



PUBLIC DEFENDER COMMISSION NEWS

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QUARTERLY MEETING HIGHLIGHTS

At the June 24, 2009 meeting of the Public Defender Commission, the members approved claims for death penalty defense costs of \$191,873.98, and claims for non-capital indigent defense costs of \$3,751,673.69. The Public Defense Fund, after payment of capital claims, was able to return a full 40% reimbursement to the counties for the 1st quarter 2009.

Guidelines Related to Capital Cases. According to Criminal Rule 24, a public defender must have 12 hours of training in the defense of capital cases in courses approved by the Public Defender Commission before he/she can be appointed to a capital case. The Commission's website has been updated to provide instructions on achieving and maintaining eligibility to take capital cases [here](#). At the June 24, 2009 meeting, the following courses for capital case training credit were approved: Clarence Darrow Death Penalty College, DePaul University School of Law, Bryan Schechmeister Death Penalty College at Santa Clara University School of Law, National Association of Criminal Defense Lawyers and Southern Center for Human Rights "Making the Case for Life," National Association of Criminal Defense Lawyers "Capital Voir Dire Training," and Trial Lawyers College of Dubois, Wyoming "Death Penalty Defense." A list of all approved courses is available [here](#). All of the Capital Guidelines are available for review on our website, www.in.gov/judiciary/pdc/.

SHOW ME THE MONEY

In the final hours of the General Assembly's special session, a two-year budget was passed that gave the Public Defense Fund an additional \$3 million for fiscal years 2009-10 and 2010-11. In addition to the money the Fund receives from distribution of court fees under IC 33-37-7-9, the General Assembly's appropriation allows the Fund to operate for the next two years with \$18.25 million. Ninety-nine percent of this \$18.25 million is distributed to the counties that participate in the Commission's public defense reimbursement program. This additional money will hopefully allow the Commission to return the full 40% requested by the counties for

- **LINKS TO FORMS AND GUIDELINES:**

Locate Reimbursement Forms [here](#)

Locate Guidelines For Capital Case Reimbursements [here](#)

Locate Guidelines and Standards for Non-capital Case Reimbursements [here](#) and [here](#)

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the next four quarters. Currently, 48 Indiana counties qualify for reimbursement from the Public Defense Fund for non-capital public defense expenses. These 48 counties comprise over 60% of Indiana's population. All 92 counties qualify for reimbursement of 50% of their capital case defense costs.

THANK YOU! THANK YOU! THANK YOU!

The Public Defender Commission and all the counties participating in the reimbursement program appreciate the support of all the State Senators and Representatives that make it possible for the Public Defense Fund to continue to return money to the counties to relieve, in part, their public defense expenses which are supported by local property taxes. A special thanks also to Chief Justice Shepard and Larry Landis, Executive Director of Indiana Public Defense Council for their efforts promoting the Public Defense Fund.

ORDERING REIMBURSEMENT OF PUBLIC DEFENSE FEES.

Three statutes address when a defendant may be ordered to reimburse the county for counsel provided at public expense, IC §§35-33-7-6, 33-40-3-6 and 33-37-2-3. Before counsel is assigned, each statute requires that a defendant be determined to be indigent and assigned counsel by the judicial officer. Only IC §35-33-7-6 limits a public defender fee to \$100 for a felony or \$50 for a misdemeanor. The other two statutes allow trial courts to impose representation costs in excess of \$100 against a defendant, but the cost must be reasonable and not more than the cost of the defense services. A trial court does not have the authority to order a presently indigent defendant to pay restitution based on possible future earnings or other speculative prospective wealth. See, *Davis v. State*, 843 N.E.2d 65 (Ind.Ct.App.2006).

At the initial hearing, after a defendant is declared indigent but able to pay part of the costs of representation, a public defender fee may be ordered under I.C. 35-33-7-6. The statute states "If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following: (1) For a felony action, a fee of one hundred dollars (\$100). (2) For a misdemeanor action, a fee of fifty dollars (\$50)". This statute contemplates that trial courts will order the fee at the initial hearing, but it does not prohibit imposing the fee at other stages of the proceeding.

I.C. 33-37-2-3 allows a trial court to order reimbursement of public defense fees if the court makes a finding of ability to pay. The fees must be reasonable and may not exceed the cost of defense services rendered

Commission Members:

Mark W. Rutherford,
Chairman, Indianapolis,
serving since May 2007

Susan Carpenter,
Indianapolis, serving
since October 1989

Betty Lou Jerrel,
Evansville, serving since
November 1993

Sen. Timothy Lanane,
Anderson, serving since
October 1998

David J. Hensel,
Indianapolis, serving
since May 2007

Peter D. Nugent,
Indianapolis, serving
since May 2007

Hon. Judge Diane Ross
Boswell, Crown Point,
serving since April 2008

Rep. Vernon Smith,
Gary, serving since
November 2008

Rep. Greg Steuerwald,
Danville, serving since
November 2008

Sen. Brent Steele,
Bedford, serving since
March 2009

to the person. The reimbursement can be imposed at any stage of the prosecution under this statute. A court may impose representation costs and suspend payment of all or part of the costs until the convicted person has completed all or part of the sentence. If the court suspends payment of the costs, the court shall conduct a hearing at the time costs are due to determine whether the convicted person is indigent. Upon conviction, if the trial court orders the defendant to pay public defense fees as a condition of probation, which will not begin until the executed portion of the sentence is completed, the court must conduct an indigency hearing at the time the costs are due.

I.C. 33-40-3-6 also allows the imposition of public defense fees after a determination of ability to pay, and the fees may not be more than the cost of representation. If a child is alleged to be a delinquent child and an attorney is appointed by the court for the child, the court must make a finding of the child's parent's ability to pay the cost of representation before such costs are assessed.

ESTABLISHING INDIGENCY.

Using the federal poverty level income figures is not sufficient for a finding of indigency for purposes of assessing public defense fees. Statutorily, before a court enters a finding that a person is able to pay the additional costs of 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... would impose on the person and the dependents of the person. See, I.C. 33-40-7.

In Indiana case law, the standard for determining indigency is substantial hardship. The "substantial hardship" test for determining indigency was adopted by the Indiana Supreme Court in 1980 and has been cited with approval in numerous subsequent appellate opinions. When conducting an indigency hearing, the judicial officer must appoint counsel if the defendant legitimately lacks financial resources to employ an attorney, without imposing substantial hardship on himself or his family. The defendant does not have to be totally without means to be entitled to counsel and the fact that the defendant was able to post a bond is not determinative of his non-indigency but is only a factor to be considered. See, *Moore v. State*, 401 N.E.2d 676 (Ind.1980). Denial of appointed counsel is also prohibited merely because the person is employed. See, *Redmond v. State*, 518 N.E.2d 1095 (Ind.1988).

INDIGENT DEFENDANTS ORDERED TO PAY FINES, COSTS, FEES AND RESTITUTION.

A finding of indigency upon conviction of a crime is not a free pass to

2009 COMMISSION MEETING DATES

September 23, 2009
2:00 p.m.
30 S. Meridian St.
Indianapolis, Room 804

December 16, 2009
2:00 p.m.
30 S. Meridian St.
Indianapolis, Room 804

IMPORTANT DEADLINES

The deadlines for filing Reimbursement Requests for **Non-capital Expenditures** for 2009 are:

2nd Quarter:
August 14, 2009

3rd Quarter:
November 16, 2009

4th Quarter:
February 15, 2010

The filing deadline for Reimbursement Requests in **Capital Cases** is 120 days from the date the County Auditor pays the underlying expense.

avoid costs, fines, fees or restitution. For instance, if a person is convicted of a controlled substance crime under IC 35-48-4, the imposition of a drug abuse, prosecution, interdiction and correction fee is not discretionary where state statute provides that the court "shall assess" and the clerk "shall" collect this fee. I.C. 33-37-5-9(b) states that "The court shall assess a drug abuse, prosecution, interdiction, and correction fee of at least two hundred dollars (\$200) and not more than one thousand dollars (\$1,000) against a person convicted of an offense under I.C. 35-48-4." The statute goes on to state that the court shall consider the person's ability to pay the fee, and that the clerk shall collect the fee set by the court. Because a fee of at least \$200 is mandatory, a trial court is required to impose it regardless of a defendant's ability to pay. The trial court's duty to examine a defendant's ability to pay is not triggered unless the trial court imposes a fee greater than \$200. See, *Taylor v. State*, 786 N.E.2d 286 (Ind.Ct.App.2003). An indigent defendant may not be imprisoned for failing to pay court costs, fines, fees or restitution.

WHO OWNS THE CASH BOND?

When a cash bond is posted by someone other than the defendant, upon conviction can fines and costs be deducted from the cash bond?

ANSWER: The laws of bailment apply. The person paying the bond is the bailor, and the person being released by the bond is the bailee who promises to use bailor's property to be released and promises to appear for all hearings in the matter and perform all other necessary acts that insure that the bond will not be revoked. Upon completion of the case, the bailor is entitled to refund of the bond. See *J.J. Richard Farm Corporation v. State of Indiana*, 642 N.E.2d 1384 (1994).

In 1994 when the *J.J. Richard Farm Corporation* opinion was published, IC 35-33-8-3.1 controlled how the courts set bail and how the bail was released upon disposition of the case. In 1998, IC 35-33-8-3.1 was repealed and replaced with IC 35-33-8-3.2.

Under IC 35-33-8-3.2, the court may require the defendant and each person who makes the cash deposit on behalf of the defendant to execute an agreement that allows the court to retain all or part of the cash bond upon conviction. The court can then order the clerk to credit the cash bond towards the publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay as part of the sentence.

Under IC 35-33-8-3.2, when a surety bail bond is executed by depositing 10% of the bail with the clerk of the court, notice must be given by the sheriff, court or clerk that the deposit may be forfeited or retained to pay costs, fines, fees or restitution upon conviction.

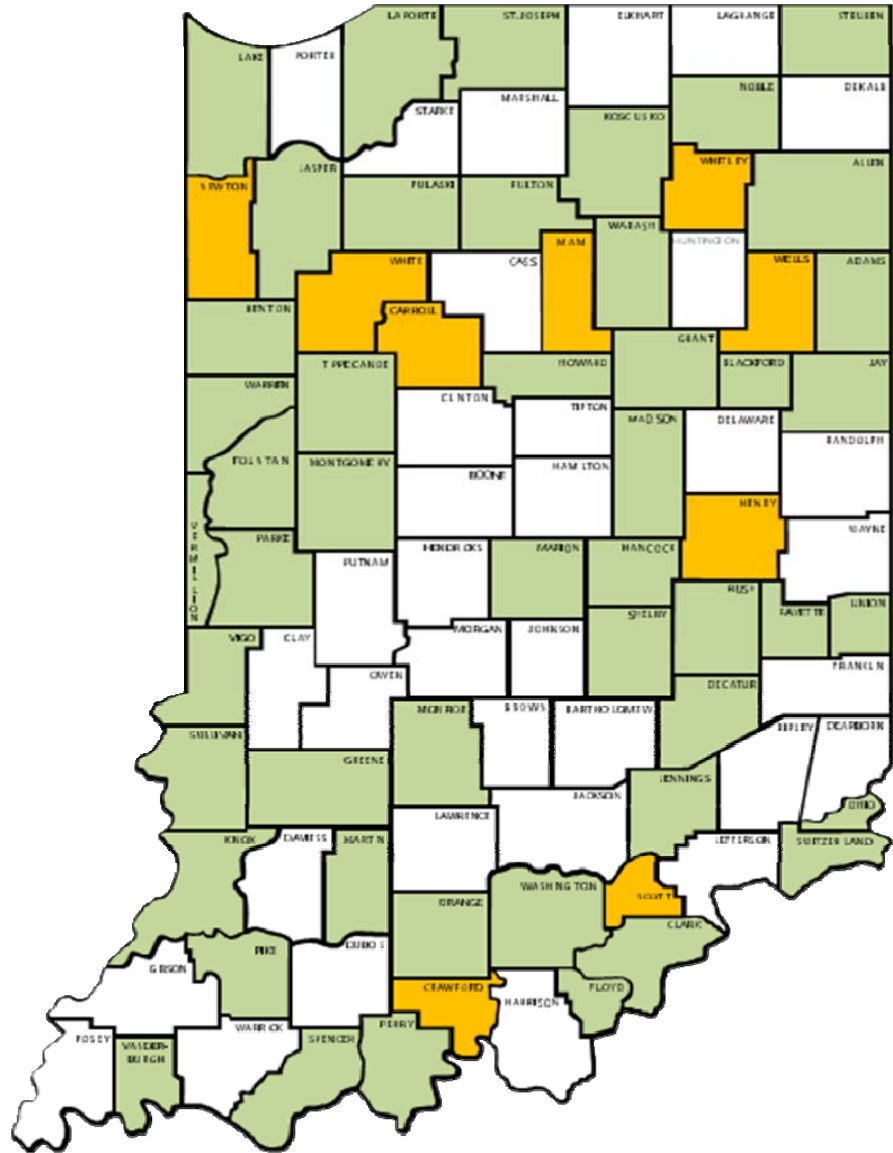
In the event of the posting of a real estate bond, the bond shall be used only to insure the presence of the defendant at any stage of the legal

proceedings, but shall not be foreclosed for the payment of fines, costs, fees, or restitution.

IS YOUR COUNTY IN THE PUBLIC DEFENDER COMMISSION PROGRAM?

COUNTIES RECEIVING REIMBURSEMENTS

Adams	Monroe
Allen	Montgomery
Benton	Noble
Blackford	Ohio
Clark	Orange
Decatur	Parke
Fayette	Perry
Floyd	Pike
Fountain	Pulaski
Fulton	Rush
Grant	St. Joseph
Greene	Shelby
Hancock	Spencer
Howard	Steuben
Jasper	Sullivan
Jay	Switzerland
Jennings	Tippecanoe
Knox	Union
Kosciusko	Vanderburgh
Lake	Vermillion
LaPorte	Vigo
Madison	Wabash
Marion	Warren
Martin	Washington



- Counties in Public Defender Program
- Counties in Public Defender Program not currently receiving reimbursements
- Counties not in Public Defender Program

A MESSAGE FROM THE STAFF:

We hope that you find the fourth edition of our newsletter informative. If you do not wish to receive the newsletter, please send an email to staff counsel Jeff Wiese at jwiese@courts.state.in.us