support matters" in the Marion County courts. The board would consist of nine members, three of whom would be appointed by the Mayor and five of whom would be appointed by the Council, with the Marion County Auditor serving as the ninth member. The board would be responsible for providing legal representation for indigent defendants, establishing and applying a definition of indigent defendants, and declining to authorize representation of defendants who are not determined to be indigent. The board would also be authorized to establish policy and procedure for the operation of the agency, to employ a chief public defender, to recommend an annual operating budget for the agency, and to employ or contract with attorneys for representation of indigent defendants. The board would also be required to prepare a comprehensive plan for the provision of legal representation to indigent defendants for presentation to the Council.

Chairman Duvall appointed a subcommittee to examine and report to the full Commission on the West Proposal. After examining and discussing the West Proposal and the report of the subcommittee, the Commission prepared a report on the West Proposal for delivery to the Council. In the Report, the Commission requested the Council to postpone consideration of the West Proposal until the Commission had an opportunity to complete its review of the public defender system. The Commission also expressed "serious reservations as to the constitutionality and legality of the proposed ordinance..." and advised the Council that "the Commission opposes the ordinance as originally drafted."

President Henry forwarded a copy of the Report to The Honorable Beurt SerVaas, President of the Council, on March 19, 1991. Mr. Henry requested that the Council defer action on the West Proposal until after the Commission issued its report, which Mr. Henry assured Mr. SerVaas would be issued in June, 1991. In response to this request, the Council deferred action on the West Proposal until July, 1991.

FINDINGS AND RECOMMENDATIONS OF THE COMMISSION

In early 1991, Chairman Duvall appointed four subcommittees to examine and report back to the full Commission on the following topics:

- I. Delivery of Public Defender Services
- II. Compensation and Workload for Trial Public Defenders and Support Staff
- III. Determination of Indigency
- IV. Appeals and Death Penalty Appeals

Each of these four subcommittees submitted a written report to the Commission with respect to its assigned topic. These reports were discussed in detail by the full Commission and revised as appropriate. The Findings and Recommendations of the Commission with respect to each of the topics so examined are set forth in full below.

I. DELIVERY OF PUBLIC DEFENDER SERVICES

Findings Concerning the Delivery of Public Defender Services

A. Right to Counsel.

The right to the effective assistance of counsel in criminal prosecutions is guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 13, of the Indiana Constitution. Under Indiana law, there is also a right to counsel in probation revocation cases, Bradford v. State (3rd Dist. 1990), Ind., 550 N.E.2d 1353; paternity suits, Kennedy v. Wood (4th Dist. 1982), Ind., 439 N.E.2d 1367; and in contempt proceedings for failure to pay child support, In re Marriage of Stariha (1st Dist. 1987), Ind., 509 N.E.2d 1117.

B. Marion County Delivery Systems.

1. Because the responsibility for providing and funding public defender services falls upon the counties and there is no state statute or county ordinance prescribing how these services should be provided, each court system in Marion County has had to develop its own system for providing public defender services. As a result, Marion County presently has eleven separate and distinct systems for providing public defender services which have evolved and exist under the inherent authority of the courts:
 - a. The Juvenile Court Division of the Superior Court has a public defender office and a separate assigned counsel panel for appeals that is administered by the Juvenile Court judge.
 - b. The Municipal Court has one office for trials and appeals.
 - c. Each of the six judges in the Criminal Division of the Superior Court has five part-time public defenders who are contractual employees of the judge. In addition, the Superior Court en banc has twelve attorneys on contract to handle appeals.
 - d. The Circuit Court has one attorney on contract for contempt proceedings for failure to pay child support.
2. Public defender services in Marion County fail to comply with most of the standards adopted by the American Bar Association Section of Criminal Justice Report to the House of Delegates -- Chapter 5: Providing Defense Services (the "ABA Criminal Justice Standards") attached as Appendix A hereto.

3. Many of the deficiencies in public defender services in Marion County previously identified in the reports and evaluations prepared by the Indianapolis Bar Association, the Indianapolis Lawyers Commission, the National Center for Defense Management, Abt Associates, and the National Center for State Courts, listed earlier in this report still exist. These deficiencies emanate chiefly from a fragmented, ineffective delivery system and the lack of adequate funding to meet the need for these services.

C. Deficiencies in Marion County Delivery Systems.

1. Unlike the Municipal Court and Juvenile Court Division of the Superior Court, the Criminal Division of the Superior Court does not have a public defender office to provide administration, supervision, and support services. The lack of a public defender office to provide comprehensive and coordinated public defender services in the Criminal Division of the Superior Court and the employment of public defenders by the judge before whom they practice make it unnecessarily difficult for the public defenders to be zealous and independent advocates for their clients. These factors also create an undesirable perception of judicial control over one of the advocates before the court. The following systemic deficiencies in public defender services in the Criminal Division of the Superior Court need to be addressed:
 - a. The public defenders are not provided any support services, i.e., secretaries, investigators, and paralegals and are required to petition the judge with notice to the prosecutor for funds for depositions, expert witnesses, investigators, and transcripts.
 - b. Paying part-time public defenders a set salary and requiring them to accept an unlimited caseload creates an economic disincentive for the public defenders to provide time-intensive representation, such as that required in jury trials.
 - c. There are no written criteria for hiring public defenders, no uniform supervision, no performance reviews, and no reporting concerning the number of cases, dispositions, or time spent.
 - d. The compensation for the part-time public defenders is inadequate for the number of cases assigned to them.
2. The Municipal Court Public Defender Office has improved substantially in the past few years due to competent administration and support from the Presiding Judge and the City-County Council, which has resulted in an increase in funding and staff, the conversion of attorney staff from part-time to full-time, and the increased delegation of authority to the Chief Public Defender to administer the office and hire staff. Nevertheless, there remain deficiencies in

public defender services in the Municipal Court which need to be addressed, including the following:

- a. The Chief Public Defender and the Chief Deputy are at-will employees of the Presiding Judge and do not have clearly defined hiring and firing authority over the office staff.
- b. The Chief Public Defender does not have authority to approve expenditures for expert witnesses even when there are adequate funds in the budget.
- c. The Public Defender Office is not authorized to provide any representation until appointed by a judge or referral of the defendant to the office for indigency screening.

Recommendations Concerning the Delivery of Public Defender Services

A. Independent and Coordinated County-wide Delivery System

1. The fair and effective administration of justice in our adversary system requires that the judge, prosecutor and defense lawyer be independent from each other. The present system for providing public defender services in Marion County violates this fundamental precept.
2. Marion County needs a comprehensive and coordinated delivery system for providing high-quality and cost-effective legal representation to approximately 20,000 persons each year who have a constitutional right to counsel but are financially unable to employ an attorney.

B. Proposed Structure, Powers and Duties of County-wide Public Defender Office

1. The City-County Council should adopt an ordinance creating an independent county-wide Marion County Public Defender Office (the "Marion County Public Defender Office") and an eleven-member Public Defender Board (the "Marion County Public Defender Board") to set policy and oversee the delivery of public defender services in Marion County. Attached hereto as Appendix B is a draft of an ordinance recommended by the Commission. The appointing authorities for the board should be as follows:

Mayor	2 (no more than 1 from the same political party)
City-County Council	2 (no more than 1 from the same political party)
Superior Court <u>en banc</u>	2 (no more than 1 from the same political party)
Municipal Court	1
Indianapolis Bar Association	2
Marion County Bar Association	1
Community Service Council	1

It is the sense of the Commission that the Community Service Council's appointee should be from an organization active in the criminal defense field.

2. The Marion County Public Defender Board should also appoint a Public Defender (the "Marion County Public Defender"), recommend to the City-County Council an annual operating budget for the Marion County Public Defender Office, and submit an annual report to the appointing authorities and the courts regarding the operation of the Marion County Public Defender Office.
3. The Marion County Public Defender should have powers and duties similar to those set forth with respect to certain other Indiana counties in House Enrolled Act No. 1963, 107th Indiana General Assembly, First Session (1991), attached hereto as Appendix C.
4. The Marion County Public Defender Office should incorporate the public defender offices in the Juvenile and Municipal Courts and the part-time public defenders in the Superior Court.
5. The county-wide public defender system should be designed to meet the ABA Criminal Justice Standards.
6. It is recommended that the newly appointed Marion County Public Defender give serious consideration to retaining the present public defenders including the part-time public defenders. Change in the system should not, in and of itself, deprive the citizens of Marion County of the dedicated services of present public defenders who have in many cases developed an expertise in criminal defense matters.
7. The Marion County Public Defender Board, in addition to selecting the Marion County Public Defender, should have continuing responsibility for seeking adequate funding for the delivery of public defender services in Marion County.
8. The Marion County Public Defender Board should establish standards for employee retention, discipline and termination.

**II. COMPENSATION AND WORKLOAD FOR TRIAL PUBLIC DEFENDERS
AND SUPPORT STAFF**

Findings Concerning Compensation and Workload

A. NAC Caseload Standards

1. In 1973 the National Advisory Commission on Criminal Justice Standards and Goals (the "NAC") formulated for the first time national criminal justice standards. In Standard 13.12, the NAC recommended the following maximum number of cases per year for a full-time public defender working in an office with support staff:

Felony	not more than 150
Misdemeanor	not more than 400
Juvenile	not more than 200
Mental Health	not more than 200
Appeals	not more than 25

2. The NAC also made the following recommendation in Standard 13.12 regarding excessive caseloads.

If the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

3. The NAC caseload standards have subsequently been endorsed by the National Legal Aid and Defender Association (the "NLADA") and by the House of Delegates of the American Bar Association in July of 1985, and are used extensively throughout the country by evaluators, public defender managers, and funding sources.

B. ABA Criminal Justice Standards

In 1990 the American Bar Association approved revisions to Standard 5.3: Providing Defense Services, ABA Criminal Justice Standards, to provide as follows:

- (a) Neither defender organizations, nor assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
- (b) Whenever defender organizations, individual defenders, or assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, or assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept workloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

C. Municipal Court Public Defenders

1. Prior to 1989, the data on public defender caseloads is of very questionable reliability. Nevertheless, the data that is available indicates that from 1983 to 1987 the Municipal Court Public Defender Office received an average of 6,200 new cases each year. In 1990, that Office received 15,344 new cases. The following is the number of new cases accepted by the Office from 1983 to 1990, according to data maintained by the Office and the Municipal Court.

<u>Year</u>	<u>New Cases</u>
1983	6,924
1984	5,188
1985	5,306
1986	7,458
1987	6,352
1988	8,162
1989	14,000
1990	15,344

2. The following is a list of the staff for the Municipal Court Public Defender Office for the past eight years, which reveals both the increase in the number of attorneys and the transition from part-time attorneys, who each worked one day a week, to full-time salaried attorneys:

<u>Year</u>	<u>Attorney Staff</u>	<u>Chief Public Defender</u>
1983	32 Part-time (1 day each)	Walter Bravard Gebuhr/Honan
1984	32 Part-time (1 day each)	Honan/Bravard
1985	19 Part-time (1 day each) 5 Full-time	Walter Bravard Michael Robak
1986	16 Part-time (1 day each) 7 Full-time	Carol Rader
1987	16 Part-time (1 day each) 7 Full-time	Carol Rader Roberta Ross
1988	13 Part-time (1 day each) 7 Full-time	Roberta Ross
1989	2 Part-time (50%) 10 Full-time	Eric Koselke
1990	1 Part-time (50%) 15 Full-time	Eric Koselke

3. A comparison of the number of new cases assigned to the Public Defender Office and the number of full-time equivalent (FTE) attorneys shows the following number of new cases per attorney:

<u>Year</u>	<u>New Cases</u>	<u>Attorney Staff (FTE)</u>	<u>New Cases Per Attorney</u>
1983	6,924	6.4	1,082
1984	5,188	6.4	810
1985	5,306	8.8	603
1986	7,458	10.2	731
1987	6,352	10.2	623
1988	8,162	9.6	850
1989	14,000	12.0	1,166
1990	15,344	15.5	990

4. In April of 1991, the City-County Council approved supplemental funding for the Public Defender Office which authorizes the following staff:

- 21 Full-time attorneys
- 1 Part-time attorneys
- 4 Paralegals
- 1 Investigator
- 1 Office Manager
- 2 Secretaries
- 1 Receptionist
- 2 Interviewers
- 2 Data Processors (also part-time interviewers)

In addition, four attorneys are on contract for \$6,000 each to handle conflict of interest cases.

5. Of the 15,344 new cases received by the Public Defender Office in 1990, 2,883 were Class D felonies, 12,061 were misdemeanors and 400 were mental health cases. Assuming that the caseload in 1991 is the same as it was in 1990, the projected caseload per attorney for 1991 will be as follows:

<u>Type of Case</u>	<u>No. of Cases</u>	<u>No. of Attorneys</u>	<u>Cases Per Attorney</u>
Felony	2,883	8	360
Misdemeanor	12,061	12	893
Mental Health	400	1	400

6. When compared with the maximum caseload standards recommended by the NAC, NLADA, and the ABA, the projected caseload of the individual public defenders in the Municipal Court Public Defender Office is clearly excessive. The current misdemeanor caseload per attorney is projected to be more than twice the recommended maximum caseload of 400 cases. Although the NAC

standard for felonies is inapplicable to Municipal Court because the standard was based upon the assumption that the caseload included all types of felonies and the Municipal Court handles only Class D felonies, it is the conclusion of this Commission that because a person sentenced for a Class D felony can receive up to three years in prison and faces the possibility of an additional sentence of 30 years if charged with being an habitual offender, the recommended caseload for an attorney handling only Class D felonies should be closer to the maximum felony caseload of 150 cases than the maximum misdemeanor caseload of 400 cases. See Recommendation 1. Thus, we believe that 360 Class D felony cases is an excessive caseload for one attorney.

7. Persons appearing before the Commission unanimously indicated that the caseload of the Municipal Court Public Defender Office was currently excessive, and that the excessive caseloads were having an adverse affect upon the quality of representation and the speed of disposition of cases.
8. Although it is beyond the scope of this Commission's charge to conduct an in-depth review of the effect of excessive caseloads upon the quality of representation provided in individual cases, the following policies and practices of the Municipal Court Public Defender Office, which were adopted to cope with the excessive caseloads, raises grave concerns about the quality of representation provided:
 - a. Public defenders are assigned to courts rather than to a client. This means that the attorneys do not follow the case. If the case is set for the same court session covered by the attorney, then the same attorney will represent the client. However, if the case is transferred to another court or set for a day when the original attorney is not assigned to be in the court in which the case is set, then another attorney will handle the case. This practice impedes the development of an effective attorney-client relationship. It also means that cases are sometimes tried by an attorney who has not met the client until the day of trial. See, e.g., Kimball v. State (1985), Ind., 474 N.E.2d 982.
 - b. Public defender clients generally do not see an attorney before their first pretrial hearing, and the majority of incarcerated clients only talk with their public defender in court. To compensate for the inability of attorneys to visit their clients in jail, the Office uses paralegals to visit clients and decide which witnesses, if any, to subpoena for trial. This results in unnecessary continuances and may be one of the primary reasons that public defender clients spend more time in jail than persons with private attorneys.

9. Based upon the above recommended caseload standards and the projected staff for 1991, the current Municipal Court Public Defender Office would have an adequate attorney staff to handle the following number of cases:

<u>Type of Case</u>	<u>No. of Attorneys</u>	<u>Total Cases</u>
Felony	8.0	2,000
Misdemeanor	12.0	4,800
Mental Health	1.0	200

10. In order to comply with the recommended caseload standards and handle the projected caseload for 1991 of 2900 felonies, 12,000 misdemeanors, and 400 mental health cases, the Municipal Court Public Defender Office would need to add an additional 23 attorneys:

<u>Type of Case</u>	<u>Projected Additional Cases</u>	<u>Cases Per Attorney</u>	<u>Number of New Attorneys Needed</u>
Felony	900	200	4.5
Misdemeanor	7,000	400	17.5
Mental Health	200	200	1.0

Total number of new attorneys needed 23

11. The average attorney in the Municipal Court Public Defender Office has 6-7 years experience and is paid \$27,500, while the average attorney in the Municipal Division of the Marion County Prosecutor's Office has only 2 years of experience and receives \$29,100.

D. Superior Court, Criminal Division Public Defenders

1. Although there is lack of hard data on the public defender caseloads in the Criminal Division of the Superior Court, there is widespread agreement among the bench and bar that the growing caseload is one of the primary problems with public defender services in the Superior Court. The Commission received presentations from three of the six judges of the Superior Court, Criminal Division, and two former judges of that court. These judges were all in agreement that the public defenders were now carrying an excessive caseload.
2. The increase in the public defender caseload in the past seven years is due primarily to the increase in the number of cases filed. The number of public defenders has remained at 30 (five for each of the six courts), while the number of felony cases filed in the Superior Court, Criminal Division, has

increased from 1,630 cases in 1984 to 2,944 cases in 1990, an increase of 71%. See Public Defender Caseloads in Marion Superior Courts, attached hereto as Appendix D, page 1-2. Persons appearing before the Commission unanimously indicated that excessive caseloads adversely affect quality of representation and the speed of disposition of cases.

3. Because the Commission was unable to determine the actual indigency rates or the actual number of cases historically handled per public defender and the estimates by judges of the indigency rate varied from 60% to 80%, for purposes of comparison and analysis we have assumed that the indigency rate is 70% for all six courts and has remained the same since 1984. Using an average indigency rate of 70%, the average public defender caseload has nearly doubled in the past seven years: 1984 - 35 cases; 1990 - 63 cases. See Appendix D, page 3.
4. In 1985, nearly all of the 30 Superior Court, Criminal Division, public defenders were converted from a part-time salaried status to independent contractors who do not receive county employee benefits. However, a few of the public defenders have been allowed to maintain county employee benefits, i.e., health insurance, FICA, etc.
5. Although the compensation rate has increased from \$12,000 in 1984 to \$19,000 in 1990, the amount of compensation received per case has actually decreased. In 1984, public defenders received approximately \$380 per case. In 1990, the public defenders received approximately \$324 per case. See Appendix D, page 4. The 1985 change in employee benefit status exacerbates the public defenders' compensation losses.
6. The unavailability of information necessary to determine actual caseloads is due to the lack of a centralized support staff for the public defenders to monitor files, caseloads and actual time spent, and the failure of the judges to require periodic reporting of the number of cases handled or time spent.
7. The public defenders must rely on their private practices for secretarial assistance, computerized legal research, photocopying, supplies and other expenses. The public defenders receive only \$60 per month to compensate them for these expenses.
8. Incarcerated clients can only make collect calls to public defenders, who are not reimbursed for the expense of these calls. This practice has an adverse impact on attorney-client contact.
9. The public defenders do not have access to the county computer system, i. e., the JUSTICE system.

10. The public defenders must seek approval by the judge on a case by case basis for investigators, paralegals, experts, depositions, transcripts, or other support services necessary for adequate representation. The request must be made by motion with notice to the prosecutor.
11. Based upon national caseload standards and the results of an informal survey conducted by the Commission, under the present system of part-time public defenders who have no support services the maximum caseload for an individual public defender in the Superior Courts should be no more than 40 cases per year and the maximum number of open files should be 20 cases.
12. Based upon these recommended caseload standards, the Superior Courts are presently staffed to handle only 1200 cases (30 attorneys x 40 cases each). In order to handle the projected caseload for 1991 of 3,000 felonies under the recommended caseload standards, there should be 45 public defenders, which is an additional 15 attorneys or 2.5 attorneys per court.

E. Superior Court, Juvenile Division Public Defenders

1. The public defender office for the Superior Court, Juvenile Division, has 4 attorneys, 1 secretary, and a part-time paralegal. In addition, there are 2 part-time attorneys on contract for conflict cases.
2. The caseload of juvenile court public defenders increased from 400 cases per attorney in 1984 to 750 cases per attorney in 1990. The current caseload is 3.5 times the maximum caseload recommended in the national standards. See Appendix D, page 4.
3. Based upon the above recommended caseload standards, the Juvenile Court Public Defender Office is presently staffed to handle 1,200 cases.
4. In order to handle the projected caseload for 1991 of 3,000 cases, the Juvenile Court Public Defender Office needs an additional six attorneys (1,800 cases divided by 300 cases per attorney).

F. Effect of Funding Limitations

The Commission acknowledges that the staffing levels found by the Commission to be necessary in order to adequately represent the indigent, if implemented immediately, would result in substantial cost increases for Marion County. While fiscal considerations may require the implementation of these recommendations over time, the Commission urges the City-County Council to implement the recommendations at the earliest possible date. Until the recommendations are implemented the county will continue to incur the costs associated with ineffective

defense services, for example, longer pre-trial confinements, reversals for ineffective assistance of counsel, and the risk of federal court intervention.

Recommendations Concerning Compensation and Workload

A. All Courts

1. The Marion County Public Defender Board and the Marion County Public Defender Office should develop a case-weighted system that assigns a work unit to each case using factors such as data from time sheets completed by public defenders, seriousness of the offense, the possible punishment, the complexity of the issues generally present in that type of case, and a comparison of the time actually spent by experienced, competent private practitioners. This system should be used for setting a maximum number of open files and caseloads per year for individual attorneys and the Marion County Public Defender Office.

For purposes of planning a budget for the recommended Marion County Public Defender Office, the Commission recommends that the NAC caseload standards be used, with adjustments for part-time public defenders, if any are employed.

2. The Marion County Public Defender Board and the Marion County Public Defender Office should develop a case projection model for forecasting the caseload of the Marion County Public Defender Office.
3. The City-County Council should establish a funding formula for the Marion County Public Defender Office which is based upon the projected caseload of the Office and the caseload standards adopted by the Marion County Public Defender Board.
4. The Marion County Public Defender Board and the Municipal Court and Superior Court should adopt caseload cut-off policies and procedures as recommended in Standard 5.3 of the ABA Criminal Justice Standards, to insure that the caseload of individual public defenders does not exceed the maximum caseload standards adopted by the Marion County Public Defender Board. These procedures should provide that when the maximum caseload for the Marion County Public Defender Office is reached, the courts will appoint attorneys on a case-by-case basis from a roster of private attorneys who have agreed to accept appointments.

5. The Marion County Public Defender Board should establish a fee schedule for payments to private counsel comparable to the fee schedule set by the Supreme Court of Indiana under I.C. 33-9-11-3 for the Public Defender of Indiana. Attached as Appendix E is a copy of the current Supreme Court Fee Schedule.

The Marion County Public Defender Board should also set maximum amounts to be paid for representation in certain types of offenses, which may be exceeded only upon a showing of exceptional circumstances. Attached as Appendix F are the results of a survey of judges and public defenders conducted by the Commission which shows the current prevailing rates by category of case, which the Commission recommends be established as the current maximum fees allowable in such cases.

6. Based upon interviews with civil and criminal practitioners, the Commission recommends that for purposes of planning a budget for the Marion County Public Defender Office the support staff ratios set forth in Appendix G should be used.
7. Salaries for attorneys and staff of the Marion County Public Defender Office should be comparable to those received by members of the Marion County Prosecutor's Office with comparable experience.
8. A separate fund for experts and support services should be established under the control of the Marion County Public Defender.
9. Computer access to the Marion County JUSTICE or comparable computer system should be provided for the public defenders.
10. A toll free call system should be established for incarcerated defendants to contact their public defenders or, in the alternative, public defenders should be reimbursed for all collect calls from incarcerated clients.
11. In the event that the Marion County Public Defender Board should conclude that public defenders are not to become employees of the county, the county should reimburse the cost for or provide adequate malpractice insurance.
12. Pending action by the City-County Council, the judges of the Superior Court, Criminal Division, should immediately initiate policies and procedures for monitoring the caseloads of the public defenders and the time spent on each case.

III. DETERMINATION OF INDIGENCY.

Findings Concerning Determination of Indigency

A. Indigency Standards in Indiana

1. There are no statutory guidelines or court rules adopted by the Supreme Court of Indiana dealing with indigency determination.
2. The decision to appoint counsel at public expense lies within the discretion of the trial judge utilizing the "substantial hardship" test. The basic question is whether the accused lacks financial resources to employ counsel without imposing a substantial hardship upon himself or his family. Bradford v. State (3rd Dist. 1990) Ind., 550 N.E.2d 1353; Moore v. State (1980), Ind., 401 N.E.2d 676. The substantial hardship test requires that the court conduct a thorough examination of the defendant's total financial situation, including a balancing of assets against liabilities and a consideration of disposable income and other available resources reasonably available to the defendant after payment of fixed obligations. See, e.g., Graves v. State (1st Dist. 1987), Ind. App., 503 N.E.2d 1258.
3. Under Trial Rule 81, promulgated by the Indiana Supreme Court, both the Municipal and Superior Court have authority to adopt local rules concerning eligibility for a public defender. Although neither court has exercised this authority, the Municipal court has adopted local rules for admission to bail and pre-trial release.

B. Indigency Determination - Municipal Courts

1. The defendant's first appearance in court is called the initial hearing. If the defendant is in custody, this hearing must be conducted promptly. If the defendant is not in custody, the initial hearing must be held within twenty (20) calendar days of his arrest. I.C. 35-33-7-1.
2. At the initial hearing, the judge is required by I.C. 35-33-7-5 to advise the accused of the following:
 - a. The right to appointed counsel if he or she is indigent;
 - b. The right to a speedy trial;
 - c. The amount and conditions of bail;

- d. The privilege against self-incrimination; and
 - e. The nature of the charge against him or her.
3. Although some judges determine eligibility for a public defender at the initial hearing, approximately one-half of the 15,344 new cases accepted by the Municipal Court Public Defender Office in 1990 were received through a referral by the judge at the initial hearing or at a subsequent proceeding for screening. The current referral procedure does not comply with the mandate of I.C. 35-33-7-6, which provides:

Prior to the completion of the initial hearing, the judicial officer shall determine whether a person who requests assigned counsel is indigent. If the person is found to be indigent, the judicial officer shall assign counsel to him. If jurisdiction over an indigent defendant is transferred to another court, the receiving court shall assign counsel immediately upon acquiring jurisdiction over the defendant. The court may review the finding of indigency at any time during the proceedings.

4. Since the creation of Municipal Court No. 11 as an initial hearing court, nearly all misdemeanor cases are scheduled for initial hearings in this court. Although having one court conduct all initial hearings has helped somewhat to standardize the policies regarding eligibility for a public defender, there is still considerable inconsistency in the indigency determination process. The two primary causes of this inconsistency are the lack of any written rules, policies, procedures or standards for the courts to follow, and the fact that the majority of court sessions in Municipal Court No. 11 are covered by a commissioner or a pro-tem judge who vary from day to day.
5. An attorney from the Municipal Court Public Defender Office is assigned to Municipal Court No. 11 for the purpose of interviewing persons referred to the Municipal Court Public Defender Office for screening. If the defendant is in custody and referred to that Office, he is usually interviewed by the attorney assigned to Municipal Court No. 11 in the lock-up on the fourth floor of the City-County Building after the referral from the court. These interviews are conducted in a large holding cell with other detainees present. Due to the lack privacy, it is impossible to offer any confidentiality to the accused. When it is not possible to interview the accused in the lock-up after the initial hearing due to the volume of referrals, it is the policy of the

Municipal Court Public Defender Office to interview the defendant within 48 hours of the initial hearing. If the person is not in custody and the Municipal Court Public Defender Office is appointed, the person is instructed to go to the interview office on the first floor and make an appointment.

6. In Class D felony cases, the initial hearings are held in Municipal Courts No. 6 and No. 15. The judges currently assigned to these courts generally determine indigency at the initial hearing and refer the case to the Municipal Court Public Defender Office.
7. The Municipal Court Public Defender Office estimates that 60-70% of all defendants in the Municipal Courts are determined to be indigent. Of the cases referred to the office for screening, approximately 90% are determined to be indigent and eligible for representation.
8. When the Municipal Court Public Defender Office determines that the accused is eligible for services, the Office accepts the case and provides representation without further judicial involvement. However, on occasion, some courts review the decision by that Office that the defendant is eligible for public defender services.
9. If the Municipal Court Public Defender Office determines that the defendant is not eligible for a public defender, the defendant is told that he or she has a right to a judicial review of the decision finding him or her ineligible for representation by a public defender, and that he or she should contact the court. However, because there is no uniform procedure or policy for providing a judicial review of a determination by the Public Defender Office that the defendant is ineligible for a public defender, the defendant must wait until his next appearance in court to raise this issue with the court.
10. The Municipal Court Public Defender Office uses the forms set forth in Appendix H attached hereto for eligibility screening. Although the client eligibility interview form and the income matrix based upon the poverty level set by the U.S. Health and Human Services Department are useful tools for determining "substantial hardship", the use of the calculation form poses several problems. The major deficiency is that the formula contained in this form results in automatic disqualification for public defender services if the person:
 - a. Has a net weekly income (average weekly income, including spousal income and disability payments, SS, AFDC, etc., minus child support and garnishments) in excess of 125% of the poverty level set by the Department of Health and Human Services;
 - b. Has more than \$7500 of equity in a home;

- c. Has more than \$1000 of equity in a vehicle; or
 - d. Has more than \$4000 of cash, savings or personal property.
11. The formula in the calculation form used by the Municipal Court Public Defender Office (See Appendix H) is also deficient for the following reasons:
- a. Spousal income is improperly considered as income of the accused;
 - b. Except for court-ordered child support payments and garnishments, no consideration is given to other expenses or liabilities, e.g., housing, utilities, food, medical expenses, employment expenses, child care, transportation, loan payments, debts, taxes; and
 - c. No consideration is given to the lack of liquidity of the real or personal property or to the cost of obtaining a loan.
12. Because reliance upon the criteria set forth above alone would violate the individualized determination of "substantial hardship" required by Indiana case law, the Municipal Court Public Defender Office has a policy of providing representation to a person who does not qualify under the formula in the calculation form if the interviewer determines that hiring private counsel would impose a substantial hardship to the person or his or her family. If the person does not qualify under the calculation form attached as Appendix H, and the interviewer determines that hiring private counsel would not impose a substantial hardship to the person or his or her family, the case is referred to the chief deputy public defender of the Municipal Court Public Defender Office for review prior to a determination that a person is not eligible for representation.

C. Indigency Determination - Superior Courts

- 1. The Superior Courts do not have a public defender office and do not fully utilize the pre-trial services of the Marion County Justice Agency. Thus, defendants in the Superior Courts are not screened for public defender eligibility prior to the initial hearing.
- 2. Superior Court judges generally make an indigency determination at the initial hearing as required by I.C. 35-33-7-6 based upon an oral examination of the defendant.
- 3. No records are kept by the Superior Courts or the public defenders indicating the percent of defendants that are found to be indigent and eligible for a

public defender. However, estimates from several judges and public defenders range from 60% to 80%.

4. There are no uniform policies or procedures for making an indigency determination after a thorough examination of the defendant's total financial situation, including a balancing of assets against liabilities and consideration of disposable income and other available resources reasonably available to the defendant after payment of fixed obligations to insure compliance with Indiana case law. See, Graves v. State (1st Dist. 1987), Ind. App., 503 N.E.2d 1258.

D. Recoupment of Public Defender Costs in Marion County

1. In 1989, the General Assembly authorized all trial courts to order the defendant to reimburse the county for the costs of court-appointed representation. See I.C. 33-9-11.5, attached hereto as Appendix I. The revenues collected from defendants are to be deposited to a non-reverting county supplemental public defender services fund that may be used to "supplement the provision for court appointed legal services and may not be used to replace other funding of court appointed legal services." I.C. 33-9-11.5-3.
2. Several of the courts in Marion County have initiated procedures for assessing and collecting costs of public defender services from defendants under I.C. 33-9-11.5. Due to the fact that there has not been sufficient time to review and evaluate the effectiveness of these procedures and policies and because the Commission believes that this issue is beyond the scope of its mission, no detailed recommendations regarding recoupment can be made in this report.

E. Cash Deposit Bail Forfeiture

1. Under I.C. 35-33-8-3.1 (attached hereto as Appendix J), the 10% of bail that is deposited with the clerk as a cash deposit is forfeited to the supplemental public defender fund if the defendant is represented by court-appointed counsel. The forfeiture statute makes no allowance for cases where the source of the 10% cash deposit is a friend or relative of the defendant. Thus, the automatic forfeiture provided in this statute poses serious due process problems which need to be addressed.
2. If strictly enforced, the cash deposit forfeiture statute will make it more difficult for a defendant to be able to borrow money for cash deposit bail because the money will not be returned. This will cause an increase in the

number of cases requiring appointment of a public defender because the defendant's ability to pay private counsel often depends upon whether he is released on bail prior to trial.

Recommendations Concerning Determination of Indigency

A. General Policies and Procedures Regarding the Determination of Eligibility

1. A determination of eligibility for public defender services should be made at the earliest possible stage of the proceedings. In order to implement this recommendation the initial screening for eligibility should be made by the Marion County Public Defender Office prior to the initial hearing. The initial screening should be based upon information received from the Marion County Justice Agency, a questionnaire and an interview.

The Marion County Public Defender Board should consult with the judiciary and the private bar and develop criteria, procedures and forms for the determination of indigency based upon the substantial hardship test, a consideration of the person's net disposable income, the estimated cost of obtaining private counsel considering the nature and number of the criminal charges, and the anticipated complexity of the defense. These policies should be consistent with Standard 5-7.3 of the ABA Criminal Justice Standards (See Appendix A) and should contain the following provisions:

- a. Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families in all cases where the right to counsel has been established by law.
 - b. Counsel should not be denied to any person merely because his or her friends or relatives have resources adequate to retain counsel or because he or she has posted or is capable of posting bond.
 - c. The fact that an accused on bail has been able to continue employment following his arrest should not be considered determinative of his or her ability to employ private counsel.
 - d. Safeguards to insure the confidentiality of information disclosed in the eligibility screening should be provided.
2. In order to make a preliminary determination of eligibility prior to the initial hearing, the Marion County Public Defender Office should determine whether the person is

- a. presumed to be eligible;
- b. presumed to be ineligible; or
- c. needs to be interviewed for an individualized determination of substantial hardship.

A cooperative agreement should be arranged between the Marion County Public Defender Office and the Pretrial Services Division of the Marion County Justice Agency to obtain information relevant to a person's eligibility for a public defender.

3. Every person in custody who indicates a desire to be represented by a public defender should be screened for eligibility at the earliest opportunity, but in no event later than 24 hours after arrest or within 48 hours of the request if the request is made after the initial hearing. Public defender services should begin immediately upon the determination of eligibility and include a personal interview with a public defender prior to the initial hearing, or within 24 hours if the eligibility decision is made after the initial hearing.
4. If a person is determined to be ineligible for a public defender, the person should be advised of his or her right to have a judicial review of this decision. If the person requests a judicial review, the Marion County Public Defender Office should forward the request to the court with non-privileged information relevant to the person's eligibility for a public defender. The courts should adopt policies and procedures for providing judicial review of non-eligibility at the initial hearing or within 10 days of the request if it is made after the initial hearing.
5. In order to expedite the processing of cases, prevent the denial of constitutionally mandated services, and avoid an appellate reversal for the denial of the right to counsel, public defender representation should be provided in close cases.
6. The Marion County Public Defender Office should establish an emergency hotline to receive telephone calls from persons in the Marion County Jail who need emergency medical assistance, have physical safety concerns, or need advice concerning critical proceedings that cannot wait for a meeting with a public defender, e.g., a request by a law enforcement officer that the person be in a line-up, give handwriting exemplars or body fluid samples, or assist in the investigation of another case.

7. A comprehensive management information system should be developed for the Marion County Public Defender Office which should include data on indigency, caseloads, staff attorney time, and case dispositions.

B. Criteria for the Determination of Eligibility

1. A defendant should be eligible to receive legal assistance based on the following factors:
 - a. The estimated cost of obtaining an adequate defense, including expert assistance, investigation, depositions, and other defense costs;
 - b. The nature of the criminal charges; and
 - c. The anticipated complexity of the defense.
2. To determine a defendants' eligibility for legal assistance the granting authority should consider the factors set forth in Appendix L attached hereto.
3. A person with an income less than 125% of the official poverty level as defined by the U.S. Department of Health and Human Services should be presumed to be indigent.

C. Payment by Defendant of Defense Costs

1. The following issues concerning orders to defendants under I.C. 33-9-11.5 to reimburse the county for the costs of providing defense representation, should be addressed by the courts:
 - a. The amount of staff and court time necessary to keep detailed time records in order to accurately determine the actual cost to the county of providing defense services to the accused;
 - b. The total cost of collecting payments from indigent defendants compared with the total revenues generated;
 - c. The problems inherent with conflicts of interest created between the Marion County Public Defender Office and the clients. See, e.g., Indiana State Bar Association Legal Ethics Committee Opinion No. 2 of 1990, attached hereto as Appendix M.

2. If a court contemplates ordering an indigent defendant to pay the costs of defense services under I.C. 33-9-11.5, the court should inform the defendant at the time counsel is appointed that:
 - a. The court may order the defendant at any stage of the prosecution to pay the cost of defense services provided;
 - b. The defendant has a right to an evidentiary hearing as to costs imposed and the extent of the burden that such an order would impose on the defendant;
 - c. Failure to comply with the order to pay defense costs could result in the revocation of probation if the failure to pay is determined to be a wilful refusal to pay; and
 - d. The order of payment has the effect of a civil judgment.
3. Before an indigent defendant is ordered to pay the cost of defense services, the court should make an individual determination that the defendant is presently able to pay the costs of defense services.
4. Courts should not use a fixed flat fee schedule for imposing orders to pay the costs of defense services under I.C. 33-9-11.5.
5. An order requiring an indigent to pay the costs of defense services should be supported by documentation of actual costs to the county for defense services provided.

D. Forfeiture of Cash Deposit Bail

1. The forms presently used by the Marion County Clerk's Office for cash deposit bail should be revised to inform the person posting a cash deposit that the money will not be returned if the defendant receives a public defender.
2. The courts should adopt local rules for cash deposit forfeiture under I.C. 35-33-8-3.1 to protect the rights of persons other than the defendant who post a 10% cash deposit for the defendant.

IV. APPEALS AND DEATH PENALTY APPEALS

A. APPEALS

Findings Concerning Appeals

1. In 1981 the Marion Circuit and Superior Courts issued an order creating the Marion County Criminal Appeal Panel to handle indigent appeals from the various courts of criminal or juvenile jurisdiction. Each of the 6 judges of the Criminal Division of the Superior Court as authorized to appoint 2 attorneys to the panel. The 12 panel attorneys were authorized to designate one of their members as chair for purposes of case assignment and court liaison. Richard Gilroy, Esq. has been the chair since 1981.
2. Appointments to the appellate panel are acknowledged to be a form of political patronage. The appeal attorneys all have the same political party affiliation as the judge who appoints them and are often active in support of that judge's re-election or financial contributions.
3. Appeals are assigned by the chair to the panel attorneys on a rotating basis. However, Mr. Gilroy reported that he sometimes assigns the most difficult and complex cases to the more experienced members of the panel. Monica Foster, Esq., one of those more experienced defenders advised the Commission that she felt compelled to recently resign from the panel because of the excessive workload. She also advised the Commission that until she heard the presentation of Mr. Gilroy, she was under the impression that the assignment of cases was made on the basis of a blind rotation.
4. In 1983 there were 110 appeals or 9.16 cases per attorney. In 1990, there were 192 appeals or 16 cases per attorney. Since the attorneys are not required to keep time records, it is difficult to determine the average number of hours spent per attorney on an appeal. However, Mr. Gilroy estimated that the average number of hours was 32. Ms. Foster estimated that she spent a minimum of 60 hours on each appeal.
5. In 1981, the compensation for part-time appeal attorneys was \$15,000, with an additional \$2,500 per year for the chair. The appeal attorneys are independent contractors and do not receive county employee benefits. The attorneys are currently paid \$18,000 per year. The chair receives an additional \$5,000. The compensation per case has declined from approximately \$1,637 in 1983 to \$1,120 in 1990.

6. There are no support services provided to the appeal attorneys, such as investigators, law clerks or secretaries. The attorneys do not receive any compensation or reimbursement for travel, telephone, or computer-assisted research.
7. There is an acute problem of lack of communication and personal contact between the client and the appellate attorneys. Due to a lack of support staff and absence of reimbursement for telephone and travel, the attorneys generally do not meet their clients. For example, Richard Gilroy estimated that he has met only 2 or 3 clients in the past 9 years.

Recommendations Concerning Appeals

1. The Marion County Public Defender Office should establish an appellate division to handle appeals with adequate funding to provide for office space, furniture, equipment, library and support staff, and should include secretaries, law clerks and investigators.
2. The twelve part-time contractual attorneys presently on the criminal appeal panel should be given the opportunity to become employees of the Marion County Public Defender Office.
3. New attorneys in the appellate division should be hired by the Marion County Public Defender on the basis of merit.
4. The Marion County Public Defender Office should establish a case-weighted system which assigns a value to each case using factors such as the length of the transcript and the number and complexity of the issues. Case assignments and contracts for conflicts cases should be based upon this system. Until a case-weighted system is established, the appeal caseload should be commensurate with the standards established by the National Advisory Commission on Criminal Justice Standards and Goals, endorsed by the American Bar Association. See Appendix N attached hereto.
5. Compensation for cases assigned outside the Marion County Public Defender Office (including cases so assigned by reason of a conflict of interest on the part of that Office) should be paid at the rate set from time to time by the Supreme Court of Indiana for the Public Defender of Indiana pursuant to I.C. 33-9-11-3. See Appendix E for the current fee schedule for the Public Defender of Indiana.
6. Compensation for appellate services should be commensurate with that of trial public defenders, as set forth in the Findings and Recommendations on Compensation and Workload for Trial Public Defenders and Support Staff, above.

B. DEATH PENALTY CASES

Findings Concerning Death Penalty Appeals

1. Since the reinstatement of the death penalty in 1977, sixty-five persons have been sentenced to death in Indiana. There are presently 51 persons on death row in Indiana. There have been two executions and one suicide. In eleven cases the conviction has been reversed or the death sentence vacated.
2. Of the 51 persons currently on death row, 14 have been sentenced from Marion County. Thirteen of the fourteen defendants sentenced to death from Marion County have been represented by a public defender.
3. An average of 5 death penalty requests are filed each year in Marion County. In 1990 the death penalty was requested in 5 cases.
4. Capital cases are different from any other criminal case for a number of reasons:
 - a. The jury selection process is unique;
 - b. The jury's role in the sentencing decision;
 - c. The unique body of capital case law which has developed in the past fifteen years;
 - d. The complexity of the rules regarding waiver and exhaustion of remedy;
 - e. The duty of defense counsel to investigate the entire life of the defendant for mitigation evidence;
 - f. The mitigation phase that involves issues of morality, ethics and religion; and
 - g. The nature of the punishment.
5. Due to the uniqueness and complexity of the law, the rapidity of change in the law, and the heightened level of appellate scrutiny in capital cases, there is a greater percentage of reversals for ineffective assistance of counsel in capital cases than any other type of case. Five Indiana cases have been reversed for ineffective assistance of counsel. One of these cases was from Marion County: Burris v. State (1990), Ind., 558 N.E.2d 1067. In another capital case resulting in a guilty plea in 1983, one Cedric Coleman received an 80 year sentence. On March 13, 1991, Judge Tranberg granted Coleman's post-conviction petition and vacated the sentence after making a finding that Coleman was induced to plead

guilty because of his public defender's lack of preparation to try the case as a capital case.

6. Counties in Indiana are eligible for 50% reimbursement from the Indiana Public Defender Commission for defense expenditures in capital cases if two attorneys are appointed and are each paid at the rate of \$75 per hour. No requests for reimbursement from the Indiana Public Defender Commission have been made by Marion County.
7. For the past several years, the judges of the Criminal Division of the Superior Court have appointed two public defenders to represent each indigent defendant charged with capital murder with no additional compensation or adjustment in caseload. In the past year, the Superior courts have begun to pay public defenders additional compensation for capital cases. However, the compensation rate has not been at the rate of \$75 per hour which is necessary to qualify for state reimbursement.
8. Although it is beyond the scope of this Commission's charge to determine whether the death penalty is imposed in a racially discriminatory manner in Marion County, the statistics set forth in Appendix O attached hereto raise concerns about the significance of the race of the victim in the decisions to charge and impose a death sentence.

Recommendations Concerning Death Penalty Appeals

1. The appointment and compensation of counsel should be made consistent with Criminal Rule 24. Attached hereto as Appendix P is proposed Criminal Rule 24.
2. Appeals in capital cases should not be assigned to the attorneys on the criminal appeal panel as part of their contract.
3. Counsel appointed in a capital case should be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceedings.
4. Attorneys appointed in capital cases should be compensated for actual time and services performed. Counsel should be reimbursed for reasonable incidental expenses, with periodic billing and payment during the course of the representation.
5. In death penalty cases, the Superior Court and the county should seek the available 50% reimbursement from the Indiana Public Defender Commission.

**American Bar Association
Section of Criminal Justice
Report To The House of Delegates -- Chapter 5:
Providing Defense Services,**

Appendix A

AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS

CHAPTER 5. PROVIDING DEFENSE SERVICES

TABLE OF CONTENTS

PART I. GENERAL PRINCIPLES	1
5-1.1. Objective	1
5-1.2. Systems for legal representation	1
5-1.3. Professional Independence	1
5-1.4. Supporting services	2
5-1.5. Training and professional development	2
5-1.6. Funding	2
PART II ASSIGNED COUNSEL	3
5-2.1. Systematic assignment	3
5-2.2. Eligibility to serve	3
5-2.3. Rotation of assignments, removal from roster and compelled service	3
5.2.4. Compensation and expenses	4
PART III. CONTRACT DEFENSE SERVICES	4
5-3.1. Use of contract for services	4
5-3.2. Contracting parties and procedures	4
5-3.3. Elements of the contract for services	4
PART IV. DEFENDER SERVICES	6
5-4.1. Chief defender and staff	6
5-4.2. Restrictions on private practice	6
5-4.3. Facilities; library	6
PART V. TYPES OF PROCEEDINGS AND QUALITY OF REPRESENTATION	6
5-5.1. Criminal cases	6
5-5.2. Collateral proceedings	7
5-5.3. Workload	7
5-5.4. Impact litigation	7
PART VI. STAGE OR PROCEEDINGS	8
5-6.1. Initial provision of counsel	8
5-6.2. Duration of representation	8
5-6.3. Removal	8
PART VII. ELIGIBILITY FOR ASSISTANCE	8
5-7.1. Eligibility; ability to pay partial costs	8
5-7.2. Reimbursement, notice and imposition of contribution	9
5-7.3. Determination of eligibility	9
PART VIII. OFFER AND WAIVER	9
5-8.1. Providing counsel to persons in custody	9
5-8.2. In-court waiver	10

PART I. GENERAL PRINCIPLES

5-1.1. Objective

The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public to the importance of this objective.

5-1.2. Systems for legal representation

(a) The legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.

(b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No programs should be precluded from representing clients in any particular type or category of case.

(c) Conditions may make it preferable to create a statewide system of defense.

(d) Where capital punishment is permitted in the jurisdiction, the plan should take into account the unique and time-consuming demands of appointed representation in capital cases. The plan should conform to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

5-1.3. Professional Independence

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-services components of defender systems should be governed by

such a board. Provisions for the size and manner of selection of board of trustees should include their independence. Board of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel, and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

5-1.4. Supporting services

The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services.

5-1.5. Training and professional development

The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.

5-1.6. Funding

Government has the responsibility to fund the full cost of quality legal representation for all eligible persons, as defined in standard 5-7.1. It is the responsibility of the organized bar to be vigilant in supporting the provision of such funding. The level of government that funds defender organizations, assigned-counsel programs or contracts for services depends upon which level will best insure the provision of independent, quality legal representation. Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services.

PART II. ASSIGNED COUNSEL

5-2.1. Systematic assignment

The plan for legal representation should include substantial participation by assigned counsel. That participation should include a systematic and publicized method of distributing assignments. Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assigned-counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.

5-2.2. Eligibility to serve

Assignments should be distributed as widely as possible among the qualified members of the bar. Lawyers licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be encouraged to submit their names for inclusion on the roster of attorneys from which assignments are made. Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards.

5-2.3. Rotation of assignments, removal from roster and compelled service

(a) As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

(b) The roster of lawyers should periodically be revised to remove those who have not provided quality legal representation or who have refused to accept appointments on enough occasions to evidence lack of interest. Specific criteria for removal should be adopted in conjunction with qualification standards.

(c) Counsel should not be required to accept assignment of cases.

5-2.4. Compensation and expenses

Assigned counsel should receive compensation at a reasonable hourly rate and should be reimbursed compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs.

PART III. CONTRACT DEFENSE SERVICES

5-3.1. Use of contracts for services

Contracts for services of defense counsel may be a component of the legal representation plan. Such contracts should ensure quality legal representation. The contracting authority should not award a contract primarily on the basis of cost. Contracts for defense services should comply with ABA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services.

5-3.2. Contracting parties and procedures

(a) The contracting authority and each contractor should be identified in the contract. Procedures for the award of contracts should be published by the contracting authority substantially in advance of the scheduled date of award.

(b) The contracting authority should ensure the professional independence of the contractor by means of a board of trustees, as provided in standard 5-1.3.

(c) The contracting parties should avoid provisions that create conflicts of interest between the contractor and clients.

5-3.3. Elements of the contract for services

(a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.

(b) Contracts for services should include, but not be limited to, the following subjects:

- (i) the categories of cases in which the contractor is to provide services;
- (ii) the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;
- (iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;
- (iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
- (v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;
- (vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;
- (vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
- (viii) limitations on the practice of law outside of the contract by the contractor;
- (ix) reasonable compensation levels and a designated method of payment;
- (x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;
- (xi) supervision, evaluation, training and professional development;
- (xii) provision of or access to an appropriate library;
- (xiii) protection of client confidences, attorney-client information and work product related to contract cases;
- (xiv) a system of case management and reporting;
- (xv) the grounds for termination of the contract by the parties.

PART IV. DEFENDER SYSTEMS

5-4.1. Chief defender and staff

Selection of the chief defender and staff should be made on the basis of merit. Recruitment of attorneys should include special efforts to employ women and members of minority groups. The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices. The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause. Selection of the chief defender and staff by judges should be prohibited.

5-4.2. Restrictions on private practice

Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.

5-4.3. Facilities; library

Every defender office should be located in a place convenient to the courts and be furnished in a manner appropriate to the dignity of the legal profession. A library of sufficient size, considering the needs of the office and the accessibility of other libraries, and other necessary facilities and equipment should be provided.

PART V. TYPES OF PROCEEDINGS AND QUALITY OF REPRESENTATION

5-5.1. Criminal cases

Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

5-5.2. Collateral proceedings

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

5-5.3. Workload

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept workloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

5-5.4. Impact litigation

(a) The legal representation plan should permit pursuit of litigation which affects:

- (i) substantial numbers of similarly situated clients of the program, or
- (ii) fundamental rights which cannot otherwise be effectively protected.

(b) Any such litigation should be undertaken only when it is in the best interests of the affected clients.

PART VI. STAGE OF PROCEEDINGS

5-6.1. Initial provision of counsel

Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel. Upon request, counsel should be provided to persons who have not been taken into custody but who are in need of legal representation arising from criminal proceedings.

5-6.2. Duration of representation

Counsel should be provided at every stage of the proceedings, including sentencing, appeal, certiorari and postconviction review. In capital cases, counsel also should be provided in clemency proceedings. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary.

5-6.3. Removal

Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused therefore should not occur over the objection of the attorney and the client.

PART VII. ELIGIBILITY FOR ASSISTANCE

5-7.1. Eligibility; ability to pay partial costs

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

5-7.2. Reimbursement, notice and imposition of contribution

(a) Reimbursement of counsel or the organization of governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.

5-7.3. Determination of eligibility

Determination of eligibility should be made by defenders, contractors for services, assigned counsel, or a neutral screening agency if confidentiality can be maintained, subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

PART VIII. OFFER AND WAIVER

5-8.1. Providing counsel to persons in custody

(a) A person taken into custody or otherwise deprived of liberty should immediately be informed, preferably by defense counsel, of the right to legal representation. An offer of counsel should be made in words easily understood, and it should be stated expressly that one who is unable to pay for representation is entitled to counsel.

(b) Custodial authorities should provide access to a telephone, the telephone number of the defender, assigned counsel or contract for services program, and any other means necessary to establish communication with a lawyer.

(c) The defender, assigned counsel or contract for services program should ensure that information on access to counsel is provided to persons in custody. An attorney or representative from the appropriate program should be available to respond promptly to a person in custody who requests the services of counsel.

5-8.2. In-court waiver

(a) The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.

(b) If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

**Ordinance Proposed
By
Indianapolis Bar Association
Commission on Public Defenders**

APPENDIX B

CITY-COUNTY GENERAL ORDINANCE NO. ____ 1991

A GENERAL ORDINANCE amending the Revised Code of the Consolidated city and County by adding a new chapter 286 entitled Marion County Public Defender Board and Agency.

BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE
CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA:

SECTION 1. The Revised Code of the Consolidated City and County be, and is hereby, amended by adding a new chapter 286 to read as follows:

CHAPTER 286 - Marion County Public Defender Board and Agency.

Section 286-1. Agency and Board Established.

This ordinance establishes the Marion County Public Defender Agency and the Marion County Public Defender Board for the purpose of providing legal representation to indigent defendants in criminal, juvenile, and child support matters.

Section 286-2. Definitions.

As used in this chapter:

"Agency" means the Marion County Public Defender Agency created by this chapter.

"Board" means the Marion County Public Defender Board created by this chapter.

"Indigent defendant" means a person who requests legal representation and whom a court finds to have insufficient assets or income to pay for legal representation without substantial hardship either to the person or the person's family.

COMMENT: The revision incorporates the Indiana law governing indigency determinations. The original definition of "indigent defendant" was contrary to ABA standards. Moreover, the definition was unconstitutional with respect to minors; minors have a constitutional

right to representation regardless of their parents' financial status. Courts may order minors' parents to reimburse the county for the cost of representation under Ind. Code § 33-9-11.5-1 et seq.

"Legal representation" means the services of an attorney provided to a defendant in a matter originating in a state court in Marion County involving (1) a person charged with a crime as defined in Indiana Code 35-41-1-6, (2) an act of delinquency as defined in Indiana Code 31-6-4-1, (3) a violation of a condition of probation established as a part of a sentence in a juvenile or criminal matter, (4) detention of a person subject to extradition to another jurisdiction, or (5) proceedings to collect unpaid child support pursuant to Indiana Code 31-2. The term includes services in connection with all pretrial, trial and appellate proceedings in which an indigent defendant has a right to counsel.

COMMENT: The definition of "legal representation" should not be read to preclude a public defender from filing a petition for post-conviction relief when such a petition is in the client's best interest.

Section 286-3. Public Defender Board Membership and Appointment.

a.) The Board shall consist of eleven (11) members. Two (2) members shall be appointed by the City-County Council. Two (2) members shall be appointed by the Mayor. Two (2) members shall be appointed by the Superior Court en banc. Two (2) members shall be elected by the members of the Indianapolis Bar Association. One (1) member shall be elected by the Marion County Bar Association. One (1) member shall be appointed by the presiding judge of the Municipal Court. One (1) member shall be appointed by the Community Service Council. No more than one (1) of the members appointed by the the Mayor, the City-County Council, and the Superior Court shall be from the same political party.

b.) The Board members appointed by the Mayor, the City-County Council, the Superior Court and the Indianapolis Bar Association shall serve staggered terms. To accomplish the staggered terms, the initial term of one of the members appointed by the Mayor, one of the members appointed by the Council, one of the members appointed by the Superior Court and one of the members appointed by the Indianapolis Bar Association shall expire on December 31, 1991. The appointing authorities shall designate which members' terms expire in December, 1991. The initial term for the other members shall expire on December 31, 1992.

c.) After the initial term of each member, appointments to the Board shall be for a two (2) year term. Members of the Board shall serve until their successor is appointed. A member of the Board may be removed for cause by a vote of the remaining Board members. An appointment to fill a vacancy shall be made by the authority appointing the member vacating the position and shall be for the remainder of the unexpired term.

d.) The Prosecuting Attorney and his deputies, Judges and members of their staff, and law enforcement officers are ineligible to serve as members of the Board.

e.) Board members shall serve without pay but may receive reimbursement for expenses if approved by the Board.

f.) A majority of the members of the Board exclusive of any vacant position shall constitute a quorum for the purpose of conducting the business of the Board. Decisions of the Board shall be approved by a majority of the members present.

Section 286-4. Powers and Duties of the Board.

The Board shall have the following powers and duties:

1. To provide competent legal representation for indigent defendants in criminal, juvenile, and child support matters.
2. To establish policies and procedures for indigency screening prior to judicial determinations of indigency. The policies and procedures shall be consistent with the Indiana law and with the definition of "indigent defendant" set out in this chapter.

COMMENT: The revision indicates that the Board should not make determinations regarding the right to counsel. The determination of the right to counsel is a judicial function.

3. To review an agency determination of ineligibility for legal representation when requested to do so by the affected person.

COMMENT: The revision provides for Board review of an initial screening determination of ineligibility.

4. To employ counsel to represent the Board, or a Board member or agent in any action against the Board to compel representation of a defendant determined by the Board to be not indigent.
5. To establish policy and procedure for the efficient operation of the Agency and the achievement of the objective of providing competent and independent legal representation for indigent defendants.
6. To employ a chief public defender who shall be an attorney admitted to the practice of law in the state of Indiana to serve as the chief administrative officer of the Agency.
7. To recommend an annual operating budget for the Agency and thereafter to monitor expenditures of funds by the Agency.

8. To authorize the chief public defender to employ or contract with attorneys, investigators, paralegals and clerical employees as necessary and consistent with the budget approved by the City-County Council based on merit without consideration of political affiliation.

COMMENT: The revision makes clear that the Board has no authority to hire any staff other than the chief public defender.

9. To receive and apply funds from grants, gifts, bequests and payments from persons served to the purposes of the Agency.
10. To prepare and submit to the Council and the general public an annual report on the operation of the Agency.
11. To elect a chairman and other appropriate officers from the membership of the Board.
12. To prepare and submit to the Council a comprehensive plan for the provision of legal representation to indigent defendants in Marion County. The comprehensive plan shall, at a minimum, provide for:
 - a. An indigency screening program to allow a determination of indigency of a person prior to the provision of services by the Agency to provide legal representation to an indigent defendant at the earliest possible point.
 - b. The legal representation of an indigent defendant by the same attorney or attorneys through the pendency of a matter to the greatest extent possible.
 - c. The use of qualified attorneys who will volunteer to provide legal representation to one or more indigent defendants without charge to the greatest extent possible.
 - d. Agency staff professional development and continuing legal education.
 - e. Formal or informal agreements with the Marion County Prosecutor and law enforcement agencies establishing simplified procedures for expediting discovery and other communications with respect to pending cases.
 - f. Utilization of all available sources of non-governmental funding including but not limited to payment or repayment under Ind. Code § 33-9-11.5-1 et seq. for services rendered to clients.
 - g. Periodic reevaluation of the operation of the Agency and the accomplishment of its purpose.

Section 286-5. Retention of Existing Public Defenders.

The Board shall initially offer employment or a contract for the provision of legal representation to each attorney acting as a public defender in the Marion County Municipal Court Criminal Division and the Marion County Superior Court Criminal, Juvenile and Title IVD Divisions on the effective date of this ordinance.

Section 286-6. Restriction on the Law Practice of Public Defenders.

Attorneys employed by the Board on a full time basis shall have as a condition of their continued employment that they do not practice law except as an employee of the Board.

COMMENT: Subparts (b) and (c) were unworkable as written. The Board should adopt restrictions on the practice of law by attorneys employed on a part time basis or on a contract for personal services.

SECTION 2. Construction. Any term defined in this chapter by reference to a state statute shall have the same meaning whenever used in this chapter unless clearly inapplicable by the context in which it is used. Any reference to a state statute shall mean the statute as amended from time to time, or any similar statutory provision that may supercede it relating to the same or similar subject matter.

SECTION 3. Severability. Should any section, paragraph, sentence, clause or any other portion of this ordinance be declared by a Court of competent jurisdiction to be invalid for any reason, the remaining provisions shall not be effected, if and only if such remaining provisions can, without the invalid provision or provisions, be given the effect intended by the council in adopting this ordinance. To this end the provisions of this ordinance are severable.

SECTION 4. Effective Date. This ordinance shall be in full force and effect from and after _____ 1991.

The foregoing was passed by the City-County Council this ___ day of _____ 1991, at ___ p.m.

ATTEST:

President

Clerk of the City-County Council

Presented by me to the Mayor this ___ day of _____, 1991 at 10:00 a.m.

Clerk of the City-County Council

Approved and signed by me this ___ day of _____, 1991.

Mayor

**House Enrolled Act No. 1963
107th Indiana General Assembly,
First Session (1991)
(County Public Defender Boards)**

Appendix C

First Regular Session 107th General Assembly (1991)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in this style type, and deletions will appear in this style type.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in this style type. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

HOUSE ENROLLED ACT No. 1963

AN ACT to amend the Indiana Code concerning courts and court officers.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 33-9-15 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 15. County Public Defender Boards

Sec. 1. This chapter does not apply to a county that:

- (1) contains a consolidated city or a county that contains only two (2) second class cities; or**
- (2) has a population of at least:**
 - (A) two hundred fifty thousand (250,000) but not more than four hundred fifty thousand (450,000);**
 - or**
 - (B) one hundred fifty-five thousand (155,000) but not more than two hundred twenty thousand (220,000).**

Sec. 2. As used in this chapter, "board" refers to a board established in an ordinance under section 3 of this chapter.

Sec. 3. (a) A county executive may adopt an ordinance establishing a county public defender board consisting of three (3) members. The county executive shall appoint one (1) member. The judges who exercise felony or juvenile jurisdiction in the county shall appoint by majority vote the other two (2) members.

(b) The members appointed by the judges may not be from the same political party. The members must be persons who have demonstrated an interest in high quality legal representation for indigent persons. However, a member may not be a city, town, or county attorney, a law enforcement officer, a judge, or a court employee.

(c) Each member of the board serves a three (3) year term beginning with the date of the member's appointment. A member appointed to fill a vacancy holds office for the remainder of the previous member's term. If a successor has not been appointed by the end of a member's three (3) year term, the member continues in office until the member's successor takes office.

(d) The members shall, by a majority vote, elect one (1) member to serve as chairman.

(e) Meetings shall be held at least quarterly and may be held at other times during the year at the call of the:

- (1)** chairman; or
- (2)** other two (2) members.

(f) A county executive may terminate the board by giving at least ninety (90) days written notice to the judges described in subsection (a).

Sec. 4. A member is entitled to reimbursement from the county for traveling expenses and other expenses actually incurred in connection with the member's duties to the same extent as is provided to a state employee for traveling expenses and other expenses under the state travel policies and procedures established by the department of administration and approved by the budget agency.

Sec. 5. The board shall prepare a comprehensive plan that must include at least one (1) of the following methods of providing legal defense services to indigent persons:

- (1)** Establishing a county public defender's office.
- (2)** Contracting with an attorney, a group of attorneys, or a private organization.
- (3)** Utilizing an assigned counsel system of panel attorneys for case-by-case appointments under

section 9 of this chapter.

Sec. 6. (a) If a county public defender's office is established under this chapter, the board shall do the following:

- (1) Recommend to the county fiscal body an annual operating budget for the county public defender's office.**
- (2) Appoint a county public defender.**
- (3) Submit an annual report to the county executive, the county fiscal body, and the judges described in section 3 of this chapter regarding the operation of the county public defender's office including information relating to caseloads and expenditures.**

(b) A county public defender shall be appointed for a term not to exceed four (4) years and may be reappointed. The county public defender may be removed from office only upon a showing of good cause. An attorney must be admitted to the practice of law in Indiana for at least two (2) years before the attorney is eligible for appointment as a county public defender.

Sec. 7. A county public defender shall do the following:

- (1) Maintain an office as approved by the board.**
- (2) Hire and supervise staff necessary to perform the services of the office after the staff positions are recommended by the board and approved by the county executive and the fiscal body.**
- (3) Keep and maintain records of all cases handled by the office and report at least annually to the board concerning the operation of the office, costs, and projected needs.**

Sec. 8. (a) A county public defender may contract with an attorney, a group of attorneys, or a private organization to provide legal representation under this chapter.

(b) The board shall establish the provisions of the contract under this section.

(c) The county fiscal body shall appropriate an amount sufficient to meet the obligations of the contract.

Sec. 9. The board may establish an assigned counsel system of panel attorneys to provide legal representation under this chapter that shall operate as follows:

- (1) The board shall gather and maintain a list of attorneys qualified to represent indigent defendants.**
- (2) Upon the determination by a court that a person**

is indigent and entitled to legal representation at public expense, the court shall appoint an attorney to provide the representation from the list maintained by the board.

(3) An attorney appointed to provide representation under this section may request authorization from the judge hearing the case for expenditures for investigative services, expert witnesses, or other services necessary to provide adequate legal representation.

(4) An attorney appointed to provide representation under this section is entitled to receive compensation and reimbursement for budgeted expenses by submitting a voucher to the court. Upon approval of the voucher by the appropriate judge, the voucher shall be presented to the county auditor who shall process the claim as other claims against county funds are processed.

(5) An attorney appointed to provide representation under this section shall, upon completion of representation, report to the board information regarding the case disposition.

Sec. 10. This chapter does not prevent a court from appointing counsel other than counsel provided for under the board's plan for providing defense services to an indigent person when the interests of justice require. A court may also appoint counsel to assist counsel provided for under the board's plan as co-counsel when the interests of justice require.

Sec. 11. A county public defender, a contract attorney, or counsel appointed by the court to provide legal defense services to indigent persons may not be a partner or employee at the same law firm that employs the county's prosecuting attorney or a deputy prosecuting attorney in a private capacity.

**Public Defender Caseloads
In
Marion County Superior Courts
1984 - 1990**

APPENDIX D

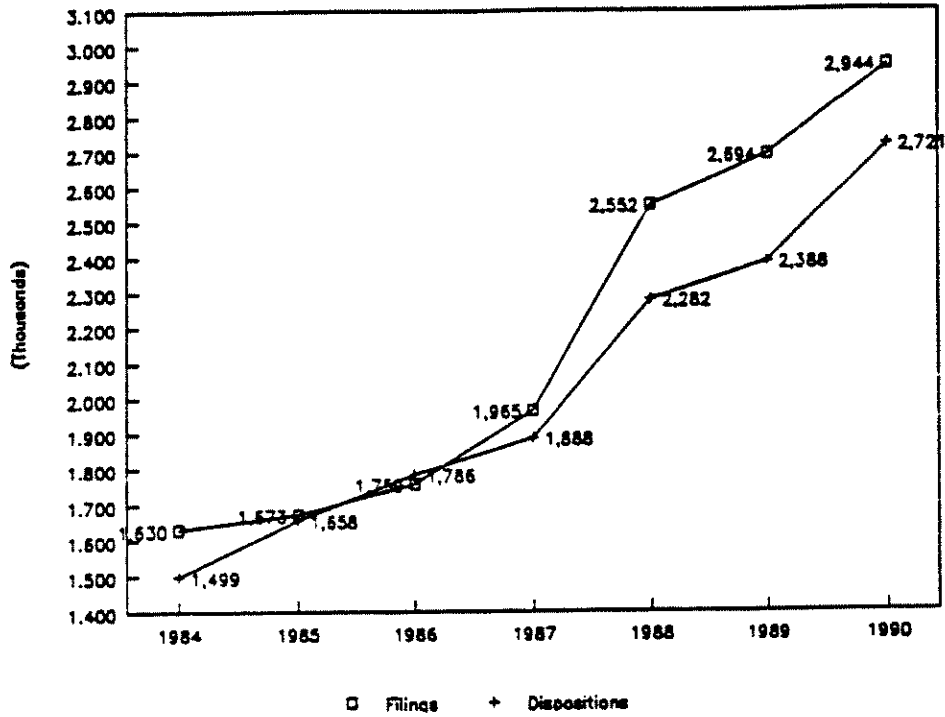
**FELONY CASE FILINGS
MARION SUPERIOR COURT**

	1984	1985	1986	1987	1988	1989	1990
SUPERIOR COURT CRIMINAL							
Crim Div 1	255	252	300	307	497	464	557
Crim Div 2	266	287	301	300	352	404	402
Crim Div 3	258	300	250	350	350	458	517
Crim Div 4	296	318	288	330	427	437	479
Crim Div 5	268	265	308	341	472	457	466
Crim Div 6	287	251	312	337	454	474	523
TOTAL FILINGS	1,630	1,673	1,759	1,965	2,552	2,694	2,944
AVERAGE PER COURT	272	279	293	328	425	449	491

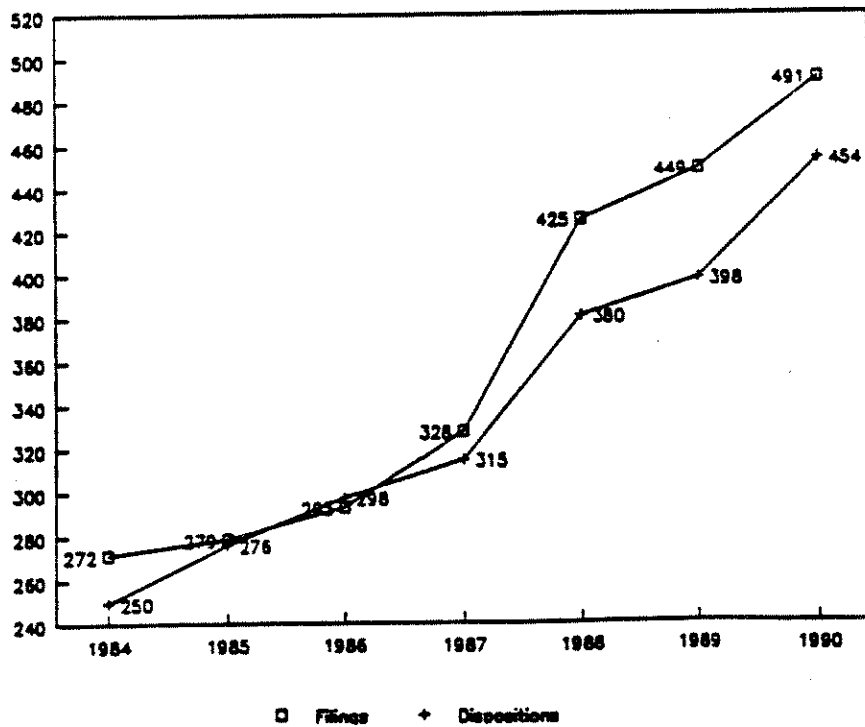
**FELONY CASE DISPOSITIONS
MARION SUPERIOR COURT**

	1984	1985	1986	1987	1988	1989	1990
SUPERIOR COURT CRIMINAL							
Crim Div 1	234	311	306	330	416	479	513
Crim Div 2	254	313	316	236	342	394	410
Crim Div 3	241	240	299	345	292	307	505
Crim Div 4	260	298	293	298	369	358	436
Crim Div 5	262	224	281	331	414	381	408
Crim Div 6	248	272	291	348	449	469	449
TOTAL DISPOSITIONS	1,499	1,658	1,786	1,888	2,282	2,388	2,721
AVERAGE PER COURT	250	276	298	315	380	398	454

**FELONY FILINGS and DISPOSITIONS FOR ALL COURTS
MARION SUPERIOR COURT**



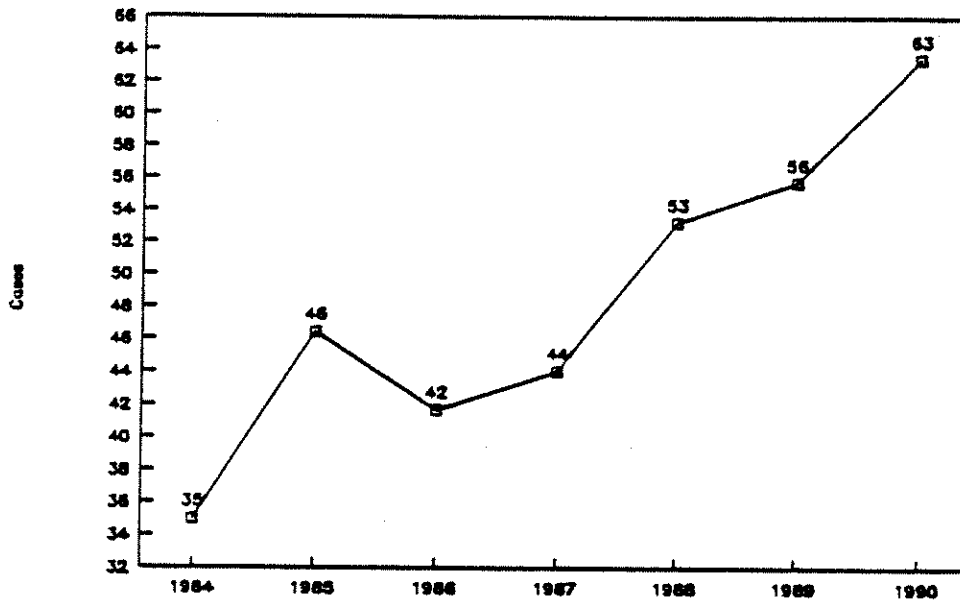
**AVERAGE FELONY FILINGS and DISPOSITIONS PER COURT
MARION SUPERIOR COURT**



**PUBLIC DEFENDER CASELOADS
MARION SUPERIOR COURT**

	1984	1985	1986	1987	1988	1989	1990
Total Dispositions	1,499	1,658	1,786	1,888	2,282	2,388	2,721
Est. Indigency Rate	70%	70%	70%	70%	70%	70%	70%
Est. of Public Defender Cases	1,049	1,161	1,250	1,322	1,597	1,672	1,905
Number of Public Defenders	30	30	30	30	30	30	30
Ave. Caseload Per Public Defender	35	46	42	44	53	56	63

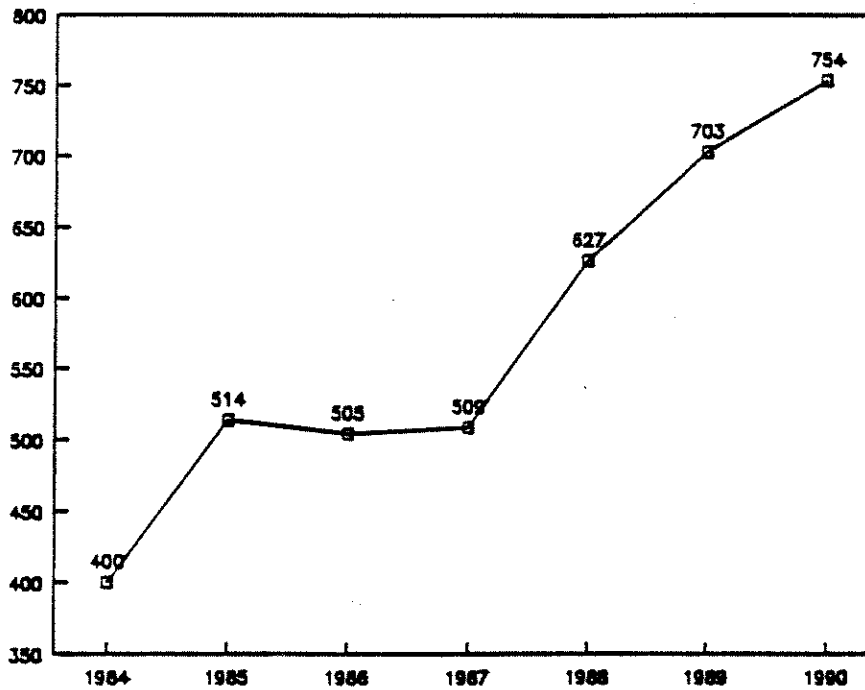
**AVERAGE CASELOAD PER PUBLIC DEFENDER
MARION SUPERIOR COURT**



**JUVENILE FILINGS and PUBLIC DEFENDER CASELOADS
MARION SUPERIOR COURT**

	1984	1985	1986	1987	1988	1989	1990
Public Defender Office Caseload	1,200	1,542	2,018	2,035	2,507	2,812	3,015
Number of Attorneys	3	3	4	4	4	4	4
Ave. Caseload Per Public Defender	400	514	505	509	627	703	754
Total Filings	3,598	3,300	4,620	3,975	5,070	5,655	6,165

**AVERAGE PUBLIC DEFENDER CASELOAD
MARION SUPERIOR JUVENILE COURT**



**Indiana Supreme Court
Approved Schedule of Minimum Fees
For Legal Services Of
The Public Defender of Indiana (1990)**

APPENDIX E

SUPREME COURT-APPROVED
SCHEDULE OF MINIMUM FEES FOR LEGAL SERVICES
OF THE PUBLIC DEFENDER OF INDIANA
(APPLICABLE TO PAUPER COUNSEL
APPOINTED IN VENUED CASES)
[Pursuant to I.C. 33-9-11-3]

The reasonable fee for legal services in trial and appellate cases for which fees are charged to the appointing county shall be determined on the basis of hours required to perform the service. Since criminal cases vary greatly in the time and labor required, depending upon complexity of evidence, legal issues, and other matters, a flat fee system is not workable and the appointing court should receive a bill which clearly states the service performed, the expenses incurred, and the reasons for same.

Non-Capital Cases:

All out-of-court work (client consultation, legal research, witness interviewing, legal drafting, et al.) shall be billed at Forty Dollars (\$40.00) per hour, with supporting documentation as to time spent. Dead time will be billed where delay was not due to the Public Defender.

For court appearances and hearings, the rate of compensation shall be Fifty Dollars (\$50.00) per hour, with supporting documentation as to time spent.

Trial work before a jury will be billed at Three Hundred Fifty Dollars (\$350.00) per day or part thereof.

Capital Cases:

All attorney time in court or out-of-court will be billed at Seventy-Five Dollars (\$75.00) per hour with supporting documentation as to time spent.

TRAVEL AND REIMBURSEMENT

Use of an automobile for the client's business shall be compensated at the rate established by the State Department of Administration and approved by the State Budget Agency. Costs and expenses incurred on the client's behalf shall be reimbursed where said costs were reasonably necessary to representation of the client. Charges for pre-authorized experts, accountants, investigators, medical doctors, and similar items will be borne by the county. Lodging and meals when traveling on the client's business are also reimbursable but limited to the costs recompensable by the State for such expenses plus the employee's salary for travel time.

Approved by me this 5th day of December, 1990.

Randall T. Shepard
Randall T. Shepard, Chief Justice
Indiana Supreme Court

**Current Fee Schedule Maximums
For Public Defender Services
Recommended By The
Indianapolis Bar Association
Commission on Public Defenders**

APPENDIX F

**RECOMMENDED 1991 FEE SCHEDULE MAXIMUMS
FOR PUBLIC DEFENDER SERVICES**

Murder	\$7,500
Class A Felony	5,000
Class B Felony	4,000
Class C Felony	3,500
Class D Felony	1,500
Misdemeanor	500
Juvenile	500
Mental Health	200

**Support Staff To Attorney Ratios
For Public Defenders
Recommended By The
Indianapolis Bar Association
Commission on Public Defenders**

APPENDIX G

**RECOMMENDED SUPPORT STAFF TO ATTORNEY RATIOS
FOR PUBLIC DEFENDERS**

Paralegal -- Felony	One for every four attorneys
Paralegal -- Misdemeanor	One for every five attorneys
Paralegal -- Juvenile	One for every four attorneys
Investigator -- Felony	One for every four attorneys
Investigator -- Misdemeanor	One for every six attorneys
Investigator -- Juvenile	One for every six attorneys
Law Clerk -- Appeal	One for every two attorneys
Secretary -- Felony	One for every four attorneys
Secretary -- Misdemeanor	One for every six attorneys
Secretary -- Juvenile	One for every five attorneys
Interviewer	One for every 1,500 cases

**Municipal Court Public Defender Office
Indigency Screening Form**

APPENDIX H

CLIENT ELIGIBILITY INTERVIEW

NAME _____ CAUSE NO. _____

ADDRESS _____ PHONE (H) _____ (W) _____

CITY _____ STATE _____ ZIP _____ NCD. _____

GALLERY NUMBER _____ APPOINTMENT DATE _____

BOOKING DATE _____ CHARGES _____

DATE OF BIRTH _____ AGE _____ SSN _____

1. Do you pay court ordered child support? Yes _____ No _____

Name of child _____ age _____ Amt. _____

Name of child _____ age _____ Amt. _____

Total court ordered child support _____ (A)

2. How many people do you support excluding children you pay court orderd child support? _____

Name _____ Relationship _____

Name _____ Relationship _____

3. Where do you work? _____

address _____

How much do you make per hour? _____

How many hours do you work per week? _____

What is your average weekly gross income? _____ (B)

Excluding court ordered child support, How much are you

garnished per week? _____ (C)

4. Are you married and living together? Yes _____ No _____

Where does your spouse work? _____

How many hours per week does your spouse work? _____

What is the average weekly gross income of your spouse?

_____ (D)

How much court ordered child support does you spouse pay?

_____ (E)

How much is your spouse garnished per week? _____ (F)

5. If you, your wife or any dependants receive income from any of the following sources, excluding disability payments, please circle the source and state the amount you receive per week: Social Security, Welfare, Pension, Workmen's Comp., Unemployment, Child Support Amt per week _____ (G)

6. Do you own a residential property? If yes, please answer the following:

Where is the property located? _____

What is the value? _____ Loan amount due? _____

What is the equity? _____ (H)

7. Do you own an automobile, truck or motorcycle? Yes ___ No ___

If yes, please answer the following:

What is the make and year of the vehicle(s) _____

What is the value? _____ Loan amount due? _____

What is the equity? _____ (I)

8. Do you have a savings account, checking account or cash on hand? If so, please state the amounts for each.

Amount in Savings account? _____

Amount in Checking account? _____

Cash on hand? _____

Total _____ (J)

9. Do you own any other personal property? If so, please identify what you own and what the value is: _____
_____ (K)

I swear and affirm under the penalties of perjury that the foregoing representations are true and accurate.

DATE _____ Signature
_____ Printed
Petitioner

Subscribed and sworn to before me, a Notary Public in and for the State of Indiana, County of Marion.

My Commission Expires: _____ NOTARY PUBLIC
_____ PRINTED
Resident of Marion County

PLEASE READ CAREFULLY

You have been charged with one or more criminal offenses. You are entitled to certain rights as guaranteed by the Constitution of the State of Indiana, the Constitution of the United States of America, as well as certain statutory rights. Among them are the following:

1. Right to be told of the charges against you and the possible penalty which can be imposed.
2. Right to trial by jury.
3. Right to remain silent at all times.
4. Right to confront and cross-examine your accusers and witnesses against you.
5. Right to call your own witnesses.
6. Right to be represented by a lawyer.
7. Right to appeal a conviction of one or all charges against you.

INTERVIEWER:

CLIENT:

FACTS

Lined area for writing facts.

INTERVIEW

I. Preliminary

A. Verify Appointment

1. Ask for court card.
 - a. Check to see if PD stamped on back
 - b. If not, check computer
 - c. If appointed, stamp card with interview stamp and begin interview

2. If from Court 4, 5, 10, 15, 14, 16 or Judge Frank, have them fill out a Client Eligibility Interview questionnaire and apply the following criteria in determining eligibility in the calculation portion of the questionnaire.
 - a.

NO. OF DEP.	HHS POVERTY LEVEL	X 125%	WEEKLY	20 HOURS	40 HOURS
1	6,280	7,850	150.96	7.54	3.77
2	8,420	10,525	202.40	10.12	5.06
3	10,560	13,200	253.84	12.69	6.34
4	12,700	15,875	305.28	15.26	7.63
5	14,840	18,550	356.73	17.84	8.91
6	16,980	21,225	408.17	20.40	10.20
7	19,120	23,900	459.62	22.98	11.49
8	21,260	26,575	511.05	25.55	12.77
9	24,000	30,000	576.92	28.84	14.42
10	26,140	32,675	628.36	31.41	15.70

For each additional dependant add the following:

2,140	2,675	51.44	2.57	1.28
-------	-------	-------	------	------

- b. If not eligible file Notice to Court with the appropriate court.

 3. If a defendant's case is in Municipal Court 15, and they come to our office, **THEY ARE TO BE SCREENED REGARDLESS OF WHETHER OR NOT THE COURT HAS REFERRED THEM TO US.**

CALCULATION

THE FOLLOWING IS TO BE FILLED OUT BY THE PUBLIC DEFENDER'S OFFICE

1. Maximum income allowed for eligibility based upon support of _____ dependants. _____
2. Average weekly income _____ (B) + (D) + (G)
3. Child support obligation per week _____ (A) + (E)
4. Garnishment per week _____ (C) + (F)
5. Average net weekly income _____
6. Does the amount in calculation five exceed the amount in calculation one? Yes _____ No _____
7. Does the amount given at (H) exceed 7500? Yes _____ No _____
8. Does the amount given at (J) exceed 1000? Yes _____ No _____
9. Does the amount given at (J) when added to the amount given at (I) and (K) exceed 4000? Yes _____ No _____
10. If, at any time the answer to either questions 6, 7, 8, or 9 is "Yes", then the defendant is not eligible for the services of the public defender.

The foregoing petitioner is:

_____ eligible
_____ not eligible
for appointment of a pauper counsel

DATE: _____

INTERVIEWER: _____

**County Supplemental Public Defender
Services Fund
I. C. 33-9-11.5**

APPENDIX I

Chapter 11.5. Supplemental Funding for Public Defender Services

- 33-9-11.5-1 Supplemental public defender services fund; establishment
- 33-9-11.5-2 Appropriation
- 33-9-11.5-3 Use of fund
- 33-9-11.5-4 Reversion of money in fund
- 33-9-11.5-5 Multiple court appointed legal service programs
- 33-9-11.5-6 Payment of costs by defendant
- 33-9-11.5-7 Determination of ordering payment of costs
- 33-9-11.5-8 Order for costs as a civil judgment; relief from payment
- 33-9-11.5-9 Collection and deposit of fees

33-9-11.5-1 Supplemental public defender services fund; establishment

Sec. 1. The supplemental public defender services fund is established in each county. The fund consists of amounts deposited under section 9 of this chapter. *As added by P.L.167-1987, SEC.7. Amended by P.L.284-1989, SEC.1.*

33-9-11.5-2 Appropriation

Sec. 2. The fiscal body of the county shall appropriate money from the fund to supplement and provide court appointed legal services to qualified defendants. *As added by P.L.167-1987, SEC.7.*

33-9-11.5-3 Use of fund

Sec. 3. The supplemental public defender services fund may be used only to supplement the provision for court appointed legal services and may not be used to replace other funding of court appointed legal services. *As added by P.L.167-1987, SEC.7.*

33-9-11.5-4 Reversion of money in fund

Sec. 4. Any money remaining in the fund at the end of the calendar year does not revert to any other fund but continues in the supplemental public defender services fund. *As added by P.L.167-1987, SEC.7.*

33-9-11.5-5 Multiple court appointed legal service programs

Sec. 5. A county may not have more than one (1) program providing court appointed legal services in the county, unless the fiscal body of the county agrees to allow additional court appointed legal services programs in the county. *As added by P.L.167-1987, SEC.7.*

33-9-11.5-6 Payment of costs by persons

Sec. 6. (a) If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay the costs of representation under section 7 of this chapter, the court shall require payment by the person or the person's parent, if the person is a child alleged to be a delinquent child, of the following costs in addition to other costs assessed against the person:

- (1) Reasonable attorney's fees, if an attorney has been appointed for the person by the court.
- (2) Costs incurred by the county as a result of court appointed legal services rendered to the person.

(b) The clerk of the court shall deposit costs collected under this section into the supplemental public defender services fund established under section 1 of this chapter. *As added by P.L.167-1987, SEC.7. Amended by P.L.284-1989, SEC.2.*

33-9-11.5-7 Determination of ordering payment of costs

Sec. 7. (a) If a defendant or a child alleged to be a delinquent child is receiving publicly paid representation, the court shall consider:

- (1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated;
- (2) the person's income;
- (3) the person's liabilities; and
- (4) the extent of the burden that payment of costs assessed under section 6 of this chapter would impose on the person and the dependents of the person.

(b) If, after considering the factors described in subsection (a), the court determines that the person is able to pay the costs of representation, the court shall enter a finding that the person is able to pay those additional costs. *As added by P.L.167-1987, SEC.7. Amended by P.L.284-1989, SEC.3.*

33-9-11.5-8 Order for costs as a civil judgment; relief from payment

Sec. 8. An order for costs assessed under section 6 of this chapter is a civil judgment subject to the exemptions allowed debtors under IC 34-2-28-1. At any time after entry of the order, the defendant may petition the court that has entered the order for relief from payment. The court may release the defendant from payment of all or a part of the payment required by the order if the court finds that payment would impose a hardship upon the defendant or dependents of the defendant. *As added by P.L.167-1987, SEC.7.*

33-9-11.5-9 Collection and deposit of fees

Sec. 9. Fees assessed under section 6 of this chapter shall be collected by the program providing court appointed legal services in the county. These fees shall be deposited in the supplemental public defender services fund established under section 1 of this chapter. *As added by P.L.167-1987, SEC.7.*

Cash Deposit Bail Forfeiture
I. C. 35-33-8-3.1

APPENDIX J

Chapter 8. Bail and Bail Procedure

35-33-8-3	Repealed
35-33-8-3.1	Bail; conditions
35-33-8-5	Alteration or revocation of bail or orders for release on personal recognizance
35-33-8-7	Failure to appear; arrest warrant; payment of unsatisfied civil action judgment from bond; forfeiture of remainder; judgment; transfer of money to common school fund; deposit return
35-33-8-8	Bond in criminal case; payment of unsatisfied civil action judgment from same transaction; forfeiture of remainder

35-33-8-3 Repealed

(Repealed by P.L.1-1990, SEC.341).

35-33-8-3.1 Bail; conditions

Sec. 3.1. (a) The court may admit the defendant to bail and impose any of the following conditions to assure the defendant's appearance at any stage of the legal proceedings:

(1) Require the defendant to execute a bail bond with sufficient solvent sureties or to deposit cash or securities in an amount equal to the bail, or to execute a bond secured by real estate in the county, where the true tax value (as determined by IC 6-1.1-1-3) less encumbrances is at least equal to the amount of the bail. The defendant must also pay the fee required by subsection (d).

(2) Require the defendant to execute a bail bond by depositing cash or securities with the clerk of the court in an amount not less than ten percent (10%) of the bail. A portion of this deposit, not to exceed ten percent (10%) of the monetary value of the deposit or fifty dollars (\$50), whichever is the lesser amount, may be retained as an administrative fee. The clerk shall also retain from the deposit the fee required by subsection (d). If any assigned counsel represents the defendant and there are publicly paid costs of representation, the deposit (less the fees retained by the clerk) shall be retained by the clerk and disposed of in accordance with subsection (b). A defendant admitted to bail

under this subdivision must be notified by the court or clerk that the defendant's deposit may be forfeited under section 7 of this chapter, or retained under subsection (b).

(3) Impose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release.

(4) Require the defendant to refrain from any direct or indirect contact with an individual.

(5) Place the defendant under the reasonable supervision of a probation officer or other appropriate public official.

(6) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. The supervisor shall maintain reasonable contact with the defendant in order to assist the defendant in making arrangements to appear in court and, where appropriate, shall accompany the defendant to court. The supervisor need not be financially responsible for the defendant.

(7) Release the defendant on personal recognizance where the defendant shows little risk of nonappearance.

(8) Impose any other reasonable restrictions designed to assure the defendant's presence in court.

(b) Within thirty (30) days after disposition of the charges against the defendant, the court that admitted the defendant to bail shall order the clerk to remit the difference, if any, between the amount of the deposit made under subsection (a)(2) (less the fees retained by the clerk) and the publicly paid costs of representation, if any, to the defendant. The portion of the deposit (less the fees retained by the clerk) that is not remitted to the defendant shall be

deposited by the clerk in the supplemental public defender services fund established under IC 33-9-11.5.

(c) For purposes of subsection (b), "disposition" occurs when the indictment or information has been dismissed, or the defendant has been acquitted or convicted of the charges.

(d) Except as provided by subsection (e), the clerk of the court shall:

- (1) collect a fee of five dollars (\$5) for each bond or deposit under subsection (a)(1); and
- (2) retain a fee of five dollars (\$5) from each deposit under subsection (a)(2).

The clerk of the court shall semiannually remit these fees to the board of trustees of the public employees' retirement fund for deposit into the special death benefit fund. The fee required by subdivision (2) is in addition to the administrative fee retained under subsection (a)(2). This subsection expires December 31, 1993.

(e) With the approval of the clerk of the court, the county sheriff may collect the bail and fees required by subsection (d). The county sheriff shall remit the bail to the clerk of the court by the following business day and remit monthly the five dollar (\$5) special death benefit fee to the county auditor. *As added by P.L.1-1990, SEC.342.*

35-33-8-5 Alteration or revocation of bail or orders for release on personal recognizance

Sec. 5. (a) Upon a showing of good cause, the state or the defendant may be granted an alteration or revocation of bail by application to the court before which the proceeding is pending. In reviewing a motion for alteration or revocation of bail, credible hearsay evidence is admissible to establish good cause.

(b) When the state presents additional evidence relevant to a high risk of nonappearance, based on the factors set forth in section 4(b) of this chapter, the court may increase bail.

(c) When the defendant presents additional evidence of substantial mitigating factors, based on the factors set forth in section 4(b) of this chapter, which reasonably suggests that the defendant recognizes the court's authority to bring him to trial, the court may reduce bail.

(d) The court may revoke bail or an order for release on personal recognizance upon clear and convincing proof by the state that while admitted to bail the defendant:

- (1) or his agent threatened or intimidated a victim, prospective witnesses, or jurors concerning the pending criminal proceeding or any other matter;
- (2) or his agent attempted to conceal or destroy evidence relating to the pending criminal proceeding;
- (3) violated any condition of his current release order;
- (4) failed to appear before the court as ordered at any critical stage of the proceedings; or
- (5) committed a felony or a Class A misdemeanor that demonstrates instability and a disdain for the court's authority to bring him to trial.

*As added by Acts 1981, P.L.298, SEC.2
Amended by P.L.36-1990, SEC.6.*

35-33-8-7 Failure to appear; arrest warrant; payment of unsatisfied civil action judgment from bond; forfeiture of remainder judgment; transfer of money to common school fund; deposit return

Sec. 7. (a) If a defendant:

- (1) was admitted to bail under section 3.1(a)(2) of this chapter; and
- (2) has failed to appear before the court as ordered;

**Report of American Bar Association
Criminal Justice Standards Committee
To
ABA Criminal Justice Section Council
(1990)**

APPENDIX K

REPORT
to
The Criminal Justice Section Council
from
The Criminal Justice Standards Committee
regarding revisions to
Chapter 5: Providing Defense Services
ABA Criminal Justice Standards

Submitted by:

Norman Lefstein, Chair
Criminal Justice Standards Committee

Richard J. Wilson, Reporter
Prosecution and Defense
Function/Providing Defense Services
Updating Task Force

April, 1990

~~5-6-2~~ 7.3. Determination of eligibility

Determination of eligibility should be made by defenders, contractors for services, or assigned counsel, or a neutral screening agency if confidentiality can be maintained, subject to review by a court at the request of a person found to be ineligible. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

DISCUSSION

The Council approved this section, as written, at its Fall meeting. No further changes were made.

The substantive addition to this standard is the inclusion of a neutral screening agency as an alternative to the defender program as a means of determining eligibility. Commentary will note that such screening agencies are now common in both the federal and state systems.

The major issue with any screening is that of the confidentiality of information revealed by the defendant. Commentary will note state cases in which such information has been the basis of perjury charges, as well as cases in which information has been admitted for either substantive or impeachment purposes. Commentary will also note the prevailing view that information revealed in the course of eligibility screening is not protected

as confidential or privileged; where that is the case, a warning to that effect should be given to the defendant.

**Criteria for the Determination of Indigency
Recommended By The
Indianapolis Bar Association
Commission on Public Defenders**

APPENDIX L

RECOMMENDED CRITERIA FOR THE DETERMINATION OF INDIGENCY

A. Income

The following should be considered in determining the defendant's income:

- a. Money, wages and salaries before any deductions;
- b. Income from self-employment after deductions for business or farm expenses;
- c. Regular payments from social security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments;
- d. Public or private employee pensions, and regular insurance or annuity payments;
- e. Income from dividends, interest, rents, royalties, estates or trusts;
- f. Benefits from a governmental income maintenance program such as AFDC, SSI, unemployment compensation, or state or county general assistance or home relief;
- g. Food or rent received in lieu of wages; and
- h. Money received from the sale of real or personal property, or received from tax refunds, gifts, one-time insurance payments or compensation for injury.

Spousal income should not be included in the calculation of a defendant's income, but should be considered in determining the actual extent of the defendant's living expenses and liabilities.

B. Assets

a. Exempt Property

Real and personal property exempt from execution of judgment under I.C. 34-2-28-1 should be not be considered.

b. Other Real and Personal Property

Equity in real property and personal property in excess of the statutory allowances in I.C. 35-2-28-1 should be considered in making a determination of financial eligibility.

C. Expenses and Liabilities

- a. The defendant's expenses and liabilities should include all living expenses, business or farm expenses, fixed debts and obligations (including federal, state and local taxes).
- b. All individuals who are actually dependant on the defendant for financial support should constitute a single household for purposes of assessing the defendant's living expenses and liabilities.
- c. Spousal income should be considered in determining the extent of defendant's actual living expenses and liabilities.
- d. Consideration should be given to the following specific factors:
 - food
 - utilities
 - housing
 - child support and alimony obligations
 - education or employment expenses
 - child care
 - medical expenses
 - transportation

**Indiana State Bar Association
Legal Ethics Committee
Opinion No. 2 of 1990**

APPENDIX M

attorney ethics

The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued *solely* for the education of those requesting opinions and the general public. The committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

Opinion No. 2 of 1990

The Committee has been requested to offer an opinion as to whether it is appropriate for a public defender to petition the court for fee reimbursement pursuant to P.L. 284-1989 (I.C. 33-9-11.5-6). This provision reads:

Payment of costs. - (a) If at any stage of a prosecution for a felony or a misdemeanor the Court makes a finding of ability to pay the costs of representation under Section 7 of this Chapter, the Court shall require payment by the person or the person's parent, if the person is a child alleged to be a delinquent child, of the following costs in addition to other costs assessed against the person:

(1) Reasonable attorney's fees, if an attorney has been appointed for the person by the Court.

(2) Costs incurred by the county as a result of Court-appointed legal services rendered to the person.

(b) The clerk of the Court shall deposit costs collected under this Section into the supplemental Public Defender Services Fund established under Section 1 of this Chapter.

The simple answer to this inquiry would be that it appears that it would never be appropriate for the public defender to petition the court to make this finding.

Rule 1.6 provides that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation. . . Further, Rule 1.7 (b) provides that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests.

While the request for opinion does not describe the particular context in which the public defender assigned to the case, or another staff public defender, might petition the court for reimbursement of fees, it seems likely that any information the public defender's office may have as to the financial ability of the defendant would have been obtained during the representation of the client. It is further presumed that the motivation for a public defender to make such a request is to provide funds for the operation of the public defender's office in subsequent, unrelated matters.

An attorney's request that a client make reimbursement is clearly detrimental to the client and is a breach of the loyalty owed by the attorney. That the attorney's office would benefit by the disclosure operates as an incentive for the breach and is an aggravating factor.

**National Advisory Commission On
Criminal Justice Standards and Goals
Recommended Public Defender Caseload Standards
Standard 13.12**

APPENDIX N

NATIONAL PUBLIC DEFENDER CASELOAD STANDARDS

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals (NAC) formulated for the first time national criminal justice standards. In Standard 13.12, the NAC recommended the following maximum number of cases per year for a full-time public defender working in an office with support staff:

The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for postjudgment review is a separate case. If the public defender determines that because of excessive workload the assumption of additional cases or continued representation is previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court. If the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office.

The NAC caseload standards have subsequently been endorsed by the National Legal Aid and Defender Association and by the House of Delegates of the American Bar Association in July of 1985, and are used extensively throughout the country by evaluators, public defender managers, and funding sources.

**Statistics Regarding Racial Composition
Of Death Row Prisoners and
Marion County Homicide Indictments**

APPENDIX O

DEATH ROW PRISONERS FROM MARION COUNTY

Since 1977 Reinstatement of Capital Punishment

<u>Victim's Race</u>	<u>Defendant's Race</u>	<u>Number of Defendants</u>	<u>Percentage of Total (14)</u>
white	black	8	57.1%
white	white	4	28.5%
black	black	2*	14.4%
black	white	0	0.0%

**In both these cases, the Indiana Supreme Court vacated the death penalty.*

MARION COUNTY HOMICIDE CHARGES

January 1, 1979 -- January 1, 1989

<u>Victim's Race</u>	<u>Defendant's Race</u>	<u>Number of Homicides</u>	<u>Number of Cases Where Prosecutor Requested DP</u>	<u>Percentage</u>
white	black	34	13	38.0%
white	white	149	8	5.3%
black	black	310	5	1.6%
black	white	8	0	0.0%
white	hispanic	(unknown)	3	?.?%

(These charts were prepared from data provided by the Indiana Public Defender Council.)

**Indiana Supreme Court
Proposed Criminal Rule 24**

APPENDIX P

PROPOSED RULES FOR CAPITAL DEFENSE COSTS

Criminal Rule 24
CAPITAL CASES

....

(B) Appointment of Qualified Trial Counsel. Upon a finding of indigence, it shall be the duty of the judge presiding in a capital case to appoint two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. The provisions for the appointment of counsel set forth in this section do not apply in cases wherein counsel is employed at the expense of the defendant.

(1) Lead Counsel; Qualifications. One of the attorneys appointed by the court shall be designated as lead counsel. To be eligible to serve as lead counsel, an attorney shall:

(a) be an experienced and active trial practitioner with at least five years of criminal litigation experience;

(b) have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion;

(c) have prior experience as lead or co-counsel in at least one case in which the death penalty was sought; and

(d) have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

(2) Co-Counsel, Qualifications. The remaining attorney shall be designated as co-counsel. To be eligible to serve as co-counsel, an attorney shall:

(a) be an experienced and active trial practitioner with at least three years of criminal litigation experience;

(b) have prior experience as lead or co-counsel in no fewer than three felony jury trials which were tried to completion; and

(c) have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

(3) **Workload of Appointed Counsel.** In the appointment of counsel, the nature and volume of the workload of appointed counsel must be considered to assure that counsel can direct sufficient attention to the defense of a capital case.

(a) Attorneys accepting appointments pursuant to this rule shall provide each client with quality representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) A judge shall not make an appointment of counsel in a capital case without assessing the impact of the appointment on the attorney's workload.

(c) Salaried or contractual public defenders may be appointed as trial counsel in a capital case, if:

(i) the public defender's case load will not exceed twenty (20) open felony cases while the capital case is pending in the trial court;

(ii) no new cases will be assigned to the public defender within thirty (30) days of the trial setting in the capital case;

(iii) none of the public defender's cases will be set for trial within fifteen (15) days of the trial setting in the capital case; and

(iv) compensation is provided as specified in paragraph (C).

(C) Compensation of Appointed Trial Counsel. All trial defense counsel appointed in a capital case shall be compensated under this provision upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought.

(1) **Hourly Rate.** Defense counsel appointed in capital cases shall be compensated for time and services performed at the hourly rate of seventy dollars (\$70.00). In the event the appointing judge determines that the rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case.

(2) **Maximum Compensation.** Payment for compensation under paragraph (1) for the representation through trial of a single defendant in a single case shall be limited to 500 hours in the aggregate except upon determination by the trial court that such time in excess of 500 hours is both reasonable and necessary for the proper defense of the defendant.

(3) **Support Services and Incidental Expenses.** Counsel appointed in a capital case shall be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase. In addition to the hourly rate provided in this rule, all counsel shall be reimbursed for reasonable incidental expenses as approved by the court of appointment.

(4) **Contract Employees.** In the event counsel is generally employed by the court of appointment to perform other defense services, the rate of compensation set for such other defense services may be adjusted during the pendency of the death penalty case to reflect the limitations of case assignment established by this rule.

....

(J) **Appointment of Appellate Counsel.** Upon a finding of indigence, the trial court imposing a sentence of death shall immediately appoint counsel under this provision for appeal. If qualified to serve as appellate counsel under this rule, trial counsel shall be appointed as sole or co-counsel for appeal.

(1) **Qualifications of Appellate Counsel.** An attorney appointed to serve as appellate counsel for an individual sentenced to die, shall:

(a) be an experienced and active trial or appellate practitioner with at least three years experience in criminal litigation;

(b) have prior experience within the last five years as appellate counsel in no fewer than three felony convictions in federal or state court; and

(c) have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

(2) **Workload of Appointed Appellate Counsel.** In the appointment of Appellate Counsel, the judge shall assess the nature and volume of the workload of appointed appellate counsel to assure that counsel can direct sufficient

attention to the appeal of the capital case. In the event the appointed appellate counsel is under a contract to perform other defense or appellate services for the court of appointment, no new cases for appeal shall be assigned to such counsel until the Appellant's Brief in the death penalty case is filed.

(K) **Compensation of Appellate Counsel.** Appellate counsel appointed to represent an individual sentenced to die shall be compensated under this provision upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought. Attorneys employed by appellate counsel for consultation shall be compensated at the same rate as appellate counsel.

(1) **Hourly rate.** Appellate defense counsel appointed to represent an individual sentenced to die shall be compensated for time and services performed at the hourly rate of seventy dollars (\$70.00). In the event the appointing judge determines that this rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case.

(2) **Maximum Compensation.** Total compensation under paragraph (1) of this section for appellate representation of a single defendant in a single case shall be limited to 250 hours in the aggregate except upon determination by the appointing judge that such time in excess of 250 hours is both reasonable and necessary for the proper preparation of an appeal.

(3) **Contract Employees.** In the event appointed appellate counsel is generally employed by the court of appointment to perform other defense services, the rate of compensation set for such other defense services may be adjusted during the pendency of the death penalty appeal to reflect the limitations of case assignment established by this rule.

(4) **Incidental Expenses.** In addition to the hourly rate provided in this rule; appellate counsel shall be reimbursed for reasonable incidental expenses as approved by the court of appointment.