

# THE RIGHT TO COUNSEL IN INDIANA

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## EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES

OCTOBER 2016



SIXTH  
AMENDMENT  
CENTER

The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services

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Publication Number: 2016.001

SIXTH AMENDMENT CENTER

PO Box 15556

Boston, MA 02215

[www.sixthamendment.org](http://www.sixthamendment.org)

PREPARED FOR

The Indiana Indigent Defense Study Advisory Committee (IDSAC) is composed of a representative of the Indiana Supreme Court, members of both chambers of the Indiana legislature, the state bar association, the Indiana Public Defender Commission, the Indiana Public Defender Council, the Indiana Prosecuting Attorneys Council, the judges' association, and the Indiana Association of Criminal Defense Lawyers.

PREPARED BY

The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide competent counsel at all critical stages of a case to the indigent accused who is facing the potential loss of liberty in a criminal or delinquency proceeding.

ACKNOWLEDGEMENT

The National Association of Criminal Defense Lawyers (NACDL) commissioned this report as a part of its public defense reform program. NACDL acknowledges the support of Koch Industries, whose generous funding supports NACDL's public defense work. That work is also supported by the Foundation for Criminal Justice (FCJ).

DISCLAIMER

This report reflects solely the opinions of the 6AC and does not necessarily reflect the views of the IDSAC, NACDL, Koch Industries, or the FCJ.

# EXECUTIVE SUMMARY

Under U.S. Supreme Court case law, the provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment. In Indiana, however, counties are responsible in the first instance to fund and administer services. Although it has not been held unconstitutional for a state to delegate its constitutional responsibilities to its counties, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.

Part I of this report (*see infra* pages 3 to 92) assesses whether Indiana meets this constitutional demand and determines that the State of Indiana's ability to monitor county indigent defense systems is either entirely absent or severely limited, depending on the type of case.

**FINDING #1: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in misdemeanor cases in any of its courts, including city and town courts.**

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as severe. Going to jail for even a few days may result in a person losing professional licenses, being excluded from public housing and student loan eligibility, or even being deported. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense. Despite this, the State of Indiana and the Indiana Public Defender Commission (IPDC) do not exercise any authority over the representation of indigent people charged with misdemeanors and facing the possibility of time in jail.

Indiana counties may, if they so choose, receive a partial state reimbursement of their indigent defense costs for non-misdemeanor cases in exchange for meeting standards set by the IPDC. However, counties are free to – and do – forgo state money in order to avoid state oversight. The “Indiana Model” for right to counsel services

both institutionalizes and legitimizes the counties' choice to not fulfill the minimum parameters of effective representation. What many Indiana counties have realized is that they can contract with private counsel on a flat fee basis for an unlimited number of cases for less money than it would cost them to comply with state standards (even factoring in the state reimbursement).

**FINDING #2: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in felony and juvenile delinquency cases, at both the trial level and on direct appeal, in counties and courts that do not participate in the IPDC reimbursement program.**

Thirty-seven of Indiana's 92 counties (40%) choose not to participate in the state's non-capital case reimbursement program as of June 30, 2015. The Commission has no authority whatsoever over the representation of indigent people in the courts located in these counties, and the courts and public defense attorneys do not have to abide by the Commission's standards. Additionally, by statutory exception, Lake County is allowed to limit its request for reimbursement to certain courts and case types. Most of Lake County's courts in which indigent representation is provided do not participate in the reimbursement program. Together, the non-participating counties and courts have trial level jurisdiction over nearly one-third of the population of Indiana.

Although the Indiana Model for indigent defense could potentially work to ensure that counties uphold the state's Sixth and Fourteenth Amendment obligations to provide effective representation in counties that do participate in the IPDC reimbursement program(s), two things have hindered those efforts. First, state funding for the reimbursement plan has not always kept pace with its intended purpose of reimbursing 40% of non-misdemeanor costs. For example, reimbursements to counties for non-capital representation dropped to a low of only 18.3% in 2006. The inconsistency in reimbursements, in part, resulted in a number of counties leaving the program.

Second, although the state is obligated to ensure effective representation to the indigent accused facing a potential loss of liberty in its five appellate districts, 91 circuit courts, 177 superior courts, and 67 city and town courts, for most of its history, IPDC operated with only a single staff member. In 2014, another staff position was added. No two people, no matter how talented, could ever possibly ensure compliance with standards in so many jurisdictions.

**FINDING #3: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in capital cases for which counties do not seek state reimbursement.**

The financial commitment that the state made to reimburse counties for a portion of their defense costs in indigent death penalty cases, though laudable, does not benefit Indiana's 92 counties equally and some not at all. From February 1991, when the first capital case reimbursements to counties were approved, through September 2014, only 43 of Indiana's 92 counties have received some amount of state reimbursement for capital case indigent defense. The amounts by which counties have benefitted vary greatly, with Hancock County claiming a single reimbursement of \$2,064 back in 1991, while Lake and Marion counties have sought reimbursement in almost every year of the program's existence and have recouped \$1,755,070 and \$3,830,027 respectively (together, 47% of the total capital reimbursement made by the state to counties over 25 years).

In 1992, the Indiana Supreme Court adopted a binding court rule ("Rule 24") that sets out the procedures all trial courts must follow when appointing and compensating public counsel in death penalty cases. A trial court must, for example, appoint two attorneys (rather than just one) to represent the defendant, and the attorneys must have specific training and experience beyond that required in non-death cases. The rule places strict numerical limits on the number of other cases a salaried or contract public defender can handle at the same time as a death penalty case, in an effort to ensure that the attorney has adequate time to provide effective representation. Though Rule 24 is binding on all jurisdictions, there is no mechanism for the state to ensure that the rule is being met unless a county chooses to seek reimbursement from the IPDC for up to 50% of the cost of defending a capital case.

Further, a county can choose to apply for reimbursement in one death penalty case and choose not to apply in another; a county can choose to apply for reimbursement in a death penalty case this year and choose not to apply in a case next year; and a county can choose to apply for reimbursement of expenditures incurred for only a given period of time in a particular death penalty case and then forgo seeking reimbursement later in that same case. If the county does not want to be subjected to the Commission's scrutiny, the county simply does not apply to the Commission for reimbursement.

**FINDING #4: The State of Indiana has only limited capacity to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in counties that participate in the reimbursement programs. The ability of the Indiana Public Defender Commission (IPDC) to ensure effective representation at the local level is hindered by the State's failure to properly fund and adequately staff the IPDC at a level sufficient for it to conduct verification audits and evaluations in participating counties.**

Inadequate funding and the lack of sufficient staffing prevent IPDC from properly assessing compliance with all of its standards. One topical area has understandably consumed the greatest portion of the IPDC's attention: limiting attorney workloads. If an attorney is assigned an excessive number of cases, he cannot perform effectively in each and every case.

Counties can and do circumvent the IPDC workload standards by asking for reimbursement in only certain cases. For example, in 2006 a judge explained that the Miami County public defender office attorneys typically reached their maximum caseloads in October of each year. To handle the rest of the cases from October through December and stay within the IPDC caseload standards, the county would have to hire three more attorneys. Instead, Miami County decided to contract at an hourly rate with the same attorneys who worked in the public defender office to handle the remaining October to December caseload, but not include these county expenditures on the reimbursement request to the Commission. Since the county did not seek reimbursement for the money spent on those cases, the county was not held to the Commission standards for those cases. But, of course, the attorneys were still carrying a caseload that far exceeded the IPDC's standards for effectiveness.

The problem of compliance with IPDC standards is exacerbated by the fact that the IPDC is limited to trying to entice counties to meet standards only through the promise of partial state reimbursement. Because counties are always free to simply leave the program, the IPDC is in the difficult position of deciding whether to allow non-compliant counties to stay in the program and receive reimbursement in the hope they will work toward meeting standards, or to not pay the counties and lose the ability to work with them toward the goal of future compliance. This structural flaw led the IPDC to make exceptions to standards that limit attorneys' workloads, thereby undercutting the goal of giving attorneys sufficient time to fulfill the state's obligation to provide effective representation.

Of course, the lack of state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel services provided by all county and municipal governments are constitutionally inadequate. But it does mean that the state has no idea

whether its Fourteenth Amendment obligation to provide competent Sixth Amendment services is being fulfilled.

Part II of this report (*see infra* pages 93 to 198) examines the adequacy of services as actually provided. At the invitation of an Indiana Indigent Defense Study Advisory Committee, the Sixth Amendment Center (6AC) conducted a statewide assessment of trial level public defense services in Indiana. The Advisory Committee is a bipartisan committee composed of judges, legislators, prosecutors, defense attorneys, and other state criminal justice stakeholders. The 6AC is a non-partisan, non-profit organization that provides policymakers with indigent defense assessments and other technical assistance with indigent defense services.

To avoid the possibility of cherry-picking either the best or the worst indigent defense systems, the Advisory Committee selected eight counties as a representative sample of Indiana's diversity in population size, geographic location, rural and suburban and urban centers, types of indigent defense service models used, and participation or non-participation in the state's indigent representation reimbursement program. The selected counties are Blackford, Elkhart, Lake, Lawrence, Marion, Montgomery, Scott, and Warrick. Site work in the eight sample counties began in February 2015 and finished in October 2015, consisting of courtroom observations, data collection, and interviews with judges, prosecutors, public defense providers, and other criminal justice stakeholders.

In *United States v. Cronin*, 466 U.S. 648 (1984), the U.S. Supreme Court determined that if certain right to counsel systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys with sufficient time and resources to provide competent representation under independent supervision. The absence of any of these factors indicates that a system is presumptively providing ineffective assistance of counsel.

**FINDING #5: The State of Indiana’s constitutional obligation to provide counsel at all critical stages of a criminal proceeding is not consistently met on the local level, where some counties encourage defendants to negotiate directly with prosecutors before being appointed counsel, accept uncounselled pleas at initial hearings, and/or use non-uniform indigency standards to deny counsel to defendants who would otherwise qualify in another county. These are all examples of actual denial of counsel under *United States v. Cronic*.**

Lawrence County’s history exemplifies this finding. In 2010, Lawrence County was mired in a public defense crisis. Four private defense lawyers who had been providing services in an unlimited number of cases for a single flat fee decided they could no longer provide effective representation under such a financial arrangement. Each moved to decline new appointments. The county turned to the IPDC for assistance and formed a public defender office.

The first chief defender realized early on that public defenders in Lawrence County historically had not staffed initial hearings and many cases were resolved by prosecutors entering into plea deals with uncounselled defendants in direct violation of Sixth Amendment case law. Lawrence County was caught in a quandary. To meet the dictates of the Sixth Amendment, the defender office needed to either: a) exceed IPDC caseload standards by providing representation to all indigent defendants beginning at the initial hearings (thus risking the loss of state reimbursement); b) increase the number of staff attorneys (thereby increasing the county’s public defense cost); or c) turn a blind eye to a blatant constitutional violation.

Fearing that a new budget battle might jeopardize the entire public defender office, the chief public defender came up with a half-measure. The office began staffing all initial hearings, but only as a “friend of the court” to answer questions a defendant might have about the prosecutor’s plea offer. By not being formally appointed to the cases, the office does not have to report the workload to the IPDC (even though the staff attorneys spend significant hours at initial hearings), giving the appearance that the office complies with the IPDC caseload standards when it does not. The county continues to receive reimbursement from the IPDC, and the county does not incur the increased cost of hiring more attorneys to handle the greater caseload, as it would be required to do if the cases were reported.

The problem is that the defendants who plead guilty at initial hearings think they have a lawyer when in fact they do not. The lawyer is not securing discovery from the state, interviewing witnesses, examining evidence, reviewing statutes, or negotiating directly with the prosecutor on behalf of the defendant – all of the things lawyers must do to determine if the plea offer is good or bad. This is the very definition of “providing an attorney in name only” that triggers what *Cronic* calls a “constructive denial of counsel” violation.



In a number of courts, judges do not appoint public counsel to any defendant who posted bond, in direct violation of Indiana Supreme Court case law stating “[t]he fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.” For example, in all the criminal division and county division courts in Lake County, the judges find every defendant who has posted bond to be *ineligible* for a public defender. The courts consider it irrelevant whether the defendant made bond with his own resources or whether someone else posted bond for the defendant. Lake County judges were observed to warn defendants who are in custody at the time of their initial hearing that, even if appointed an attorney at the initial hearing, if they subsequently post bail they have to try to hire their own attorney and their public defender may be removed from their case. One Lake County defender explained that he advises in-custody defendants it is better for them to stay in jail, because if they post bond they will have to pay for their own attorney. This, of course, needlessly increases the cost to taxpayers to house defendants who are neither a risk to public safety nor at risk of flight.

**FINDING #6: The State of Indiana does not consistently require indigent defense attorneys to: a) have specific qualifications to handle cases of varying severity; or, b) have training to handle specific non-capital case types. This is a constructive denial of counsel under *United States v. Cronic*. Counties and courts outside of the reimbursement programs do not have to abide by Commission standards at all. To the extent that participating counties must adhere to Commission attorney qualification and training standards, the Commission’s ability to ensure compliance is limited because of inadequate funding and insufficient staffing.**

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy. Specialties must be developed. Just as you would not go to a dermatologist rather than a heart surgeon for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot handle a complex felony case competently.

Every county has some process for selecting and retaining the attorneys who provide public defense. In Blackford, Lake county and juvenile divisions, and Warrick, the judges control that process, and attorneys can be dismissed at the whim of a judge. However, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer’s representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot

provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. But judges choosing the attorneys create conflicts, because the attorney takes into account what he needs to do to please the judge in order to secure the next contract or appointment instead of advocating solely in the stated interests of the indigent accused.

Of further concern is the lack of training and supervision in most of the sample counties. In Blackford, Elkhart, Lake county and juvenile divisions, Lawrence, Scott, and Warrick, there is simply no training provided for or required of the public defense attorneys and no supervision over their work.

**FINDING #7: The public defense systems in many Indiana counties have undue judicial interference, undue political interference, flat-fee contracts, or all three, that produce conflicts between the lawyer's self-interest and the defendant's right to effective representation. These conflicts result in public defense attorneys throughout Indiana carrying excessive caseloads and spending insufficient time on their public cases. To the extent that participating counties must adhere to Commission caseload standards, many counties have found and implemented methods that, while giving the appearance of compliance, impede rather than enhance effective assistance of counsel. The ability of the Commission to ensure compliance with standards is limited because of inadequate funding and insufficient staffing. This results in the constructive denial of counsel under *United States v. Cronic*.**

The public defense contracts currently used in many Indiana counties cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant. Many counties pay a lawyer a single flat fee to handle an unlimited number of cases, meaning that the lawyer makes more money the quicker he disposes of cases. By not spending sufficient time on cases, lawyers handle an excessive number of cases.

The estimated number of cases assigned to each Elkhart County public defender office attorney in 2014, applying the Commission *Standards* for attorneys without adequate support staff, are startlingly high – in some instances more than 5 times the maximum allowed for an attorney in a year.

In the Lake County courts that are not in the IPDC reimbursement program, attorneys who devote approximately only 20% of their professional hours to indigent clients are carrying caseloads far in excess of that allowed under any possible measure for a full-time attorney.

In 2014, one Marion County attorney handled 1,333 cases in a single 12-month period. This is more than three times the maximum annual caseload allowed for misdemeanors under national standards.

The Sixth Amendment right to counsel is a right of individuals. It does not matter if government provides effective representation to the first co-defendant, if not to the second; or to people charged with felony offenses, if not to those charged with misdemeanors; or to those charged in certain courts, if not to those charged in other courts. It does not matter even if government *generally* provides adequate counsel to *most* people. If indigent defense services are structured so as to actually deny counsel to defendants, or to constructively give the accused a lawyer in name only because the lawyer has too many cases or operates under too many financial conflicts to be effective, the system itself is constitutionally deficient. Yet, this is an apt description of the constitutional right to counsel in Indiana today.

Part III of this report (*see infra* pages 199 to 212) asks Indiana policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, to make informed decisions about how best to implement the following recommendations:

**Recommendation 1: Indiana must require all courts in all counties to meet the parameters of effective indigent defense systems as defined in *United States v. Cronin*. At a minimum, binding standards must be promulgated and applicable at trial and on direct appeal for all adult criminal and juvenile delinquency cases, including conflict cases, related to: a) presence of counsel at all critical stages of a criminal proceeding; b) indigency determination; c) attorney performance; d) attorney qualification, training, and supervision; and, e) attorney workload.**

**Recommendation 2: The State of Indiana must create a comprehensive and mandatory training and supervision system for all indigent defense providers based on standards.**

**Recommendation 3: The State of Indiana must create an independent system to evaluate compliance with, and enforce adherence to, all standards (capital and non-capital).**

**Recommendation 4: The State of Indiana must prohibit contracts that create financial disincentives for attorneys to provide effective representation.**

**Recommendation 5: The State of Indiana should create a statewide appellate defender office as a check against inadequate trial-level representation.**

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INDIGENT DEFENSE SERVICES

OCTOBER 2016

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**NOTE:**

This report allows readers to take “a closer look” at the data that drives the findings and recommendations contained herein. Click to learn more wherever you see:

A CLOSER LOOK

The complete online companion for this report can be found via the Sixth Amendment Center (6AC) website at <http://www.sixthamendment.org/indiana-report>.

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# PART I

## THE RIGHT TO COUNSEL & THE ROLE OF THE STATE

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“For more than a hundred years, Indiana has held to the ideal that in a decent society someone charged with a crime should not go to trial without a lawyer just because he or she is too poor. Indiana’s right to counsel was spelled out more than a hundred years before the Supreme Court of the United States made it a national rule in *Gideon v. Wainwright*.”

then-Chief Justice Randall T. Shepard,  
State of the Judiciary, January 22, 2001

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# CHAPTER 1

## INTRODUCTION

### **A. Indiana's early right to counsel history.**

Indiana's first and second Constitutions, adopted in 1816 and 1851 respectively, both included the right to be represented by an attorney in a criminal prosecution.

[I]n all criminal prosecutions, the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favour, and in prosecutions by indictment, or presentment, a speedy public trial by an impartial Jury of the County or district in which the offence shall have been committed; and shall not be compelled to give evidence against himself, nor shall be twice put in jeopardy for the same offence.<sup>1</sup>

In 1854, the Indiana Supreme Court made clear that this right is more than just the right to be heard by counsel if you can afford to hire one yourself.<sup>2</sup> Rather, the court held, an attorney is “necessary” whenever a person is “put in jeopardy of life or liberty,” stating:

[i]t is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.<sup>3</sup>

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<sup>1</sup> IND. CONST. of 1861, art. I, § 13. *See* IND. CONST. of 1851, art. I, § 13 (“In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.”)

<sup>2</sup> *Webb v. Baird*, 6 Ind. 11, 15 (1854).

<sup>3</sup> *Id.*

The court determined that, under the Indiana Constitution, lawyers are not required to volunteer their services.<sup>4</sup> Instead, the court held that the county prosecuting a defendant is responsible for paying the cost of his defense.<sup>5</sup>

Over the next hundred years, Indiana demonstrated its commitment to the right to counsel in misdemeanor cases,<sup>6</sup> felonies,<sup>7</sup> and on direct appeals.<sup>8</sup> As the United States Supreme Court observed in 1963, “[i]n the administration of its criminal law, Indiana seems to have long pursued a conspicuously enlightened policy in the quest for equal justice to the destitute . . . .”<sup>9</sup>

## **B. The United States constitutional right to counsel.**

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”<sup>10</sup> In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”<sup>11</sup> Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney.<sup>12</sup>

<sup>4</sup> *Id.* at 14 (relying on IND. CONST. of 1851, art. 1, § 21: “No man’s particular services shall be demanded, without just compensation”).

<sup>5</sup> *Id.* at 16 (“It seems eminently proper and just, that the treasury of the county, which bears the expense of his support, imprisonment and trial, should also be chargeable with his defense.”).

<sup>6</sup> *Bolkovac v. State*, 229 Ind. 294, 299, 98 N.E.2d 250 (1951) (“Since § 13 of Article 1 [of the Constitution of Indiana] makes no distinction between misdemeanors and felonies, the right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules it exists in felony cases.”).

<sup>7</sup> *Webb v. Baird*, 6 Ind. 11, 15 (1854). *See also* *Hendryx v. State*, 130 Ind. 265, 29 N.E. 1131, 1131-32 (1892) (“The power as well as the duty of the court to assign to poor persons charged with serious crimes counsel for their defense, upon a proper showing, is no longer open to dispute in this state. . . . [I]n this state the law regards the appointment of counsel to defend persons charged with grave crimes, who are too poor to employ counsel on their own behalf, as indispensably necessary to the orderly administration of justice and a fair trial.”)

<sup>8</sup> *State ex rel. White v. Hilgemann*, 218 Ind. 572, 578, 34 N.E.2d 129 (1941) (“If a defendant is denied counsel he is effectively deprived of the right to review contemplated by both [the federal and Indiana] Constitutions. From what has been said, we must conclude that one accused of crime has the right to be provided with counsel literally ‘at every stage of the proceedings,’ including the proceedings by which he may seek a review for error by appeal.”).

<sup>9</sup> *Lane v. Brown*, 372 U.S. 477, 478 (1963). *See also* Susan K. Carpenter, *Conspicuously Enlightened Policy* in THE HISTORY OF INDIANA LAW ch. 6 (David J. Bodenhamer & Randall T. Shepard ed., 2014) (the author served as State Public Defender for Indiana for three decades).

<sup>10</sup> U.S. CONST. amend. VI.

<sup>11</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>12</sup> *Id.*

Early on, *Gideon* was presumed to apply only to felonies. The Supreme Court has since expressly clarified that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time in misdemeanors,<sup>13</sup> misdemeanors with suspended sentences,<sup>14</sup> direct appeals,<sup>15</sup> and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.<sup>16</sup> Children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.<sup>17</sup>

In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”<sup>18</sup> For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”<sup>19</sup> without regard to whether a prosecutor is aware of the arrest.<sup>20</sup> For all defendants, the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.<sup>21</sup>

The *Rothgery* Court carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.<sup>22</sup> “Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . .”<sup>23</sup> In other words, according to the Court, the Constitution does not necessarily require that

<sup>13</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>14</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002).

<sup>15</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>16</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005).

<sup>17</sup> *In re Gault*, 387 U.S. 1, 36 (1967) (“A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’ . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21.”). *Id.* at 27-28. (“[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.”).

<sup>18</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

<sup>19</sup> *Rothgery*, 554 U.S. at 213.

<sup>20</sup> *Id.* at 194.

<sup>21</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

<sup>22</sup> *Rothgery*, 554 U.S. at 211.

<sup>23</sup> *Id.* at 212.

defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

Over the decades, the Supreme Court has inch-by-inch delineated many case events as being critical stages, although it has never purported to have capped the list of events that may fall into this category.<sup>24</sup> Events that are definitely critical stages are: custodial interrogations both before and after commencement of prosecution;<sup>25</sup> preliminary hearings prior to commencement of prosecution where “potential substantial prejudice to defendant[s] rights inheres in the . . . confrontation;”<sup>26</sup> lineups and show-ups at or after commencement of prosecution;<sup>27</sup> during plea negotiations and at the entry of a guilty plea;<sup>28</sup> arraignments;<sup>29</sup> during the pre-trial period between arraignment and the beginning of trial;<sup>30</sup> trials;<sup>31</sup> during sentencing;<sup>32</sup> direct appeals as of right;<sup>33</sup> probation revocation proceedings to some extent;<sup>34</sup> and parole revocation proceedings to some extent.<sup>35</sup>

Moreover, under Sixth Amendment case law, the appointed lawyer needs to be more than merely a warm body with a bar card.<sup>36</sup> The attorney must also be effective,<sup>37</sup>

<sup>24</sup> The critical stages in a case are the moments when the defendant has to make choices – when “counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’” *Rothgery*, 554 U.S. at 212 n.16 (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)). None of these proceedings can occur unless counsel is present or has been waived because, as the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984) (citing *Shaefer, Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

<sup>25</sup> *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

<sup>26</sup> *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

<sup>27</sup> *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-38 (1967).

<sup>28</sup> *Lafleur v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>29</sup> *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

<sup>30</sup> *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

<sup>31</sup> *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *In re Gault*, 387 U.S. 1, 36-37 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

<sup>32</sup> *Lafleur v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

<sup>33</sup> *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963).

<sup>34</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

<sup>35</sup> *Id.*; *cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question “whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent”).

<sup>36</sup> As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), “[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”

<sup>37</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”). To be effective, an attorney must be

subjecting the prosecution's case to "the crucible of meaningful adversarial testing."<sup>38</sup> To do so, the defense function must have adequate support resources, such as access to investigators, social workers, paralegals, substantive experts, and forensic testing in order to marshal an effective defense.<sup>39</sup>

### C. Scope of the right to counsel in Indiana today.

Indiana law today recognizes that a person who cannot afford to hire an attorney is entitled to have one appointed at public expense in a wide variety of cases. As required by both the federal and state Constitutions,<sup>40</sup> all persons found to be indigent and facing the possibility of incarceration on misdemeanors<sup>41</sup> or felonies<sup>42</sup> are entitled to public counsel at trial<sup>43</sup> and on direct appeal.<sup>44</sup> Similarly, children charged in juvenile delinquency proceedings are entitled to public counsel.<sup>45</sup>

"States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,"<sup>46</sup> but they cannot provide less. Though the federal Constitution does not require it,<sup>47</sup> Indiana statutorily provides public representation to incarcerated indigent defendants in their post-conviction proceedings from a criminal conviction or delinquency adjudication if proceedings are determined to

reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

<sup>38</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

<sup>39</sup> The Court has held, for example, that an indigent accused is entitled to the assistance of a psychiatrist at public expense to assert an insanity defense. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

<sup>40</sup> U.S. CONST. amend. VI; IND. CONST. art. 1 § 13(a).

<sup>41</sup> All misdemeanors in Indiana carry potential terms of imprisonment. IND. CODE §§ 35-50-3-2 to 35-50-3-4 (2015).

<sup>42</sup> A felony in Indiana is an offense for which a person may be imprisoned for more than one year. IND. CODE § 35-50-2-1(b) (2015). Special rules govern the provision of counsel in death penalty cases. IND. CRIM. R. 24 (2015).

<sup>43</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); Ind. Code §§ 35-33-7-5, 35-33-7-6.

<sup>44</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963).

<sup>45</sup> *In re Gault*, 387 U.S. 1, 36 (1967); *Bible v. State*, 253 Ind. 373, 388 (Ind. 1970); IND. CODE §§ 31-32-2-2, 31-32-4-1(1) (2015); IND. CRIM. R. 25 (eff. Jan. 1, 2015).

<sup>46</sup> *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) ("The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are 'independently responsible for safeguarding the rights of their citizens.'"); *State v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) ("There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.").

<sup>47</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

be “meritorious and in the interests of justice.”<sup>48</sup> Since 2001, courts have authority to appoint counsel for an indigent person, whether incarcerated or at liberty, who is convicted of and sentenced for a level 5 or greater felony when they are seeking forensic DNA testing and analysis of evidence related to the investigation or prosecution of their case.<sup>49</sup>

The U.S. Supreme Court has yet to expand *Gideon*’s promise to parents in civil actions where a child can be removed from the home of her parent or guardian (CHINS proceedings) or in which the state seeks to terminate parental rights permanently (TPR proceedings), but Indiana established such a right for indigent parents in 1997.<sup>50</sup> Indiana law also provides for a guardian ad litem or a court appointed special advocate, or both, to be appointed for the child in CHINS and TPR proceedings, and where the court finds it necessary an attorney may be appointed for the child as well.<sup>51</sup>

An indigent person alleged to have a mental illness and to be either dangerous or gravely disabled has the right to be represented by public counsel in involuntary commitment proceedings<sup>52</sup> for temporary 90-day commitment,<sup>53</sup> regular commitment exceeding 90 days,<sup>54</sup> discharge,<sup>55</sup> and annual reviews of commitment.<sup>56</sup> The court may also appoint counsel for an indigent person who is petitioning to have someone committed.<sup>57</sup>

#### **D. Indiana’s court structure and jurisdiction.**

Indiana’s right to counsel is implemented in its courts, and its Constitution<sup>58</sup> and statutes establish the structure of its court system. There is one state Supreme Court

<sup>48</sup> IND. CODE § 33-40-1-2 (2015). *See also* IND. P-C RULE 9 (as amended through Jan. 1, 2015).

<sup>49</sup> IND. CODE § 35-38-7-11 (2015); *see generally* IND. CODE §§ 35-38-7-1 *et seq.* (2015).

<sup>50</sup> IND. CODE § 31-32-4-3 (2015). “A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.” IND. CODE § 31-32-2-5 (as added by P.L. 1-1997, sec. 15); *see e.g.* IND. CODE §§ 31-32-4-1(2); -3 (2015). In a child in need of services proceeding, “[t]he parent, guardian, or custodian has the right to be represented by a court appointed attorney . . . upon the request of the parent, guardian, or custodian if the court finds that the parent, guardian, or custodian does not have sufficient financial means for obtaining representation as described in IC 34-10-1.” IND. CODE § 31-34-4-6(a) (2015).

<sup>51</sup> IND. CODE § 31-34-10-3 (2015) (appointment of GAL or CASA for child in CHINS proceedings); IND. CODE § 31-35-2-7 (2015) (appointment of GAL or CASA for child in TPR proceedings).

<sup>52</sup> IND. CODE § 12-26-2-2 (2015).

<sup>53</sup> IND. CODE §§ 12-26-6-1 *et seq.* (2015).

<sup>54</sup> IND. CODE §§ 12-26-7-1 *et seq.* (2015).

<sup>55</sup> IND. CODE §§ 12-26-12-1 *et seq.* (2015).

<sup>56</sup> IND. CODE §§ 12-26-15-1 *et seq.* (2015).

<sup>57</sup> IND. CODE § 12-26-2-5 (2015).

<sup>58</sup> IND. CONST. art. 7.

with five justices who sit as the court of last resort,<sup>59</sup> and there is one Court of Appeals with fifteen judges who sit in three-judge panels and decide direct appeals from the trial courts.<sup>60</sup>

The trial court system is more complex and varied, made up primarily<sup>61</sup> of circuit courts, superior courts, and city/town courts. There are 91 circuit courts; every county has its own except Dearborn and Ohio which share a joint circuit, and some circuit courts have more than one judge.<sup>62</sup> In most counties, there are also superior courts – sometimes a single superior court with multiple divisions, and sometimes one or more superior courts.<sup>63</sup> As of December 31, 2014, there was a total of 114 circuit court judges and 200 superior court judges throughout the state.<sup>64</sup> By whatever name the courts are known, the 314 judges are authorized to exercise jurisdiction over all civil and criminal matters under state law and to hear *de novo*<sup>65</sup> appeals from lesser courts – they are general jurisdiction courts.<sup>66</sup> But that is largely where the similarity ends.

In addition to judges, many counties have a significant number of appointed positions (variously referred to as magistrates,<sup>67</sup> commissioners,<sup>68</sup> and referees<sup>69</sup>) that carry out many judicial functions, including presiding over cases.<sup>70</sup> For example, of the eight counties visited for this report: Warrick County has one magistrate; Lawrence County and Scott County each have one referee; Elkhart County has one commissioner and three magistrates; Lake County has twenty appointed judicial officers; and Marion County has 45. Blackford County and Montgomery County have none.<sup>71</sup>

<sup>59</sup> IND. CODE §§ 33-24-1-1 *et seq.* (2015); IND. R. APP. P. 4 (2015).

<sup>60</sup> IND. CODE §§ 33-25-1-1 *et seq.* (2015); IND. R. APP. P. 5 (2015).

<sup>61</sup> In St. Joseph County, there is also a Probate Court with one judge. IND. CODE §§ 33-31-1-1 *et seq.* (2015).

<sup>62</sup> *See generally* IND. CODE §§ 33-33-1-1 *et seq.* (2015).

<sup>63</sup> *See generally* IND. CODE §§ 33-33-1-1 *et seq.* (2015).

<sup>64</sup> SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 1 at 43-44 (2014).

<sup>65</sup> *De novo* translated from Latin means “from the new.” When a court hears a case *de novo*, it is not reviewing the lower court’s decision for legal or procedural errors, like a direct appeal. Instead, it is essentially a new trial, whereby the higher court is examining the same evidence previously presented in lower court.

<sup>66</sup> IND. CODE §§ 33-28-1-2, 33-29-1-1.5, 33-31-1-9 (2015). There are also Tax Courts and a Small Claims Court in Marion County, but neither exercise jurisdiction over cases involving indigent clients, so they are not included for purposes of this report.

<sup>67</sup> IND. CODE §§ 31-31-3-1 *et seq.*, 33-23-5-1 *et seq.*, 33-33-1-1 *et seq.* (2015).

<sup>68</sup> IND. CODE §§ 33-29-5-4, 33-31-1-18, 33-33-1-1 *et seq.* (2015).

<sup>69</sup> IND. CODE §§ 31-12-1-9 to -10, 31-12-2-5, 31-25-4-15, 31-31-3-1 *et seq.*, 31-31-4-1 *et seq.*, 33-29-3-1 *et seq.*, 33-33-1-1 *et seq.* (2015).

<sup>70</sup> IND. R. TRIAL P. 53 (as amended through July 23, 2015). *Indiana Division of State Court Administration, Appointed Judicial Officer Listing*; *see generally* IND. CODE §§ 33-33-1-1 *et seq.* (2015). For a listing by county of all elected and appointed court positions as of July 1, 2015, *see* SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 1 at 161-170 (2014).

<sup>71</sup> *Indiana Division of State Court Administration, Appointed Judicial Officer Listing*.



In each county, the judges of the general jurisdiction trial courts develop their own plan for how to distribute cases amongst themselves and the appointed officials and then implement that plan by local rule.<sup>72</sup> This means that the manner in which trial level cases are allocated is different in each of Indiana's 92 counties and can only be discerned by reviewing the local rules for each county.<sup>73</sup> So, for example, in one county all level 1 felony cases may be heard in the circuit court, while in another county they are evenly allotted across all general jurisdiction courts; in one county a single appointed magistrate may conduct all initial appearances, while in another county initial appearances are conducted by the judges to whom the cases will be allotted based on the type of case. The possible variations are great in number.

On July 1, 2014, a substantial revision of the Indiana criminal code took effect.<sup>74</sup> Among other things, it replaced the four classes of felony offenses (A to D) with six levels of felony offenses (1 to 6) and modified the sentences that can be imposed for the various levels of felony offenses.<sup>75</sup> Notably, this legislation also changed the offense levels for some crimes, including for example reducing theft under \$750 and bad checks under \$750 from a level 6 felony to a class A misdemeanor<sup>76</sup> and reducing possession of less than 30 grams of marijuana from a class A misdemeanor to a class B misdemeanor.<sup>77</sup> In those counties that allocate cases to courts based on level of offense, these changes in the criminal code mean that, until the courts can assess their caseloads and modify their local rules, some courts are receiving a significantly lesser number of cases while other courts are receiving a significantly greater number of cases.

Cities and towns in Indiana may also establish city/town courts<sup>78</sup> that have jurisdiction over criminal misdemeanors, infractions, and city ordinance violations occurring within the geographical boundaries of the city or town.<sup>79</sup> As of December 31, 2014, there was a total of 67 city and town courts in Indiana, located in 35 of Indiana's 92 counties.<sup>80</sup> The judges presiding over 19 of these courts were required to be licensed attorneys, but the judges in the other 48 courts did not have to be attorneys. Beginning July 1, 2015, all judges of city and town courts must be licensed attorneys, though those who are not attorneys and who were elected prior to that date may continue to serve until they are no longer re-elected.<sup>81</sup> The reclassification of some offenses from felonies to misdemeanors, taking effect July 1, 2014, increased the workloads of these courts. These are not courts of record and appeals from them are tried *de novo* in the

<sup>72</sup> Ind. Admin. R. 1(E) (as amended through Jan. 1, 2016); Ind. Crim. P. R. 2.2 (as amended through Apr. 8, 2015); Ind. Trial R. 81 (as amended through July 23, 2015).

<sup>73</sup> Local Rules of court by county are available at <http://www.in.gov/judiciary/2694.htm>.

<sup>74</sup> See 2013 Ind. Acts HEA1006; 2014 Ind. Acts HEA1006.

<sup>75</sup> 2013 Ind. Acts HEA1006, §§ 652, 655-660 (codified at IND. CODE §§ 35-50-2-1, -4 to -7 (2015)).

<sup>76</sup> 2013 Ind. Acts HEA1006, §§ 463, 485 (codified at IND. CODE §§ 35-43-4-2, 35-43-5-12, (2015)).

<sup>77</sup> 2013 Ind. Acts HEA1006, § 638 (codified at IND. CODE § 35-48-4-11 (2015)).

<sup>78</sup> IND. CODE §§ 33-35-1-1 *et seq.* (2015).

<sup>79</sup> IND. CODE §§ 33-35-2-3, 33-35-2-8 (2015).

<sup>80</sup> SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 1 at 45, 161-170 (2014).

<sup>81</sup> IND. CODE §§ 33-35-5-7, 33-35-5-7.5 (2015).

# CITY AND TOWN COURTS IN INDIANA

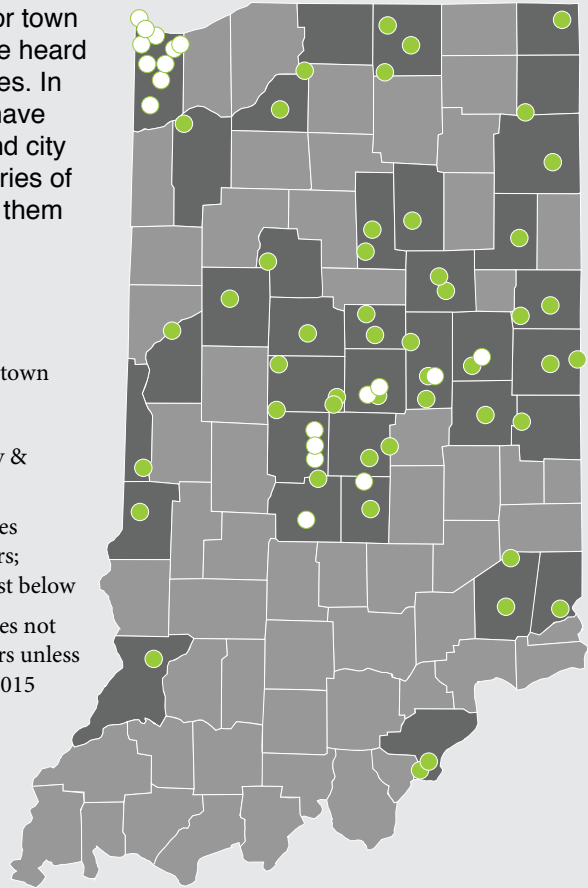
( AS OF DEC. 31, 2014 )

As of December 31, 2014, there were a total of 67 city and town courts in Indiana. Fifty-seven counties do not contain any city or town courts, and in those counties misdemeanors and infractions are heard in the general jurisdiction circuit & superior courts of the counties. In the 35 counties that do have city or town courts, these courts have original jurisdiction over criminal misdemeanors, infractions, and city ordinance violations that occur within the geographical boundaries of the city/town. These are not courts of record and appeals from them are tried *de novo* in the county's general jurisdiction courts.

Until July 1, 2015, state law did not require the judges in these courts to be lawyers, though of course the judge might have been an attorney even though not required to be. As of December 2014, 19 courts did require their judges to be licensed attorneys. Beginning July 1, 2015, all judges of city and town courts must be licensed attorneys, though judges who are not attorneys and were elected prior to that date may continue to serve until they are not re-elected.

## LEGEND

- counties with city & town courts
- counties without city & town courts
- court locations, judges required to be lawyers; shown in *italics* in list below
- court locations, judges not required to be lawyers unless elected after July 1, 2015



### Allen County:

- New Haven City

### Boone County:

- Jamestown Town
- Thorntown Town
- Whitestown Town
- Zionsville Town

### Carroll County:

- Delphi City

### Clark County:

- Clarksville Town
- Jeffersonville City  
(abolished Dec. 31, 2015)

### Clinton County:

- Frankfort City

### Dearborn County:

- Lawrenceburg City

### DeKalb County:

- Butler City

### Delaware County:

- *Muncie City*
- Yorktown Town (abolished Apr. 2015)

### Elkhart County:

- Elkhart City
- Goshen City
- Nappanee City

### Fountain County:

- Attica City

### Grant County:

- Gas City City
- Marion City

### Hamilton County:

- *Carmel City*
- Fishers Town (City effective Jan. 1, 2015)
- *Noblesville City*

### Hendricks County:

- *Avon Town*
- *Brownsburg Town*
- *Plainfield Town*

### Henry County:

- New Castle City

### Jasper County:

- Demotte Town

### Jay County:

- Dunkirk City
- Portland City

### Johnson County:

- Franklin City
- *Greenwood City*

### Knox County:

- Bicknell City

### Lake County:

- *Crown Point City*
- *East Chicago City*
- *Gary City*
- *Hammond City*
- *Hobart City*

- *Lake Station City*

- *Lowell Town*

- *Merrillville Town*

- *Schererville Town*

- *Whiting City*

### Madison County:

- *Anderson City*
- Edgewood Town
- Elwood City
- Pendleton Town

### Marion County:

- Beech Grove City
- Cumberland Town

### Miami County:

- Bunker Hill Town
- Peru City

### Morgan County:

- *Martinsville City*
- Mooresville Town

### Randolph County:

- Union City City
- Winchester City

### Ripley County:

- Batesville City
- Versailles Town

### St. Joseph County:

- Walkerton Town

### Starke County:

- Knox City

### Steuben County:

- Fremont Town

### Tiptecanoe County:

- West Lafayette City

### Tipton County:

- Sharpsville Town
- Tipton City

### Vermillion County:

- Clinton City

### Vigo County:

- Terre Haute City

### Wabash County:

- Wabash City

### Wayne County:

- Hagerstown Town

### Wells County:

- Bluffton City

### Sources:

IND. CODE §§ 33-35-1-1 *et seq.* (2015); SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 1 at 45, 161-170 (2014).

counties' general jurisdiction courts.<sup>82</sup> In the 57 counties that do not contain any city or town courts, misdemeanors and infractions are heard in the general jurisdiction circuit or superior courts, which are courts of record, and any appeal goes directly to the Court of Appeals.

### E. The “Home Rule” Act.

Indiana has made its local governments responsible in the first instance for the provision and costs of virtually all representation of indigent people.<sup>83</sup> County councils and city officials are responsible for fixing tax rates and establishing levies to raise funds to meet their budget requirements.<sup>84</sup> Property taxes on real and personal property are the primary source of revenue for counties to use in providing public attorney services.<sup>85</sup> But, the hands of county and city officials are fairly well tied as they try to meet these fiscal needs.

In 1980, the Indiana General Assembly passed the Home Rule Act.<sup>86</sup> Under the home rule statutes, cities, townships, and counties are presumed to have power to act in all areas unless that power has been expressly denied by the Indiana Constitution or statutes, or has been expressly granted to another entity.<sup>87</sup> The Home Rule Act and subsequent amendments to it list powers that are specifically withheld from local governments, including the power to impose a tax except where the legislature allows them to do so by express statutory language.<sup>88</sup>

The Indiana Constitution and statutes relating to taxation limit the amount of property taxes that counties can assess to not more than: 1% for homesteads; 2% for non-homestead residential, agricultural, and long-term care facility property; and 3% for

<sup>82</sup> IND. CODE §§ 33-35-5-7, 33-35-5-9 (2015).

<sup>83</sup> See, e.g., IND. CODE § 33-40-7-6 (2015) (county fiscal body allocates operating budget for county public defender office); IND. CODE § 33-40-7-8 (2015) (county appropriates funding of indigent defense contracts with attorneys); IND. CODE § 33-40-7-9 (2015) (county auditor pays voucher of assigned counsel attorney); IND. CODE § 33-40-7-10(a) (2015) (“Expenditures by a county for defense services not provided under the county public defender board’s plan are not subject to reimbursement from the public defense fund under IC33-40-6.”); IND. CODE § 33-40-8-4 (2015) (county must appropriate funds where judge contracts with an attorney to provide indigent representation); *Webb v. Baird*, 6 Ind. 11 (1854).

<sup>84</sup> IND. CODE § 36-2-5-11 (2015) (counties); IND. CODE § 36-4-7-7 (2015) (cities).

<sup>85</sup> The Association of Indiana Counties notes that “[t]here are six major categories of county revenue: local taxes, state funding, federal funding, debt funding, investment income and miscellaneous revenue.” ASS’N OF INDIANA COUNTIES, *GUIDE TO INDIANA COUNTY GOVERNMENT* 27 (2009).

<sup>86</sup> 1980 Ind. Acts, P.L. 211 (current version IND. CODE §§ 36-1-3-1 to 36-1-3-10 (2015)).

<sup>87</sup> IND. CODE § 36-1-3-5(a) (2015). For a description of county government in Indiana, see generally ASS’N OF INDIANA COUNTIES, *GUIDE TO INDIANA COUNTY GOVERNMENT* (2009).

<sup>88</sup> IND. CODE § 36-1-3-8 (2015).

non-residential (i.e., business and commercial) property and personal property.<sup>89</sup> Thus, an individual county has little ability to increase its revenues in order to produce funds for public needs including public attorneys.<sup>90</sup>

Where the state legislature has enacted laws, local governments have some discretion in how they carry out those laws.<sup>91</sup> Each county in Indiana is required by statute to have a “supplemental public defender services fund.”<sup>92</sup> The money deposited into this fund in each county comes from four types of what can best be described as user fees. (*See infra* pages 125 to 126). The money held in the supplemental public defender services fund does not revert to the county at the end of the year; instead, it remains in the fund.<sup>93</sup>

There are limits on how a county can spend money from the supplemental public defender services fund. It must be used to provide court appointed legal services, but it cannot “replace other funding” for those services.<sup>94</sup> Presumably this means that a county cannot use the money in this fund to pay for the normal costs of providing indigent representation that would be budgeted from the county’s general fund. There is no indication, though, that any person or agency in Indiana is exercising oversight of counties’ uses of the fund, and there is no consistency in how counties in fact use the fund.

## **F. State level public defense services.**

Between 1945 and 1989, Indiana created three state level agencies related to the provision of counsel to the poor, all of which still exist today: the State Public Defender; the Public Defender Council; and the Public Defender Commission. None of these entities, however, provides trial level representation to indigent people mandated by the Sixth and Fourteenth Amendments to the U.S. Constitution. That responsibility is left entirely to Indiana’s counties and cities.

*1. State Public Defender.* Once a defendant is convicted and the conviction is affirmed on direct appeal, the only possible relief available to that defendant is through what are known as discretionary proceedings.<sup>95</sup> These discretionary proceedings are commonly the first opportunity that a defendant has to ask a court to consider things that were

<sup>89</sup> IND. CONST. art. 10 (as amended 2010) (applying to taxes due and payable in 2012 and thereafter).

<sup>90</sup> *See generally* DAGNEY FAULK, THE IMPACT OF PROPERTY TAX RATE CAPS ON LOCAL PROPERTY TAX REVENUE IN INDIANA (May 2013).

<sup>91</sup> IND. CODE § 36-1-3-6 (2015).

<sup>92</sup> IND. CODE § 33-40-3-1 (2015). The cities that operate city courts located within Lake County must each also have a supplemental public defender services fund. IND. CODE § 33-40-3-10 (2015).

<sup>93</sup> IND. CODE § 33-40-3-4 (2015).

<sup>94</sup> IND. CODE § 33-40-3-3 (2015).

<sup>95</sup> Such as a writ of coram nobis, writ of mandamus, writ of certiorari, or writ of habeas corpus.

# INDIGENT REPRESENTATION IN INDIANA: RESPONSIBILITY FOR FUNDING, ADMINISTRATION, AND REPRESENTATION

The only state level representation of indigent defendants is in discretionary post-conviction cases; all other representation is provided by counties, cities, and towns. All funding is provided by counties, cities, and towns, except for the optional state reimbursement available to counties

in certain types of cases. The only administrative oversight exercised by the state is through the Commission's oversight of those cases for which the counties choose to seek partial state reimbursement.

**STATE LEVEL**

**Office of the State Public Defender**  
discretionary post-conviction

**Public Defender Council**  
training & research

**Public Defender Commission**  
development of standards  
and administration

state funds

**NO STATE RESPONSIBILITY**

**40% STATE REIMBURSEMENT**  
if request + comply with  
*Commission Standards*  
- 55 counties participating  
- 37 counties not participating

**50% STATE REIMBURSEMENT**  
if request + comply with  
Rule 24

**COUNTY LEVEL**

**administered by trial court judges & county officials**

- adult misdemeanor

- adult felony  
- juvenile delinquency  
- CHINS  
- TPR  
- MH / involuntary commitment  
- contempt  
- direct appeal

- death penalty

**CITY & TOWN LEVEL**

**administered by city and town court judges & city officials**

- adult misdemeanor

*not* done during his trial or appeal – witnesses that should have been called to testify but were not; evidence that should have been introduced on his behalf but was not; motions, arguments, and objections that should have been made by counsel but were not – things that might have shown his innocence of the charge. But the United States Supreme Court has held that there is no federal constitutional right to counsel for an indigent person seeking discretionary review of a state court conviction.<sup>96</sup> This means that defendants in many states are left to seek discretionary review on their own, or *pro se*.

States are free, however, to make public counsel available to defendants at any and all stages of judicial review and far beyond the minimal requirements of the federal Constitution, should they so choose.<sup>97</sup> In 1945, the Indiana General Assembly did exactly that by creating the Office of the State Public Defender to represent incarcerated, indigent individuals in post-conviction and Department of Corrections or parole board proceedings after their time for filing direct appeals has expired.<sup>98</sup>

The duties of the State Public Defender (SPD) remain the same today as at its creation in 1945, with only minor changes.<sup>99</sup> From 1989 to 1991, the SPD was authorized by an order of the Indiana Supreme Court to represent children who were being detained or

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<sup>96</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

<sup>97</sup> *Ross*, 417 U.S. at 618.

<sup>98</sup> 1945 Ind. Acts, ch. 38, §§ 1-5 (current version IND. CODE §§ 33-40-1-1 to 33-40-1-6 (2015)). Then-Chief Justice Emmert of the Indiana Supreme Court explained the legislative rationale for the creation of the office: “Many prisoners in the Indiana State Prison were filing many petitions for writs of *coram nobis* and *habeas corpus* in the trial courts, as well as petitions for writs of mandate in this court, all without benefit of counsel, which created a great burden upon the trial courts as well as this court. A pauper prisoner was not entitled to counsel or record at public expense. Most of the prisoners were acting as their own lawyer, with the result that their pleadings were generally in a confused and unintelligible form, and a chaotic condition was developing due to the numerous pleadings drafted without benefit of legal skill. On December 8, 1944, the Seventh Circuit Court of Appeals decided the case of *Potter v. Dowd* . . . The Attorney General of Indiana, believing the decision unanswerable, refused to attempt to have this decision reviewed by the United States Supreme Court. . . . In order to provide counsel in behalf of pauper prisoners, avoid the objections noted in the *Potter* case, and to try these cases in the state courts rather than force them into the Federal District Courts, the Public Defender Act was drafted, enacted by the General Assembly, and became effective February 26, 1945.” *State ex rel. Lake v. Bain*, 225 Ind. 505, 514-15 (1948) (Emmert, C.J., concurring) (citations omitted).

<sup>99</sup> IND. CODE §§ 33-40-1-1 to 33-40-2-6 (2015). *See* IND. P-C RULE 9 (as amended through Jan. 1, 2015).

incarcerated in adult jails.<sup>100</sup> “No lawsuits were filed by the state public defender, but authority to investigate these cases gave the office the opportunity to educate and to provide state court judges and counties with information about the federal law.”<sup>101</sup>

In 2004, the general assembly added authority for the State Public Defender to “accept appointment himself” or appoint any competent attorney to represent an indigent defendant in any criminal case (not just a post-conviction proceeding) whenever a judge makes a written request after determining that the court cannot provide counsel within a reasonable time.<sup>102</sup> In actual practice, however, the SPD does not directly represent these clients and instead always provides to the trial court a recommendation for an attorney who is not associated with the SPD, whom the trial court can then choose to appoint or not. Despite its name, the State Public Defender has never been responsible for providing Sixth Amendment right to counsel representation.<sup>103</sup>

*2. Public Defender Council.* In 1977, the general assembly created the Indiana Public Defender Council (Council) to provide training, research, and support, and to serve as a liaison among and on behalf of the attorneys throughout the state who represent indigent clients.<sup>104</sup> The Council was created as a membership organization, where by statute every person regularly appointed to or contracted to represent indigent clients, along with employees of public defender offices, is automatically considered a member.<sup>105</sup> There is nothing, though, that compels anyone who provides right to

<sup>100</sup> *In re* Deinstitutionalization of Status Offenders, 537 N.E.2d 468 (Ind. 1989). *See, e.g.*, INDIANA CRIMINAL JUSTICE INSTITUTE, INDIANA’S THREE-YEAR DELINQUENCY PREVENTION & SYSTEMS IMPROVEMENT PLAN & APPLICATION FY 2013 UPDATE 28; Kathryn Dolan, *Susan Carpenter Retires as State Public Defender*, INDIANA COURTTIMES (Aug. 16, 2011); Chief Justice Randall T. Shepard, State of the Judiciary (Jan. 17, 1990).

<sup>101</sup> Margret G. Robb and Nancy Gettinger, *Juvenile Law: The Quest to Redeem Youthful Offenders*, in THE HISTORY OF INDIANA LAW, ch. 7 (David J. Bodenhamer & Randall T. Shepard eds, 2006).

<sup>102</sup> IND. CODE §§ 33-40-2-1 to 33-40-2-6 (2015) (added by 2004 Ind. Acts, P.L. 98-2004 § 19).

<sup>103</sup> Indiana expends significant sums for this discretionary representation. The state allocated a total of \$14,000,640 from the general fund to the State Public Defender in the two-year 2013-2015 biennial budget. 2013-2015 As-Passed Budget, Ind. House Enrolled Act No. 1001 § 3.B. at 12 (2013), *available at* [http://www.in.gov/sba/files/AP\\_2013\\_0\\_0\\_1\\_HEA\\_1001.pdf](http://www.in.gov/sba/files/AP_2013_0_0_1_HEA_1001.pdf); INDIANA GENERAL ASSEMBLY, STATE OF INDIANA LIST OF APPROPRIATIONS FOR THE BIENNIUM JULY 1, 2013 TO JUNE 30, 2015, at B-16, I-4 (2013), *available at* [http://www.in.gov/sba/files/AP\\_2013\\_0\\_0\\_2\\_Budget\\_Report\\_w\\_Tabs.pdf](http://www.in.gov/sba/files/AP_2013_0_0_2_Budget_Report_w_Tabs.pdf). In 2015, the office employed a total of 65 staff, including 44 attorneys, three clerks, one mitigation specialist, and 17 administrative and support staff.

<sup>104</sup> IND. CODE §§ 33-40-4-2, 33-40-4-5 (2015). As of 2015, the office employs ten staff. *See* Indiana Public Defender Council, *Contact Us, IPDC Staff*, *available at* <http://www.in.gov/ipdc/public/ipdcstaff.html>. In the two-year 2013-2015 biennial budget, the allocated to the Council a total of \$2,768,548 from a combination of general fund, dedicated funds, and federal funds. 2013-2015 As-Passed Budget, Ind. House Enrolled Act No. 1001, at 12 (2013), *available at* [http://www.in.gov/sba/files/AP\\_2013\\_0\\_0\\_1\\_HEA\\_1001.pdf](http://www.in.gov/sba/files/AP_2013_0_0_1_HEA_1001.pdf); INDIANA GENERAL ASSEMBLY, STATE OF INDIANA LIST OF APPROPRIATIONS FOR THE BIENNIUM JULY 1, 2013 TO JUNE 30, 2015, at B-16, I-5 (2013), *available at* [http://www.in.gov/sba/files/AP\\_2013\\_0\\_0\\_2\\_Budget\\_Report\\_w\\_Tabs.pdf](http://www.in.gov/sba/files/AP_2013_0_0_2_Budget_Report_w_Tabs.pdf).

<sup>105</sup> IND. CODE § 33-40-4-2 (2015).

counsel services to participate in any of the activities of the Council. The Council is overseen by a board of directors, made up of the State Public Defender and another ten directors who are elected by the membership.<sup>106</sup>

The Council produces a significant number of publications.<sup>107</sup> On request of members, the Council provides research services and assistance with automating local computer services.<sup>108</sup> As of 2015, the Council puts on 13 training seminars each year: ten in Indianapolis and three in other areas of the state. Topics include programs for new lawyers, death penalty representation, and annual updates on the law.<sup>109</sup> One of the training programs is held in conjunction with the Council's annual meeting, which is usually attended by 500 to 600 public defenders. Eighty to 100 people typically attend each of the other training programs, and in total about 1,400 attorneys attend at least one Council sponsored program each year. Through these educational programs and meetings, the Council's staff has greater interaction with the local attorneys who actually represent clients than any other state level agency, though interaction is limited to only those attorneys who choose and have resources to attend these programs.

As statutorily directed,<sup>110</sup> the Council's Executive Director spends significant time advocating at the legislature and with state level judiciary on behalf of the needs of indigent defendants and the attorneys who represent them. The Council's Executive Director is presently a member of the third state level right to counsel entity, the Indiana Public Defender Commission (Commission). Because the Commission directly affects trial level services in many counties through the promulgation of indigent defense standards and administration of partial state reimbursement of local expenditures, the role of the Commission is discussed at length in the ensuing chapters of Part I.

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<sup>106</sup> IND. CODE § 33-40-4-3 (2015).

<sup>107</sup> See Indiana Public Defender Council, *Our Services, Publications*, available at <http://www.in.gov/ipdc/public/publications2.html>.

<sup>108</sup> See Indiana Public Defender Council, *Our Services, Research*, available at <http://www.in.gov/ipdc/public/research.html>.

<sup>109</sup> See Indiana Public Defender Council, *Our Services, Training*, available at [http://www.in.gov/ipdc/public/training\\_calendar.html](http://www.in.gov/ipdc/public/training_calendar.html).

<sup>110</sup> IND. CODE § 33-40-4-5(5) (2015) (“The council shall . . . maintain liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that will benefit criminal defense as part of the fair administration of justice in Indiana.”).



# CHAPTER 2

## THE INDIANA PUBLIC DEFENDER COMMISSION

The Indiana Public Defender Commission is an eleven-member commission appointed by diverse entities. The Governor has three appointments, the Chief Justice has three, the Speaker of the House and the Senate President Pro Tempore each have two, and the Indiana Criminal Justice Institute, which is the state's criminal justice planning committee, has one appointment.

The Commission today has the same authority and responsibilities that it has had since May 13, 1993.<sup>111</sup> Its primary duty is to administer the program under which counties can receive reimbursement by the state for their expenses in providing representation to the indigent, at the trial level and on appeal, of 50% in death penalty cases and of 40% in all other cases where the state provides a right to counsel (excluding misdemeanors).<sup>112</sup> The Commission has on-going responsibility to adopt standards and guidelines for indigent defense services in non-capital cases,<sup>113</sup> and to recommend standards to the Indiana Supreme Court in death penalty cases,<sup>114</sup> all by which counties must abide to receive reimbursement.<sup>115</sup> Its other statutory duties are to report annually on the operation of the public defense fund<sup>116</sup> and broadly to make recommendations about the delivery of indigent defense services throughout the state.<sup>117</sup>

This chapter explains the state capital and non-capital partial reimbursement program.

### **A. Capital case reimbursement.**

Indiana has maintained the death penalty as an available punishment since before becoming a state in 1816. Between 1972 and 1977, Indiana's death penalty statutes were held unconstitutional.<sup>118</sup> The general assembly passed a new death penalty statute, effective October 1, 1977, that with modifications along the way remains in

<sup>111</sup> The effective date of 1993 Ind. Acts, P.L. 238, which commenced the state reimbursement program for non-capital cases.

<sup>112</sup> IND. CODE §§ 33-40-5-4(2), 33-40-6-5 (2015).

<sup>113</sup> IND. CODE § 33-40-5-4(2) (2015).

<sup>114</sup> IND. CODE § 33-40-5-4(1) (2015).

<sup>115</sup> IND. CODE § 33-40-6-5 (2015).

<sup>116</sup> IND. CODE § 33-40-5-4(4) (2015).

<sup>117</sup> IND. CODE § 33-40-5-4(3) (2015).

<sup>118</sup> French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

effect today.<sup>119</sup> As one Indiana scholar has written, “there was considerable evidence of significant problems” in capital defense representation as the state attempted to implement this new statute.<sup>120</sup> Another Indiana lawyer explains that, “[a]s the supreme court reviewed capital sentences imposed under the 1977 death penalty law, the court saw the need for standards, support services, and adequate compensation for attorneys” to represent indigent defendants facing the death penalty.<sup>121</sup> The legislature responded to that need and, in 1989, created the Indiana Public Defender Commission.<sup>122</sup>

Previously, Indiana counties were responsible for all costs of both prosecution and defense in death penalty cases. With the creation of the Commission, the state promised to reimburse each county for fifty percent of its costs in providing representation to indigent defendants facing the death penalty,<sup>123</sup> if the county complies with guidelines that the Commission was charged with recommending to the state Supreme Court.<sup>124</sup> Indiana’s lawmakers devised this mechanism of the state partially reimbursing counties for the costs of death penalty defense in indigent cases as the incentive for local trial courts to comply with the standards.<sup>125</sup> Otherwise, the state and its higher courts would have no way of knowing whether local courts were complying with these requirements unless and until each of these death penalty cases arose one by one on appeal.

The Commission set to work in January 1990 and met frequently to develop the proposed rule that it submitted to the Indiana Supreme Court in the fall of 1990.<sup>126</sup> At the urging of the Indiana Supreme Court,<sup>127</sup> the Commission began making interim

<sup>119</sup> 1977 Ind. Acts, P.L. 340, § 122 (codified as amended at IND. CODE § 35-50-2-9 (2015)).

<sup>120</sup> Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experiment*, 29 IND. L. REV. 495, 498 (1996) (citing *Dillon v. Duckworth*, 751 F.2d 895, 900-02 (7th Cir. 1984); *Burris v. State*, 558 N.E.2d 1067, 1073 (Ind. 1990)).

<sup>121</sup> Susan K. Carpenter, “*Conspicuously Enlightened Policy*” in *THE HISTORY OF INDIANA LAW* ch. 6 (David J. Bodenhamer & Randall T. Shepard ed., 2014).

<sup>122</sup> 1989 Ind Acts, P.L. 284 (codified as amended at IND. CODE §§ 33-40-5-1 to 33-40-8-5 (2015)).

<sup>123</sup> IND. CODE §§ 33-40-6-4(a), 33-40-6-5(a)(1) (2015).

<sup>124</sup> IND. CODE §§ 33-40-5-4(1), 33-40-6-5(a)(1) (2015).

<sup>125</sup> In 1989, the Indiana General Assembly was forward thinking in enacting this legislation that enabled the state Supreme Court to set minimum standards for representation of indigent defendants in death penalty cases. Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996). For the times, this was an innovative and proactive approach toward trying to ensure prospectively that effective representation would actually be provided while the case was taking place in the trial court, rather than waiting perhaps years for the case to conclude at the trial court level and then consider retrospectively, on appeal or in discretionary review, whether the lawyer had been effective. The enforcement mechanism of rewarding a county for complying with standards through the state making partial reimbursement came to be known as “the Indiana model.” Though Indiana has followed, and expanded, this model for over a quarter of a century, this evaluation is the first that has ever been conducted to measure the results.

<sup>126</sup> See generally Ind. Pub. Def. Comm’n, *Minutes* (Jan. 29, 1990 through Dec. 18, 1990).

<sup>127</sup> Ind. Pub. Def. Comm’n, *Minutes*, para. 4 (Aug. 29, 1990) (“The Commission discussed Chief Justice Shepard’s letter to the Chairman dated August 29, 1990 in which he reiterated his request that the Commission act promptly to make assistance available to indigent capital defendants.”).

reimbursements to counties on February 27, 1991,<sup>128</sup> before the court acted on the proposed rule. To do so, the Commission promulgated and distributed to counties<sup>129</sup> an early version of what would become its *Guidelines Related to Capital Cases*.<sup>130</sup> These guidelines for capital cases do not contain any substantive requirements that attorneys, trial courts, or counties must follow on behalf of indigent capital defendants. Rather, they establish the process that a county must follow to apply for reimbursement, and they explain what the Commission does and does not consider reimbursable under the statutory scheme (additional guidelines have been added to explain the Commission's interpretation of the specific requirements imposed by Rule 24 after its adoption and as questions have arisen over the years since).

The Commission's role in approving reimbursement of expenses incurred by counties for the two-and-a-half years from July 1, 1989 through December 30, 1991 was limited to verifying that the expenses were for the defense of a death penalty case with a public attorney.<sup>131</sup> There was no quality control involved in the state's reimbursement program during this time. The Commission has, from the outset, required counties to submit requests for death penalty defense reimbursement on an "approved claim form, with itemized invoices, billing statements and certification of payments," with the county auditor certifying that the county has actually paid all of the expenses for which it is seeking reimbursement.<sup>132</sup> Assuming adequate staff time to thoroughly review every page of every reimbursement request, this allows the Commission to see exactly what expenses a county is seeking to have reimbursed and to ensure that only true defense-related expenses are included. Indeed, when reviewing the first few counties' requests for reimbursement, the Commission found that counties had included expenses for court security, jury expenses, and experts requested by the court rather than by the defense, among other things, all of which the Commission refused to reimburse.<sup>133</sup>

<sup>128</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1991).

<sup>129</sup> Ind. Pub. Def. Comm'n, *Minutes* (Aug. 29, 1990).

<sup>130</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO CAPITAL CASES (1990) (last amended Dec. 12, 2012). The Commission formally adopted the *Guidelines* on December 5, 1991, Ind. Pub. Def. Comm'n, *Minutes* (Dec. 5, 1991), and they took effect along with Rule 24 on January 1, 1992, Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1992).

<sup>131</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1992) ("[I]t was agreed that the Commission should not adopt guidelines which require compliance with any portion of C.R. 24 for appointments made prior to January 1, 1992.").

<sup>132</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO CAPITAL CASES, B. Procedure and time limits (as adopted through Feb. 27, 1991); Ind. Pub. Def. Comm'n, *Minutes* (Sept. 17, 1990); Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1991).

<sup>133</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1991). The statute authorized counties to apply to the Commission for reimbursement of *only* expenditures made for "indigent defense services provided after July 1, 1989, to a defendant against whom the death sentence is sought." 1989 Ind. Acts, P.L. 284 (codified at IND. CODE §§ 33-9-14-4 (1989) prior to amendment by 1993 Ind. Acts, P.L. 238). Subsequent county reimbursement requests also included inappropriate expenses, such as: the cost of sequestering the jury, an airplane trip for a prosecutor, the costs of training a court reporter to use computer-aided transcription along with the necessary software, Ind. Pub. Def. Comm'n, *Minutes* (Aug. 29, 1991), and

The Indiana Supreme Court adopted Rule 24 governing capital cases, effective January 1, 1992.<sup>134</sup> Rule 24 sets out special rules that all trial courts must follow for the appointment and compensation of defense counsel in a death penalty case where the defendant is indigent.<sup>135</sup> It requires a prosecutor to notify the state Supreme Court and the trial court when he intends to seek the death penalty. Once that notice is filed, if the defendant is indigent, the trial court must appoint two attorneys (rather than just one) to represent the defendant, and the attorneys who are appointed must have certain amounts and types of training and experience beyond that required in non-death cases. The rule places strict numerical limits on the number of other cases a salaried or contract public defender can handle at the same time as a death penalty case, in an effort to ensure that the attorney has adequate time to provide effective representation to all of his clients. For private attorneys who are appointed by a trial court in a death penalty case, the judge is responsible for assessing “the impact of the appointment on the attorney’s workload.” If the appointed attorney is paid an hourly rate (as opposed to being a salaried or contracted public defender), the rule sets the specific amount of that hourly rate,<sup>136</sup> and all public death penalty attorneys must be provided or reimbursed for case-related expenses including investigative, expert, and other support services that the trial court determines are reasonably necessary.

Once Rule 24 took effect, the Commission had the added responsibility of ensuring that trial courts had complied with that Rule in any death penalty case where a county sought reimbursement from the state, before certifying that the county’s reimbursement request should be paid.<sup>137</sup> The Commission, though, had no way of knowing and insufficient staff to independently verify whether the attorneys who were appointed in fact met the requirements of the Rule.

In an effort to fulfill its mandate, the Commission adopted a new guideline requiring every reimbursement request to contain a signed certification by the trial judge “that counsel was appointed in compliance with Rule 24, including attorney workload requirements.”<sup>138</sup> In September of 1993, the Commission took the additional step of requiring the reimbursement requests to also contain a signed certification by both of the attorneys appointed in a case “that they were in compliance with Rule 24 and

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the cost of transcripts that the court ordered for its own use, Ind. Pub. Def. Comm’n, *Minutes* (Apr. 22, 1992).

<sup>134</sup> IND. R. CR. P. 24 (as amended through Apr. 8, 2015).

<sup>135</sup> *Id.* at §§ B, C.

<sup>136</sup> Since January 1, 2001, that rate has been \$90.00 per hour, *id.* at § C(1), up from the rate of \$70 per hour originally set in January 1992. From September 1, 1990 until Rule 24 became effective on January 1, 1992, the Commission reimbursed counties for hourly attorney pay set at the rate of \$75.00 per hour. *See generally* Ind. Pub. Def. Comm’n, *Minutes* (Aug. 29, 1990 through Feb. 27, 1992). Effective January 1, 1992, Rule 24 set the hourly rate at \$70.00 per hour.

<sup>137</sup> IND. CODE § 33-40-5-4 (2015).

<sup>138</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO CAPITAL CASES, B. Procedure and time limits (as adopted through Dec. 5, 1991).

its workload requirements.”<sup>139</sup> The Commission had little reason to think that a trial judge or an attorney might sign these certifications when Rule 24 had not in fact been complied with, so they were concerned when they received information showing clear violations of the Rule that could not have been inadvertent.<sup>140</sup> The Commission refused to reimburse claims whenever it learned that a trial court had not complied with Rule 24, but this did not cause compliance; it merely meant the county did not receive any reimbursement from the state.

The representation of indigent capital defendants is never subjected to the Commission’s scrutiny at all unless the county in which the prosecution occurs chooses to seek reimbursement from the state for half “of the county’s expenditures for indigent defense services provided to [the] defendant” in a specific death penalty case.<sup>141</sup> It is entirely up to each county in each case as to whether it wants to apply for this partial reimbursement by the state, triggering the Commission’s responsibility to check for compliance with Rule 24, or bear the full cost of the defense but without anyone overseeing its Rule 24 compliance. A county can choose to apply for reimbursement in one death penalty case and choose not to apply in another; a county can choose to apply for reimbursement in a death penalty case this year and choose not to apply in a case next year; and a county can choose to apply for reimbursement of expenditures incurred for only a given period of time in a particular death penalty case and then forgo seeking reimbursement later in that same case.

Notably, this death penalty expense reimbursement program was the first time in Indiana’s history that the state had contributed any funds toward the cost of providing indigent defense services required by the Sixth Amendment.<sup>142</sup> And when they occur, death penalty cases can dramatically affect county budgets. This is in large part because they are so much more costly than other criminal prosecutions, but also because a county cannot plan in advance for when or whether it will have a death penalty case.

<sup>139</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO CAPITAL CASES, B. Procedure and time limits (as adopted through Sept. 22, 1993).

<sup>140</sup> For example, a Marion County capital reimbursement claim was denied when one of the attorneys confirmed “that he had more than 20 open felony cases while assigned to [a death case] and received new appointments within 30 days of the trial.” Ind. Pub. Def. Comm’n, *Minutes* (Dec. 15, 1993). An Elkhart County capital reimbursement claim was denied because the attorneys were paid less than the required rate of \$70 per hour. Ind. Pub. Def. Comm’n, *Minutes* (Jan. 11, 1996). Vanderburgh County was required to refund \$49,996.69 previously received when the commission “learned that compliance with Criminal Rule 24 did not exist despite certification by counsel and the judge to the contrary.” Ind. Pub. Def. Comm’n, *Minutes* (Sept. 1, 1999 and Dec. 17, 1999).

<sup>141</sup> IND. CODE §§ 33-40-6-4(a), 33-40-6-5(a)(1) (2015).

<sup>142</sup> The state appropriated \$650,000 annually for capital case reimbursements through the Commission. IND. PUB. DEF. COMM’N, 2000-2001 ANNUAL REPORT 6 (2001).

The death penalty is only available in Indiana as a penalty for the crime of murder, and then only for those murders that involve a specified list of aggravating circumstances.<sup>143</sup> Even for these cases, the decision whether to seek the death penalty is in the discretion of the prosecutor, who can choose instead that a sentence of life imprisonment without parole will be imposed following any conviction and avoid the due process complexities and financial costs of attempting to secure a death sentence. As a result, only a small number of Indiana's counties will have a death penalty case in a given year, if ever.

.....  
**A CLOSER LOOK**

CAPITAL REIMBURSEMENT BY IPDC,  
 1990 TO 2014

[ via 6AC website ]  
 .....

All of this means the financial commitment that the state made to reimburse counties for a portion of their defense costs in indigent death penalty cases, though laudable,<sup>144</sup> does not benefit Indiana's 92 counties equally and some not at all. If a county has no murder cases with the specified aggravating circumstances, the program does not apply. If a county's prosecutor does not seek the death penalty, the program does not apply. If the county does not want to be subjected to the Commission's scrutiny, the program does not apply.

From February 27, 1991, when the first capital case reimbursements to counties were approved,<sup>145</sup> through September 17, 2014, only 43 of Indiana's 92 counties have received some amount of state reimbursement for capital case indigent defense.<sup>146</sup> In fact, five of the counties (Daviess, Hancock, Randolph, Shelby, and Sullivan) that have ever received state reimbursement for death penalty cases did so *only* during the 1991 period that did not require compliance with Rule 24; a time when the only requirement for reimbursement was that the county had paid an expense in the defense of an indigent death penalty case.<sup>147</sup> The amounts by which counties have benefitted vary greatly, with Hancock County claiming a single reimbursement of \$2,064 back

<sup>143</sup> IND. CODE § 35-50-2-9 (2015).

<sup>144</sup> From the program's inception in 1989 through the close of the 2013-2014 fiscal year, over 25 years the state reimbursed a total of \$11,870,212 to counties for the indigent defense costs of capital cases, IND. PUB. DEF. COMM'N, 2013-2014 ANNUAL REPORT 13 (2014) – an average of \$494,592 per year. The largest amount ever paid by the state in a single year for this purpose was \$844,769, during the 2006-2007 fiscal year. *Id.*

<sup>145</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1991).

<sup>146</sup> Ind. Pub. Def. Comm'n, *Reimbursements in Capital Cases* (Sept. 17, 2014). The largest number of counties ever seeking capital defense expense reimbursement in a single quarter is ten. *See* "A Closer Look: Capital Reimbursement by IPDC, 1990 to 2014" (ten counties reimbursed for capital defense expenditures in the second quarter of 1992 and in the fourth quarter of 2006).

<sup>147</sup> *See generally*, Ind. Pub. Def. Comm'n, *Minutes*; Ind. Pub. Def. Comm'n, *Reimbursements in Capital Cases* (Sept. 17, 2014). The Commission, in an effort to get relief to county coffers as quickly as possible, authorized reimbursements during 1991 to applying counties for some expenses and attorney fees, even as the Commission and Supreme Court were developing Rule 24. Ind. Pub. Def. Comm'n, *Minutes* (Aug. 29, 1990).

in 1991,<sup>148</sup> while Lake and Marion counties have sought reimbursement in almost every year of the program's existence and have recouped \$1,755,070 and \$3,830,027 respectively (together, 47% of the total capital reimbursement made by the state to counties over 25 years).<sup>149</sup> Forty-nine counties have never received reimbursement for any capital case defense, thus those counties either: did not have a death penalty case with an indigent defendant during the past quarter century; or sought reimbursement but were found to not comply with Rule 24; or simply chose to not seek reimbursement.

### **B. Non-capital case reimbursement.**

Of much greater potential significance to the right to counsel in Indiana's trial courts, in 1993, the general assembly expanded the Commission's standard-making authority and the state's fiscal commitment.<sup>150</sup> The state agreed to reimburse counties for twenty-five percent of *all* of their non-capital indigent defense costs in exchange for county compliance with standards promulgated by the Commission.<sup>151</sup> While few counties may ever have a death penalty case, *every* county *always* has non-capital adult and juvenile cases. For example, during 2014 alone, there were a total of 220,058 new such cases filed in the trial courts of Indiana (an average of 2,392 per county), and public counsel was provided in 102,108 of those cases (46.4%).<sup>152</sup> (See table, next page).

With the passage of this new legislation, every one of Indiana's 92 counties, if they so chose, could be reimbursed by the state for 25% of their costs in providing representation to indigent people in all of these cases, as long as they complied with minimum standards established by the Commission. But as with the capital case reimbursement program, it was up to the counties then, and today, to decide whether they wanted to participate.

There is one major difference between the capital defense reimbursement program and that governing reimbursement in non-capital cases. The general assembly gave the Commission full authority to adopt the standards with which counties and courts must comply in providing counsel for indigent people in non-capital cases, in order to receive reimbursement.<sup>153</sup> Unlike the capital cases, there is no rule of court in

<sup>148</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 1991). Of note, Hancock County sought and received this reimbursement for expenses incurred in an indigent death penalty case before the Rule 24 became effective. *Id.*

<sup>149</sup> Ind. Pub. Def. Comm'n, *Reimbursements in Capital Cases* (Sept. 17, 2014).

<sup>150</sup> 1993 Ind. Acts, P.L. 283.

<sup>151</sup> 1993 Ind. Acts, P.L. 283 (codified as amended at IND. CODE §§ 33-40-5-4(2), 33-40-6-4(b), 33-40-6-5(a)(2) (2015)).

<sup>152</sup> INDIANA JUDICIAL SERVICE REPORT 2014, VOLUME 1: JUDICIAL YEAR IN REVIEW 91 (2015). Only adult felony, adult misdemeanor, and juvenile delinquency cases are included in this number. The number of murder cases here may include cases in which the death penalty was sought.

<sup>153</sup> 1993 Ind. Acts, P.L. 238 (codified at IND. CODE §§ 33-9-13-3(a)(2) (1993)) ("The commission

**2014 Cases Filed (all Indiana counties)  
Adult Felony, Adult Misdemeanor, and Juvenile Delinquency**

<b>Case Type</b>	<b>Number of New Cases Filed</b>	<b>Number of Cases, Attorney Appointed</b>	<b>Percentage of Cases, Attorney Appointed</b>
Murder	271	177	65.31%
Class A Felony	2,173	1,513	69.63%
Class B Felony	4,922	4,474	90.90%
Class C Felony	6,285	5,571	88.64%
Class D Felony	28,597	23,944	83.73%
Level 1 Felony	159	97	61.01%
Level 2 Felony	409	228	55.75%
Level 3 Felony	869	580	66.74%
Level 4 Felony	1,283	847	66.02%
Level 5 Felony	3,755	2,256	60.08%
Level 6 Felony	17,601	8,909	50.62%
Misdemeanor (CM)	138,384	42,814	30.94%
Juv. Delinquency	15,350	10,698	69.69%
<b>TOTAL</b>	<b>220,058</b>	<b>102,108</b>	<b>46.40%</b>

non-capital cases that corresponds to these standards. So, counties and courts never have any obligation at all to comply with the Commission’s adopted standards unless they seek reimbursement from the state.

The Commission’s *Standards for Indigent Defense Services in Non-Capital Cases* (“Standards”) were finalized by September of 1994<sup>154</sup> and were distributed statewide<sup>155</sup> before taking effect on January 1, 1995.<sup>156</sup> The legislature allocated \$1,250,000 for distribution by the Commission to counties for both capital and non-capital case reimbursements during fiscal year 1995-1996.<sup>157</sup> Between January 1, 1995 and June 30, 1997, nine counties developed plans for providing non-capital indigent representation services that on their face appeared to comply with the Commission’s *Standards*, and on that basis those counties were approved to apply for non-capital case reimbursements.<sup>158</sup> Eight of those nine counties successfully received reimbursements during that time, though one did not.<sup>159</sup>

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shall: . . . Adopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement under IC 33-9-14 . . .”).

<sup>154</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 1, 1994).

<sup>155</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 2, 1994).

<sup>156</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES (2015) (as amended through June 18, 2014).

<sup>157</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 8, 1995).

<sup>158</sup> Clark, Floyd, LaPorte, Marion, Miami, Montgomery, Orange, Parke, and Warren. Ind. Pub. Def. Comm’n, *Minutes* (June 8, 1995; Sept. 7, 1995; May 9, 1996; Dec. 4, 1996; and Feb. 19, 1997).

<sup>159</sup> Ind. Pub. Def. Comm’n, *Non-Capital Reimbursements* (Sept. 17, 2014). *See generally*, Ind. Pub. Def. Comm’n, *Minutes*. Miami County’s plan was approved, but it did not receive any non-capital



Counties volunteered to participate in the non-capital case reimbursement program at a slower pace than anticipated, given the opportunity to receive state funds. Then four years in, the general assembly modified the non-capital reimbursement program. Effective July 1, 1997, the state increased to forty percent the amount it would reimburse counties for the expense of representation to the indigent in non-capital cases, but it expressly *excluded* all costs related to misdemeanors.<sup>160</sup>

It is difficult to quantify the financial effect of this change. Certainly it costs counties, on average, more to provide representation for a single felony than it does for a single misdemeanor.<sup>161</sup> As shown in the table at page 26, of the 102,108 new cases filed in 2014 where a public attorney was provided, 58% of them (48,596 felonies and 10,698 juvenile delinquency cases) were reimbursable, while the other 42% (42,814 misdemeanor cases) were not reimbursable. Whatever the actual dollar difference to counties between the 1993 statute and the 1997 statute, the promise that the state would reimburse counties for forty percent of *something* seemed to cause an increase in counties' interest in participating; though the statutory change significantly decreased the Commission's authority to influence the existence or the quality of the right to counsel for poor people charged with misdemeanors.<sup>162</sup>

As additional counties voluntarily adopted non-capital indigent representation plans to comply with the Commission's *Standards* and were approved to apply for non-capital case reimbursements,<sup>163</sup> the money the state had allotted for this purpose covered less and less of the demand. When the general assembly added in the non-capital reimbursement program in 1993, it required that the Commission always reimburse all claims for capital expenses first and suspend or prorate the reimbursement of non-capital claims any time the full payment of those claims would reduce the fund balance below \$250,000.<sup>164</sup> By early 2000, the Commission began discussing "the possibility

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reimbursements during this period.

<sup>160</sup> 1997 Ind. Acts, P.L. 202 (codified as amended at IND. CODE §§ 33-40-6-4(b), 33-40-6-5(a)(2) (2015)).

<sup>161</sup> For example, the Texas Indigent Defense Commission recently reported that, in 2015, Texas paid public defense attorneys on average \$651 for a felony, \$208 for a misdemeanor, and \$394 for juvenile delinquency cases. Testimony of Jim Bethke, Executive Director of the Texas Indigent Defense Commission, to the Texas House Criminal Jurisprudence Committee (Mar. 21, 2016). A 2013 report by the National Association of Criminal Defense Attorneys shows that states consistently pay more by the hour and overall for felonies than for misdemeanors. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE – THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS, at 20-32 (Mar. 2013).

<sup>162</sup> The Commission acknowledged this change in its authority: "The legislation [1987 Ind. Acts, P.L. 202] excludes reimbursement in non-capital cases for indigent defense expenditures in misdemeanors [sic] cases. Therefore, the Commission's unanimous decision was to eliminate misdemeanors from its compliance standards for counties seeking 40% reimbursement." Ind. Pub. Def. Comm'n, *Minutes* (May 14, 1997).

<sup>163</sup> See generally Ind. Pub. Def. Comm'n, *Minutes*.

<sup>164</sup> 1993 Ind. Acts, P.L. 238 (codified at IND. CODE § 33-9-14-6 (1993)).



of . . . being forced to suspend payments due to the unavailability of funds.”<sup>165</sup> In November 2000, “the funds available to the Commission [were] not expected to be sufficient to pay non-capital claims presented at the next meeting, and therefore claims in non-capital cases would have to be suspended.”<sup>166</sup>

Beginning with claims submitted by counties during the fourth quarter of 2000 and continuing through claims submitted by counties during the second quarter of 2012, for nearly 12 years there was frequently insufficient funds to pay all of the requests for reimbursement at the time they were approved.<sup>167</sup> Payments to participating counties for non-capital cases were often suspended and prorated, while payments for both capital and non-capital cases were frequently delayed until the Commission received its next semi-annual deposit of funds from the state.<sup>168</sup> The all-time low occurred with claims submitted by counties during the fourth quarter of 2006; there was only enough money to reimburse 18.3% of approved non-capital expenses for the 45 counties that applied.<sup>169</sup> The table on page 31 shows the money statutorily promised to participating counties during those years, but which the state defaulted on paying. This situation continued until September 2012 when the Commission was finally able to regularly pay reimbursements at the full 40% promised and on time<sup>170</sup> to the counties that voluntarily chose to comply with minimal standards for appointed counsel.

The state’s failure to keep its financial promise to the counties had an effect. In May 2000, Commission staff reported that “[a] number of county officials have indicated an inclination to wait on . . . increased funding before seeking eligibility to participate under the Fund.”<sup>171</sup> By 2001, the Commission no longer felt it should actively encourage more counties to attempt compliance with standards in order to receive state reimbursement, since more counties participating would result in lower pro-rated reimbursement to each county.<sup>172</sup> While 47 counties requested non-capital reimbursements at some point during the 2001-2002 fiscal year,<sup>173</sup> twelve years later at the end of the 2013-2014 fiscal year, the number of counties requesting reimbursement had only grown by seven.<sup>174</sup>

<sup>165</sup> Ind. Pub. Def. Comm’n, *Minutes* (Feb. 2, 2000).

<sup>166</sup> Ind. Pub. Def. Comm’n, *Minutes* (Nov. 29, 2000).

<sup>167</sup> *See generally* Ind. Pub. Def. Comm’n, *Minutes* (Jan. 31, 2001 through July 1, 2012).

<sup>168</sup> *See generally id.*

<sup>169</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 11, 2007).

<sup>170</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 19, 2012 and subsequent).

<sup>171</sup> Ind. Pub. Def. Comm’n, *Minutes* (May 24, 2000).

<sup>172</sup> Ind. Pub. Def. Comm’n, *Minutes* (Aug. 29, 2001).

<sup>173</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 5, 2001; Feb. 27, 2002; May 29, 2002; and Sept. 4, 2002).

<sup>174</sup> Ind. Pub. Def. Comm’n, *Annual Report 2013-2014*, at 10 (2014).

Thirty-seven of Indiana's 92 counties,<sup>175</sup> as of June 30, 2015, do not agree to comply with the Commission's standards in order to avail themselves of the state's offer to reimburse 40% of non-capital indigent defense expenses. Whatever amount a non-

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**A CLOSER LOOK**

NON-CAPITAL REIMBURSEMENT  
 BY IPDC, 1995 TO 2014

[ via 6AC website ]  
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participating county is currently spending, over the course of the Commission's existence counties have typically incurred about a one-third increase in their costs in order to come into compliance with the Commission standards. No one in Indiana knows for certain how much money the counties and cities spend to provide right to counsel services for the poor. The Commission and Council staff estimate that all 92 counties combined likely spend more than \$75 million annually, but because county spending for the representation of indigent people is provided through multiple line items in the budgets of each of

the counties (and not the same line items for every county), true total spending may be more. Further, this total estimate is only for county spending and does not include spending by those cities and towns that provide and fund right to counsel services.

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<sup>175</sup> The Commission reports that 64 of 92 counties *participate* in the reimbursement program as of June 30, 2015, but that nine of these participating counties are not requesting or are ineligible to receive reimbursements. See Public Defender Commission, *About Your County, County Eligibility Status for Reimbursement in Non-capital Cases: 1/5/2016*, at <http://www.in.gov/publicdefender/2383.htm>.

# SPENDING BY THE STATE OF INDIANA

## ON SIXTH AND FOURTEENTH AMENDMENT

### RIGHT TO COUNSEL FOR THE POOR

The state's only financial responsibility for Sixth and Fourteenth Amendment right to counsel services for the indigent is through the reimbursement program administered by the Indiana Public Defense Commission. Counties that choose to participate in the program by adhering to Commission guidelines

and standards are able to have a portion of their expenses for indigent representation reimbursed by the state. Although many of Indiana's cities and towns operate and fund courts that also must provide public counsel to indigent defendants, those municipalities do not receive any reimbursement from the state.

Fiscal Year	Total State \$ Approp'd	Capital Cases			Non-Capital Cases			\$ Promised but Unpaid to Particip. Counties
		\$ Reimb'd to Counties	# of Counties Receiving	# of Counties Not Receiving	\$ Reimb'd to Counties	# of Counties Receiving	# of Counties Not Receiving	
89-90	\$650,000							
90-91	\$650,000	\$40,795	6	86				
91-92	\$650,000	\$320,697	9	83				
92-93	\$650,000	\$480,716	14	78				
93-94	\$650,000	\$333,020	6	86				
94-95	\$650,000	\$288,450	7	85				
<b>*95-96*</b>	\$1,250,000	\$529,472	6	86	\$668,747	5	87	
<b>*96-97*</b>	\$1,250,000	\$370,959	7	85	\$628,841	7	85	
97-98	\$3,000,000	\$799,449	6	86	\$1,031,467	9	83	
98-99	\$3,000,000	\$526,525	11	81	\$2,188,699	17	75	
99-00	\$2,400,000	\$378,209	8	84	\$3,302,471	30	62	
00-01	\$2,400,000	\$712,054	11	81	\$3,669,318	38	54	
01-02	\$6,000,000	\$473,317	12	80	\$4,869,314	46	46	\$2,036,380
02-03	\$7,000,000	\$413,805	7	85	\$5,371,364	47	45	\$1,619,285
03-04	\$7,000,000	\$478,222	7	85	\$6,030,992	49	43	\$1,403,053
04-05	\$8,000,000	\$672,381	8	84	\$8,524,652	46	46	\$771,538
05-06	\$9,000,000	\$386,288	11	81	\$7,305,318	48	44	\$895,476
06-07	\$10,000,000	\$844,769	12	80	\$10,175,448	50	42	\$2,674,834
07-08	\$14,500,000	\$753,772	11	81	\$13,586,669	52	40	\$825,367
08-09	\$15,250,000	\$742,251	7	85	\$14,411,615	49	43	\$1,262,700
09-10	\$18,250,000	\$618,252	7	85	\$15,376,845	50	42	
10-11	\$18,250,000	\$370,709	6	86	\$15,707,861	52	40	
11-12	\$20,250,000	\$532,706	4	88	\$20,722,547	53	39	
12-13	\$20,250,000	\$381,459	5	87	\$17,546,818	53	39	
13-14	\$22,250,000	\$421,935	6	86	\$18,693,834	54	38	

Sources of information: IND. PUB. DEF. COMM'N, ANNUAL REPORTS; IND. PUB. DEF. COMM'N, MINUTES.

\*\*NOTE: The Annual Reports show \$650,000 allocated for 1995-1997, but the Minutes of June 8, 1995 show \$1,250,000 allocated for 1995-1997.

# CHAPTER 3

## NON-CAPITAL REIMBURSEMENT: PARTICIPATING COUNTY REQUIREMENTS

Today in Indiana, there is still no *system* for the provision of indigent representation, even for the 55 counties that participate in the state’s non-capital case reimbursement program.<sup>176</sup> Instead, each of the 55 counties has its own individualized plan for providing indigent representation. To begin participating in the state’s non-capital case reimbursement program, there are several statutory steps a county usually must follow:<sup>177</sup>

- the county executive must adopt a local ordinance that establishes a county public defender board;<sup>178</sup>
- three members must be appointed to that public defender board to serve three-year terms and begin meeting at least quarterly;<sup>179</sup> and
- the public defender board must adopt a comprehensive plan for how the county will provide representation to indigent people in the courts located within the county.<sup>180</sup>

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### A CLOSER LOOK

IPDC, SAMPLE COMPREHENSIVE  
PLANS AND MODEL ORDINANCE

[ via 6AC website ]

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The statutory requirement that a county must pass an ordinance<sup>181</sup> is in recognition of the way local governments exercise power under Indiana law.<sup>182</sup> The Commission has a model ordinance that it provides to counties upon request when they are considering joining the non-capital reimbursement program. The language of that model ordinance generally tracks the requirements imposed by statute about the creation of a public defender board and the powers and duties of such a board.<sup>183</sup>

<sup>176</sup> As of June 30, 2015.

<sup>177</sup> IND. CODE §§ 33-40-7-1 through -12 (2015).

<sup>178</sup> IND. CODE § 33-40-7-3(a) (2015).

<sup>179</sup> IND. CODE § 33-40-7-3 (2015).

<sup>180</sup> IND. CODE § 33-40-7-5 (2015).

<sup>181</sup> IND. CODE § 33-40-7-3(a) (2015).



<sup>182</sup> IND. CODE § 36-1-3-6 (2015).

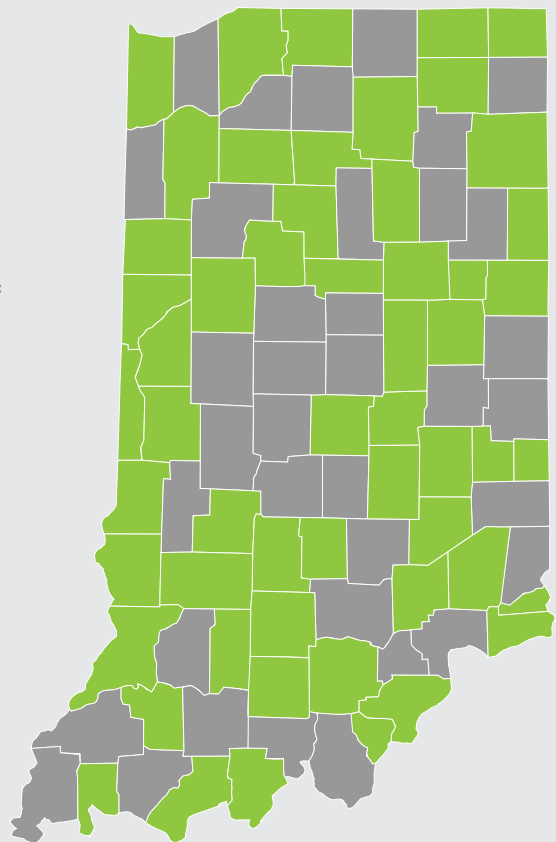
<sup>183</sup> IND. CODE §§ 33-40-7-2 through -6 (2015).

# COUNTIES RECEIVING STATE REIMBURSEMENT FOR NON-CAPITAL INDIGENT REPRESENTATION AS OF JUNE 2015

The state offers reimbursement to counties of 40% of their indigent defense spending in non-capital cases, excluding misdemeanors. Each county chooses whether to apply for this reimbursement by the state. To be eligible to receive this reimbursement, a county must comply with the Public Defender Commission *Standards for Indigent Defense Services in Non-Capital Cases*. Counties that do not seek this reimbursement by the state do not have to comply with the *Standards* and can provide indigent representation in whatever manner they choose. At the end of the 2014-2015 fiscal year, there were 55 counties choosing to comply with the *Standards* in order to receive non-capital reimbursements, and there were 37 counties choosing to forgo state reimbursement.

The Commission groups the state's 92 counties into three categories: those that are currently eligible for reimbursement (55 counties); those that have previously had their plans approved but are no longer requesting reimbursement or have been determined by the Commission to be presently ineligible for reimbursement (9 counties); and those that have never sought to participate in the non-capital state reimbursement program (28 counties). See Division of State Court Administration, *Pub. Defender Comm'n, Eligible Counties*, at <http://www.in.gov/judiciary/pdc/2367.htm> (last visited Dec. 16, 2015).

 **in state program**  
 **not in program**



### **A. County public defender boards.**

The second statutory requirement for most counties is to establish a public defender board.<sup>184</sup> According to the Commission, the purpose of the public defender board in a county is “to guarantee professional independence of the defense function and the integrity of the relationship between lawyer and client in accordance with the American Bar Association Standards for Criminal Justice.”<sup>185</sup> In Part II, this report discusses independence of the defense function, why it is considered necessary, and to what extent it is present in Indiana’s counties. This section focuses on what the Indiana legislature requires of a public defender board in order for counties to receive reimbursement from the state for their indigent representation expenses in non-capital cases.

The statute requires a three-member board, with one member appointed by the county executive and two members appointed by the felony and juvenile judges, and the two judicial appointments cannot be from the same political party.<sup>186</sup> Thus, no single branch of government or single political party can control public defense in a county. While the board members “must . . . have demonstrated an interest in high quality legal representation for indigent persons,” they cannot be a prosecutor, judge, law enforcement officer, or employee of any court.<sup>187</sup> Under this provision, public defenders are out from under the control of all other segments of the criminal justice system. The board members serve for three-year terms,<sup>188</sup> which provides for continuity and prevents a county executive or judge from interfering with the board if it takes action with which they disagree. The public defender board has complete and lone authority to decide the method(s) by which indigent representation is provided in the courts of the county,<sup>189</sup> to select the attorneys who provide that representation,<sup>190</sup> and to recommend the budget necessary for a public defender office or contract system.<sup>191</sup>

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<sup>184</sup> IND. CODE § 33-40-7-3(a) (2015).

<sup>185</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A, Commentary (as amended through June 18, 2014).

<sup>186</sup> IND. CODE § 33-40-7-3(a), (b) (2015).

<sup>187</sup> IND. CODE § 33-40-7-3(b) (2015).

<sup>188</sup> IND. CODE § 33-40-7-3(c) (2015).

<sup>189</sup> IND. CODE § 33-40-7-5 (2015).

<sup>190</sup> IND. CODE §§ 33-40-7-6(a)(2) (appoint county public defender), 33-40-7-8(b) (establish contracts with attorneys and organizations), 33-40-7-9(1), (2) (gather and maintain list of qualified attorneys to be assigned) (2015).

<sup>191</sup> IND. CODE §§ 33-40-7-6(a)(1), 33-40-7-8(b), (c) (2015).



## B. County comprehensive plans.

The comprehensive plan required by statute<sup>192</sup> is the way a county public defender board tells the Commission in writing what method(s) the county uses to provide indigent representation and the specifics of how indigent representation in the county complies with statutory law and the Commission’s *Standards*. The Commission has a sample template that it provides to counties on request when they are considering joining the non-capital reimbursement program.

In providing representation, counties can choose to use: a public defender office; contracts with attorneys or organizations; a list of attorneys who are assigned on a case by case basis; or a combination of these methods.<sup>193</sup> Once the county has put its system in place, the county can only receive reimbursement for cases in which a judge appoints counsel according to that system (or, for conflicts or in the interest of justice, where the judge requests the state public defender to provide an alternate attorney).<sup>194</sup> In other words, if a judge violates the county’s plan for the provision of indigent representation in a case, the county cannot be reimbursed for that case.<sup>195</sup>

*1. Public defender offices.* When most people think of a public defender office, they think of a county agency where all the attorneys and staff are full-time government employees working together in a single office building with supplies and equipment provided by the county. The use of the term “public defender office” does not necessarily mean this in Indiana. A county with a public defender office system may provide a county-funded building, but it is also possible that the attorneys each work out of their own private law offices at different locations. A public defender office may be made up of several attorneys or it may in fact be a single attorney. The attorneys working for a public defender office may be full-time employees who receive a salary and benefits, but they may be only part-time employees without any benefits beyond their salary and who also maintain a private practice on the side. The use of the phrase “public defender office” simply does not define much about the attorneys who provide indigent representation or the manner in which they do so.

### A CLOSER LOOK

IPDC, SAMPLE COMPREHENSIVE  
PLANS AND MODEL ORDINANCE

[ via 6AC website ]

<sup>192</sup> IND. CODE § 33-40-7-5(b) (2015).

<sup>193</sup> IND. CODE § 33-40-7-5 (2015) (applicable to most participating counties); IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard B (as amended through June 18, 2014) (applicable to all participating counties).

<sup>194</sup> IND. CODE § 33-40-7-10 (2015).

<sup>195</sup> IND. CODE § 33-40-7-10(a) (“Expenditures by a county for defense services not provided under the county public defender board’s plan are not subject to reimbursement from the public defense fund under IC 33-40-6.”).

If a county says in its comprehensive plan that it is using a public defender office, the general assembly has by statute imposed some additional requirements. The public defender board “shall” recommend an annual operating budget for the office and “shall” appoint a county public defender to serve for a term of up to four years.<sup>196</sup> Once appointed, the county public defender can only be removed from office on a showing of good cause.<sup>197</sup> The county public defender is responsible for maintaining the public defender office and for hiring and supervising all of the staff that the public defender board, county executive, and county fiscal officers agree are needed to provide indigent representation.<sup>198</sup>

2. *Contract services.* Contract systems are created when a county actor enters into a formal agreement with one or more attorneys or law offices to provide representation to indigent people for a specified term in exchange for specified compensation. The Indiana General Assembly allows two ways of entering into these contracts. In the first, the county public defender board establishes the terms of the contracts and enters into contracts with attorneys or organizations to provide the county’s indigent representation services.<sup>199</sup> In the second, each criminal court judge (excluding the judges in Lake and Marion counties)<sup>200</sup> can establish the terms of and enter into a contract with an attorney or group of attorneys to provide representation for indigent people appearing in that judge’s court.<sup>201</sup> However the contracts are established, the county’s fiscal body “shall appropriate” the amounts needed to meet these contractual obligations.<sup>202</sup>

The specific terms of the contracts used in Indiana’s counties, though, take a wide variety of forms. For example, the agreement may be in writing or it may be oral. The representation provided may be in only certain types of cases, or in only certain courts, or it may be every indigent case in the county. Some contracts pay the attorney an hourly rate, while others provide an annual compensation rate that is paid monthly. What all of the contracts in Indiana’s counties do appear to have in common is that they do not require the attorney to devote full time to representing indigent clients; in other words, these are part-time public attorneys.

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<sup>196</sup> IND. CODE § 33-40-7-6 (2015).

<sup>197</sup> IND. CODE § 33-40-7-6(b) (2015).

<sup>198</sup> IND. CODE § 33-40-7-7 (2015).

<sup>199</sup> IND. CODE § 33-40-7-8 (2015).

<sup>200</sup> The statutory provision that allows a criminal court judge to directly enter into contracts for the provision of indigent representation expressly excludes the judges “in those counties with a population of at least four hundred thousand (400,000).” IND. CODE §§ 33-40-8-1 (2015). As of the 2010 U.S. decennial census, this defined Lake (population 496,005) and Marion (903,393) counties. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>201</sup> IND. CODE §§ 33-40-8-1 through -3 (2015).

<sup>202</sup> IND. CODE §§ 33-40-7-8(c) (contracts with public defender boards); 33-40-8-4 (contracts with judges) (2015).

3. *Assigned counsel panels.* The third method of providing counsel is for judges to appoint individual private attorneys on a case-by-case basis to represent an indigent person in a particular case. For counties choosing this assigned counsel model, the public defender board is responsible for gathering and maintaining the list of the attorneys they determine are qualified to be appointed.<sup>203</sup> In these counties, every judge is required, in every case involving an indigent person, to appoint an attorney from that list<sup>204</sup> (other than for conflicts or in the interest of justice, where the judge must request the state public defender to provide an alternate attorney).<sup>205</sup> By statute, if a judge appoints an attorney who is not on the public defender board approved list, the county cannot be reimbursed for that case.<sup>206</sup>

### C. Exceptions.

The requirements for how counties begin participating in the non-capital reimbursement program are different depending on the circumstances of a particular county. Statutes establish three special exceptions<sup>207</sup> that, when read together, allow five of Indiana's seven most populous counties<sup>208</sup> to participate in the non-capital reimbursement program under different circumstances than other counties. Additionally, the Commission created a special exception for the seven smallest counties by population<sup>209</sup> that allows them to participate differently as well.<sup>210</sup>

1. *Large counties exceptions.* The first statutory exception to the rules for beginning participation in the reimbursement program applies solely to any county that contains a consolidated city.<sup>211</sup> Marion County is the only county in the state that contains a

<sup>203</sup> IND. CODE § 33-40-7-9(1) (2015).

<sup>204</sup> IND. CODE § 33-40-7-9(2) (2015).

<sup>205</sup> IND. CODE § 33-40-7-10 (2015).

<sup>206</sup> IND. CODE § 33-40-7-10(a) (“Expenditures by a county for defense services not provided under the county public defender board’s plan are not subject to reimbursement from the public defense fund under IC 33-40-6.”).

<sup>207</sup> IND. CODE § 33-40-7-1 (2015).

<sup>208</sup> These are, from largest to smallest, Marion, Lake, Allen, St. Joseph, and Vanderburgh counties. Hamilton and Elkhart, the fourth and sixth largest counties, do not currently fall within the exceptions. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>209</sup> These are, in order of size beginning with the smallest: Ohio, Union, Warren, Benton, Martin, Switzerland, and Crawford. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>210</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A (as amended through June 18, 2014); IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard A. County Public Defender Boards 09/01/94 (as amended through Sept. 11, 2013).

<sup>211</sup> IND. CODE § 33-40-7-1(1) (2015).

consolidated city, Indianapolis,<sup>212</sup> and so it is the only county subject to this particular exception. Under this statutory exception, Marion County does not have to comply with the same rules as other counties regarding the establishment and work of its county public defender board.<sup>213</sup>

However, Marion County still must comply with the Commission's *Standards and Guidelines* to have its quarterly reimbursement requests authorized for payment.<sup>214</sup> The Commission *Standards* require Marion County to establish a public defender board having "powers and duties consistent with" those required of other counties,<sup>215</sup> and to adopt a comprehensive plan for the provision of services that is "consistent with" those required of other counties.<sup>216</sup>

Marion County adopted its current ordinance on February 22, 1993, establishing a public defender board and the Public Defender Agency for the county.<sup>217</sup> It was among the first three counties approved by the Commission for participation in the non-capital reimbursement program on June 8, 1995.<sup>218</sup> Rather than the three-member board that most counties are required to have,<sup>219</sup> Marion County has a nine-member board, with four members appointed by the city-county council, four members appointed by the judges, and one member appointed by the mayor.<sup>220</sup>

The Marion County board does not itself determine the method of providing indigent representation;<sup>221</sup> instead, the city-county council has legislated that the Public Defender Agency will provide legal services for indigent people.<sup>222</sup> The chief public defender of the agency must stand for annual confirmation by the city-county council,<sup>223</sup> unlike the county public defenders in most counties who are appointed by their public defender boards for terms of up to four years and can only be removed from office on a showing of good cause.<sup>224</sup> Also unlike other counties, the city-county

<sup>212</sup> IND. CODE §§ 36-3-1-0.3 *et seq* (2015).

<sup>213</sup> IND. CODE § 33-40-7-1(1) (2015).

<sup>214</sup> IND. CODE § 33-40-6-5 (2015).

<sup>215</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A (as amended through June 18, 2014) ("Counties excluded from I.C. 33-40-7-1 shall establish a county public defender board under I.C. 36-1-3 with powers and duties consistent with I.C. 33-40-7-6.").

<sup>216</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard B (as amended through June 18, 2014) ("The county public defender board shall adopt a comprehensive plan for indigent defense services either pursuant to or consistent with the provisions in I.C. 33-40-7-5 . . .").

<sup>217</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES ch. 286 (2015).

<sup>218</sup> Ind. Pub. Def. Comm'n, *Minutes* (June 8, 1995).

<sup>219</sup> IND. CODE § 33-40-7-3 (2015).

<sup>220</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES § 286-3 (2015).

<sup>221</sup> In contrast to the statutory requirement for most counties. IND. CODE § 33-40-7-5 (2015).

<sup>222</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES §§ 286-1, 286-2(1), 286-5, 286-7, 286-8 (2015).

<sup>223</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES § 286-4(4) (2015).

<sup>224</sup> IND. CODE § 33-40-7-6 (2015).

council approves the comprehensive plan for the provision of services,<sup>225</sup> rather than the public defender board.<sup>226</sup> In short, the political branches of Marion County have retained significant power over the operations of indigent representation, rather than creating a truly independent system as envisioned by the general statutes applicable to most counties.<sup>227</sup>

The second statutory exception applies to counties falling within three population ranges: a) 175,001 to 184,999; b) 250,001 to 269,999; and, c) 300,001 to 399,999.<sup>228</sup> There is nothing magical about these population numbers as compared to other populations in the provision of indigent representation. Rather, because the Indiana Constitution prohibits special legislation on behalf of a specific county,<sup>229</sup> when policymakers want to pass legislation that is targeted at certain counties, they sometimes use population ranges to accomplish that result. Under Indiana law however, the population of a county is generally determined by the most recent federal decennial census,<sup>230</sup> so counties can be expected to, and do, move into and out of these population categories.<sup>231</sup> Since the 2010 Census, there are three counties that fall within this exception: Allen, St. Joseph, and Vanderburgh,<sup>232</sup> all three of which participate in the non-capital reimbursement program (Elkhart and Hamilton counties fell within the exception under the 2000 Census, though neither participates in the program).<sup>233</sup> Similar to Marion County, these counties must comply with the Commission *Standards*, including the standard to adopt a public defender board and submit a comprehensive plan.

<sup>225</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES § 286-6 (2015).

<sup>226</sup> IND. CODE §§ 33-40-7-5 through -9 (2015).

<sup>227</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A, Commentary (as amended through June 18, 2014) (“The purpose of the requirement of a county public defender board is to guarantee professional independence of the defense function”).

<sup>228</sup> IND. CODE § 33-40-7-1(2) (2015).

<sup>229</sup> IND. CONST. art. 4 § 22.

<sup>230</sup> IND. CODE § 1-1-3.5-3 (2015).

<sup>231</sup> According to the U.S. Census Bureau decennial census, counties falling within this exception are as follow: both Elkhart and Hamilton were below the “175,001-184,999” range in the 1990 Census, within it during the 2000 Census, and above it in the 2010 Census; only St. Joseph fell within the “250,001-269,999” range in the 2000 and 2010 census (no counties were within this range in the 1990 Census); and, Allen County is the sole Indiana county within the “300,001-399,999” range for all three censuses. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>232</sup> INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>233</sup> These five counties are the third through seventh largest counties in the state by population, following Marion and Lake. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

Allen County adopted its current ordinance on August 6, 2003, creating its three-member public defender board.<sup>234</sup> The only differences between the Allen County ordinance and those mandated for most other counties by statute are that one board member is appointed by the county commissioners<sup>235</sup> and the two members appointed by the judiciary may be from the same political party.<sup>236</sup>

St. Joseph County adopted an ordinance providing public defense in 1975, and then a replacement ordinance in 1978, long before the state non-capital reimbursement program began.<sup>237</sup> That ordinance established a County Public Defenders Department as a “separate individual department of the county.”<sup>238</sup> According to the ordinance, the department’s budget is prepared in compliance with state laws and county ordinances,<sup>239</sup> and the department can contract or make agreements with the judges, subject to approval by the county council, about providing indigent representation.<sup>240</sup> The county’s ordinance is silent as to the existence or non-existence of any public defender board.

When the Commission considered St. Joseph County’s application to participate in the non-capital case reimbursement program, it noted that the “St. Joseph County council is forming a Public Defender Board but is proposing that the county judges appoint

<sup>234</sup> Allen County, Indiana, CODE OF ORDINANCES tit. 1, art. 17 (2015).

<sup>235</sup> Allen County, Indiana, CODE OF ORDINANCES § 1-17-3-1 (2015).

<sup>236</sup> The Allen County Code is silent on this, while the general statutes applicable to most counties expressly state: “[t]he members appointed by the judges may not be from the same political party.” IND. CODE § 33-40-7-3(b) (2015). The Commission reviewed Allen County’s proposed comprehensive plan in September of 2003. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 3, 2003). At that time, the Commission said “the plan contained language that was unacceptable” and so it tabled further consideration of Allen County’s application until the county could provide clarification. The unacceptable language was: “In order to achieve compliance with the caseload standards of the Public Defender Commission, the County will follow a five (5) year plan of phased-in compliance. The County will achieve full compliance with the Commission Standard (sic) no later than the end of the fifth plan year.” It is somewhat difficult to understand why the Commission found this language unacceptable, since a year earlier the Commission had adopted a guideline expressly allowing counties to receive reimbursement so long as they were “substantially in compliance with” a phase-in plan for the Commission *Standards* of “normally” not more than five years. Apparently some agreement was reached, because Allen County began receiving reimbursements for non-capital indigent representation expenditures incurred from October 1, 2003 forward. *See* Ind. Pub. Def. Comm’n, *Minutes* (Mar. 10, 2004).

<sup>237</sup> St. Joseph County, Indiana, CODE OF ORDINANCES § 32.24 (2014).

<sup>238</sup> St. Joseph County, Indiana, CODE OF ORDINANCES § 32.24(A) (2014). The official website for St. Joseph County does not list a County Public Defenders Department or anything similar under the county departments (but this is not unusual; many counties in Indiana do not show the public defense function on their websites). *St. Joseph County Departments*, ST. JOSEPH COUNTY INDIANA, <http://www.stjosephcountyindiana.com/departments/index.htm> (last visited Mar. 4, 2016). In the section of the website devoted to the judiciary and courts, under “Frequently Asked Questions,” it says that “thirty-two attorneys work in the Public Defenders Office” and a phone number is provided. *Frequently Asked Questions*, ST. JOSEPH COUNTY INDIANA, <http://www.stjosephcountyindiana.com/departments/courts/FAQs.htm> (last visited Mar. 4, 2016).

<sup>239</sup> St. Joseph County, Indiana, CODE OF ORDINANCES § 32.24(D) (2014).

<sup>240</sup> St. Joseph County, Indiana, CODE OF ORDINANCES § 32.24(B), (C) (2014).

all members of the board, thus eliminating an appointment by the county executive as required by statute. The Commission concluded that a county public defender board should not be named solely by the judiciary.”<sup>241</sup> St. Joseph County was approved for participation in the non-capital reimbursement program on April 11, 2007, under a plan that allowed two years for the county to come into compliance with Commission standards.<sup>242</sup>

Vanderburgh County today falls within a population exception based on the 2010 U.S. Census,<sup>243</sup> but it did not meet the criteria based on the 2000 or the 1990 U.S. Census.<sup>244</sup> The county adopted its ordinance for public representation on August 9, 1999,<sup>245</sup> and its comprehensive plan was approved by the Commission on September 6, 2000,<sup>246</sup> all at a time when its population required it to comply with the general statutory scheme that applies to most counties.<sup>247</sup> This begs the question, though, of whether Vanderburgh County could today change the form of its indigent representation system based on falling within the population exception to the statute and how the Commission will deal with counties as they fall in and out of these population exceptions.

*2. Lake County exception.* The next statutory exception to the rules for beginning participation in the reimbursement program is for any county with a population of more than 400,000 but less than 700,000.<sup>248</sup> This describes only Lake County.<sup>249</sup> This Lake County exception is different than the special exceptions for the other large counties. Instead of being excused entirely from the general statutory requirements, Lake County is allowed to *limit* its participation in the reimbursement program to only certain courtrooms.

Every other county in Indiana must be all in or all out – either all of a county’s courts participate in the non-capital reimbursement program and are subject to Commission standards, or the county cannot receive state reimbursement for non-capital indigent expenditures.<sup>250</sup> This exception, though, allows Lake County to pick and choose. The county is allowed to ask for reimbursement only for indigent cases that are allotted

<sup>241</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 14, 2006).

<sup>242</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 11, 2007).

<sup>243</sup> IND. CODE § 33-40-7-1(2)(C) (2015) (exception for counties having population of more than 175,000 but less than 185,000); INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA (Vanderburgh County 2010 population 179,703).

<sup>244</sup> INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA (Vanderburgh County 2000 population 171,922 and 1990 population 165,058).

<sup>245</sup> Vanderburgh County, Indiana, CODE OF ORDINANCES ch. 2.38 (2015).

<sup>246</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 6, 2000).

<sup>247</sup> IND. CODE §§ 33-40-7-1 through -12 (2015).

<sup>248</sup> IND. CODE § 33-40-7-1(3) (2015).

<sup>249</sup> Lake County is one of the eight counties at which site visits were conducted during the course of this evaluation. For more information about the manner in which Lake County provides indigent representation, see “A Closer Look: Indigent Defense Services in the Sample Counties.”

<sup>250</sup> IND. CODE § 33-40-6-4(b) (2015).

to the four judges assigned to the criminal division of the superior court, and so only these courtrooms are required to comply with the Commission standards.<sup>251</sup>

Lake County adopted its ordinance on July 7, 1998, establishing a public defender board that is responsible for the provision of indigent representation before only the four judges assigned to the criminal division of superior court.<sup>252</sup> Lake County applied and was approved for participation in the non-capital reimbursement program on December 17, 1999,<sup>253</sup> limited to those four criminal division benches.<sup>254</sup> These four judges hear all murder charges and all level 1 through 5 (formerly class A through C) felonies, but only a portion of the level 6 (formerly class D) felonies and none of the misdemeanors charged in the county.<sup>255</sup> Lake County's comprehensive plan similarly covers the provision of indigent representation only before these four judges<sup>256</sup> and does not require compliance with the Commission standards in the other courts of the county.

*3. Small counties exception.* The Commission created an additional exception to the rules for participation in the reimbursement program, specifically for small counties. Under the Commission's *Standards and Guidelines*, counties with a population of less than 12,000 are not required to have a public defender board.<sup>257</sup> In creating this exception, the Commission observed that it believes the "establishment of such a board in the state's least populous counties is unfeasible."<sup>258</sup> Of concern then is who is overseeing the system of indigent representation in these counties and whether the independence intended to be provided by a public defender board is protected.

The seven small counties that fall within this exception are Benton, Crawford, Martin, Ohio, Switzerland, Union, and Warren.<sup>259</sup> Warren County was the first of these small

<sup>251</sup> IND. CODE §§ 33-40-7-5(a)(4), 33-40-7-11(a) (2015).

<sup>252</sup> Lake County, Indiana, CODE OF ORDINANCES § 31.195 (2014) (Ordinance 1181A, passed July 7, 1998, established public defender board for the Superior Court of Lake County, Criminal Division).

<sup>253</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 17, 1999).

<sup>254</sup> Lake County, Indiana, CODE OF ORDINANCES § 31.195 (2014) (Ordinance 1181A, passed July 7, 1998, established public defender board for the Superior Court of Lake County, Criminal Division); Lake County Public Defender Board, *Comprehensive Plan for Indigent Defense Services in Lake County*, para. B.2.a. (May 20, 1999).

<sup>255</sup> Lake County, Indiana, Local Court Rules, L.R. 45-C.R.2.2-1(A)(3) to (7), L.R. 45-A.R.1-01(1) to (2) (2015).

<sup>256</sup> Lake County Public Defender Board, *Comprehensive Plan for Indigent Defense Services in Lake County*, para. B.2.a. (May 20, 1999).

<sup>257</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A (as amended through June 18, 2014); IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard A. County Public Defender Boards 09/01/94 (as amended through Sept. 11, 2013).

<sup>258</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard A, Commentary (as amended through June 18, 2014).

<sup>259</sup> All seven counties fit the criteria in 1990, 2000, and 2010 censuses. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA. Of these



counties to begin participating in the non-capital reimbursement program in December 1996.<sup>260</sup> Benton County joined in May 1998.<sup>261</sup> The other five small counties all joined the reimbursement program during September or December of 1999.<sup>262</sup>

All seven of these small counties have a single circuit court with one judge.<sup>263</sup> From the limited information available, it appears that the circuit court judge of each county administers that county's program. The Union County Local Rules say the court appoints a "contracted attorney" "who has a contract with the Union Circuit Court,"<sup>264</sup> suggesting that the judge selects the attorneys with whom the court contracts and determines the terms and conditions of those contracts. In 2009, the Commission found that Martin County was not in compliance with caseload standards and had conversations with the circuit court judge there in an attempt to resolve the problems,<sup>265</sup> which suggests that the judge administers the system. Likewise, when Switzerland County was not in compliance with caseload standards, it was the judge with whom Commission staff spoke to try to repair non-compliance.<sup>266</sup>

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seven counties, all but Crawford County currently participate in the non-capital reimbursement program. Crawford County was approved to participate in the program, but never submitted any reimbursement requests to the Commission.

<sup>260</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 4, 1996).

<sup>261</sup> Ind. Pub. Def. Comm'n, *Minutes* (May 19, 1998).

<sup>262</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 1, 1999 and Dec. 17, 1999).

<sup>263</sup> IND. CODE §§ 33-33-4-1 (Benton County), 33-33-13-1 (Crawford County), 33-33-51-1 (Martin County), 33-33-15-1 through -4 (Ohio County), 33-33-78-2 (Switzerland County), 33-33-81-1 (Union County), 33-33-86-1 (Warren County) (2015).

<sup>264</sup> Union County Circuit Court, Local Rules LR81-CR00-1(2) (2015).

<sup>265</sup> Ind. Pub. Def. Comm'n, *Minutes* (June 24, 2009) ("[Staff] reported [Martin County] has two public defenders out of compliance this quarter. Judge Howell was informed the new case assignments must be distributed more evenly. Also, Judge Howell said the county prosecutor has had a long-standing practice of charging related crimes as individual cases, which inflated the number of new public case assignments. Judge Howell has succeeded in stopping this practice.").

<sup>266</sup> Ind. Pub. Def. Comm'n, *Minutes* (Mar. 25, 2009) ("[Commission staff] spoke with Judge Coy. He just took office in January and is working to overhaul the county public defense system. He expects changes in three to six months."); Ind. Pub. Def. Comm'n, *Minutes* (June 24, 2009) ("Judge Coy, who took the bench January 1st, is working to overhaul the county's public defense system. He hopes to change the delivery system from hourly to contract public defenders and he expects to see changes in three to six months.").

# CHAPTER 4

## NON-CAPITAL REIMBURSEMENT: PUBLIC DEFENDER COMMISSION ROLE

The Commission's role in reimbursing counties for indigent expenses in non-capital cases is much broader and more complex than its role in capital case reimbursement. Except where specifically indicated, this chapter deals with the non-capital case reimbursement program.

### **A. Promulgate standards.**

The general assembly required the Commission to adopt standards for at least:

- how a person is determined to be indigent and eligible for representation;
- the qualifications of the attorneys selected to provide indigent representation;
- the amount of compensation for attorneys providing indigent representation;
- the minimum and maximum caseloads allowed for “public defender offices and contract attorneys;”
- the collection from indigent defendants of any amounts they are required to repay for the cost of their representation; and
- the use of funds held in each county's supplemental public defender services fund.<sup>267</sup>

In response to this statutory command, the Commission created some, but not all, of these required standards, along with a few others it found to be necessary. Specifically, the Commission *Standards* require a comprehensive plan to address:

- eligibility for indigent representation (*Standard C*);
- repayment by the accused for indigent representation (*Standard D*);
- attorney qualifications (*Standards E and F*);
- attorney compensation (*Standards G and H*);
- availability of support services (*Standard I*);
- allowable caseloads (*Standards J and K*);
- specifics where contracts are used (*Standard L*);
- training and professional development of attorneys and staff (*Standard M*); and

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<sup>267</sup> IND. CODE § 33-40-5-4(2) (2015).

- availability of funding and resources for case-related needs of an indigent person who has a private attorney (*Standard N*).<sup>268</sup>

The Commission adopted a *Guideline* addressing the use of the supplemental public defender services fund, for the first time, in September 2013.<sup>269</sup>

## B. Approve comprehensive plans.

As previously noted, the Commission’s role in reimbursing counties for indigent expenses in non-capital cases begins with approving or disapproving a county’s comprehensive plan for the delivery of services. There are many examples where the Commission used its authority to bring counties into compliance with statutory requirements and with standards.

- In December 1999, Knox County’s comprehensive plan was approved conditioned on the county removing the judges’ authority to terminate a public defender contract.<sup>270</sup>
- In April 2001, the Commission rejected Allen County’s comprehensive plan in part because “the ordinance provided that the members served at the pleasure of the judge. The Commission felt this did not achieve necessary independence.”<sup>271</sup> The Allen plan was rejected again at the following quarterly meeting for the same reasons.<sup>272</sup>
- When problems became apparent in White County in 2003, the Commission chair “expressed grave concern that the comprehensive plan was transmitted to the Commission by the judge of the White Superior Court, and suggested that the Commissioners ought to be particularly concerned about the independence of a county public defender board any time a proposed comprehensive plan is transmitted to the Commission by a court or a judge.”<sup>273</sup>

<sup>268</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES (as amended through June 18, 2014).

<sup>269</sup> As early as June of 2007, Commission staff brought to the attention of the members that the Commission was required to establish standards for the use of the supplemental funds, but had never done so. Ind. Pub. Def. Comm’n, *Minutes* (June 27, 2007). Six years later, Commission staff again observed that: “The Indiana Public Defender Commission’s duty under state statute 33-40-5-4(2)(C) is to adopt guidelines and standards for the use and expenditure of funds in the county supplemental public defender services fund. [Staff] said that to date she has not found in past meeting minutes or established Guidelines and Standards where the Public Defender Commission has determined the use and expenditure of funds in county supplemental public defender services funds.” Ind. Pub. Def. Comm’n, *Minutes* (Mar. 20, 2013). The Commission subsequently adopted a *Guideline* in September 2013 addressing the supplemental public defender services fund for the first time. IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Miscellaneous 09/11/13 (as amended through Sept. 11, 2013).

<sup>270</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec 17, 1999).

<sup>271</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 18, 2001).

<sup>272</sup> Ind. Pub. Def. Comm’n, *Minutes* (Aug. 29, 2001).

<sup>273</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2003).

- In 2004, the Commission held off on approving the Perry County comprehensive plan because of “concern that the proposed plan was signed by the Perry Circuit Court judge, and that the plan seemed to be largely the creation of the judge. . . . The Commission resolved that all future contact between the Commission and Perry County officials regarding the county’s public defense program should be through the Perry County Public Defender Board.”<sup>274</sup> Perry County’s comprehensive plan was tabled at the next quarterly Commission meeting because “the Perry County Circuit Court judge was a party to the public defender contract.”<sup>275</sup> It was not until the judge acceded to the Commission’s concerns that Perry County was approved for reimbursement.<sup>276</sup>
- In 2010, the LaGrange County comprehensive plan was rejected because it contained “language that the [b]oard would issue contracts based upon the recommendation of the judge,” implying that “approval from the judges is necessary and gives the impression that the [b]oard may not be independent from the courts;”<sup>277</sup> the county’s plan was approved only after the violative provision was removed.<sup>278</sup>

However, the Commission’s review is limited to what is contained in a county’s plan -- the Commission does not have sufficient staff to verify that the county’s plan reflects the day-to-day realities of how the county provides indigent defense services. For example, prior to the second quarter of 2015 the Commission did not take steps to verify whether a county had in fact created a public defender board. In preparation for this evaluation, the Commission could not identify the names of the people serving on the public defender board in any participating county.<sup>279</sup>

As Commission staff explain, “[o]ccasionally the Commission will receive ‘whistle blower’ information that a county is out of compliance in some fashion and will then make attempts to verify. And from time to time the Commission will visit a county for a day and might verify some information in the comprehensive plan. But there is no overall, on-going verification process.”

<sup>274</sup> Ind. Pub. Def. Comm’n, *Minutes* (Mar. 10, 2004).

<sup>275</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 28, 2004).

<sup>276</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 16, 2004).

<sup>277</sup> Ind. Pub. Def. Comm’n, *Minutes* (Mar. 24, 2010).

<sup>278</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 23, 2010).

<sup>279</sup> Beginning with the second quarter of 2015, the Commission requires participating counties to list the names, addresses, telephone numbers, and email addresses of their current public defender board members on each quarterly reimbursement request. Ind. Pub. Def. Comm’n, *Newsletter* (Apr. 2015) (“[A] revised Request for Reimbursement was emailed to counties at the beginning of this quarter. This form requires that the County Public Defender Board’s information be provided each quarter.”).

The Commission does not require counties to provide information about whether a board is actually meeting regularly, or at all, and limited staff prevents the Commission from conducting independent audits. Despite this, there have been many instances when it was discovered that counties' plans did not reflect day-to-day realities.

- In 2003, the Commission “learned that the White County Public Defender Board has not met quarterly as required by statute, and that two board members reported that the board has never met at all”<sup>280</sup> – this despite the Commission having approved every reimbursement request submitted by White County during the nine preceding quarters.<sup>281</sup>
- In the early fall of 2005 while visiting Miami County, Commission staff learned that the county’s public defender office had been operating without a county public defender.<sup>282</sup> A new chief public defender was appointed in January 2006, but prior to that “two non-legal staff” had been “interviewing clients, assigning cases and handling files.”<sup>283</sup>
- In 2009, the chief public defender in Jay County notified Commission staff that there was only one member on the county’s public defender board; a fact he had learned when he could not hire additional public defenders because there were not enough board members to approve the hiring.<sup>284</sup>
- In 2011, Commission staff learned that one of the Steuben County public defender board members accepted assignments as a public defender while simultaneously serving on the public defender board.<sup>285</sup> The Commission was aware at least as early as June of 2008 that this attorney served on – in fact was chairman of – the public defender board,<sup>286</sup> and presumably the attorney’s name would have appeared on the case assignment worksheets as having been appointed to represent indigent clients.

The Commission adopted a detailed standard that a county’s comprehensive plan must address if the county uses contracts to provide indigent representation,<sup>287</sup> but the Commission does not require participating counties that use a contract system to

<sup>280</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2003). White County never again sought reimbursement from the program after these problems came to light.

<sup>281</sup> Ind. Pub. Def. Comm’n, *Minutes* (Aug. 29, 2001 through Sept. 4, 2003).

<sup>282</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 15, 2005).

<sup>283</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 6, 2006).

<sup>284</sup> Ind. Pub. Def. Comm’n, *Minutes* (Mar. 25, 2009). There is no way of knowing how long this had been the situation in Jay County. The Commission had consistently approved quarterly reimbursement requests from Jay County for every quarter beginning with the second quarter of 2002. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 4, 2002 and forward).

<sup>285</sup> Ind. Pub. Def. Comm’n, *Minutes* (Mar. 23, 2011).

<sup>286</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 28, 2008). Steuben County was approved for participation in the program on January 31, 2001, and the Commission continually approved the county’s requests for reimbursement during every quarter since. Ind. Pub. Def. Comm’n, *Minutes* (Jan. 31, 2001 and forward).

<sup>287</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard L (as amended through June 18, 2014).

provide copies of the contracts. The Commission “usually” gets copies of the contracts that are in place at the time the county applies to participate,<sup>288</sup> however, contract terms expire, judges and public defender boards who let those contracts change, and the attorneys who provide indigent representation under those contracts also change. Despite this, the Commission does not require counties to provide copies of the contracts in use during the period for which reimbursement is sought by a county. As a result, the Commission does not know the identity of the attorneys contracted to provide public representation in each participating county nor does it know the terms of the contracts in place. And, the Commission has insufficient staff to verify whether the contracts a county uses actually comply either with that county’s comprehensive plan or with the Commission *Standards*.

The Commission similarly does not require participating counties using the assigned counsel model to provide the list of attorneys that the public defender board has determined are qualified to represent indigent clients during the period for which reimbursement is sought by a county. As a result, the Commission does not have any way of knowing whether the public defender board has prepared such a list of qualified attorneys. The Commission also does not know the identity of the attorneys on any such list, and it has insufficient staff to verify whether the judges are appointing only attorneys from the board approved list or are going off-list in violation of the county’s comprehensive plan and the statutory requirements for an assigned counsel system.

### **C. Review reimbursement requests.**

As of June 30, 2015, fifty-five of Indiana’s 92 counties were approved for participation in the state’s non-capital case reimbursement program.<sup>289</sup> Having been approved for participation in the program, each county is allowed (but not required) to submit a request seeking reimbursement from the state for 40% of their expenses in providing indigent representation, excluding expenses related to misdemeanors.<sup>290</sup>

<sup>288</sup> In September of 2003, for example, when reviewing Wells County’s proposed comprehensive plan, the Commission did receive a copy of its proposed contract and rejected the county’s plan because the contract did not comply with Commission standards. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 4, 2003).

<sup>289</sup> These counties are: Adams, Allen, Benton, Blackford, Brown, Carroll, Cass, Clark, Decatur, Delaware, Fayette, Floyd, Fountain, Fulton, Grant, Greene, Hancock, Howard, Jasper, Jay, Jennings, Knox, Kosciusko, LaGrange, Lake, LaPorte, Lawrence, Madison, Marion, Martin, Monroe, Noble, Ohio, Orange, Owen, Parke, Perry, Pike, Pulaski, Ripley, Rush, St. Joseph, Shelby, Spencer, Steuben, Sullivan, Switzerland, Tippecanoe, Union, Vanderburgh, Vermillion, Vigo, Wabash, Warren, and Washington. See Public Defender Commission, *About Your County, County Eligibility Status for Reimbursement in Non-capital Cases: 1/5/2016*, at <http://www.in.gov/publicdefender/2383.htm>. The Commission groups the state’s 92 counties into three categories: those that are currently eligible for and requesting reimbursement (55 counties); those that have previously had their plans approved but are no longer requesting reimbursement or have been determined by the Commission to be presently ineligible for reimbursement (9 counties); and those that have never sought to participate in the non-capital state reimbursement program (28 counties).

<sup>290</sup> IND. CODE § 33-40-6-4(b) (2015).

If an approved county seeks reimbursement, the county's public defender board<sup>291</sup> submits a written request to the county auditor showing the total of the county's expenditures for indigent defense services during the relevant period.<sup>292</sup> The county auditor reviews the request, certifies the total of the county's expenditures, and submits that certified request to the Commission seeking reimbursement.<sup>293</sup> The procedure for how the Commission is supposed to handle these reimbursement requests is established by statute. If the county's indigent representation during the relevant quarter complied with the Commission's *Standards and Guidelines*, the Commission "shall" authorize the reimbursement due to the county, the division of state court administration certifies the amount due, the state auditor issues a warrant, and the state treasurer disburses the funds to the county.<sup>294</sup> "If a county's indigent defense services fail to meet the standards" of the Commission, the statutes require that the Commission "shall notify the county public defender board and the county fiscal body of the failure to comply" with the Commission's standards.<sup>295</sup> "Unless the county public defender board corrects the deficiencies to comply with the standards not more than ninety (90) days after the date of the notice, the county's eligibility for reimbursement from the public defense fund terminates at the close of that fiscal year."<sup>296</sup>

Over the decades of the program, the Commission has developed guidelines and internal policies for the steps in this process. Since February of 2002, the Commission has required counties to submit quarterly reimbursement requests to the Commission within 45 days of the end of the quarter in which the county expenses were incurred.<sup>297</sup>

<sup>291</sup> There is no indication in the Commission's *Guidelines* about who, in the stead of a public defender board, submits the request to the county auditor in the seven smallest counties.

<sup>292</sup> IND. CODE § 33-40-7-11(a) (2015).

<sup>293</sup> IND. CODE §§ 33-40-6-4(b); 33-40-7-11(a) (2015).

<sup>294</sup> IND. CODE §§ 33-40-6-5; 33-40-7-11(b) (2015).

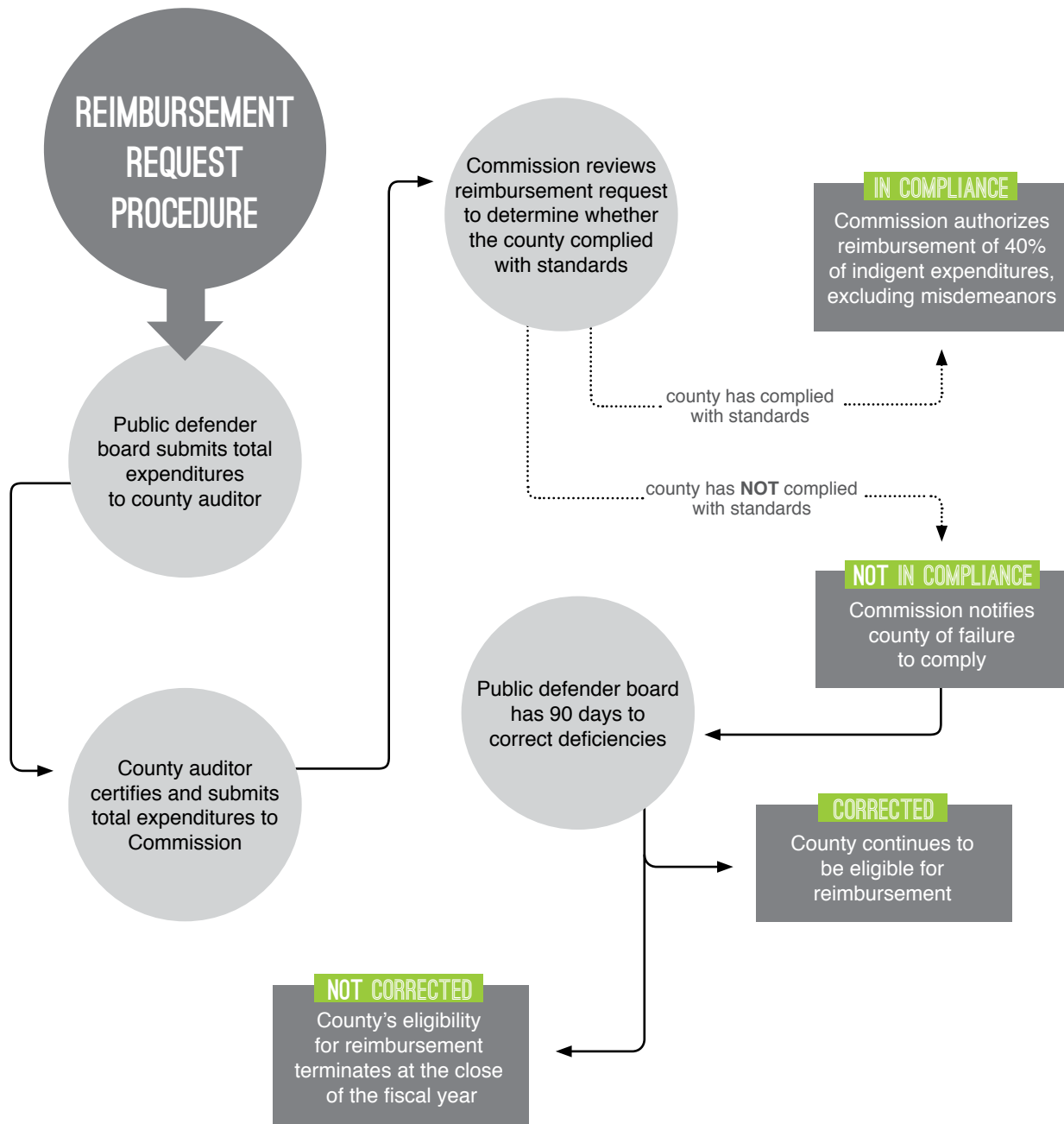
<sup>295</sup> IND. CODE § 33-40-7-11(c) (2015).

<sup>296</sup> IND. CODE § 33-40-7-11(c) (2015).

<sup>297</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 2002). Prior to February 2002, counties could submit reimbursement requests covering time periods of any length preceding the submission.

For a time following adoption of the 45-day submission deadline, the Commission occasionally denied reimbursements outright if requests were submitted late. In September 2002, the Commission denied the portions of the reimbursement requests from Fayette and Jay counties that were for expenses incurred prior to January 1, 2002, based on late filing. Ind. Pub. Def. Comm'n, *Minutes* (Sept. 4, 2002).

In the summer of 2003, Martin County submitted claims for reimbursement of non-capital expenses from 2000, 2001, and 2002. Ind. Pub. Def. Comm'n, *Minutes* (Sept. 4, 2003). The Commission invoked its "clear and unambiguous policy" to deny reimbursement of these claims to Martin County. Ind. Pub. Def. Comm'n, *Minutes* (Dec. 11, 2003). There is no indication that the Commission made any effort to contact the Martin County Public Defender Board or other county officials to ensure their familiarity with the reimbursement program or that they had in fact received notice of the Commission's February 2002 policy on timing of claim submissions. Martin County's Comprehensive Plan was approved by the Commission on September 1, 1999. Ind. Pub. Def. Comm'n, *Minutes* (Sept. 1, 1999). Between approval of its plan in September 1999 and this request for reimbursement in the summer of 2003, the county had only been reimbursed for one non-capital reimbursement request in the third quarter of 2000, Ind. Pub. Def. Comm'n, *Minutes* (Nov. 29, 2000); and it had never sought reimbursement for capital case



expenses at any time during the existence of the Commission.

Yet the Commission approved reimbursement of late filed claims by Fulton and Miami counties when they said they had not received notice of the deadline for submitting the second quarter claims for 2004. Ind. Pub. Def. Comm'n, *Minutes* (Dec. 16, 2004). Fulton County was late again in submitting its claim for the fourth quarter of 2004, and still the Commission waived its guideline for them and paid their claim in full. Ind. Pub. Def. Comm'n, *Minutes* (June 16, 2005). The Commission on February 11, 1998, approved the Fulton County Comprehensive Plan. Ind. Pub. Def. Comm'n, *Minutes* (Feb. 11, 1998), and the county had been reimbursed for claims submitted in the first and third quarters of 2004, every quarter of 2003, and every quarter of 2002, clearly demonstrating that Fulton County was aware of the Commission's February 2002 policy on timing of claim submissions. *See* Ind. Pub. Def. Comm'n, *Minutes* (Feb. 27, 2002 to June 16, 2005). Likewise, the Commission waived its guideline and



In 2005, the Commission added financial penalties based on the length of delay in submitting reimbursement requests and expressly stated that it will “deny all late claims received more than 65 days after the end of the calendar quarter” unless it finds good cause for the delay based on a written explanation from the county.<sup>298</sup>

The information that the Commission requires counties to provide and the forms they must use in requesting reimbursement have been a work in progress that continues to change as the Commission hones its procedures. As of 2015, the Commission has forms for each of the following (available on its website), which a county must submit for every quarterly reimbursement request, along with the county’s explanation of the method it uses for calculating non-reimbursable expenses:

- Request for Reimbursement;<sup>299</sup>
- Attorney Qualifications;
- Verifications;
- New Case Assignment Worksheets.<sup>300</sup>

**A CLOSER LOOK**

IPDC QUARTERLY REIMBURSEMENT  
REQUEST FORMS

[ via 6AC website ]

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paid in full the late submitted fourth quarter 2004 claim of Blackford County. Ind. Pub. Def. Comm’n, *Minutes* (June 16, 2005). The Commission on February 16, 1999, approved the Blackford County Comprehensive Plan. Ind. Pub. Def. Comm’n, *Minutes* (Feb. 16, 1999), Blackford County was similarly aware of the policy, because it was reimbursed for claims submitted in the first quarter of 2004, the last three quarters of 2003, and the last three quarters of 2002. Ind. Pub. Def. Comm’n, *Minutes* (Feb. 27, 2002 to June 16, 2005).

<sup>298</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 15, 2005). The penalties imposed are: 10% if 1 to 10 days late; 25% if 11 to 20 days late; and denial of reimbursement entirely beyond that. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 15, 2005); IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Miscellaneous 12/15/05 (as amended through Sept. 11, 2013). The Commission fairly vigorously enforced these delay penalties going forward, but was generous in finding good cause for delay where a county went to the effort to explain.

<sup>299</sup> The Commission in April 2005 promulgated the earliest version of this form and all counties were required to complete and submit it as part of their reimbursement requests beginning with the second quarter of 2005. Ind. Pub. Def. Comm’n, *Minutes* (Apr. 5, 2005). The form contains a line for “Non-Reimbursable Expenditures” and effective with the second quarter of 2006, each county has been allowed to use its own method, which it must show in writing to the Commission, for determining the amount of its expenditures that are non-reimbursable because they were for the cost of salaries and overhead related to misdemeanors and other non-reimbursable cases. Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006). “The Commission will accept a county’s explanation of its non-reimbursable indigent defense expenditures unless it is patently clear that the method of computation is neither fair nor reasonable.” Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>300</sup> The Commission in April 2005 promulgated the earliest version of this worksheet and all counties were required to complete and submit it as part of their reimbursement requests beginning with those submitted for the second quarter of 2005. Ind. Pub. Def. Comm’n, *Minutes* (Apr. 5, 2005).

The Commission reviews the information submitted to decide whether the county is following its own previously approved comprehensive plan (which had to comply with the Commission *Standards* at the time of approval) and is therefore entitled to reimbursement.<sup>301</sup>

#### **D. Assess compliance.**

Though the procedures and forms to apply for reimbursement are the same for every county participating in the non-capital reimbursement program, the Commission applies the rules differently to the 55 participating counties. There is one main reason for this: the Commission by statute has only the modest offer of partial reimbursement of some expenses to use as an enticement to counties to meet standards. They cannot enforce compliance. This means the Commission will at times authorize reimbursement to counties that have not been in compliance with their own comprehensive plan and Commission standards so that the Commission can continue to work with the counties toward meeting standards.

For example, early in the program's implementation the Commission decided to approve reimbursement to counties that have "complied with part, but not all, of a comprehensive plan" – meaning counties that were not in compliance – so long as the counties "submit[ted] a proposal for a master plan of full compliance."<sup>302</sup> In 2002, the Commission expressly determined that it would authorize reimbursement to counties that were not in compliance during the quarter for which reimbursement is sought so long as the counties were in "substantial compliance" with "the terms of a phase-in plan" and providing that "normally the phase-in period will not be permitted to exceed five years."<sup>303</sup>

Because statutes allow the Commission to determine the standards under which counties may receive reimbursement, the Commission most assuredly has the authority to include a phase-in period for counties to meet those standards. The difficulty with this approach is that there are no firm rules with which all counties must comply within a definite period of time. Instead, the Commission makes individualized decisions about each county as to whether it believes that county is trying sufficiently hard enough to substantially comply with whatever agreement it has reached with the

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<sup>301</sup> IND. CODE § 33-40-6-5 (2015).

<sup>302</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard B, Comprehensive Plan 12/02/94 (as amended through Sept. 11, 2013).

<sup>303</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard B, Comprehensive Plan 09/04/02 (as amended through Sept. 11, 2013).

Commission. As a Commission staff member explains: “the Commission typically works with counties to help them come into compliance and reimburses them so long as they are in ‘substantial compliance’ and working to remedy any problematic situation.”

To give context to these issues, Chapters 5 and 6 explore the Commission’s history of trying to assess compliance with its attorney compensation and workload standards. To be clear, the problems the Commission has in assessing and enforcing these standards are demonstrative of the hurdles it encounters in assessing and enforcing all of its standards.

# CHAPTER 5

## ASSESSING COMPLIANCE: STANDARDS ON CASELOADS AND COMPENSATION

Throughout the existence of the non-capital indigent expense reimbursement program, one topical area has understandably consumed the greatest portion of the Commission's attention: attorney workload. If an attorney is assigned an excessive number of cases, he cannot perform effectively in each and every case. The in-depth analysis of the rules about attorney caseloads that follows serves as an example of the difficulty encountered by the Commission in enforcing all of the standards. Because assessing caseloads is, under the Commission *Standards*, inherently tied to attorney compensation, an explanation of the Commission's attorney compensation rules is necessary.

### **A. Attorney compensation.**

The Indiana legislature required the Commission to establish standards for compensation of public attorneys.<sup>304</sup> Citing to standards of the American Bar Association urging that adequate compensation is important to ensure adequate quality of representation for the indigent,<sup>305</sup> the Commission created different rules for the compensation of indigent defense attorneys based on how they are paid: hourly, by salary, or by contract.<sup>306</sup>

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<sup>304</sup> IND. CODE § 33-40-5-4(2)(E) (2015) (“The commission shall . . . [a]dopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement under IC 33-40-6, including . . . [c]ompensation rates for salaried, contractual, and assigned counsel.”).

<sup>305</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G, Commentary (as amended through June 18, 2014) (“[T]he current level of compensation . . . is inadequate. . . . This level of compensation, inevitably, creates grave concerns about the quality of defense services provided to the accused.”); IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard H, Commentary (as amended through June 18, 2014) (“The case for adequate compensation for appointed counsel in criminal cases is well states in the commentary to Standard 5.2-4 of ABA Providing Defense Services.”).

<sup>306</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014) (establishing rules for salary and contract compensation); IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard H (as amended through June 18, 2014) (establishing rules for hourly compensation).

*1. Private attorneys paid hourly.* The Commission *Standards* address public attorneys who are paid hourly only in connection with an assigned counsel system,<sup>307</sup> requiring that “counsel appointed on a case-by-case basis for trial or appeal . . . shall be compensated for time actually expended at the hourly rate of not less than seventy dollars (\$70.00).”<sup>308</sup> These hourly rate attorneys also “shall be reimbursed” for their out-of-pocket expenses for items such as “photocopying, long-distance telephone calls, postage, and travel” incurred in providing indigent representation.<sup>309</sup> Hourly rate assigned counsel attorneys do not have to wait until the end of a case to be paid; they “shall be” paid monthly upon their request.<sup>310</sup>

The Commission has sometimes refused to reimburse a county for the compensation paid to hourly rate attorneys when those attorneys were paid less or differently than the rate required by the *Standards* or by a county’s comprehensive plan. For example, in 1997, the Commission declined to reimburse Floyd County for its appellate attorneys because the county paid a flat fee of \$1,500 per appeal, rather than the hourly rate required by standards, but the Commission approved the rest of the county’s reimbursement request.<sup>311</sup> In 2001, the Commission rejected Lake County’s request to pay conflict attorneys on a flat fee per case basis, because the county’s comprehensive plan called for hourly rate compensation.<sup>312</sup> Lake County then tried a different tack, suggesting that it pay conflict attorneys an hourly rate with a maximum cap; the Commission likewise disapproved this plan.<sup>313</sup>

*2. Public salaried defenders.* The compensation requirements are more complex when the public attorneys are salaried. One rule applies only to the salaries of the chief public defender and deputy chief public defender in counties that have a public

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<sup>307</sup> The *Standards* are silent about the compensation of an attorney employed by a public defender office who is paid hourly. One might guess that the hourly rate compensation requirements would apply, but there is no way to know for certain. The *Standards* also do not address the situation of an attorney under contract to provide public representation where the contract provides for an hourly rate, though presumably the rules governing contracts would apply rather than the rules governing hourly compensation.

<sup>308</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard H.1. (as amended through June 18, 2014). This hourly rate for non-capital cases took effect on January 1, 2013. IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard H, Compensation of Assigned Counsel 09/09/12 (as amended through Sept. 11, 2013).

<sup>309</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard H.2. (as amended through June 18, 2014).

<sup>310</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard H.3. (as amended through June 18, 2014).

<sup>311</sup> Ind. Pub. Def. Comm’n, *Minutes* (Nov. 18, 1997).

<sup>312</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 18, 2001).

<sup>313</sup> Ind. Pub. Def. Comm’n, *Minutes* (Aug. 29, 2001). Oddly, the Lake County public defender office today does pay its conflict attorneys an hourly rate with a maximum cap. *See infra* p. 187.

defender office.<sup>314</sup> A different rule applies only to “full-time” salaried attorneys.<sup>315</sup> There is no rule for the compensation of “part-time” salaried attorneys, though there is a *Guideline* that discusses their compensation, but only in counties “where there is no position in the prosecutor’s office corresponding with” the position of that part-time salaried public attorney.<sup>316</sup>

Since January 1, 2014, in every county that has a public defender office, the Commission *Standards* require that “[t]he salaries and compensation provided to the chief public defender and deputy chief public defender shall be the same as provided to the elected prosecutor and the chief deputy prosecutor in the county under I.C. 33-39-6-5.”<sup>317</sup>

The general assembly enacted statutes governing the compensation for the elected prosecutors in each circuit and the chief deputy prosecuting attorneys whom they appoint.<sup>318</sup> The state (rather than the county) pays the minimum annual salary of the prosecutors required by these statutes.<sup>319</sup> The elected prosecuting attorney can choose whether to be full-time or part-time (except in a circuit with a population of 250,000 to 269,999 where the prosecutor must be full-time).<sup>320</sup> A full-time elected prosecuting attorney receives the same state salary as a circuit court judge in the same judicial circuit.<sup>321</sup> As of January 1, 2014, an Indiana circuit court judge’s salary was set at \$134,112 per year.<sup>322</sup> Most part-time elected prosecuting attorneys receive 60% of the

<sup>314</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014) (“In counties that have established a county public defender office, the salaries and compensation provided to the chief public defender and deputy chief public defender shall be the same as provided to the elected prosecutor and the chief deputy prosecutor in the county under I.C. 33-39-6-5.”).

<sup>315</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014) (“[T]he salaries and compensation of full-time salaried public defenders shall be the same as the salaries and compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney.”).

<sup>316</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013) (“For counties where there is no position in the prosecutor’s office corresponding with a position in the public defenders office . . . a part-time salaried . . . public defender [must be paid] not less than \$30,175.”).

<sup>317</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014); Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013).

<sup>318</sup> IND. CODE §§ 33-39-6-1 *et seq.* (2015).

<sup>319</sup> IND. CODE §§ 33-39-6-5(d) (directing that state pays salary of elected prosecuting attorney), 33-39-6-2(g) (directing that state pays salary of chief deputy prosecuting attorney and statutory additional deputy prosecuting attorneys) (2015).

<sup>320</sup> Ind. Code §§ 33-39-6-6 to -7 (2015).

<sup>321</sup> IND. CODE § 33-39-6-5(a) (2015).

<sup>322</sup> 38 NAT’L CTR. FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES, AS OF JANUARY 1, 2014, No. 1 (2014). The circuit court judge salary increased to \$137,062 per year as of January 1, 2016. 41 NAT’L CTR. FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES, AS OF JANUARY 1, 2016, No. 1 (2016).

circuit court judge's salary,<sup>323</sup> though some part-time elected prosecutors in certain types of judicial circuits receive 66% of that salary.<sup>324</sup>

Every elected prosecutor is entitled to appoint at least one chief deputy prosecuting attorney, and some counties are allowed to have a specified number of additional deputy prosecutors, all of whose salaries are paid by the state.<sup>325</sup> Like the elected prosecutor, the chief deputies may be full-time or part-time. A full-time chief deputy receives a salary that is 75% of the statutory salary for a full-time elected prosecutor in that circuit,<sup>326</sup> while a part-time chief deputy receives a salary that is 75% of the statutory salary for a part-time elected prosecutor in that circuit.<sup>327</sup> For additional deputy prosecutors, where provided by statute, their salary is 75% of the statutory salary for a part-time elected prosecutor in that circuit.<sup>328</sup> Each county is free to pay up to \$5,000 per year<sup>329</sup> to its prosecutors, in addition to the state salary these prosecutors receive.<sup>330</sup>

For ease of understanding what this all means, the chart below shows the actual salaries for prosecutors that were established and paid by the state as of January 1, 2014, along with the maximum possible salary if a county chose to pay the additional optional \$5,000 per year.

#### Judge & Prosecutor Salaries (established by state)

	Method of determining salary	State salary	Additional optional county salary	Maximum allowed salary
<b>Circuit Court Judge</b>	Established by General Assembly	\$134,112	Up to \$5,000	\$139,112
<b>Elected Prosecutor (full-time)</b>	Same as Circuit Court judge	\$134,112	Up to \$5,000	\$139,112
<b>Elected Prosecutor (part-time)</b>	60% of Circuit Court judge in most counties	\$80,467	Up to \$5,000	\$85,467
<b>Chief Deputy Prosecutor (full-time)</b>	75% of full-time elected prosecutor	\$100,584	Up to \$5,000	\$105,584
<b>Chief Deputy Prosecutor (part-time)</b>	75% of part-time elected prosecutor	\$60,350	Up to \$5,000	\$65,350
<b>Additional Deputy Prosecutor</b>	75% of part-time elected prosecutor	\$60,350	Up to \$5,000	\$65,350

<sup>323</sup> IND. CODE § 33-39-6-5(b) (2015).

<sup>324</sup> IND. CODE § 33-39-6-5(c) (2015).

<sup>325</sup> IND. CODE § 33-39-6-2 (2015).

<sup>326</sup> IND. CODE § 33-39-6-2(a)(1), (3) (2015).

<sup>327</sup> IND. CODE § 33-39-6-2(a)(2), (4) (2015).

<sup>328</sup> IND. CODE §§ 33-39-6-2(b) through (f) (2015).

<sup>329</sup> IND. CODE §§ 36-2-5-14, 36-3-6-3(c) (2015).

<sup>330</sup> IND. CODE § 33-39-6-1(b) (2015); *see also* IND. CODE § 33-39-6-2(g) (2015).

The Commission adopted the requirement of equal pay to prosecutors at its meeting held June 19, 2013.<sup>331</sup> This gave counties a little over six months to adjust their budgets to meet the requirement when their fiscal year began on January 1, 2014 and the compensation standard took effect. One chief public defender present at the meeting noted that she was required to submit her budget to her county by July 1, 2013 – less than two weeks after the Commission made the change in the standard.<sup>332</sup> A budget adjustment was necessary for most counties using a public defender office, because the prior requirement had been only that the compensation of salaried public defenders should be “substantially comparable to similar positions” in the prosecutor’s office, with a chief public defender’s salary set at “not less than 90%” that of the elected prosecutor.<sup>333</sup> Indeed, many counties had struggled throughout their participation in the program to meet even this 90% salary requirement for chief public defenders.<sup>334</sup> With

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<sup>331</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013).

<sup>332</sup> *Id.*

<sup>333</sup> Prior to January 1, 2014, there was no special compensation rule for the chief public defender and deputy chief public defender. Until that date, *Standard G* said: “The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and other reasonable, incidental expenses, e.g., photocopying, long distance telephone calls, postage, and travel.” Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013). A Commission *Guideline*, then in effect that had been adopted in 1995 explained: “As it pertains to the Chief Public Defender’s salary, the Commission defines ‘substantially comparable’ as not less than 90% of the Prosecutor’s compensation.” Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013). The Commission allowed counties two years to “phase in” the 90% chief public defender salary requirement by paying at least 80% beginning Sept. 1, 1995, at least 85% by Sept. 1, 1996, and at least 90% by Sept. 1, 1997 and thereafter. Ind. Pub. Def. Comm’n, *Minutes* (June 8, 1995).

<sup>334</sup> In 1995, Clark County asked for an exemption from this rule. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 7, 1995). The Commission agreed to approve reimbursements for Clark County even though they were in violation of the 90% chief public defender salary standard, but if the standard was not met when the contract came up for renewal, the Commission planned to exclude the chief public defender salary from reimbursement while continuing to reimburse the county’s other non-capital expenditures. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 7, 1995). In August 1997, February 1998, and July 1998, the Commission denied reimbursement to Clark County for the amount of its chief public defender’s salary, because it did not comply with the standards, but approved the rest of the county’s reimbursement request. Ind. Pub. Def. Comm’n, *Minutes* (Aug. 17, 1997 and Feb. 11, 1998 and July 14, 1998).

Similarly, Floyd County’s Chief Public Defender salary did not comply with standards in 1997, so the Commission denied reimbursement for that salary while allowing reimbursement for the rest of the county’s expenses. Ind. Pub. Def. Comm’n, *Minutes* (Aug. 17, 1997).

Henry County was approved to participate in the program on December 11, 2003, but the Commission noted at that time that it “would need more information in the future about potential problems with a disparity between the compensation of the new chief public defender of Henry County and the Henry County Prosecutor.” Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2003). The Henry County chief public defender appeared at the July 28, 2004 Commission meeting and explained that, while his salary did not comply with *Standard G* at that moment, the county would incrementally increase his salary each year to bring it into compliance over the next three years. Ind. Pub. Def. Comm’n, *Minutes* (July 28, 2004). The Commission decided it would not reimburse Henry County for the chief public defender’s salary until the county reached compliance with the compensation standard, but it would allow reimbursement for the county’s other non-capital expenses once the county provided its current



each new raise the state gave to judges, and therefore prosecutors, counties found it more and more difficult to keep up financially.<sup>335</sup>

The difficulty counties faced in complying with the new 2014 equal pay requirement quickly became apparent. For example, Vanderburgh County notified the Commission that it “refused to fund the 2014 budget to pay the Chief Public Defender a salary and benefits equal to the Prosecutor.”<sup>336</sup> The Commission nonetheless approved Vanderburgh County’s first quarter 2014 reimbursement request, but indicated that the pay standards for the chief public defender would have to be met for the next quarter or the county’s reimbursement would be suspended,<sup>337</sup> and the county did increase the salary to come into compliance by the next quarter.<sup>338</sup> On December 11, 2013, the Commission decided that counties could use their supplemental public defender services fund to provide the increase in public defender compensation newly mandated by the Commission.<sup>339</sup> Still, the Commission observed in September 2014 that “many counties in fact are reluctant to join the Commission’s program because they do not have either the funding or political support to fund the Chief Public Defender at the same salary as the prosecutor.”<sup>340</sup>

As of January 1, 2014, the Commission *Standards* require that “[t]he salaries and compensation of full-time salaried public defenders shall be the same as the salaries and compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney.”<sup>341</sup> The commentary to that

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caseloads to the Commission. Ind. Pub. Def. Comm’n, *Minutes* (July 28, 2004). The Commission began approving reimbursement to Henry County in September 2004, retroactive to the first quarter of 2004. Ind. Pub. Def. Comm’n, *Minutes* (Sept. 29, 2004). In early 2007, however, Henry County advised the Commission that it would no longer participate in the non-capital case reimbursement program, because the county did “not want to pay their Chief Public Defender the salary that would be substantially equal to the Henry County Prosecutor’s salary, or approximately \$105,000 annually. . . . [T]he Henry County Council thought that the defense costs of being in the Public Defender Fund program were too much, and that it was not worth the money.”

<sup>335</sup> In 2006, judicial salaries increased and therefore so did those of prosecutors, requiring an increase in the pay of chief public defenders under the Commission’s compensation standard. “To lessen the impact on county budgets, the Commission approved a motion allowing counties to phase-in the increase of chief public defender salaries over two years. Counties will be required to pay 50% of the increase beginning January 1, 2006 and the remainder of the increase beginning January 1, 2007.” Ind. Pub. Def. Comm’n, *Minutes* (June 16, 2015).

<sup>336</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2013).

<sup>337</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 18, 2014).

<sup>338</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 17, 2014).

<sup>339</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2013).

<sup>340</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 17, 2014).

<sup>341</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014). Prior to January 1, 2014, the *Standard* did not distinguish between salaried public defenders and contract attorneys. Until that date, *Standard G* said: “The comprehensive plan shall provide that the salaries and compensation of salaried and contractual public defenders shall be substantially comparable to similar positions in the office of the Prosecuting Attorney. Compensation shall include, but is not limited to, reimbursement for reasonable office expenses and

*Standard* explains that, rather than setting minimum levels of compensation for public attorneys, “it is more consistent with notions of home rule and county autonomy to peg compensation to rates approved by the county for the prosecution function.”<sup>342</sup> Counties are free to hire and pay as many additional deputy prosecutors as they wish, beyond those that the state requires by statute and pays for.<sup>343</sup> It is these county-paid deputy prosecutors to which the Commission has seen fit to peg the compensation of public attorneys. Though the Commission itself created the language of this compensation rule, it has struggled with the implementation.

The first problem is determining who is a “full-time” public attorney to whom this rule applies. In September 2013, the Commission decided that whether an attorney is “full-time” depends on the number of cases that attorney is assigned to handle in a rolling 12-month period.<sup>344</sup> In other words, as the Commission *Guidelines* explain, if a salaried public attorney is assigned 100% of a full-time caseload, then that public attorney is “full-time” and must be paid “the same” salary as that paid to a deputy prosecutor of similar position and experience in the prosecutor’s office of the same county.<sup>345</sup> (Determining what constitutes a “100% full-time caseload” has its own set of difficulties and is discussed in the caseload section *infra*, pages 62 to 68).

The next difficulty is deciding what is and is not included in “salaries and compensation.” The Commission has fleshed this out a bit in response to specific questions that have arisen over the years of the program. For example, compensation does not include retirement benefits,<sup>346</sup> even in those counties that provide retirement for deputy prosecutors with similar positions and experience to that of the public attorneys. Also problematic is identifying what constitutes a “similar position” with “similar experience” in the prosecutor’s office. The Commission has not explicitly answered this question, leaving it instead to the county authorities to decide.

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other reasonable, incidental expenses, e.g., photocopying, long distance telephone calls, postage, and travel.” Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013).

<sup>342</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014).

<sup>343</sup> IND. CODE § 33-39-6-2(h) (2015).

<sup>344</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013) (“Full and part time public defenders are defined as such by the number of cases assigned in a 12-month period.”).

<sup>345</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

<sup>346</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 06/20/12 (as amended through Sept. 11, 2013).

Finally, there is the quandary of how to determine the compensation of a salaried public attorney when there simply is no similar position with similar experience in the prosecutor's office. Commission staff raised this question as early as 1998.<sup>347</sup> At that time, the Commission adopted a *Guideline* stating: “[f]or counties where there is no position in the prosecutor’s office corresponding with a position in the public defenders’ office a full-time public defender must be paid not less than \$40,100 and a part-time public defender, not less than \$20,050.”<sup>348</sup> Effective January 1, 2014, the *Guideline* was amended to encompass contract defenders and to increase the pay levels to \$60,350 for “full-time” and \$30,175 for “part-time.”<sup>349</sup>

3. *Private contract attorneys.* If a county uses contracts<sup>350</sup> to provide indigent representation, the Commission *Standards* require that “[t]he compensation of contractual public defenders shall be substantially comparable to the compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney.”<sup>351</sup>

This rule confronts many of the same issues as the rule governing salaries for full-time public attorneys, (i.e., what is and is not “compensation,” what constitutes a “similar position” with “similar experience” in the prosecutor’s office, and how to determine appropriate compensation when there is no similar position with similar experience in the prosecutor’s office). Effective January 1, 2014, the *Guidelines* require in pertinent part that: “[f]or counties where there is no position in the prosecutor’s office corresponding with [that of a contract attorney,] . . . a full-time . . . contract public defender must be paid not less than \$60,350 and a part-time . . . contract public defender not less than \$30,175.”<sup>352</sup>

Deciding whether a contract defender is full-time or part-time is somewhat unnecessary, since the contracts used in participating counties typically require an attorney to handle a particular type of case or the cases in a particular courtroom, without regard to whether the attorney devotes all of his working time or only a portion of it to indigent representation. In other words, there are no full-time contract public attorneys. However, there is the additional problem of what is meant by “substantially comparable.” The Commission has only ever defined that phrase in connection with the

<sup>347</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 14, 1998).

<sup>348</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013).

<sup>349</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

<sup>350</sup> As discussed *supra* at pp. 47 to 48, the Commission does not require counties to provide copies of the contracts actually in use in the county during the period for which reimbursement is sought.

<sup>351</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014).

<sup>352</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

salary of the chief public defender in a public defender office, where they defined it to mean 90% of the prosecutor’s compensation; with regard to contracts, the Commission has not provided any guidance to counties.<sup>353</sup>

## **B. Attorney caseload standards.**

The general assembly required the Commission to establish rules about the caseloads of the attorneys who provide indigent representation.<sup>354</sup> The Commission adopted three standards that, together, set out the rules about caseloads that public attorneys are allowed to carry if a county is to be eligible for state reimbursement of expenses in non-capital indigent cases.

The first of these standards requires a county to provide “investigative, expert, and other services necessary to provide quality legal representation.”<sup>355</sup> The second standard requires that a county “insure” its public attorneys are not assigned excessively large caseloads, and it sets out “guidelines [that] are recommended” as the maximum number of cases, in a large array of circumstances and case types, to which an attorney can be assigned during a 12-month period.<sup>356</sup> The third standard requires a county’s comprehensive plan to include a provision requiring individual attorneys and chief public defenders to notify various authorities whenever “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.”<sup>357</sup> This analysis focuses on the first two of these standards.

*1. Adequate support staff.* The first step in determining the maximum caseload a public attorney can carry is deciding whether that attorney does or does not have “adequate support staff.” The Commission *Standards* require that a county’s comprehensive plan “shall provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: Providing Defense Services (3rd ed. 1990).”<sup>358</sup> The commentary to that *Standard* explains:

<sup>353</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 19, 2013).

<sup>354</sup> IND. CODE § 33-40-5-4(2)(F) (2015) (“The commission shall . . . [a]dopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement under IC 33-40-6, including . . . [m]inimum and maximum caseloads of public defender offices and contract attorneys.”).

<sup>355</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard I (as amended through June 18, 2014).

<sup>356</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J (as amended through June 18, 2014).

<sup>357</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard K (as amended through June 18, 2014).

<sup>358</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard I (as amended through June 18, 2014).

Quality legal representation cannot be rendered unless defense lawyers have adequate support services available. Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.<sup>359</sup>

Despite this language, counties are not required to provide information about public attorneys' actual use of investigative, expert, or secretarial services during the quarter for which reimbursement is sought. Similarly, the Commission never requires a county to say whether its public attorneys have a computer, telephone, copy machine, or even a brick and mortar office out of which they work. If a county spends money on these resources for indigent cases and seeks reimbursement for them, it will have to include the expenses in its reimbursement request. But if the county has not spent money on these things, then it has no duty to report any information about them to the Commission. It is, therefore, difficult for the Commission to determine whether a county has complied with this *Standard*.

The Commission *Standards* require that the maximum caseload a public attorney can carry is lower for attorneys “without adequate support staff” than for those “with adequate support staff.”<sup>360</sup> Originally under the Commission *Standards*, adequate support staff meant that there was one secretary, one paralegal, and one investigator for every four public attorneys in a county's indigent defense system.<sup>361</sup> Effective July 1, 2012, the Commission modified this definition so that a county can have any combination of three support staff for every four public attorneys in order to be considered as providing adequate support staff – or as the Commission puts it, “.75 support staff for each full-time equivalent (FTE) attorney.”<sup>362</sup>

The Commission recognizes that the number of support staff really can only be measured in a county that uses a public defender office. This is because attorneys who provide representation under contract or as assigned counsel typically work out of their own individual private offices, where they may or may not have a secretary or any other support, and even if they do have support staff, those staff may assist only

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<sup>359</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard I, Commentary (as amended through June 18, 2014).

<sup>360</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J.1, 2 (as amended through June 18, 2014).

<sup>361</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J, Commentary (as amended through June 18, 2014).

<sup>362</sup> *Id.*

with the attorney's private-pay cases and not with indigent cases. For this reason, the Commission automatically treats all attorneys working under contract or as assigned counsel as being "without adequate support staff."<sup>363</sup>

In counties with a public defender office as their method of providing indigent representation, an attorney's caseload can be higher if he (or more precisely, the system within which he works)<sup>364</sup> has adequate support staff, defined by the Commission as three support staff for every four lawyers *and* where those support staff are county employees. If there are less than three support staff who are employees of the county for every four public defender office lawyers, then the Commission requires that the attorneys' caseloads must be lower because they are "without adequate support staff."

Despite this rule, there have always been counties that lacked sufficient support staff and allowed (or required) their attorneys to carry the higher caseload permissible only for attorneys with adequate support staff. In 2006, Commission staff reported that there were 13 then-participating counties that applied "adequate support staff" maximum caseloads to their attorneys, but that did "not have four attorneys to one paralegal, to one investigator, and to one secretary."<sup>365</sup> "For instance, Adams County ha[d] three part-time contract attorneys to one secretary," but applied the adequate support staff

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<sup>363</sup> Commission staff advised that there is one county participating in the program that is an exception to this rule – the county uses contracts to pay its public attorneys, but the county provides a single office for all of those attorneys to work out of and the county employs support staff who work out of that single office. As a result, the contract attorneys in this county are considered to have "adequate support staff" so long as there is a 3-to-4 ratio of support staff to attorneys.

<sup>364</sup> This qualification is added because, in those counties that use a public defender office system, it is not the case that every attorney in the office will have the same access to use the support staff provided by that office. For example, we were routinely told during on-site interviews in counties with public defender offices that investigators were available for serious felony cases, but that the investigators could only be used with express permission or only for very limited purposes in misdemeanor cases. This means that in a public defender office that has an overall ratio of 3 support staff for every 4 attorneys, there may be more than 3 support staff available for every 4 felony attorneys, but there may be no support staff at all available for any of the misdemeanor attorneys.

As another example, in 2002, Vanderburgh County wanted to add a juvenile attorney to its public defender office, but doing so would cause the support staff to attorney ratio to drop below that needed for the attorneys in the office to be considered as having adequate support staff. This would mean, under the Commission standards, that the caseloads for every attorney in the office would have to be reduced to the maximum allowed for attorneys without adequate support staff. Instead, the Commission agreed "the county would be permitted to exceed staff standards by 5% and still be considered to be compliant." The Commission did this because it "desired to encourage the county to bring its juvenile PD's into compliance." Vanderburgh County was told to submit a plan to bring all of its juvenile defense attorneys into caseload compliance and to report back to the Commission within nine months about its status. Ind. Pub. Def. Comm'n, *Minutes* (June 13, 2002). Four years later in July 2006, the Vanderburgh County juvenile attorneys were still not in compliance – at that time, the county needed seven part-time public defenders to meet Commission caseload standards, rather than the three it had. Ind. Pub. Def. Comm'n, *Minutes* (July 13, 2006).

<sup>365</sup> Ind. Pub. Def. Comm'n, *Minutes* (July 13, 2006).

caseload maximums.<sup>366</sup> Noble County was applying the adequate support staff caseload maximums to its two public defender office attorneys by considering a single office staff person to be “33% secretary, 33% paralegal and 33% investigator,” though in truth the county had “never reported any investigative expenses and they [did] not, in fact, have a contract with [any] investigator.”<sup>367</sup> The Commission nonetheless approved these counties’ reimbursement requests at that time.<sup>368</sup>

*2. Maximum allowable caseload.* The first step in measuring an attorney’s caseload is to define what constitutes a “case” in order to count them. The Commission has struggled with this over the years. For example, from 1995 to the present, the Commission *Guidelines* addressed how to count cases when charges are severed, joined, or consolidated for docketing. At the end of 2004, the Commission decided that: (1) each cause number is one case; (2) if a count or charge is severed out, it counts as a separate case; (3) counts or charges joined together count as only one case; and (4) where multiple cause numbers are consolidated for docketing, each cause number is still a separate case.<sup>369</sup> In 2008, Commission staff perceived a contradiction between the 1995 and 2004 guidelines, so the Commission deleted the fourth of these provisions,<sup>370</sup> leaving it an open question as to whether multiple cause numbers consolidated in a court for docketing count as one or multiple cases.<sup>371</sup>

As another example, from 1995 through the beginning of 2006, a probation violation handled by a public attorney counted as one case separate and apart from the original conviction giving rise to that violation, but if the probation violation occurred as a result of a new charge, then only the new charge counted as a case and the probation violation did not count.<sup>372</sup> As of July 2006, the Commission changed course on how to count probation violations: if a public defender represented a defendant on a charge, any subsequent probation violation for that charge is not counted as a new case; but if a private attorney represented a defendant on a charge, any subsequent probation violation assigned to a public attorney is counted as a new case.<sup>373</sup>

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 16, 2004).

<sup>370</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 24, 2008).

<sup>371</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard J, Caseloads of Counsel 09/24/08 (Amended 12/10/08) (as amended through Sept. 11, 2013).

<sup>372</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 5, 2001).

<sup>373</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard J, Caseloads of Counsel 07/13/06 (as amended through Sept. 11, 2013).

The next step, in determining the maximum caseload a county can require its attorneys to carry and be eligible for state reimbursement, is based on whether each attorney is full-time or part-time and the types of cases the attorney handles. Under the Commission's caseloads standards, the number allowed for any given case type is meant to represent the total number of cases that a single lawyer can be assigned during any rolling 12-month period.<sup>374</sup>

For example, a full-time lawyer without adequate support staff should not be assigned more than 300 misdemeanors during any rolling 12-month period – 300 misdemeanors equals 100% of the maximum allowed caseload. Alternatively, that same lawyer should not be assigned more than 150 level 6 felonies during a rolling 12-month period – 150 level 6 felonies equals 100% of the maximum allowed caseload. Most public attorneys handle a caseload that is a mixture of different types of cases, and, when this occurs, that lawyer's maximum allowed caseload is based on the percentage of each type of case he is assigned. If he has 150 misdemeanors that is 50% of a full-time caseload, and so he can also be assigned 75 level 6 felonies that equal 50% of a full-time caseload.

The *Standards* say that the “caseload guidelines are recommended” and that counsel “should generally not be assigned” more than the maximum number.<sup>375</sup> The Commission's commentary explains that this language is used to avoid a county being out of compliance, and therefore ineligible for state reimbursement, “merely because one of its public defenders was assigned a case or two in excess of the maximum number of caseloads in this standard. However, this language should not be interpreted to mean that the Commission will overlook substantial deviations from the caseload standards.”<sup>376</sup>

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<sup>374</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J (as amended through June 18, 2014); IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard J. Caseloads of Counsel 05/04/06 (as amended through Sept. 11, 2013). Whether the 12-month period for counting cases is a 12-month calendar year or a rolling 12 months was a subject of some disagreement at the Commission. In 2006, the Commission agreed that counties should report new case assignments made to attorneys over a rolling 12-month period. Ind. Pub. Def. Comm'n, *Minutes* (May 4, 2006). IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard J. Caseloads of Counsel 05/04/06 (as amended through Sept. 11, 2013). In the course of that discussion, though, the Executive Director of the Council “explained that the ‘rolling year’ represents a change over what he has been telling counties over the years” because he had always believed it was a calendar year. Ind. Pub. Def. Comm'n, *Minutes* (May 4, 2006).

<sup>375</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J (as amended through June 18, 2014).

<sup>376</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J, Commentary (as amended through June 18, 2014).



# MAXIMUM ALLOWABLE CASELOADS IN NON-CAPITAL TRIAL LEVEL CASES: "STANDARD J"

The Commission has established standards for the maximum number of cases a county can allow its public attorneys to be assigned during a rolling 12-month period, if a county is to be certified as in compliance with standards and eligible to be reimbursed by the state for a given quarter. The maximum number of cases allowed to be assigned to each public attorney depends on: whether the attorney does or does not have adequate support staff; whether the attorney is full-time or part-time; and the types of cases the attorney handles. The *Standards* say that “the following

caseload guidelines are recommended” and that counsel “should generally not be assigned” more than the maximum number shown. The Commission’s commentary explains that this language is used to avoid a county being out of compliance, and therefore ineligible for state reimbursement, “merely because one of its public defenders was assigned a case or two in excess of the maximum number of caseloads in this standard. However, this language should not be interpreted to mean that the Commission will overlook substantial deviations from the caseload standards.”

Type of Case	With Adequate Support Staff		Without Adequate Support Staff	
	Full-Time Attorney	Part-Time Attorney	Full-Time Attorney	Part-Time Attorney
Adult level 5 felony and above	120	60	100	50
Adult level 6 felony	200	100	150	75
Adult misdemeanor	400	200	300	150
Adult other (prob. viol., contempt, extradition, etc.)	400	200	300	150
Juvenile level 5 felony and above	250	125	200	100
Juvenile level 6 felony	300	150	250	125
Juvenile misdemeanor	400	200	300	150
Juvenile status offense	500	250	400	200
Juvenile probation violation	500	250	400	200
Juvenile other	400	200	300	150
CHINS & TPR	120	60	100	50
If attorney handles <i>only</i> level 6 felony cases	270	135	225	110

However, before a county can know which maximum standards apply to each of its attorneys, it must decide whether that attorney is “full-time” or “part-time.”<sup>377</sup> The Commission *Guidelines* say: “[f]ull and part time public defenders are defined as such by the number of cases assigned in a 12-month period.”<sup>378</sup> The Commission rules are saying that the maximum caseload an attorney can effectively handle depends on whether that attorney works full-time or part-time,<sup>379</sup> and whether that attorney is considered to work full-time or part-time depends on the caseload the attorney is assigned.<sup>380</sup> To get around this apparent Catch-22, the Commission now primarily calculates attorneys’ allowable caseloads as a percentage of a full-time caseload, based on the percentage of full-time compensation that the attorney receives.

The impact of the Commission’s implementation of its standards creates many hurdles to ensuring reasonable caseloads in Indiana.

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<sup>377</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J (as amended through June 18, 2014).

<sup>378</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

<sup>379</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J (as amended through June 18, 2014).

<sup>380</sup> IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

# CHAPTER 6

## CIRCUMVENTING THE INTENT OF ATTORNEY WORKLOAD STANDARDS

Depending on how attorneys are paid, counties sometimes want to be able to assign larger caseloads to attorneys (in order to save money) and in some instances attorneys want to be assigned a greater number of cases (in order to make more money) than those allowed by the Commission's caseload maximums. This chapter explores how these two competing financial factors circumvent the intent of Commission workload standards to ensure sufficient time for effective representation. Specifically, the analysis includes how counties circumvent the standards locally and how the Commission creates exceptions to the workload standards to dissuade counties from simply leaving the program.

### **A. County circumvention of standards.**

Throughout the Commission's history, counties and the attorneys engaged to provide indigent defense services have asked the Commission whether every indigent case that each attorney handles must be counted as part of the attorney's caseload and reported to the Commission. For example, in 2001, Madison County suggested allowing its attorneys "to handle some of their cases on a pro bono basis and not count them toward caseload compliance."<sup>381</sup> The Commission rejected this proposal,<sup>382</sup> but indicated it would be willing to reevaluate its position if given "further information regarding the types of cases and circumstances involved."<sup>383</sup>

In 2006, Grant County explained that it used a contract system to provide indigent representation, and the contracts established a specific number of cases that each attorney could be assigned in a year.<sup>384</sup> When the part-time contract attorneys reached the limit for the number of cases allowed under their contracts, these same attorneys would then switch over to be appointed at an hourly rate to handle additional cases.<sup>385</sup> Grant County had not been reporting these outside-of-the-contract cases to the

<sup>381</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 5, 2001).

<sup>382</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard J, Caseloads of Counsel 12/05/01 (as amended through Sept. 11, 2013).

<sup>383</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 5, 2001).

<sup>384</sup> Ind. Pub. Def. Comm'n, *Minutes* (Oct. 5, 2006).

<sup>385</sup> *Id.*

Commission. The county also explained that, “when one defendant has multiple cases, but is granted one public defender, it is reported as one case.”<sup>386</sup> The Commission continued to approve the county’s reimbursement requests.<sup>387</sup>

Perhaps most illuminating is a July 2006 conversation between the Commission members and the Circuit Court Judge of Miami County, which demonstrates one of the ways in which a county could ignore a significant number of cases in its caseload reports to the Commission. Miami County used a public defender office to provide indigent representation. The judge explained that the Miami County public defender office attorneys typically reached their maximum caseloads in October of each year.<sup>388</sup> To handle the rest of the cases from October through December and stay within the Commission caseload standards, the county would have to hire three more attorneys; the judge noted that “the county does not have three more attorneys in town to do that, and . . . the county will not give us the funding.”<sup>389</sup>

Therefore, Miami County decided to contract at an hourly rate with the same attorneys who worked in the public defender office to handle the remaining October to December caseload, but not include these county expenditures on the reimbursement request to the Commission.<sup>390</sup> In the mind of the Miami County judge, if the county did not seek reimbursement for the money it spent on those cases, then the county was not held to the Commission standards for those cases.<sup>391</sup> When the Commission said it expected to receive information about all of the county’s indigent cases based on the Commission’s approval of the county’s comprehensive plan, the judge responded “you’d never know, because I will not be seeking reimbursement for that attorney contracting cases in October until December 31st.”<sup>392</sup> The Commission approved every reimbursement request submitted by Miami County from May 1999 through December 2006, at which point Miami County simply stopped submitting requests for reimbursement.<sup>393</sup>

There are in fact cases handled by public attorneys throughout almost all of the counties participating in the non-capital reimbursement program that are *never* counted. The Commission is aware that most of the attorneys in almost all of the participating counties are handling, during a rolling 12-month period, more cases than are reported by the county requesting reimbursement. This is because the Commission does not require counties to report the number or type of private-pay cases the attorneys accept, nor appointed indigent cases that the attorneys handle in city and

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<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> Ind. Pub. Def. Comm’n, *Minutes* (May 12, 1999 through Dec. 14, 2006).

town courts, in non-participating counties, or in federal courts and the courts of other states. Only in 2015 did the Commission begin comparing reimbursement requests from all participating counties to check the combined number of cases a single public attorney might be accepting from two or more participating counties during the same quarters and the same rolling 12-month periods.<sup>394</sup>

## **B. Commission exceptions to workload standards.**

The Commission itself has had difficulty deciding how to apply its caseload standards, and at first it simply “allow[ed] staff to apply whichever standard best suited the county’s situation.”<sup>395</sup>

*1. New reporting requirements.* Effective with the second quarter of 2005, the Commission promulgated a “standardized quarterly report form and attorney caseload worksheet” that all counties are required to complete and submit as part of their reimbursement request.<sup>396</sup> This allowed the Commission, for the first time in its existence, to see the number of cases that were assigned to all public attorneys (public defender office, contract, and assigned counsel)<sup>397</sup> in all participating counties.<sup>398</sup> As the then-Commission chair observed, prior to the use of these caseload worksheets, “the Commission ha[d] been ‘flying blind for years.’”<sup>399</sup>

Almost immediately, the caseload assignment worksheets showed that a significant number of counties were consistently violating the Commission caseload standards. For example, Lake County had “appellate attorneys who [were] severely out of compliance.”<sup>400</sup> Since the Commission had only explained to counties in May of 2006 that caseloads should be reported on a rolling 12-month basis, the Commission determined Lake County “should not have funding withheld, but be advised that they need to be aware of the compliance issues going forward.”<sup>401</sup> Similarly, the Marion County attorneys who handled only domestic violence cases (mostly class D felonies)

<sup>394</sup> As early as December 2009, Commission staff said they “could provide information on [the caseloads of] public defenders crossing county lines immediately, however, [staff] reminded the Commission [they] would only have information on counties in the program.” Ind. Pub. Def. Comm’n, *Minutes* (Dec. 16, 2009).

<sup>395</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 14, 1998).

<sup>396</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 5, 2005).

<sup>397</sup> The Commission recognized, though, that “since reimbursement is not provided for misdemeanor cases, county public defenders do not submit misdemeanor statistics unless the public defenders handle a mixed felony and misdemeanor caseload.” Ind. Pub. Def. Comm’n, *Minutes* (Apr. 5, 2005).

<sup>398</sup> At the first meeting to address reimbursement requests filed with the new forms, Commission staff reported that they “received case information in all of the reimbursement claims submitted, and in some cases, a lot more information than was needed.” Ind. Pub. Def. Comm’n, *Minutes* (Sept. 15, 2005).

<sup>399</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 6, 2006).

<sup>400</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>401</sup> *Id.*

had “reached almost half a year’s quota in the 1st quarter” of 2006.<sup>402</sup> The Marion County chief public defender reported he had already asked the county for additional funds to hire 13 more D-felony lawyers, in an effort to come into compliance with caseload standards, and the Commission approved the county’s reimbursement request.<sup>403</sup>

The Commission had previously excused Vanderburgh County from reporting the caseloads of its entire juvenile department because the county was not being reimbursed for its juvenile attorneys until they could be brought into compliance (though the county was still allowed to receive reimbursement for the rest of its indigent representation program).<sup>404</sup> Now that all participating counties had to report all caseloads, the non-compliance of the Vanderburgh County juvenile attorneys was apparent – the county would need seven part-time public defenders (instead of the three it currently had) to meet the Commission standards.<sup>405</sup> The Commission gave the county until January 1, 2007 to bring their juvenile caseload into compliance and approved its reimbursement request in the meantime.<sup>406</sup>

Both Steuben and Switzerland counties also had attorneys whose caseloads “were seriously out of compliance,” yet the Commission also approved their reimbursement requests.<sup>407</sup> At least 13 counties, including Adams and Noble, were out of compliance because they were applying the higher “adequate support staff” caseload maximums to their lawyers when they should have been using the lower “without adequate support staff” caseload maximums.<sup>408</sup>

In the face of so much evidence that such a large number of counties was clearly not complying with the Commission’s caseload standards, the Commission chair soon observed: “there is real concern regarding non-compliance, because for the first time we are getting data on which we can rely to determine caseloads.”<sup>409</sup> Over the next months the Commission discussed the need to warn counties about their attorneys who

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<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> In 2002, Vanderburgh County wanted to add a juvenile attorney to its public defender office, and the Commission “desired to encourage the county to bring its juvenile PD’s into compliance.” Vanderburgh County was told to submit a plan to bring all of its juvenile defense attorneys into caseload compliance and to report back to the Commission within nine months about its status. Ind. Pub. Def. Comm’n, *Minutes* (June 13, 2002).

<sup>405</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>406</sup> *Id.* Four years earlier the Commission told Vanderburgh County to have its juvenile attorneys in caseload compliance by March of 2003. Ind. Pub. Def. Comm’n, *Minutes* (June 13, 2002). In December 2006, Vanderburgh County was back before the Commission saying that its juvenile attorneys could not possibly come into full compliance with Commission caseload standards until May of 2009. Ind. Pub. Def. Comm’n, *Minutes* (Dec. 14, 2006).

<sup>407</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>408</sup> *Id.*

<sup>409</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 14, 2006).

were not in compliance with caseload standards.<sup>410</sup> From time to time, the Commission had sent letters to counties to let them know “they were close to being substantially out of compliance,” but the Commission’s view was that those “Warning” letters could be considered a “threat” but not “a formal notice in accordance with the Indiana statute.”<sup>411</sup> As the Commission observed, “out-of-compliance counties could not be terminated from the Fund, until given notice and time to respond.”<sup>412</sup>

At the beginning of 2007, the Commission took a new tack and began sending what it referred to as “90-Day Notice” letters to counties that were substantially out of compliance with caseload standards.<sup>413</sup> These letters were intended to have teeth and actually set in motion the formal process by which a county could be terminated from the non-capital reimbursement program. The Commission was heartened by the first round of responses received from counties in response to these letters, because every recipient county had responded with a plan to come into compliance.<sup>414</sup> On the basis of each county having a plan, the Commission continued to approve reimbursement.<sup>415</sup>

Meanwhile, as representatives of various participating counties appeared before the Commission to discuss caseload concerns and as additional counties joined the reimbursement program, the way in which the Commission applies its caseload standards began to clarify. At a single Commission meeting in April 2007, the Commissioners heard three participating counties each describe using *different* maximum caseload limits for their indigent representation system lawyers: St. Joseph County, using 55% of the Commission’s full-time maximum caseload; Floyd County, using 75%; and Vigo County, using 80% – all based solely on the compensation paid to the public attorneys in each of those counties.<sup>416</sup>

The Commission approved Vigo County’s comprehensive plan in September 1999.<sup>417</sup> When the county ran afoul of the caseload standards in 2006,<sup>418</sup> it was necessary to reconstruct the county’s history with the Commission. Vigo County used a public defender office system, and the comprehensive plan as originally approved by the Commission expressly provided that the public defender office attorneys would use the caseload standards for full-time attorneys without adequate support staff, but at

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<sup>410</sup> Ind. Pub. Def. Comm’n, *Minutes* (July 13, 2006).

<sup>411</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 14, 2006).

<sup>412</sup> *Id.*

<sup>413</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 11, 2007).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 1, 1999).

<sup>418</sup> At that time, several Vigo County public attorneys were out of compliance with the caseload standards. The chief public defender advised the Commission that one new attorney had been hired to start in January 2007, “but that three more attorneys would be needed to solve the compliance issue,” and the “budget for 2007 [was] already fixed.” Ind. Pub. Def. Comm’n, *Minutes* (Dec. 14, 2006).

80% of the allowed caseload rather than 100%.<sup>419</sup> Floyd County's comprehensive plan was approved by the Commission on February 19, 1997<sup>420</sup> and, as they explained to the Commission ten years later, the maximum caseload their attorneys were allowed was 75% of a full-time caseload, "based upon the amount of the salaries paid to the public defense attorneys."<sup>421</sup> St. Joseph County was approved for participation in the non-capital reimbursement program on April 11, 2007, under a phase-in plan that allowed two years for the county to come into compliance with Commission caseload standards.<sup>422</sup> The Commission noted that "the public defense attorneys in St. Joseph County, according to the comprehensive plan, would be part-time attorneys with a 55% caseload due to the amount of salary being paid to each public defense attorney."<sup>423</sup>

This prompted the Commission chair to observe that "the Commission could have 50 counties deciding what percentage of a full-time caseload their public defense attorneys could handle in a 12-month period."<sup>424</sup> In the manner that the Commission interpreted and applied its compensation and caseload standards, the caseloads public attorneys were allowed to carry in participating counties were based solely on their compensation -- not on the actual adequacy of their available support staff and defense resources, as required by Commission *Standards I* and *J*, and not on whether the attorneys were devoting all of their working hours to their indigent cases or only a lesser portion of those hours, as required by Commission *Standard J*.

2. *A change in the Standards' rationale.* The Commission chair who had headed the Commission from its inception retired at the Commission's June 2007 meeting,<sup>425</sup> and his absence left a gap in leadership. Two long-time commissioners both retired along with the chair.<sup>426</sup> At mid-2007, only two commissioners remained who had been on the Commission prior to 1995, during the years in which it developed the *Standards* and *Guidelines* for the non-capital reimbursement program.<sup>427</sup> Three more of the remaining commissioners had served prior to 2005,<sup>428</sup> as the Commission struggled to move participating counties into compliance with the Commission's caseload standards, but one of them left the Commission in January 2008<sup>429</sup> and another in March 2009.<sup>430</sup> After almost 20 years of continuous leadership, the Commission was left with little institutional memory of how and why intricate policies had been formed

<sup>419</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 14, 2006 and Apr. 11, 2007).

<sup>420</sup> Ind. Pub. Def. Comm'n, *Minutes* (Feb. 19, 1997).

<sup>421</sup> Ind. Pub. Def. Comm'n, *Minutes* (Apr. 11, 2007).

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> Norman Lefstein. Ind. Pub. Def. Comm'n, *Minutes* (June 27, 2007).

<sup>426</sup> Monica Foster and Representative Ralph Foley. Ind. Pub. Def. Comm'n, *Minutes* (June 27, 2007).

<sup>427</sup> State Public Defender Susan Carpenter and Bettye Lou Jerrell. Ind. Pub. Def. Comm'n, *Minutes* (June 27, 2007).

<sup>428</sup> Judge Daniel Donahue, Senator Timothy Lanane, and Senator Joseph Zakas.

<sup>429</sup> Judge Daniel Donahue. Ind. Pub. Def. Comm'n, *Minutes* (Mar. 26, 2008).

<sup>430</sup> Senator Joseph Zakas.



and of the agreements that had been reached with individual counties regarding the implementation of caseload standards.

From 2005 through 2012, the Commission was overwhelmed and inadequately staffed as it tried to prod, cajole, and threaten 50-plus recalcitrant counties into complying with the Commission’s caseload standards (as well as the entirety of the other standards, including those addressing attorney compensation).

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**A CLOSER LOOK**  
 COMMISSION MEMBERS TO DO THE  
 WORK OF THE COMMISSION  
 [ via 6AC website ]  
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Unfortunately, this time frame coincided almost exactly with the worst financial period in the life of the non-capital case reimbursement program.

From the fourth quarter of 2004 through the fourth quarter of 2008, the state was near consistently defaulting on its promise of 40% reimbursement to the counties, with approximately every other quarterly reimbursement having to be prorated. Things hit an all-time low when the Commission could only reimburse

18.3% of the counties’ non-capital indigent case expenses for the fourth quarter of 2006.<sup>431</sup> Even when the Commission was finally able once again to consistently reimburse 40% beginning with the first quarter of 2009,<sup>432</sup> the payments often had to be suspended, causing delays in the participating counties’ receipt of the money they had been promised by the State of Indiana and the Commission.<sup>433</sup> These delays continued until the second quarter of 2012.<sup>434</sup> Thus, at the very time that the Commission members and staff most needed to deal confidently and authoritatively with counties, they were instead operating from a position of weakness with little to offer to counties as incentive for compliance with standards.

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**A CLOSER LOOK**  
 STAFF TO DO THE WORK OF THE  
 COMMISSION  
 [ via 6AC website ]  
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The end goal of the state reimbursement program and the Commission was and is to ensure effective representation for indigent people. One factor, among others addressed by the Commission *Standards*, that enhances the likelihood of public defense attorneys providing effective representation is giving them adequate time and resources to do so. Placing a cap on the number of cases each lawyer can be required to handle in a 12-month period helps give the lawyer, and the client, those resources and that time. Compliance merely for the sake of compliance with the Commission’s caseload standards was never in and of itself the end that the Commission, and the state

<sup>431</sup> Ind. Pub. Def. Comm’n, *Minutes* (Apr. 11, 2007).  
<sup>432</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 24, 2009).  
<sup>433</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 16, 2009; June 23, 2010; Dec. 15, 2010; June 15, 2011; June 20, 2012).  
<sup>434</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 19, 2012).

through its reimbursement program, sought to achieve. But with inadequate resources, insufficient staff, and the constant threat that counties could simply leave the program and disregard standards altogether, the Commission focused more on technical compliance than on holding down workload. And there were only two ways of causing every public defense attorney in every participating county to have a caseload that complied with the Commission *Standards*. Either the counties would have to spend more money to hire more lawyers, or the Commission would have to allow the existing number of public lawyers in each county to handle the existing number of cases.

At every Commission meeting from April 2007 onward, staff provided an updated report on how each county was responding to the “Warning” letter or the “90-Day Notice” letter the Commission had sent about non-compliance with caseloads. Every county was reported as either substantially out of compliance, out of compliance but working on a plan to achieve compliance, or back in compliance.

In time, the Commission began advising counties to adjust their public defense systems in several ways that made no substantive changes but that had the effect of causing an “out of compliance” county to be an “in compliance” county. Changing the title of a lawyer from a “chief public defender” to a “managing public defender” meant the county could pay that lawyer less than the prosecuting attorney and still comply with the Commission compensation standards.<sup>435</sup> If a contract attorney was carrying the maximum allowable number of cases under the “part-time” caseload standards and wanted to take additional assigned hourly rate cases in order to make more money, all that was needed was to re-label him as a “full-time” attorney and the number of cases he was allowed to carry under the caseload standards would increase to whatever percentage his salary was of a full-time compensation level.<sup>436</sup> If the attorneys in

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<sup>435</sup> In 2007, Adams County sent an amended comprehensive plan to the Commission for approval. Commission staff explained:

Adams County has a contract system for providing public defense services, with an office and chief public defender. The amendments to the comprehensive plan include changing the position of chief public defender to managing attorney. This allows Adams County to not have to pay 90% of a full-time prosecutor’s salary to a chief public defender, but instead the managing attorney contracts with the county and then receives an additional amount for the managing duties.

Ind. Pub. Def. Comm’n, *Minutes* (June 27, 2007). Similarly, in 2014 Commission staff “noted that there are statutory obligations for the Chief Public Defender, but that many counties avoid these duties by creating alternate positions.” Ind. Pub. Def. Comm’n, *Minutes* (Sept. 17, 2014).

<sup>436</sup> In 2007, Grant County’s contract attorneys were out of compliance with caseloads standards. Commission staff explained:

In Grant County, contract public defenders take cases up to their contract limit and then start taking assigned cases. [Commission staff and Grant County officials] reached the understanding that the maximum caseload allowable under the Grant County public defenders’ contracts indicates the attorneys work part time. If a Grant County public defender chooses to take assigned cases in numbers equaling the maximum allowable caseload for a part-time public defender in addition to his/her contract case assignment, it might be best to consider him/her full time and report his/her caseload on a full-time/inadequately staffed caseload worksheet. If a

a public defender office were all carrying mixed caseloads of both felonies and misdemeanors, moving all of the misdemeanors (no matter how many that might be) to just certain of the lawyers would ensure those misdemeanors were not counted under the Commission's caseload standards, and that way all of the attorneys in the office could carry more cases.<sup>437</sup> Along the way of bringing counties into compliance with Commission caseload standards, the Commission got sidetracked from its purpose -- to *limit* the number of cases each attorney was required to handle, rather than to re-label the attorney into handling *more* cases.

Today, the Commission decides the caseload that a salaried or contract public attorney can carry, for the county to be in compliance and entitled to reimbursement, based on the compensation paid to the full-time deputy prosecutors in that county.<sup>438</sup> If a public attorney is paid the same as the corresponding prosecutor position, then the Commission considers that public attorney to be "full-time," without regard to how many hours the public attorney actually devotes to indigent representation and without regard to whether the public attorney has one or more other jobs. If a public attorney is paid less than the corresponding prosecutor, the Commission divides the public attorney compensation by the prosecutor compensation to arrive at a percentage; then the Commission allows that public attorney to handle that same percentage of the maximum full-time caseload set out in *Standard J*. If there are no full-time deputy prosecutors in a county or no deputy prosecutor position that corresponds to that of a particular public attorney, the Commission has established by *Guideline* a salary of \$60,350 per year for a public attorney to be considered full-time.<sup>439</sup> In these counties,

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contract public defender chooses not to take assigned cases over his/her contract limit, then that public defender's cases should be reported on a part-time caseload worksheet.

Ind. Pub. Def. Comm'n, *Minutes* (Sept. 26, 2007).

Similarly, Commission staff met with Jay County officials in 2011. "After figuring the salaries of three attorneys who handle most of the public defense cases in Jay County, and comparing those salaries with that of the Deputy Prosecutor, [Commission staff] was able to determine that these attorneys could report new case assignments as a percentage of a full-time/inadequately staffed attorney. This brings all but one attorney into compliance with Standard J." Ind. Pub. Def. Comm'n, *Minutes* (Mar. 23, 2011).

<sup>437</sup> In 2008, Montgomery County was out of compliance with caseload standards and attended the Commission meeting to explain:

Judge Milligan reported that, by his calculation, the county would need to hire an additional 3.5 public defenders to handle the caseload and be in compliance with Standard J. . . . The [Montgomery County] Council decided that for the amount of reimbursement provided by the Commission, it was not worth the expense of hiring additional public defenders. . . . [A commissioner] asked if the public defenders handled mixed caseloads of reimbursable and non-reimbursable cases. Judge Milligan said yes. [The commissioner] asked if the county was aware that compliance with Standard J was only required for public defenders who handled reimbursable cases. If a public defender had no reimbursable cases, then he/she did not need to comply with Standard J. The county might not be so out of compliance if cases were assigned differently.

Ind. Pub. Def. Comm'n, *Minutes* (June 25, 2008).

<sup>438</sup> The rationale for this is that the compensation a county has decided to pay to its full-time deputy prosecutors is the measure of the monetary value that county places on criminal justice.

<sup>439</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G,

the maximum caseload a public attorney can carry is based on what percentage of this \$60,350 full-time salary a public attorney receives.<sup>440</sup> Assigned counsel attorneys must be paid at least \$70 per hour, and they are all allowed under the Commission standards to handle up to the full-time caseload for attorneys without adequate support staff.

### **C. New approach undermines *Standards'* intent**

This correlation between compensation and the maximum caseloads allowed plays out in practice in incongruous ways. For purposes of all of the following examples, consider the Commission's full-time caseloads for attorneys who do not have adequate support staff.<sup>441</sup>

In this first example, consider a single public attorney and the caseloads he is allowed based on two different salaries. If a prosecutor is paid \$50,000 and Public Attorney A is also paid \$50,000, then Public Attorney A can handle 100% of a full-time caseload – for example, 100 serious felony cases. But, if Public Attorney A is paid \$30,000, then he can only handle 60% of a full-time caseload – for example, 60 serious felony cases. Nothing about the circumstances of Public Attorney A changed in these two examples. He has the same number of hours available in each day, week, and year to devote to his job, and has the same resources available to devote to representing his clients. Nonetheless, under the Commission's application of its standards, a more highly paid attorney can, somehow, effectively handle a larger number of cases in exactly the same amount of time and with exactly the same resources than an attorney who is paid less.

For another example, compare public attorneys in two different counties, where prosecutors are paid the same but public attorneys are paid different amounts. The prosecutors in County B and County C are both paid \$50,000. In County B, a public attorney is also paid \$50,000, so that public attorney can handle 100% of a full-time caseload – for example, 100 serious felony cases. In County C though, a public attorney is paid only \$30,000, so that public attorney can only handle 60% of a full-time caseload – for example, 60 serious felony cases. Even if the County B public attorney and the County C public attorney have exactly the same number of hours available to devote to representing their clients and exactly the same resources available for their cases, the number of cases they are able to handle effectively is

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Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013). The Commission has also established, in this same *Guideline*, that a part-time salaried or part-time contract public defender (in a county with no corresponding deputy prosecutor position) must be paid not less than \$30,175 per year, though it is unclear to what purpose this provision is ever put.

<sup>440</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

<sup>441</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard J.1., Table 1 (as amended through June 18, 2014).

different from one county to the next based solely on their compensation, under the Commission's application of its standards.

In a third example, compare public attorneys in two different counties, where the public attorneys are paid the same but the prosecutors are paid different amounts. If a prosecutor in County D is paid \$60,000 and a public attorney is also paid \$60,000, then that County D public attorney can handle 100% of a full-time caseload – for example, 100 serious felony cases. In County E, the prosecutor is paid \$100,000 and the public attorney is paid only \$60,000, so that County E public attorney can only handle 60% of a full-time caseload – for example, 60 serious felony cases. In the way the Commission standards are being applied, the County D public attorney who is paid \$60,000 is considered able to effectively handle a larger caseload (100 felony cases) than the County E public attorney who is paid the same \$60,000 but can only effectively handle a smaller caseload (60 felony cases).

Consider as a fourth example the situation where a public attorney in one county earns more than a public attorney in another county. If a prosecutor in County F is paid \$60,000 and a public attorney is also paid \$60,000, then that County F public attorney can handle 100% of a full-time caseload – for example, 100 serious felony cases. In County G, the prosecutor is paid \$100,000 and the public attorney is paid only \$80,000, so that County G public attorney can only handle 80% of a full-time caseload – for example, 80 serious felony cases. Here, the way the Commission standards are applied means the County F public attorney who is paid \$60,000 can somehow effectively handle a larger caseload (100 felony cases) than the County G public attorney who is paid more money at \$80,000 but can only effectively handle a smaller caseload (80 felony cases).

As a fifth example, look at two public attorneys in the same county, but where there is a corresponding prosecutor position for one of them but not for the other. If a prosecutor in a county is paid \$100,000 and a corresponding Public Attorney F is paid only \$60,000, then Public Attorney F can handle only 60% of a full-time caseload – for example, 60 serious felony cases. Meanwhile, there is another Public Attorney G in that same county for whom there is no corresponding deputy prosecutor position. If Public Attorney G is paid \$60,350, then he can handle 100% of a full-time caseload – for example, 100 serious felony cases. In a single county, the manner in which the Commission standards are applied means that Public Attorney F can effectively handle only 60 serious felony cases because he is paid \$350 less per year than Public Attorney G who can effectively handle 100 felony cases. Attorney F's salary is 99.42% of Attorney G's salary, but Attorney F is limited to a caseload that is 60% of Attorney G's caseload.

Finally, consider two public attorneys in the same county, where one is paid hourly as assigned counsel and the other is a full-time salaried public defender office attorney

with inadequate support staff (there is not a 3 to 4 ratio of support staff to attorneys). As long as Assigned Counsel H is paid \$70 per hour, he can be appointed to a full-time caseload – for example, 100 serious felony cases. This is without regard to how many hours the assigned counsel spends on these cases and also without regard to how many other clients and cases this assigned counsel may have beyond his indigent appointed clients. If he devotes, for example, 10 hours on average to each case, this assigned counsel will expend a total of 1000 working hours and earn \$70,000, leaving approximately 1000 working hours that year for the assigned counsel attorney to devote to as many more lucrative paying cases as he wants and at whatever fee he charges. Meanwhile, PD Office Attorney J is paid \$70,000 (the same as the corresponding deputy prosecutor in the county, and the same as Assigned Counsel H earns for indigent representation), and he will also be allowed a maximum caseload of, for example, 100 serious felony cases. This PD Office Attorney J will devote all of his approximately 2000 working hours that year to his indigent caseload, allowing 20 hours on average per case (twice as much time as the assigned counsel attorney provided), and will do so for the same \$70,000 per year in compensation. Under the Commission’s interpretation of allowable maximum caseloads, Assigned Counsel H can effectively handle 100 felony cases in 1000 hours at a compensation of \$70,000, while PD Office Attorney J will need 2000 hours to effectively handle the same 100 felony cases at the same compensation of \$70,000.

#### **D. Counties leaving the program.**

To be clear, the Commission’s actions reflect a defective system. Because the State of Indiana does not require all jurisdictions to meet minimum standards, counties are free to walk away from the program and do pretty much whatever they want without any state oversight. This structural deficiency is, perhaps, best demonstrated by the fact that eight counties have voluntarily left the non-capital reimbursement program (Crawford, Henry, Miami, Montgomery, Newton, Scott, White, and Whitley). For the most part, these counties have stopped filing reimbursement requests after the Commission identified that the county was not in compliance with standards.<sup>442</sup> So to the extent

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<sup>442</sup> The one exception is Newton County where its September 1999 comprehensive plan was accepted without any apparent concerns, Ind. Pub. Def. Comm’n, *Minutes* (Sept. 1, 1999), yet the county never submitted a single request for reimbursement.

Crawford County’s first request for reimbursement was considered in February 2002, and the Commission tabled the request to look further into the county’s caseload compliance; the county never again submitted a request for reimbursement. Ind. Pub. Def. Comm’n, *Minutes* (Feb. 27, 2002).

After the Commission approved all seven of White County’s reimbursement requests from August 2001 through September 2003, it tabled the county’s reimbursement request in December 2003 because the county public defender board had not been meeting, perhaps ever, and it appeared the judge might be in charge of the public defense system; the county did not submit any further reimbursement requests. Ind. Pub. Def. Comm’n, *Minutes* (Dec. 11, 2003). ‘

In December 2006, the Miami County chief public defender notified the Commission that the county did “not believe it is cost effective to stay in the program” and the county stopped submitting

# WHY THE "INDIANA MODEL" DOES NOT WORK

## SPOTLIGHT: INADEQUATE FUNDING AND SCOTT COUNTY

The jurisdictions that are often most in need of indigent defense services are the ones that are typically least likely to be able to afford them. Indiana requires its local governments to fund indigent defense services in the first instance. However, Indiana counties have significant revenue-raising restrictions placed on them by the state, while being statutorily prohibited from deficit spending. The primary source of revenue available to local government is property taxes, but even there the amounts local governments are allowed to assess are stringently limited by the state. Worse yet, factors that in many instances lead to higher crime rates -- low property values, high unemployment, high poverty rates, limited house-hold incomes, limited higher education, etc. -- are often the exact same factors that limit counties' revenues. And those same counties often have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted.

Scott County, for example, is one of the poorest counties in the state. Property values are low, and it is geographically small, so there is less land to assess for property taxes. The site visit to Scott County coincided with the outbreak of an AIDS epidemic. As one judge stated: "If you look at Austin -- that community is imploding on itself." The small community had confirmed 20% of its population as being HIV+, and the number continued to climb as testing spread further. But the judge noted that the HIV crisis is just the latest in a long line of issues the

county has faced. In the late 1980s, it was cocaine. In the 1990s, it was pills. Just as the county fought and won each successive fight, the judge is convinced it will win out over the HIV scare as well. But it is taking the few resources the county has available to do it. There is nothing left for criminal justice -- and certainly not enough to adequately fund the right to counsel within Scott County.

Rather than increase public defense costs to meet IPDC standards, Scott County left the state reimbursement system and reduced the number of its public defense attorneys from ten to six. The county uses flat fee contracts that pay a single fee for attorneys to handle an unlimited number of cases. There is no line item available for investigators or social workers, so none of the attorneys ask for these support resources on their indigent clients' cases. When asked what is needed to remedy the situation, the judge said: "The state needs to take over the public defender system." The "Indiana Model" does not work in Scott County because it abdicates the state's responsibility to ensure that counties are in fact able to and actually are providing effective assistance of counsel, and it institutionalizes and legitimizes the county's choice not to spend its limited public funds on fulfilling the requirements of the Sixth Amendment.

that the Commission is trying to hold counties accountable to standards, a county may always simply choose to not meet standards when challenged. Montgomery County provides an example.

Montgomery County adopted an ordinance creating its public defender board in 1994.<sup>443</sup> The public defender board approved the county's comprehensive plan for participation in the non-capital indigent expense reimbursement program,<sup>444</sup> and the Commission approved the county's plan on September 7, 1995.<sup>445</sup> The county submitted sporadic requests for reimbursement from the second quarter of 1995 through the second quarter of 2002, all of which the Commission approved.<sup>446</sup>

When the Commission promulgated its "standardized quarterly report and attorney caseload worksheet," Montgomery County's difficulties began. At the September 2007 Commission meeting, Commission staff reported that they had "sent a 90-day notice of possible termination of funds" to Montgomery County.<sup>447</sup> The county had a plan for bringing its attorneys into compliance with the caseload standards by "hir[ing] more public defenders and taking whatever additional steps are necessary to gain control of the public defenders' caseloads," but improvements to the program could not take place until the county's new budget year in 2008.<sup>448</sup> "The Commission accepted Montgomery County's plan and timetable," and approved its request for reimbursement.<sup>449</sup>

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requests for reimbursement. Ind. Pub. Def. Comm'n, *Minutes* (Dec. 14, 2006).

The Commission sent a letter to Whitley County officials on August 14, 2007, notifying them they were out of compliance; the county auditor acknowledged the letter indicating the county "understand[s] they are not in compliance and are ineligible to receive reimbursements;" staff met with county officials and reported that the county "does not intend to alter their public defense program to come into compliance with commission standards;" and the county submitted its final reimbursement request for the first quarter of 2008. Ind. Pub. Def. Comm'n, *Minutes* (Sept. 26, 2007; Dec. 12, 2007; Mar. 26, 2008; June 25, 2008).

Henry County refused to increase its budget to pay the chief public defender the same salary as the prosecutor, and in fact decreased its public defense budget, ending its participation in the reimbursement program as of June 30, 2009. Ind. Pub. Def. Comm'n, *Minutes* (Apr. 11, 2007; June 25, 2008; Sept. 24, 2008; Dec. 10, 2008; Mar. 25, 2009; June 24, 2009).

Scott County was out of compliance with caseload standards in 2007 and 2008; then in 2009 the county cut the public defense funding to such an extent that they had to hire fewer rather than more attorneys, ending their participating in the reimbursement program. Ind. Pub. Def. Comm'n, *Minutes* (June 25, 2008; Sept. 24, 2008; Mar. 25, 2009; June 24, 2009).

<sup>443</sup> Montgomery County, Indiana, Code, § 33.08 (2016).

<sup>444</sup> *Montgomery County Comprehensive Plan for Indigent Defense Services, MONTGOMERY COUNTY PUBLIC DEFENDER BOARD* (1995).

<sup>445</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 7, 1995).

<sup>446</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 7, 1995 through Sept. 4, 2002).

<sup>447</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 26, 2007).

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*



When the Commission met in June 2008, it hoped to see improvement in caseloads based on the new 2008 budgets in the counties. The Montgomery County Circuit Court Judge addressed the Commission:

Judge Milligan reported that, by his calculation, the county would need to hire an additional 3.5 public defenders to handle the caseload and be in compliance with Standard J. The Montgomery County Public Defender Board took this matter to the County Council. The Council decided that for the amount of reimbursement provided by the Commission, it was not worth the expense of hiring additional public defenders. . . . He presented these options to the council: hire additional part time public defenders, hire a full time public defender, or establish a public defender office with adequate support staff. The county council was not willing to pursue any of these options.<sup>450</sup>

Of interest during this exchange with the Montgomery County Circuit Judge, one Commission member suggested that, since the Commission only required compliance with caseload standards for public defenders who handled reimbursable cases, “[t]he county might not be so out of compliance if cases were assigned differently,” i.e., if all non-reimbursable cases were assigned to one or more lawyers whose caseload would not have to comply with the Commission standards.<sup>451</sup> The Commission voted to table Montgomery County’s request for reimbursement until the next meeting to “allow the county time to make any adjustments they can to come into compliance.”<sup>452</sup>

Judge Milligan appeared again at the Commission meeting in September 2008. He had proposed to the Montgomery county council adding a part-time public defender and a public defender administrator in October 2008 (to “help separate the reimbursable cases from the non-reimbursable cases”) and then adding two additional part-time public defenders in January 2009.<sup>453</sup> The Montgomery county council would not meet to vote on the proposal until September 30th.<sup>454</sup> The Commission liked the plan and voted to approve the county’s reimbursement request once the county provided written proof that the county council had authorized the necessary funding.<sup>455</sup> Montgomery County subsequently provided proof to the Commission that the county council had approved an increase in public defense funding for 2009 (though no mention was made of additions in 2008), and in December 2008 the Commission approved the previously tabled and suspended reimbursement requests as well as the newly submitted request.<sup>456</sup>

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<sup>450</sup> Ind. Pub. Def. Comm’n, *Minutes* (June 25, 2008).

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> Ind. Pub. Def. Comm’n, *Minutes* (Sept. 24, 2008).

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> Ind. Pub. Def. Comm’n, *Minutes* (Dec. 10, 2008).

In March 2009, the Commission took notice that, while Montgomery County had again been sent a 90-Day Notice of non-compliance letter, it had also provided a plan to the Commission.<sup>457</sup> Because the county's compliance plan was dependent on the funding in its 2009 budget, the Commission was not expecting to see results until the next meeting.<sup>458</sup> With that in mind, the Commission approved the county's reimbursement request.<sup>459</sup> In advance of the next Commission meeting, Commission staff met with the Montgomery County judge, public defender board, auditor, and a public defender and advised them that the county could achieve caseload compliance by increasing the salary of the public defense attorneys by approximately \$2,000 per year.<sup>460</sup> According to the Commission staff, this would allow the Montgomery County defense attorneys to use the caseload maximums for full-time attorneys without adequate staff (instead of those for part-time attorneys without adequate staff), allowing each attorney to carry a higher caseload.<sup>461</sup> While the county considered these suggestions, the Commission approved its reimbursement request.<sup>462</sup>

At the September 2009 Commission meeting, Montgomery County's caseload numbers were still out of compliance.<sup>463</sup> The Commission tabled the reimbursement request<sup>464</sup> and wrote to the Montgomery County public defender board, inviting county representatives to attend the upcoming December 16th meeting of the Commission to "present reasons that the Commission should not suspend the December payment or terminate reimbursements for non-capital expenditures to Montgomery County."<sup>465</sup> The letter showed the history of the county's attorneys consistently carrying caseloads in excess of those allowed by the Commission standards from the third quarter of 2007 through the third quarter of 2009, and said "[s]ince 2007, we have been working with Montgomery County to bring its public defense attorneys into compliance with the Commission's *Standard J* concerning caseloads."<sup>466</sup>

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<sup>457</sup> Ind. Pub. Def. Comm'n, *Minutes* (Mar. 25, 2009).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> Ind. Pub. Def. Comm'n, *Minutes* (June 24, 2009).

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 23, 2009).

<sup>464</sup> *Id.*

<sup>465</sup> Letter from IPDC Staff Counsel, to Montgomery County Public Defender Board (Oct. 29, 2009).

<sup>466</sup> *Id.*

Mr. John Wyatt  
 Montgomery County Public Defender Board  
 715 Sycamore Drive  
 Crawfordsville, Indiana 47933

Re: Reimbursement from the Public Defense Fund

Dear Mr. Wyatt:

At the September 23, 2009 quarterly meeting, the members of the Indiana Public Defender Commission considered suspending the reimbursement payment to the county for the 2<sup>nd</sup> quarter 2009. Since 2007, we have been working with Montgomery County to bring its public defense attorneys into compliance with the Commission's Standard J concerning caseloads. Following is a history of non-compliance for Montgomery County.

	3Q07	4Q07	1Q08	2Q08	3Q08	4Q08	1Q09	2Q09	3Q09
Dicks	2.129	1.969	1.852	1.465	1.538	1.476	1.542	1.461	1.261
Redmaster	2.323	2.006	1.865	1.573	1.600	1.640	1.407	1.320	1.093
Bowlin	2.309	1.953	1.899	1.610	1.557	1.633			
Perkins	0.670	0.705	1.031	1.285	1.471				
Donaldson	1.541	1.781	1.653	1.369	1.559	1.599	1.559	1.493	1.173
Sarver			1.128	1.361	1.687				

Between the September and December 2009 Commission meetings, Commission staff met with the Montgomery County Circuit Judge and the public defender board president.<sup>467</sup> Staff reported that they had:

solved the non-compliance problem by basing the maximum caseloads for public defenders on the compensation paid to county prosecutors. Montgomery County pays its prosecutors at two different salary levels, \$60,000 and \$48,000. The public defenders taking Class D felonies and misdemeanors earn 80% of the prosecutors making \$48,000 and the public defenders taking major felonies were making 65% of the prosecutors being paid \$60,000. These public defenders will now be allowed to be reported on a full-time worksheet with a maximum FTE of 0.800 and 0.650 respectively. When this is accomplished, all public defenders are actually in compliance with Standard J.<sup>468</sup>

The Commission accordingly approved all of Montgomery County's pending reimbursement requests.<sup>469</sup>

<sup>467</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 16, 2009).

<sup>468</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 16, 2009). The contract attorneys in Montgomery County were paid \$40,000 per year in 2009 and 2010 and "will continue to maintain separate law practices." See Contract for Legal Services for Indigent Defendants, para. 7, 9, between Bryan Donaldson and Montgomery County Public Defender Board for January 1, 2009 through December 31, 2010; Contract for Legal Services for Indigent Defendants, para. 7, 9, between Jon McCarty and Montgomery County Public Defender Board for January 1, 2010 through December 31, 2010.

<sup>469</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 16, 2009).

This new method of calculating the caseloads of the Montgomery County contract attorneys figured heavily in the public defender board's decision-making when it came time to let the contracts for the January 2011 to December 2012 term. The public defender board wrote to the collectively bidding attorneys:

We have studied your proposal, we have conferred with [staff] to the Indiana State Public Defenders Commission, and we have met to talk about these issues.

If we were to pay anything less than \$40,000.00 per attorney per year for indigent criminal defense services the State Public Defender Commission would consider the attorneys to be part time rather than full time attorneys. Part time attorneys can only carry half of the caseload of a full time attorney. In reviewing the cases that were reported for the rolling four quarters ending March 31, 2010 as part time rather than full time attorneys every attorney carried either a little bit under or a little bit over the maximum number of cases a part time attorney can carry and still qualify the County for State reimbursement. The numbers were so close to the maximum that it left no room for flexibility and if the numbers varied even a little bit it would throw us out of compliance with the State and we would be looking at hiring another attorney. If the attorneys are full time attorneys we can serve the indigent defendants with fewer attorneys, pay a little more money per attorney and be well within the State guidelines for a number of cases per attorney.<sup>470</sup>

Then things changed. At its September 2013 meeting, the Commission voted<sup>471</sup> that, effective January 1, 2014, for counties using contracts: “[t]he compensation of contractual public defenders shall be substantially comparable to the compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney.”<sup>472</sup> And, in counties that did not have a position in the prosecutor's office corresponding to a public defender's position: “a full-time public defender must be paid not less than \$60,350 and a part-time public defender, not less than \$30,175.”<sup>473</sup>

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<sup>470</sup> Letter from Montgomery County Public Defender Board, to Montgomery County Public Defenders (May 18, 2010).

<sup>471</sup> Ind. Pub. Def. Comm'n, *Minutes* (Sept. 11, 2013).

<sup>472</sup> IND. PUB. DEF. COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard G (as amended through June 18, 2014).

<sup>473</sup> IND. PUB. DEF. COMM'N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard G, Compensation of Salaried or Contractual Public Defenders 09/11/13 (as amended through Sept. 11, 2013).

The Montgomery County public defender administrator called the Commission to get help with understanding what effect this would have on compensation and caseloads for the contracting attorneys.<sup>474</sup> The news was worse than expected. Commission staff wrote to the county's public defender administrator:

As I look at the New Case Assignment Sheets submitted with the 3rd quarter Request for Reimbursement, I see that I have failed to monitor caseloads in accordance with our agreement and that several attorneys are out of compliance. . . . For 2014, and to be in compliance with the Commission's Standard G guideline, we need to refigure the percentage of cases allowed to be assigned to public defenders in Montgomery County if the full-time, county-paid prosecutors' salaries have increased from \$60,930 and \$48,550 annually. It is also important that the excessive caseloads be addressed.<sup>475</sup>

The Montgomery County public defender board responded that the county "is not in financial condition to hire another attorney and is considering withdrawing from the reimbursement program."<sup>476</sup> The county council indeed did vote to stop seeking reimbursements.<sup>477</sup> Commission staff agreed with the county that "[i]t costs the county about the same to be in the program and not be in the program."<sup>478</sup> The Commission denied Montgomery County's final two requests for reimbursement.<sup>479</sup> Yet still one Commission member urged that "someone talk to the county to try to convince them to stay in and give them some more information."<sup>480</sup> Montgomery County is no longer in the non-capital reimbursement program.

Despite the Commission's best efforts to encourage counties to comply with standards and to work with them to do so over extended periods of time, the system that Indiana has established does not require all counties to participate and the only incentive the Commission has to offer in exchange is the quite modest reimbursement of 40% of the expenses a county incurs in providing non-capital indigent defense (excluding the cost of misdemeanor defense).

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<sup>474</sup> Email from Indiana Public Defender Commission, to Sarah Dicks (Nov. 15, 2013).

<sup>475</sup> *Id.*

<sup>476</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 11, 2013).

<sup>477</sup> Ind. Pub. Def. Comm'n, *Minutes* (Mar. 19, 2014).

<sup>478</sup> *Id.*

<sup>479</sup> Ind. Pub. Def. Comm'n, *Minutes* (Dec. 11, 2013 and Mar. 19, 2014).

<sup>480</sup> Ind. Pub. Def. Comm'n, *Minutes* (Mar. 19, 2014).

# CHAPTER 7

## FINDINGS ON STATE SYSTEM AND STRUCTURE

Under Supreme Court case law, the provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment.<sup>481</sup> This stands in contrast to the Indiana Court’s *Webb* decision that held counties responsible for providing the right to counsel under the state constitution.<sup>482</sup> Although it has not been held unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.<sup>483</sup>

**FINDING #1: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in misdemeanor cases in any of its courts, including city and town courts.**

Misdemeanors matter. For most people, our nation’s misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry’s confidence in the courts as a whole – their faith in the state’s ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great.<sup>484</sup> Going to jail for even a few days may result in a person’s loss of

<sup>481</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

<sup>482</sup> *Webb v. Baird*, 6 Ind. 11, 16 (1854).

<sup>483</sup> *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (holding that, although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (holding that, where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), available at [http://www.nlada.net/sites/default/files/nv\\_delegationwhitepaper09022008.pdf](http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf).

<sup>484</sup> Collateral consequences are those things that automatically happen to a defendant when he is convicted of a crime, even though they are not contained as part of the sentence that is publically imposed on the defendant in court. In 2009, the American Bar Association attempted to compile, for the first time, an exhaustive listing of the collateral consequences of a felony conviction that arise under federal laws. ABA, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND

professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

The U.S. Supreme Court determined that the Sixth Amendment right to counsel extends to misdemeanors when incarceration is a possibility, whether imminent or suspended. All misdemeanors in Indiana carry the possibility of jail as a punishment,<sup>485</sup> so every indigent person charged with a misdemeanor has a Sixth Amendment right to publicly provided counsel.<sup>486</sup> Despite this, the State of Indiana has no mechanism to ensure its constitutional obligation to provide competent attorneys to the indigent accused in misdemeanor cases.

Effective July 1, 1997, the state stopped reimbursing counties for indigent misdemeanor cases.<sup>487</sup> Since there is no reimbursement for misdemeanor cases, the Commission unanimously decided it must “eliminate misdemeanors from its compliance standards.”<sup>488</sup> Therefore even in participating counties, if a specific attorney handles *only* misdemeanors, the Commission has no authority to require compliance with its standards by that attorney or for the cases to which he is appointed. Similarly, if a court within a participating county is allotted only misdemeanor cases and if all of the attorneys accepting indigent appointments in that court handle only misdemeanor cases, then the court is not bound by the Commission's standards. Additionally, the Commission does not have any authority at all over the 67 city and town courts in Indiana with jurisdiction over all misdemeanors that occur within the geographical boundaries of the city or town.<sup>489</sup>

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REGULATIONS (Jan. 2009). In explaining the limitations of that report, the ABA noted:

[I]t does not include the many collateral consequences contained in state laws and regulations, or in state-controlled federal benefit programs such as welfare, food stamps, and public housing. Moreover, it does not include court-imposed conditions of probation and parole that may have a collateral effect on travel, employment, and other family matters, or civil forfeiture provisions that are often triggered by an arrest. . . . People with criminal convictions who served time in prison may have significant difficulty due to gaps in work experience on a resume in a job application. More and more frequently potential employers and landlords are requesting and using background check information, including arrest and conviction records in their decisions regarding jobs and leases independent of statutory requirements.

*Id.* at 11.

<sup>485</sup> IND. CODE §§ 35-50-3-2 through 35-50-3-4 (2015).

<sup>486</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Bolkovac v. State*, 98 N.E.2d 250 (Ind. 1951) (“Since § 13 of Article 1 [of the Constitution of Indiana] makes no distinction between misdemeanors and felonies, the right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules it exists in felony cases.”).

<sup>487</sup> 1997 Ind. Acts, P.L. 202 (codified as amended at IND. CODE §§ 33-40-6-4(b), 33-40-6-5(a)(2) (2015)). *See supra*, pp. 27-28, discussing statutory change to non-capital reimbursement program.

<sup>488</sup> Ind. Pub. Def. Comm’n, *Minutes* (May 14, 1997).

<sup>489</sup> IND. CODE §§ 33-35-2-3, 33-35-2-8 (2015).

**FINDING #2: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in felony and juvenile delinquency cases, at both the trial level and on direct appeal, in counties and courts that do not participate in the reimbursement program.**

Meeting the dictates of the Sixth Amendment is not a choice. By creating a system in which counties can choose whether to meet minimum standards or not, Indiana has institutionalized and legitimized the choice to not provide adequate representation.

Thirty-seven of Indiana's 92 counties do not choose to participate in the state's non-capital case reimbursement program as of June 30, 2015.<sup>490</sup> The Commission has no authority whatsoever over the representation of indigent people in the courts located in these counties, and the courts and public attorneys do not have to abide by the Commission's standards. Together, the courts in these counties have trial level jurisdiction over nearly one-third of the people of Indiana.<sup>491</sup>

Additionally, by statutory exception, Lake County is allowed to limit its request for reimbursement, and accordingly its compliance with Commission standards, to "a particular division of a court" and to exclude all other courts and cases in the county.<sup>492</sup> Most of Lake County's courts in which indigent representation is provided do not participate in the reimbursement program. The excluded courts are: the four county divisions of Superior Court that hear a portion of the level 6 (formerly class D) felonies charged in the county, along with all misdemeanor offenses occurring outside the geographical boundaries of a city or town court;<sup>493</sup> and the juvenile division of Superior Court, in which one judge, six magistrates, and one referee exercise jurisdiction over all juvenile delinquency, CHINS, and TPR cases in the county.<sup>494</sup>

**FINDING #3: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in capital cases for which counties do not seek state reimbursement.**

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<sup>490</sup> These counties are: Bartholomew, Boone, Clay, Clinton, Crawford, Daviess, Dearborn, DeKalb, Dubois, Elkhart, Franklin, Gibson, Hamilton, Harrison, Hendricks, Henry, Huntington, Jackson, Jefferson, Johnson, Marshall, Miami, Montgomery, Morgan, Newton, Porter, Posey, Putnam, Randolph, Scott, Starke, Tipton, Warrick, Wayne, Wells, White, and Whitley.

<sup>491</sup> The 2010 U.S. Decennial Census shows a total population for Indiana of 6,483,802. The 37 non-participating counties comprise 2,121,902 people, or 32.73% of the state's population. INDIANA BUSINESS RESEARCH CENTER, INDIANA UNIV., *Indiana County-Level Census Counts, 1900 to 2010*, in STATSINDIANA.

<sup>492</sup> IND. CODE §§ 33-40-6-4(c), 33-40-7-1(3) (2015).

<sup>493</sup> Lake County, Indiana, Local Court Rules, L.R. 45-C.R.2.2-1(A)(1), (4), L.R. 45-A.R.1-01(2) to (3) (2015).

<sup>494</sup> Lake County, Indiana, Local Court Rules, L.R. 45-A.R.1-01(5) (2015).



As explained *supra*,<sup>495</sup> the Commission's role in reimbursing counties for indigent capital case expenses is actually quite limited. While any county with an indigent death penalty case can apply for reimbursement of 50% of their defense expenses, only 43 counties have ever done so.<sup>496</sup> In a given quarter, the Commission typically reviews between one and ten county applications for capital expense reimbursement. In order to approve a county's request for reimbursement in an indigent death penalty case, the Commission does two things. It reviews the invoices and billing statements to ensure that the expenses for which the county is seeking reimbursement are for and only for defense-related expenses. And, it relies on the certifications signed by the judge and the appointed defense attorneys as assurance that the appointment is in compliance with Rule 24, seeking further verification only if something causes the Commission to become aware that Rule 24 is not being followed despite the certifications. The Commission has no authority over any court, defense attorney, or capital case for which a county does not seek reimbursement by the state.

**FINDING #4: The State of Indiana has only limited capacity to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in counties that participate in the reimbursement programs. The ability of the Indiana Public Defender Commission to ensure effective representation at the local level though is hindered by the State's failure to properly fund and adequately staff the IPDC at a level sufficient for it to conduct verification audits and evaluations in participating counties.**

The Commission has significant time-consuming statutory responsibilities.<sup>497</sup> It has on-going responsibility to recommend standards for all indigent defense services. It is wholly responsible for establishing and overseeing the procedures that counties must follow to seek and receive both capital and non-capital reimbursement. And, it is responsible for carrying out on a continuing basis the state reimbursement program to counties. This means reviewing every page of every reimbursement request to ensure that the expenses for which counties are seeking reimbursement are proper ones, that the courts are complying with Rule 24 in capital cases, and that the counties, courts, and attorneys are complying with the Commission's non-capital case standards, all before certifying that a county's reimbursement request should be paid.

The Commission itself is made up of appointed members,<sup>498</sup> who typically fill their role on the Commission in their spare time because they hold other full-time jobs. As a result, quarterly Commission meetings occur mostly in the late afternoons and evenings, and the day-in day-out work of the Commission must be performed by staff

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<sup>495</sup> See *supra* pp. 19-25, discussing history of the Public Defender Commission and oversight of capital case reimbursement.

<sup>496</sup> Ind. Pub. Def. Comm'n, *Reimbursements in Capital Cases* (Sept. 17, 2014).

<sup>497</sup> IND. CODE § 33-40-5-4 (2015).

<sup>498</sup> IND. CODE §§ 33-40-5-2 to 33-40-5-3 (2015).

whom the Division of State Court Administration of the Indiana Supreme Court is responsible for providing.<sup>499</sup> The Commission, however, has never been adequately staffed to fulfill all of its statutory duties.

From the Commission's inaugural meeting in January 1990 until February 1998, it had only as-needed part-time access to a Division of State Court Administration employee for its staffing needs. As a practical matter, the Council Director carried out the staff duties of the Commission during this time; first under a contract from July 1990 through June 1991, and then as an uncompensated service from July 1991 through January 1998.<sup>500</sup>

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## A CLOSER LOOK

STAFF TO DO THE WORK OF THE  
COMMISSION

[ via 6AC website ]

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In February 1998, the Commission finally received a single full-time staff attorney.<sup>501</sup> This was over eight years after the Commission was created and a full three years after being charged with overseeing standards compliance and reimbursement requests from as many of Indiana's 92 counties as chose to

participate in the non-capital reimbursement program. There was relatively high turnover for the single staff position until Deborah Neal was hired in April 2006. Ms. Neal remained as staff counsel until her retirement in December 2013, with sometimes another full-time staff attorney and sometimes another part-time staff attorney during that time.<sup>502</sup> Only since September of 2014 has the Commission consistently had two full-time staff attorneys.

<sup>499</sup> IND. CODE § 33-40-5-5 (2015).

<sup>500</sup> See generally, Ind. Pub. Def. Comm'n, *Minutes*.

<sup>501</sup> IND. PUB. DEF. COMM'N, 2002-2003 ANNUAL REPORT 5 (2003).

<sup>502</sup> Ind. Pub. Def. Comm'n, *Minutes* (Apr. 6, 2006 through Dec. 11, 2013).

# PART II

## ASSESSMENT OF LOCAL SERVICES

.....

“One of the perennial barriers to reform has been the framework of the state’s court system, largely unaltered since before the turn of the last century. In effect, it hasn’t been a court system but rather 92 court systems or even 150 court systems, and the result is something like what you’d get by sending a football team out onto the field with instructions that each of the eleven should choose his own play for the next down.”

then-Chief Justice Randall T. Shepard,  
State of the Judiciary, January 19, 2005

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# CHAPTER 8

## EVALUATION METHODOLOGY & ASSESSMENT CRITERIA

The lack of state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel services provided by county and municipal governments are constitutionally inadequate. But it does mean that the state has no idea whether its Fourteenth Amendment obligation to provide competent Sixth Amendment services is being fulfilled. Part II of this report examines the question of adequacy of services.

### A CLOSER LOOK

#### INDIGENT DEFENSE SERVICES IN THE SAMPLE COUNTIES

[ via 6AC website ]

At the invitation of the Indiana Indigent Defense Study Advisory Committee (IDSAC), the Sixth Amendment Center (6AC) conducted a statewide assessment of trial level public defense services in Indiana. The Advisory Committee is a bipartisan committee composed of judges, legislators, prosecutors, defense attorneys, and other state criminal justice stakeholders.<sup>503</sup> To avoid the possibility of cherry-picking either the best or the worst indigent defense services, the Advisory Committee selected eight counties as a representative sample of Indiana's

diversity in population size, geographic location, rural and suburban and urban centers, types of indigent defense service models used, and participation or non-participation in the state's indigent representation reimbursement program.

The selected counties are Blackford, Elkhart, Lake, Lawrence, Marion, Montgomery, Scott, and Warrick.

<sup>503</sup> The members of the Advisory Committee are: Indiana Supreme Court Justice Mark Massa; Sen. Brent Steele, Senate Judiciary Chair; Rep. Jud McMillin, Former Chair House Criminal Code; Jim Oliver, Indiana Prosecuting Attorneys Council Representative; Hon. Mary Willis, Henry County Judge/Judge's Association Representative; Laura Paul, Indiana State Bar Association Chair of Criminal Justice Section; David Hennessy, Indiana Association of Criminal Defense Lawyers; Carol Adinamis, Indiana State Bar Association President; Mark Rutherford, Indiana Public Defender Commission Chairman; Larry Landis, Indiana Public Defender Council Executive Director; Jim Abbs, Indiana Chief Defender Association; and, Terri Rethlake, Clerk St. Joseph County/Association of Indiana Counties.

# STATEWIDE SAMPLE OF COUNTIES

Because limitations of time and resources prevent most any evaluation from considering every court, indigent defense system, and service provider in the state, it is important that the study look closely at a representative segment of the state. The Advisory Committee identified a sample of eight counties that reflects Indiana's diversity in population size, geographic location, rural and

suburban and urban centers, types of indigent defense service models used, and participation or non-participation in the state's indigent defense reimbursement program. The eight counties chosen for this study were Blackford, Elkhart, Lake, Lawrence, Marion, Montgomery, Scott, and Warrick.

## LAKE COUNTY

Pop: 496,005

### **Criminal Division**

In Commission

Primary: PDO, PT, salary

Conflict: contract with PDO, hourly to annual cap

### **County and Juvenile Divisions**

Never in Commission

Primary: oral contract with judge, annual flat fee

## ELKHART COUNTY

Pop: 197,559

Never in Commission

Primary: PDO, some FT - some PT, salary

Conflict: same PDO

## LEGEND

- Public defender office (PDO)
- Contract with PD board or judge
- Appointed by case
- Hybrid

## MONTGOMERY COUNTY

Pop: 38,124

Left Commission

Primary: contract with PD board, annual flat fee

Conflict: same contract, annual flat fee

## BLACKFORD COUNTY

Pop: 12,766

In Commission

Primary: appointed case by case, hourly

Conflict: appointed case by case, hourly

## LAWRENCE COUNTY

Pop: 46,134

In Commission

Primary: PDO, FT, salary

Conflict: same PDO with ethical screen

## MARION COUNTY

Pop: 903,393

In Commission

Primary: PDO, FT, salary

Conflict: contract with PDO, annual flat fee

## WARRICK COUNTY

Pop: 59,689

Never in Commission

Primary: oral contract with judge, annual flat fee

Conflict: appointed case by case, hourly

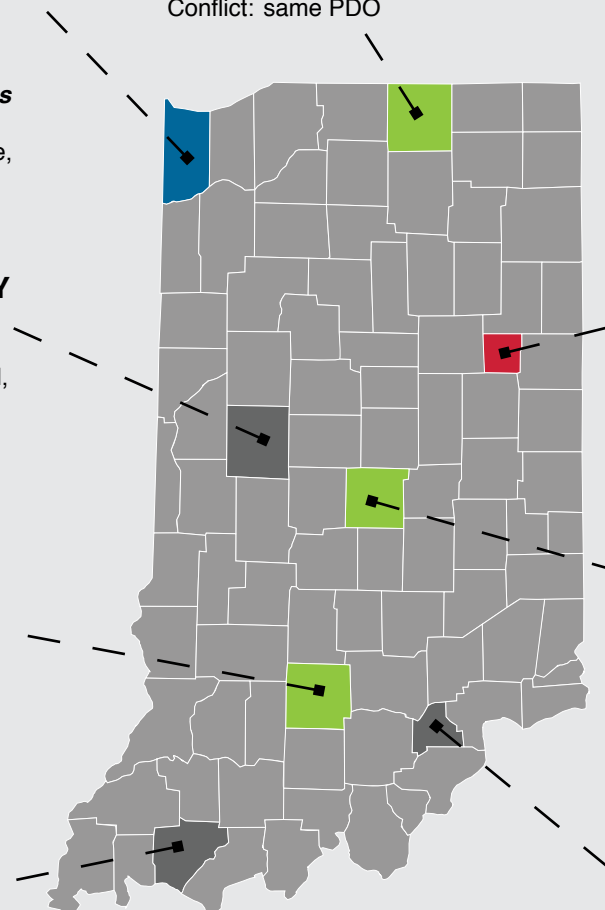
## SCOTT COUNTY

Pop: 24,181

Left Commission

Primary: contract with PD board, annual flat fee

Conflict: same contract, annual flat fee



## A. Evaluation methodology.

Site work in the eight sample counties began in February 2015 and finished in October 2015. The site work was carried out through three basic components.

*Data collection.* Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents and digital resources, from statistical information to policies and procedures. All relevant hard copy or electronic information, including copies of indigent defense contracts, policies, and procedures, was obtained at the local level and reviewed. The Indiana Division of State Court Administration gathers and compiles annually and releases publicly a significant amount of information related to trial courts and indigent defense services. Additionally, the three state level agencies related to indigent representation in Indiana all maintain websites that house helpful information, and each of these agencies provided additional and historical information in response to our requests.

*Court observations.* Evaluating how the right to counsel works in any jurisdiction requires an understanding of the interaction between at least three critical processes: (a) the process the individual defendant experiences as his case moves from arrest through to disposition; (b) the process the attorney experiences while representing that individual at the various stages of the defendant's case; and (c) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. Courtroom observations were conducted in the trial courts of each sample county.

*Interviews.* No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect all of the others. Because of this, interviews were conducted with a broad cross-section of stakeholder groups during each site visit. In addition to speaking with indigent defense attorneys and public defender boards, interviews were conducted with judges, county officials, prosecutors, sheriffs, court clerks, probation officers, and law enforcement. We also interviewed state level agency staff.

## B. Assessment criteria.

Two principal U.S. Supreme Court cases, decided on the same day, describe the tests employed to determine the constitutional effectiveness of right to counsel services. *United States v. Cronin*<sup>504</sup> and *Strickland v. Washington*<sup>505</sup> together describe a continuum of representation. *Strickland* is backward-looking, setting out the two-

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<sup>504</sup> 466 U.S. 648 (1984).

<sup>505</sup> 466 U.S. 668 (1984).

pronged test of whether the appointed lawyer’s actions were unreasonable and prejudiced the outcome of the case, and it is used after a case is final to decide whether the lawyer provided effective assistance of counsel. *Cronic* is forward-looking and states that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys with sufficient time and resources to provide competent representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

*Presence of counsel at critical stages.* The first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused at the “critical stages” of a case. Arraignments,<sup>506</sup> plea negotiations,<sup>507</sup> and sentencing hearings,<sup>508</sup> for example, are all critical stages of a case. If counsel is not present at every one of these critical stages, an actual denial of counsel occurs.

*Attorney qualifications, training, and resources.* Next, the U.S. Supreme Court explains in *Cronic* that there are systemic deficiencies that make any lawyer – even the best attorney – perform in a non-adversarial way. As opposed to the “actual” denial of counsel of *Cronic*’s first prong, the Court calls this a “constructive” denial of counsel.<sup>509</sup> The overarching principle in *Cronic* is that the process must be a “fair fight.” *Cronic* notes that the “fair fight” standard does not necessitate one-for-one parity between the prosecution and the defense. Rather, the adversarial process requires states to ensure that both functions have the resources they need at a level their respective roles demand. As the U.S. Supreme Court notes: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”<sup>510</sup>

*Cronic*’s necessity of a fair fight requires the defense function to put the prosecution’s case to the “crucible of meaningful adversarial testing.”<sup>511</sup> If a defense attorney is either

<sup>506</sup> *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

<sup>507</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

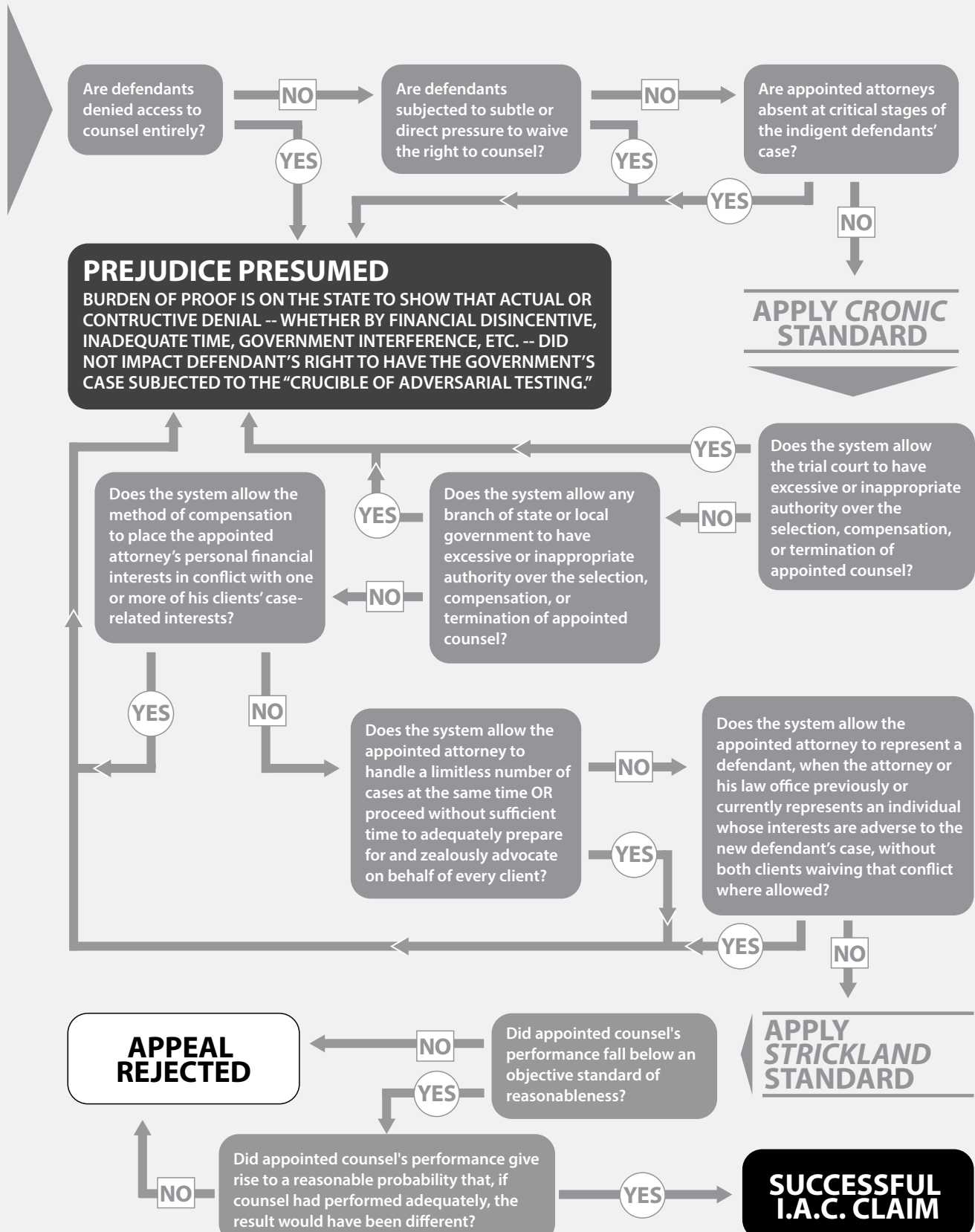
<sup>508</sup> *Lafler*, 132 S. Ct. at 1386; *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

<sup>509</sup> *Strickland*, 466 U.S. at 683 (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.” (citing *Cronic*, 466 U.S. 648)).

<sup>510</sup> *Cronic*, 466 U.S. at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7<sup>th</sup> Cir. 1975)).

<sup>511</sup> *Id.* at 656-57 (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its

# THE CRONIC-STRICKLAND CONTINUUM





incapable of challenging the state’s case or barred from doing so because of a structural impediment, a constructive denial of counsel occurs.

In *Cronic*, the Court points to the deficient representation received by the defendants known as the “Scottsboro Boys” and detailed in the U.S. Supreme Court case of *Powell v. Alabama*<sup>512</sup> as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys’ case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.<sup>513</sup> The *Powell* Court concluded that defendants require the “guiding hand”<sup>514</sup> of counsel – i.e., attorneys must be qualified and trained to help the defendants advocate for their stated interests.

*Sufficient time.* Having been assigned unqualified counsel, the Scottsboro Boys’ trials proceeded immediately that same day.<sup>515</sup> *Powell* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel, commenting that impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”<sup>516</sup> Insufficient time is, therefore, a marker of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly.

*Independence of the defense function.* Perhaps the most noted critique of the Scottsboro Boys’ defense was that it lacked independence from governmental interference, specifically from the judge presiding over the case. As noted in *Strickland*, “independence of counsel” is “constitutionally protected,” and “[g]overnment violates

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character as a confrontation between adversaries, the constitutional guarantee is violated.”).

<sup>512</sup> In 1931, nine young black men stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the “Scottsboro Boys.”

<sup>513</sup> A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

<sup>514</sup> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

<sup>515</sup> Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest – only 13 years old – was instead sentenced to life in prison.

<sup>516</sup> *Powell*, 287 U.S. at 56-59.

the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>517</sup> In specific relation to judicial interference, the *Powell* Court stated:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.<sup>518</sup>

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer’s representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney’s in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge’s opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that the judge’s in-court observations of a defense attorney cannot comprise the totality of supervision.

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case of *Ferri v. Ackerman*,<sup>519</sup> the United States Supreme Court stated that the “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court observed in *Polk County v. Dodson*<sup>520</sup> that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.” Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court notes in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”<sup>521</sup> The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer’s independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.

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<sup>517</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>518</sup> *Powell*, 287 U.S. at 61.

<sup>519</sup> 444 U.S. 193, 204 (1979).

<sup>520</sup> 454 U.S. 312, 321-22 (1981).

<sup>521</sup> *Id.*

*Cronic* determined that, when a public lawyer works within a system where factors are present that constructively deny the right to counsel, then the public lawyer is presumptively ineffective. The government bears the burden of overcoming that presumption. The government may argue that, despite such conflicts, the defense lawyer in a specific case was not ineffective, but it is the government's burden to establish this. As the Seventh Circuit Court of Appeals noted in *Wahlberg v. Israel*,<sup>522</sup> "if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, 'sure we impeded your defense – now prove it made a difference.'"<sup>523</sup> Only after the system within which public attorneys work is found to be structurally sound, as defined and prospectively determined by a *Cronic* and *Powell* analysis, can *Strickland's* two-prong test be used to retrospectively measure the effectiveness of specific attorneys who work within those structurally sound indigent defense systems.

The United States Department of Justice urges this application of *Cronic*. On September 25, 2014, the DOJ filed a Statement of Interest<sup>524</sup> in a class action lawsuit, *Hurrell-Harring v. New York*, brought by the New York Civil Liberties Union (NYCLU) alleging a systemic denial of counsel in five upstate New York counties.<sup>525</sup> The Statement of Interest provides DOJ's expertise to the court on what constitutes a "constructive" denial of counsel under the Sixth Amendment. In short, the DOJ statement establishes that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant's representation met the aims of *Gideon* and its progeny. If state or local governments create structural impediments that make the appointment of counsel "superficial" to the point of "non-representation," a court can step in and presume prospectively that the representation is ineffective. The types of government interference enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): "a severe lack of resources," "unreasonably high caseloads," "critical understaffing of public defender offices," and/or anything else making the "traditional markers of representation" go unmet (i.e., "timely and confidential consultation with clients," "appropriate investigations," and adversarial representation, among others).

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<sup>522</sup> 766 F.2d 1071 (7th Cir. 1985).

<sup>523</sup> *Id.*, at ¶27.

<sup>524</sup> Statement of Interest of the United States, *Hurrell-Harring v. New York* (N.Y. Sup. Ct. Oct. 21, 2014) (No. 8866-07), available at [http://www.justice.gov/sites/default/files/press-releases/attachments/2014/09/25/statement\\_of\\_interest.pdf](http://www.justice.gov/sites/default/files/press-releases/attachments/2014/09/25/statement_of_interest.pdf).

<sup>525</sup> In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. filed Oct. 21, 2014). The state agreed to pay \$5.5 million in attorneys' fees and costs to the NYCLU and the law firm representing the plaintiffs. The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.

In another Statement of Interest<sup>526</sup> filed August 14, 2013, in *Wilbur v. City of Mount Vernon*, the DOJ comments specifically on the issue of public defense attorneys having sufficient time to provide adequate representation. At the heart of the *Wilbur* case was the issue of how excessive caseloads of public defense attorneys resulted in deficient representation under the Sixth Amendment to the U.S. Constitution.<sup>527</sup> At the time the original complaint was filed in 2011, the cities of Mt. Vernon and Burlington, Washington, jointly contracted with two private attorneys to represent indigent defendants in their municipal courts, as they had done “for nearly a decade.” Under the contract, the two attorneys served together as “the public defender” and were paid a flat annual fee out of which they had to provide all “investigative, paralegal, and clerical services” without any additional compensation. In other words, the more work and non-attorney support they dedicated to their clients’ cases, the less each attorney’s take-home pay. And each contracting attorney handled between 950 and 1,150 appointed cases each year, in addition to maintaining a healthy private practice on the side. With such heavy caseloads, the contract defenders were alleged to “regularly fail to return calls” or “meet with” or “interview” their clients, and “rarely, if ever, investigate the charges made against” their clients. And the cities’ failure to adequately “monitor and oversee” the system they operated by way of the contract amounted to a “construct[ive] denial of the right to counsel” as guaranteed under *Gideon*.

Pointing to the ABA’s *Ten Principles of a Public Defense Delivery System*,<sup>528</sup> the DOJ urged the court to consider that every jurisdiction should have caseload controls, but that:

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<sup>526</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

<sup>527</sup> “The notes of freedom and liberty that emerged from *Gideon*’s trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.” Memorandum of Decision, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash. filed Dec. 4, 2013). Thus concluded U.S. District Judge Robert Lasnik in the court’s decision granting injunctive relief against the Washington cities of Mount Vernon and Burlington for “regularly and systematically” providing deficient right to counsel services to the indigent accused. Announcing that “adversarial testing of the government’s case” was so infrequent as to be a “non-factor in the functioning of the Cities’ criminal justice system,” the court found the appointment of counsel in Mount Vernon and Burlington to be “little more than a formality,” resulting in plea bargains having almost nothing to do with the individualized nature of each case. Importantly, the court found the cities culpable because this lack of adversarial testing of the prosecution’s cases was “natural, foreseeable, and expected,” given the deficient structure of indigent defense services.

<sup>528</sup> ABA-SCLAID, *TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, (Feb. 2002). Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles* are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Principles* include the four parameters of a *Cronic* analysis, including: independence of the defense function (Principle 1); presence of counsel at critical stages (Principle 3); sufficiency of time (Principles 4 and 5); and, qualifications, training, and resources of attorneys (Principles 6 and 10).

caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties.<sup>529</sup>

The DOJ has twice filed amicus briefs furthering their position on constructive denial of counsel. Most recently, on May 12, 2016, DOJ filed an amicus brief<sup>530</sup> in the Supreme Court of Idaho in *Tucker v. Idaho*, in which the ACLU of Idaho alleges systemic denial of counsel for the indigent accused. As in *Hurrell-Harring*, the DOJ states in *Tucker* that a "constructive denial of counsel violating *Gideon* occurs where the traditional markers of representation are frequently absent or significantly compromised as a result of systemic, structural limitations." On September 11, 2015, the DOJ filed an amicus brief<sup>531</sup> in *Kuren v. Luzerne County* at the Pennsylvania Supreme Court. The *Kuren* class action lawsuit alleged that the county so poorly funded right to counsel services as to constructively deny counsel to the indigent accused. The DOJ amicus brief makes clear that a civil constructive denial of counsel claim is an "effective way for litigants to seek to effectuate the promise of *Gideon*," and "[p]ost-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders."

The DOJ has also made clear that its *Cronic* analysis applies equally to juvenile delinquency proceedings, through its Statement of Interest<sup>532</sup> in *N.P. v. Georgia*, filed March 13, 2015. The Southern Center for Human Rights (SCHR) filed the class action lawsuit alleging that children were regularly denied their right to counsel and instead treated to "assembly-line justice" in the Cordele Judicial Circuit. According to SCHR, kids regularly appeared in court without lawyers, and those who did receive representation were assigned lawyers who did not have time to talk with them before court. The suit claimed that the Cordele Circuit Public Defender Office was structurally

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<sup>529</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash. filed Aug. 14, 2013).

<sup>530</sup> Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Tucker v. Idaho*, No. 43922-2016 (Idaho filed May 11, 2016).

<sup>531</sup> Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren v. Luzerne County*, Nos. 57 MAP 2015, 58 MAP 2015 (Pa. Sept. 10, 2015), available at <http://www.justice.gov/opa/pr/departments-justice-files-amicus-brief-pennsylvania-right-counsel-case>.

<sup>532</sup> Statement of Interest of the United States, *N.P. v. Georgia* (Ga. Super. Ct. filed Mar. 13, 2015) (No. 2014-CV-241025), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np\\_v\\_state\\_of\\_georgia\\_usa\\_statement\\_of\\_interest.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf).

unable to provide meaningful representation due to chronic underfunding and understaffing. The DOJ Statement provides the trial court with a *Cronic* framework to evaluate the claims.<sup>533</sup>

Finally, the DOJ has taken action to enforce the four main principles enumerated in *Cronic*. On April 26, 2012, the DOJ Civil Rights Division delivered a report, *Investigation of the Shelby County Juvenile Court*,<sup>534</sup> to officials in Shelby County (Memphis), Tennessee, stating that the juvenile court of Memphis and Shelby County (JCMSC) “fails to ensure due process for all children appearing for delinquency proceedings” in direct violation of the U.S. Supreme Court’s ruling in *In re Gault*.<sup>535</sup> An agreement<sup>536</sup> was reached requiring the county and JCMSC to ensure, among other things, that “juvenile defenders have appropriate administrative support, reasonable workloads, and sufficient resources to provide independent, ethical, and zealous representation to children in delinquency matters” at “all stages of the juvenile delinquency case, including pre-adjudicatory investigation, litigation, dispositional advocacy, and post-dispositional advocacy,” for as long as a case is active. The agreement additionally requires “the promulgation and adoption of attorney practice standards” and the “supervision and evaluation” of defense attorneys “against such practice standards.”

The balance of this part of the report is an assessment of right to counsel services in the sample counties under *Cronic* and its progeny.

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<sup>533</sup> A month after the DOJ filed its statement of interest, on April 20, 2015 the defendants in the class action lawsuit – the Georgia Public Defender Standards Council, the Cordele Circuit Public Defender, and the four counties in the circuit – agreed to settle the matter with SCHR. Consent Decree, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct. filed Apr. 20, 2015). The approved consent decree seeks to address a number of structural flaws. Specifically, it will: increase the size of the public defender’s office staff; require public defenders to meet with clients (a) within three days of their detainment to determine indigency, and (b) within three days of assignment to their case; and require defenders to receive training, including specific training for juvenile defenders. The consent decree requires public defenders to advise juvenile defendants seeking to waive their right to counsel what a lawyer could do for them, and also requires the public defender office to comply with the terms of the Georgia Indigent Defense Act of 2003 including by creating a specialized juvenile division.

<sup>534</sup> UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF SHELBY COUNTY JUVENILE COURT (Apr. 26, 2012), *available at* [http://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv\\_findingsrpt\\_4-26-12.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf).

<sup>535</sup> 387 U.S. 1 (1967).

<sup>536</sup> UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY (Dec. 17, 2012), *available at* <http://sixthamendment.org/wp-content/uploads/2012/12/DOJ-ShelbyAgreement.pdf>.

# CHAPTER 9

## PRESENCE OF COUNSEL AT CRITICAL STAGES OF CRIMINAL PROCEEDINGS

All people who are found to be indigent and facing the possibility of incarceration on misdemeanors<sup>537</sup> or felonies<sup>538</sup> are entitled to public counsel at trial<sup>539</sup> under both the federal and state Constitutions.<sup>540</sup> As explained *supra*, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”<sup>541</sup> without regard to whether a prosecutor is aware of the arrest.<sup>542</sup> For all defendants, the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.<sup>543</sup> No critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

This chapter explains the methods and timing of the appointment of counsel in adult criminal proceedings and assesses whether the appointment processes in the sample counties comply with prevailing Sixth Amendment case law. Though the right to counsel applies equally to both criminal and delinquency proceedings, we focus solely on adult criminal proceedings for two primary reasons.

First, because adult criminal and juvenile delinquency proceedings each have their own vocabularies, procedures, and laws, they must be discussed separately. Second, Indiana Supreme Court Rule 25 took effect on January 1, 2015, requiring courts to appoint counsel to all children in all delinquency proceedings, without regard to whether the child is indigent, whenever the child may be removed from his home, or has interests

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<sup>537</sup> All misdemeanors in Indiana carry potential terms of imprisonment. IND. CODE §§ 35-50-3-2 to 35-50-3-4 (2015).

<sup>538</sup> A felony in Indiana is an offense for which a person may be imprisoned for more than one year. IND. CODE § 35-50-2-1(b) (2015). Special rules govern the provision of counsel in death penalty cases. IND. CRIM. R. 24 (2015).

<sup>539</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Ind. Code §§ 35-33-7-5, 35-33-7-6 (2015).

<sup>540</sup> U.S. CONST. amend. VI; IND. CONST. art. § 13(a).

<sup>541</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 215 (2008).

<sup>542</sup> *Id.* at 194.

<sup>543</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *See also Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

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## A CLOSER LOOK

COUNSEL AT ALL  
CRITICAL STAGES OF  
A DELINQUENCY PROCEEDING

[ via 6AC website ]

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that are adverse to his parents, or the prosecution is seeking transfer to adult court. Though a child may still waive his right to an attorney, he may do so only after receiving counsel.<sup>544</sup> As a result, the prevalence of the indigent accused being denied counsel in a delinquency proceeding is significantly less than in adult criminal proceedings, showing the effectiveness of binding versus voluntary standards.<sup>545</sup> During the course of this evaluation, juvenile delinquency courts were in the process of implementing that rule.

### A. Procedures from arrest or summons to initial hearing.

When a person is suspected of a criminal offense in Indiana, he will either be arrested (for a felony or a misdemeanor)<sup>546</sup> or he will receive a summons telling him when and where to appear for court (only available for a misdemeanor).<sup>547</sup>

For a person who is arrested, a judicial officer must review the facts and determine whether there is probable cause to believe that a crime was committed and that the arrested person committed it.<sup>548</sup> If the person was arrested on the basis of a previously issued arrest warrant, then a judge or grand jury has already determined that there is probable cause for the arrest.<sup>549</sup> But if a person is arrested without a warrant, a judicial officer must promptly make a probable cause determination.<sup>550</sup> The United States Supreme Court has held that a judicial determination of probable cause made

<sup>544</sup> IND. R. CRIM. P. 25(C) (eff. Jan. 1, 2015).

<sup>545</sup> Moreover, juvenile delinquency representation is a specialized area that has been separately examined in Indiana through two separate assessment processes. In 2006, the National Juvenile Defender Center and the Central Juvenile Defender Center, through the Children’s Law Center, Inc., released “Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings.” That report led to implementation of Criminal Rule 25 that places added restrictions on waiver of counsel and to significant increases in juvenile defender training. Over the last year, the Indiana Public Defender Council and the Children’s Law Center have worked jointly on implementation of a state-planning grant awarded by the Office of Juvenile Justice and Delinquency Prevention. The planning grant worked with an Advisory Committee as well as convening large stakeholder group meetings as part of its comprehensive examination of state statutes and rules relative to juvenile right to counsel, structure of the juvenile defense delivery system, quality of representation, and juvenile defense data collection. A series of findings and recommendations have come from that process and implementation funding is being separately pursued for improvements in the indigent defense delivery system.

<sup>546</sup> IND. CODE § 35-33-1-1 (2015).

<sup>547</sup> IND. CODE § 35-33-4-1 (2015).

<sup>548</sup> IND. CODE §§ 35-33-5-2, 35-33-5-8, 35-33-7-2 (2015).

<sup>549</sup> IND. CODE §§ 35-33-5-2, 35-33-5-8 (2015).

<sup>550</sup> IND. CODE §§ 35-33-5-2, 35-33-5-8, 35-33-7-2 (2015).



within 48 hours of the arrest is presumptively considered to be sufficiently prompt.<sup>551</sup> In all eight of the sample counties, there are policies in place for a judicial officer to determine probable cause within 48 hours of arrest. The arrested person does not have to be present when this probable cause determination is made, nor is the presence of a prosecutor or defense attorney necessary.

A person who is arrested for any offense other than murder is entitled to be released on bail.<sup>552</sup> At any time following arrest, a court can release a person on their own recognizance, require them to deposit cash as bail, require them to execute a bail bond or post a real estate bond, and/or require them to comply with special conditions to assure that they will appear in court and to protect the safety of others.<sup>553</sup> As a practical matter, many courts in Indiana have established by local rule or court order a schedule of pre-set bail amounts and the conditions under which the sheriff may release a person who has been arrested, based on the charge of arrest. For example, Blackford, Marion, and Montgomery counties all have a pre-set bail schedule.<sup>554</sup> Elkhart and Warrick counties do not have a pre-set bail schedule, but judges set bond at the same time that they determine probable cause – always within 48 hours of arrest. In Warrick County most defendants bond out of jail quickly, because the county has, according to the judges, “very low bonds.”

But whether courts make use of pre-set bail schedules and the type and amount of bail required for a particular charge varies from county to county and sometimes from court to court within a single county. Thus it is possible that a person who has been arrested can make bail and be released from jail before any further proceedings occur in their case. It is also possible, however, that an arrested person will not have sufficient resources to post the pre-set bail where there is one or that they will have to wait in jail until they appear before a judge to have their bail set.

The first formal step in an Indiana criminal case, after summons or arrest, is the initial hearing. The initial hearing is the first time a defendant will come before a judicial officer. In some jurisdictions, the judge who will actually preside over the defendant’s prosecution conducts the initial hearing (for example, in Blackford, some Elkhart courts, Lake county division, Lawrence, all out-of-custody and some in-custody in Marion, Montgomery, Scott, and felonies in Warrick). In other jurisdictions, an appointed magistrate conducts the initial hearing (for example, in most Elkhart courts, Lake criminal division, most in-custody in Marion, and misdemeanors in Warrick).

Neither the prosecutor nor any defense attorney is required to be present at or

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<sup>551</sup> County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991).

<sup>552</sup> IND. CONST. art. 1, §§ 16-17; IND. CODE § 35-33-8-2 (2015).

<sup>553</sup> IND. CODE § 35-33-8-3.2 (2015).

<sup>554</sup> See *Blackford County Bond Schedule*, provided by Judge Barry; Montgomery County Local Court Criminal Rules, LR54-CR00-7, Appendix B (as amended through Aug. 22, 2014); Marion Superior Court Criminal Division Rules, Rule LR49-CR00-108 (2015).

participate in the initial hearing, though whether they are also varies from county to county. In Blackford, Elkhart, Montgomery, and Scott counties, neither prosecutors nor defense attorneys are present at initial hearings. In Lake County criminal division, neither prosecutors nor defense attorneys are present at initial hearings, but a representative of the public defender office is present to gather appointment information for the office. In Lake County county division and in Lawrence County, both prosecutors and public defense attorneys are present at initial hearings. In Warrick County, prosecutors may be present at initial hearings, but public defense attorneys are not.

The initial hearing, whenever it occurs, is also the first time following arrest or summons that a defendant will have an opportunity to request appointed counsel. For a person who was issued a summons to appear in court, the initial hearing will take place on the date they were told to appear in court.<sup>555</sup> If the person was arrested but has been able to get out of jail on bail, the initial hearing must take place within 20 days after the arrest.<sup>556</sup>

If a person was arrested and has not been able to get out of jail on bail, the initial hearing must occur “promptly” after the arrest.<sup>557</sup> While there is no firm definition of “promptly,” most courts intend to hold the initial hearing for a defendant who is in custody within 48 hours of arrest. In Lake, Lawrence, and Scott counties, the initial hearings for in-custody defendants are consistently held within 48 hours of arrest. In Elkhart County, the initial hearings conducted by the magistrates are consistently held within 48 hours of arrest, but initial hearings conducted by some of the judges can be delayed up to a week after arrest simply because the judge only holds initial hearings once a week. In Warrick County, initial hearings are almost always held within 72 hours of arrest for an in-custody defendant – “if a person is arrested, they are on my next docket,” explained one judge.

But the initial hearing cannot take place until the prosecutor has filed an information or indictment instituting prosecution,<sup>558</sup> because the defendant is entitled at that initial hearing to receive a copy of the charges filed against him and upon which he will be prosecuted.<sup>559</sup> For example, in Blackford County, judges attempt to bring in-custody defendants to court for their initial hearing quickly, but it may be up to one week following arrest before the initial hearing is held due to delays in the prosecutor filing charges.

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<sup>555</sup> IND. CODE § 35-33-7-3.5 (2015).

<sup>556</sup> IND. CODE §§ 35-33-7-1(b), 35-33-7-4 (2015). This is shortened to 10 days for a charge of operating a vehicle while intoxicated. IND. CODE § 35-33-7-1(c) (2015).

<sup>557</sup> IND. CODE §§ 35-33-7-1(a) (arrest without warrant), 35-33-7-4 (arrest under warrant) (2015).

<sup>558</sup> IND. CODE § 35-33-7-3(a) (2015).

<sup>559</sup> IND. CODE § 35-33-7-5 (2015).

In Montgomery County, the judges receive a daily roster from the jail that allows the judges to keep track of all arrested defendants, and defendants have a “miscellaneous” docket number when probable cause has been based on the arrest but the prosecutor has not yet filed charging information. Each Montgomery County judge has a different policy about how to handle the situation of the prosecutor not filing charging information in a timely fashion. The circuit court judge contacts the prosecutors and tells them he wants to hold an initial hearing for the defendant if charging information is not filed within three to four days of arrest (but he notes that this typically only occurs when a defendant is out of custody and the police are still investigating, for example in an ongoing drug investigation). One superior court judge dismisses the arrest if the prosecutor does not file charging information within seven days of arrest. The other superior court judge contacts the prosecutors if they have not filed charging information within 10 days of arrest, noting that occasionally a defendant can sit in jail for up to 2 ½ weeks before having an initial hearing.

Whenever the initial hearing is set, it can be put off for an additional 72 hours, not counting “intervening Saturdays, Sundays, and legal holidays,” if the prosecutor requests more time to file the charging document.<sup>560</sup> Taken together, this 48-hour rule of thumb, plus the 72-hour prosecutorial delay, plus intervening weekends, can result in defendants in many counties being held in custody for seven or more days after the arrest occurred, all before having an opportunity to receive public counsel to advocate on their behalf.

At the initial hearing, if bail has not been set according to a pre-set schedule or individually for the defendant, the judge will set bail. During the initial hearing, the judge advises the defendant of: the charges upon which he will be prosecuted and gives him a written copy of the formal charges; the amount and conditions of bail that can be posted for the defendant to get out of jail, if he is in jail at the time; and various constitutional rights including his right to be represented by counsel and to have counsel assigned if he is indigent.<sup>561</sup>

Marion County is distinctly different from other counties in how it handles initial hearings. The Arrestee Processing Center (“APC”) is the entry point into the Marion County jail system. When defendants are arrested, the officer drops them off at the APC building, where they are screened by medical and mental health personnel and assigned a miscellaneous case number. Some people who are arrested make bail and are released before anything else occurs at the APC. They, along with defendants who receive a summons instead of being arrested, have their initial hearing on the date they are instructed to come to court before the judge who presides over their case.

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<sup>560</sup> IND. CODE § 35-33-7-3(b) (2015).

<sup>561</sup> IND. CODE § 35-33-7-5 (2015).

Commissioners who are assigned to the APC conduct initial hearings for most defendants who have been arrested and who have not bailed out before they appear before the commissioner. At the APC initial hearing, the commissioner informs the defendant of the bail set in his case, the charges upon which he will be prosecuted, and his rights including his right to counsel. If the defendant requests appointed counsel, the commissioner determines whether the defendant is indigent and, if so, appoints the public defender office to represent him. The commissioner also gives the defendant notice of the date on which he must appear in the court to which his case is assigned (based on type of case). There are some exceptions, however, to this general procedure.

First, prosecutors do not always have charges ready to be filed by the time the defendant appears before the APC commissioner. Prosecutors are intended to file charges within 72 hours of arrest, however, judges are required to grant one 72-hour continuation request if a prosecutor asks for it.<sup>562</sup> When this occurs at the APC, the commissioner informs the defendant of the bail set in his case (based on the charge of arrest) and of his rights including his right to counsel. If the defendant requests appointed counsel, the commissioner determines whether the defendant is indigent and, if so, appoints the public defender office to represent him. But because the prosecutor has not filed charges, the commissioner cannot advise the defendant of the charges upon which he is being prosecuted, and the case cannot be allotted to a court nor can a specific public defender be appointed. These defendants in Marion County are the ones most in danger of being lost in the system. They appear on the jail roster with a miscellaneous case number until the prosecutor files charges, then they are brought to court where the judge presiding over their case holds their initial hearing.

Second, some of the level 6 felony court judges have instructed the APC commissioners to handle cases that will be allotted to their courts differently. For these defendants, even though the prosecutor has filed charges and the APC commissioner knows what they are, the APC commissioner does *not* advise the defendant of the charges upon which he will be prosecuted.<sup>563</sup> For defendants whose cases are allotted to these particular level 6 felony courts, the commissioner informs the defendant of the bail set in his case (based on the charge of arrest) and of his rights including his right to counsel. If the defendant requests appointed counsel, the commissioner determines whether the defendant is indigent and, if so, appoints the public defender office to represent him. The commissioner also gives the defendant notice of the date on which he must appear in the court to which his case is assigned (based on type of case), and the court holds the initial hearing on that date and advises the defendant of the charges upon which he is being prosecuted.

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<sup>562</sup> IND. CODE § 35-33-7-3(b) (2015).

<sup>563</sup> The commissioner explained this is entirely up to each individual level 6 felony court judge as to which way it falls: to tell the accused of what generally they have been accused, or to not tell them.

Third, in all major felony cases, the initial hearing will be in the court to which the case is allotted and is typically set for one to two days following arrest. There, as at the APC, if the prosecutor has not filed charges he can request a 72-hour continuance that the court is required to grant. These 72-hour continuances are very common in major felony cases in Marion County.

### **B. Uncounselled pleas prior to appointment of counsel.**

There is no doubt that the initial hearing signals the commencement of the criminal case prosecution in Indiana, because “all prosecutions of crimes shall be instituted by the filing of an information or indictment by the prosecuting attorney,”<sup>564</sup> and as explained this charging document must be filed before the initial hearing can take place. The right to counsel *attaches* at this hearing, but in most of the counties no defense attorney is present in the room to immediately begin representing the indigent defendant. And, no critical stage of a criminal case can take place without the presence of counsel for an indigent defendant who is facing jail as a penalty.<sup>565</sup>

The United States Supreme Court has defined plea negotiations and the entry of a guilty plea<sup>566</sup> as critical stages. The Indiana general assembly seems to have taken this into account, because a defendant is expressly *not* called on to make a decision about how to plead during the initial hearing. Instead, the presiding judicial officer must tell the defendant:

a preliminary plea of not guilty is being entered for him and the preliminary plea of not guilty will become a formal plea of not guilty:

- (A) twenty (20) days after the completion of the initial hearing; or
- (B) ten (10) days after the completion of the initial hearing if the person is charged only with one (1) or more misdemeanors;

unless the defendant enters a different plea.<sup>567</sup>

Many judges meticulously honor the words of this statute and will not allow a defendant to enter a plea of guilty at the initial hearing. Judges in Blackford, Lake criminal division and some county division courts, and Scott counties do not allow defendants to plead guilty at the initial hearing, and Montgomery County judges will only rarely do so. However, judges in some of the other courts and counties do allow defendants to negotiate with prosecutors and plead guilty at the initial hearing prior to indigent defense eligibility determinations and appointment of counsel.

<sup>564</sup> IND. CODE § 35-34-1-1(b) (2015), with the exception of Medicaid fraud prosecutions under IND. CODE § 12-15-23-6 (2015).

<sup>565</sup> Rothgery v. Gillespie County, 554 U.S. 191 (2008).

<sup>566</sup> Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>567</sup> IND. CODE § 35-33-7-5(7) (2015).

Encouraging or otherwise directing unrepresented defendants to meet with prosecuting attorneys to discuss plea deals, before making appointed counsel available to them, is a violation of the right to counsel. The United States Supreme Court confirmed in *Lafler v. Cooper*<sup>568</sup> and in *Missouri v. Frye*<sup>569</sup> that a defendant has the right to “effective assistance of competent counsel” during plea negotiations. The plea negotiation is a critical stage of the case, meaning the negotiation cannot happen unless counsel is present or the defendant’s right to counsel has been knowingly, voluntarily, and intelligently waived.<sup>570</sup>

Prosecuting attorneys who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. Rule 3.8 of the *Indiana Rules of Professional Conduct* states in part: “The prosecutor in a criminal case shall: . . . (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; [and] (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; . . .”<sup>571</sup> As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.”<sup>572</sup> The National Right to Counsel Committee report notes further:

Beyond the court’s role in making certain that a defendant’s waiver of counsel is valid, prosecutors have a professional responsibility duty “not [to] give legal advice to an unrepresented person, other than the advice to secure counsel.” Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel. Prosecutors also are reproached by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.<sup>573</sup>

The criminal process cannot presume defendants are aware of all the rights they are waiving by entering into uncounseled negotiations directly with the prosecutor.

<sup>568</sup> 132 S. Ct. 1376 (2012).

<sup>569</sup> 132 S. Ct. 1399 (2012).

<sup>570</sup> *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

<sup>571</sup> IND. R. PROF. CONDUCT 3.8 (as amended through Apr. 30, 2015).

<sup>572</sup> NATIONAL RIGHT TO COUNSEL COMMITTEE, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 8 (Apr. 2009).

<sup>573</sup> NATIONAL RIGHT TO COUNSEL COMMITTEE, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 88 (Apr. 2009) (citing ABA, *Model Rules*, Rule 4.3); ABA, *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION* 3-4.1(b), 3-3.10(a) (3d ed. 1993); ABA, *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION* 3-3.10(c) (3d ed. 1993)). Rule 4.3 of the *Indiana Rules of Professional Conduct* is identical to ABA *Model Rule* 4.3.

To demonstrate how and why uncounselled pleas occur in Indiana prior to the appointment of counsel, we highlight Lawrence County, as that county's actual denial of counsel also underscores the circumvention of the Commission's caseload standards, and Elkhart County, where confusion is caused by conflicting instructions contained in forms and given by the court.

*1. Lawrence County.* In Lawrence County both prosecutors and public defense attorneys are physically present at initial hearings. Although prosecutors are present in their full capacity, public defenders are not. To explain why requires some brief history on the county's indigent defense system.

In 2010, Lawrence County was mired in a public defense crisis. Four private defense lawyers who had been providing services in an unlimited number of cases for a single flat fee decided they could no longer provide effective representation under such a financial arrangement. Each moved to decline new appointments, forcing the county to pay other private attorneys at an hourly rate, and the total cost threatened to greatly exceed the county's budget. The county turned to the IPDC for assistance and formed a public defender office.

The first chief defender realized early on in her tenure that public defenders in Lawrence County historically had not staffed initial hearings, and many cases were resolved with prosecutors entering into plea deals with uncounselled defendants, in particular defendants who were being held in custody on high bonds. The new public defender office attorneys rightly recognized that this practice could not continue, but they were caught in a quandary. To meet the dictates of the Sixth Amendment, the defender office needed to either: a) exceed IPDC caseload standards to provide representation to all indigent defendants beginning at the initial hearings (thus risking the loss of state reimbursement); b) increase the number of staff attorneys (thereby increasing the county's public defense cost); or c) turn a blind eye to a blatant constitutional violation.

Fearing that a new budget battle might jeopardize the entire public defender office, the chief public defender came up with a half-measure. The office began staffing all initial hearings, but only as a "friend of the court" to answer questions a defendant might have about the prosecutor's plea offer. By not being formally appointed to the cases, the office does not have to report the workload to the IPDC (even though the staff attorneys spend significant hours at initial hearings), giving the appearance that the office complies with IPDC caseload standards when it does not. The county continues to receive reimbursement from the IPDC, and the county does not incur the increased cost of hiring more attorneys to handle the greater caseload, as it would be required to do if the cases were reported.

The problem is that the defendants think they have a lawyer when in fact they do not. The lawyer is not securing discovery from the state, interviewing witnesses, examining evidence, reviewing statutes, or negotiating directly with the prosecutor on behalf of the defendant – all of the things lawyers must do to determine if the plea offer is good or bad.

As defendants arrive at court, the court secretary gives them several documents to read, complete, and sign. One document is a copy of the defendant's charge(s). The second is an "Acknowledgment of Rights" form, which details the range of sentence that can be imposed for all misdemeanors and class D (level 6) felonies along with the rights a defendant has, including the right to an attorney if unable to afford one.<sup>574</sup> The third is an "Affidavit of Financial Status" where a defendant who is requesting appointed counsel provides financial information.<sup>575</sup> The court secretary collects these completed forms from all of the defendants.

The Lawrence County judge then addresses all of the defendants together as a group to explain that, by signing the acknowledgement of rights, they are telling the court that they have received a copy of the charges against them and that they understand their rights and the possible consequences if they are found guilty of the charges. The judge also explains to the defendants *en masse* that a public defender is present and they can ask to talk to him today to ask questions and they can also ask that the public defender be appointed to represent them.

Next, the judge addresses each defendant individually, but what the judge tells the defendant depends on whether the prosecutor is making a plea offer to the defendant that very day. All in-custody defendants and out-of-custody defendants charged with a level 5 felony or higher will be required to enter a not guilty plea at the initial hearing. But the prosecutor's office usually makes a plea offer to all out-of-custody defendants who are charged with level 6 felonies or misdemeanors, or an offer to pre-trial diversion for certain misdemeanors, which the defendant can accept that day if they so desire.

If the prosecutor is offering diversion or a guilty plea bargain, the judge advises the defendant that the prosecutor wants to speak with them about a possible resolution of their case, but that the defendant must waive his right to counsel in order to speak to the prosecutor that day. Defendants who elect to do this waive their right to counsel on the record in the courtroom and then go into the hallway to speak privately with the prosecutor. The public defender is standing by in the hallway to answer any questions the defendant might have after speaking to the prosecutor. Prosecutors hand their file to the public defender to look over with the defendant in the hall. According to the public defenders, almost all defendants talk with the public defender after the prosecutor

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<sup>574</sup> See Acknowledgment of Rights form, provided by Lawrence County Superior Court Division 1.

<sup>575</sup> See Affidavit of Financial Status form, provided by Lawrence County Superior Court Division 1.



informs them of their plea offer, but none of the public defenders keep notes on the defendants they advise at initial hearings.

If a defendant chooses to accept the prosecutor's offer, he returns to the courtroom, having already waived his right to counsel, to enter a guilty plea and be sentenced that day. There is commonly no public defender in the courtroom when these guilty pleas are taking place, because the public defenders usually leave once they have talked with all of the interested defendants. The judge does not ask, prior to accepting a defendant's guilty plea, whether he spoke to the public defender (though occasionally the prosecutor might ask a defendant this during the plea colloquy). Public defenders estimate that about 50% of the defendants to whom plea offers are made plead guilty at the initial hearing.

If a defendant does not accept the prosecutor's plea offer, the defendant returns to the courtroom where the initial hearing is resumed, and, despite having waived the right to counsel, the defendant can now assert his right to counsel.

2. *Elkhart County.* Before initial hearings begin in Elkhart County, defendants are given a four-page document available in both English and Spanish entitled "Advisement of Rights and Penalties," which they are instructed to read, complete, sign, and turn back in to the court. The form lists defendants' rights and details extensively the minimum and maximum penalties for all levels of offense. At the bottom of the form, it asks "*DO YOU WISH TO HAVE A LAWYER?*" and offers three options among which the defendant is to choose one:

\_\_\_\_\_ I do not want a lawyer in this case. I understand that I have the right to one and the right to have time to talk to one. I know that if I cannot afford one, a Public Defender would be appointed for me. I may be charged for services of the Public Defender at a later date. No promises, force, or threats have been made to me to make me waive my right to a lawyer. I freely and voluntarily give up my right to a lawyer.

**OR**

\_\_\_\_\_ I wish to have a court appointed lawyer. The court will question you to determine if you are indigent.

\_\_\_\_\_ I will obtain my own lawyer. I understand that I should attain counsel within twenty (20) days for felonies and ten (10) days for misdemeanors because there are deadlines for filing motions and raising defenses that could be waived.

The form also requires the defendant to check whether he wants to plead guilty or not guilty. According to the magistrate who presides over out-of-custody initial hearings, defendants in Elkhart County are not allowed to plead guilty at the initial hearing, and the form is a relic from when the court did accept uncounseled guilty pleas at initial hearings years ago. Indeed, the presiding magistrate announces to the courtroom *en masse* “I will not be able to accept guilty pleas at today’s hearing. If you wish to do so you can do so at a future hearing. Today I’m just going to enter not guilty pleas.” This results in some confusion, because defendants have just completed a form explicitly asking whether they want to plead guilty or not guilty, and a number of defendants continue to try to plead guilty when they approach the bench individually on their cases.

Compounding the confusion, the prosecution offers pre-trial diversion to some defendants, which they can accept at the initial hearing. When this occurs, the magistrate advises the defendant that the prosecutor is offering pre-trial diversion and explains the nature and details of the diversion program. If the defendant is interested in the diversion program, the magistrate sends them into the hallway to talk to the prosecutor’s pre-trial diversion representative and also suggests that the defendant speak with a public defender (though none are present in the courtroom) to discuss whether it would be a good option in their case. After talking with the prosecutor, defendants who decide to enter the diversion program return to the courtroom where they must waive their right to counsel and admit guilt in order to be eligible for the diversion program. The magistrate says that, if he has any question about whether the defendant is guilty, he will send the defendant to talk to the public defender office, but nine times out of ten they just send the person back down with advice to take the diversion offer.

### **C. Lack of uniform indigency determination procedures resulting in uncounselled pleas.**

All misdemeanor and felony charges in Indiana carry jail time as a potential penalty,<sup>576</sup> so every person charged with a misdemeanor or a felony and who cannot afford to hire their own attorney is constitutionally entitled to have counsel provided for them.<sup>577</sup> There is no standardized colloquy or set of questions that the presiding judge is required to ask of a defendant to determine whether they intend to get their own attorney or want to have an attorney appointed, but the judges’ criminal bench book provides a recommended colloquy.<sup>578</sup>

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<sup>576</sup> IND. CODE §§ 35-50-2-1, 35-50-2-3 through 35-50-2-7, 35-50-3-2 through 35-50-3-4 (2015).

<sup>577</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>578</sup> INDIANA CRIMINAL BENCHBOOK, § 19.60.000 *Dialogue for Initial Hearing*, excerpt provided by judge.

IV. *DETERMINE IF THE DEFENDANT IS REPRESENTED BY COUNSEL*

...

IF IT IS NOT OBVIOUS THAT DEFENDANT IS REPRESENTED BY COUNSEL, THEN ASK:

Q. \_\_\_\_\_, do you have an attorney who is present with you at this time?

A. \_\_\_\_\_.

LET THE RECORD SHOW THAT THE DEFENDANT IS PRESENT IN PERSON AND WITHOUT COUNSEL, AND THE STATE OF INDIANA IS REPRESENTED BY \_\_\_\_\_.

\_\_\_\_\_, you have a right to retain and be represented by an attorney in this case. You also have the right to proceed without an attorney, if you so desire.

Q. Do you understand that you have those rights?

A. \_\_\_\_\_.

Q. Do you intend to employ an attorney?

A. \_\_\_\_\_.

*(IF YES, intends to employ attorney:)*

Q. Do you understand that you must retain counsel within 20 days (10 days if you are charged with misdemeanors only) because there are deadlines for filing motions and raising defenses and, if those deadlines are missed, the legal issues and defenses that could have been raised will be waived or given up?

A. \_\_\_\_\_.

[PROCEED TO PARAGRAPH VII]

*(IF NO, does not intend to employ attorney:)*

\_\_\_\_\_, if you do not have the money, means or property with which to employ your own attorney the Court will appoint an attorney to represent you in this case.

Q. Do you understand that?

A. \_\_\_\_\_.

Q. Do you want the Court to appoint an attorney for you?

A. \_\_\_\_\_.

[IF DEFENDANT WISHES TO PROCEED **WITHOUT COUNSEL**,  
PROCEED TO PARAGRAPH VI.]

[IF DEFENDANT **WANTS COUNSEL**, CONTINUE WITH  
PARAGRAPH V ON THE NEXT LINE]

If a defendant asks for an attorney to be provided, the court must “determine whether a person who requests assigned counsel is indigent.”<sup>579</sup> The Indiana Supreme Court has said:

While it is not possible to set specific monetary guidelines which would determine a defendant’s indigency, there are several factors which must be considered. Since we are dealing with such a fundamental constitutional right, the record in each case must show that careful consideration commensurate with the right at stake has been given to the defendant. . . .

First, it appears clear that the defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.

The determination as to the defendant’s indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant’s total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant’s disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.<sup>580</sup>

This is known throughout the state as the “substantial hardship” test. National standards similarly require jurisdictions to determine whether hiring counsel will impose a substantial hardship on a defendant.<sup>581</sup>

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<sup>579</sup> IND. CODE § 35-33-7-6(a) (2015).

<sup>580</sup> Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980) (citations omitted).

<sup>581</sup> ABA, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-7.1 (3d ed. 1992) (“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.”). See also NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, c. 13, Guideline 1.5 (1976):

Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person’s liquid assets are not sufficient to cover the anticipated costs of representation as indicated by

For counties that participate in the non-capital indigent case reimbursement program, the general assembly, by statute, required the Commission to develop standards for “[d]etermining indigency and the eligibility for legal representation.”<sup>582</sup> The Commission adopted a rather detailed standard about what a county’s comprehensive plan must say a court will consider in deciding whether a person is indigent and entitled to public representation.<sup>583</sup> The Commission does not, however, require counties to report any information about the criteria actually used by judges, during the period for which reimbursement is sought, to determine whether a person is indigent and entitled to appointment of counsel.

Again, the judges’ benchbook provides a recommended colloquy of questions the judge can use to decide who is indigent and who is not:

*V. DETERMINATION OF ELIGIBILITY FOR COURT-APPOINTED COUNSEL*

Q. Are you willing to be placed under oath and to answer questions to determine if you are eligible for court-appointed counsel?

A. \_\_\_\_\_.

PUT DEFENDANT UNDER OATH AND INQUIRE AS FOLLOWS:

Q. Please again state your name and age.

A. \_\_\_\_\_.

Q. Where did you live at the time of your arrest?

A. \_\_\_\_\_.

Q. Whom did you live there with?

A. \_\_\_\_\_.

Q. Are you married? Presently living with your spouse?

A. \_\_\_\_\_.

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the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused’s assessment of his own financial ability to obtain competent representation should be given substantial weight.

(a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other assets which can be readily converted to cash. The person’s home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.

(b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

*See, e.g.,* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, *Eligible for Justice: Guidelines for Appointing Counsel* (2008); THE SPANGENBERG GROUP, *Determination of Eligibility for Public Defense* (2002).

<sup>582</sup> IND. CODE § 33-40-5-4(2)(A) (2015).

<sup>583</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard C and Commentary (as amended through June 18, 2014).

Q. Do you have any children? Are you supporting them?

A. \_\_\_\_\_.

Q. Do you own any real estate?

A. \_\_\_\_\_.

Q. Do you have any cash money?

A. \_\_\_\_\_.

Q. Do you have any savings or checking accounts?

A. \_\_\_\_\_.

Q. Do you own any motor vehicles, cars, trucks, motorcycles, or other vehicles? What makes, models, payments required (etc.)?

A. \_\_\_\_\_.

Q. Do you own any furniture or appliances of a value over \$100?

A. \_\_\_\_\_.

Q. Do you own any tools or other equipment of a value over \$100?

A. \_\_\_\_\_.

Q. Does anyone owe you money?

A. \_\_\_\_\_.

Q. Has any member of your family been in touch with you since your arrest on this charge?

A. \_\_\_\_\_.

Q. (If yes to preceding,) Have they indicated they will get an attorney for you?

A. \_\_\_\_\_.

Q. Are you presently employed? (Develop further.)

A. \_\_\_\_\_.

Q. Where were you last employed? (Develop further.)

A. What is your usual trade or occupation?

A. \_\_\_\_\_.

Q. Do you have any money, means or property whatsoever which can be used to employ an attorney for you in this case?

A. \_\_\_\_\_.

It is worrisome that the benchbook colloquy recommended to judges asks only about a defendant's income and assets, but does not contain any questions inquiring about a defendant's expenses and liabilities. As the Indiana Supreme Court has said:

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against

liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations.<sup>584</sup>

In fact, most judicial officers in the sample counties do go further than the benchbook's recommended colloquy and ask defendants about their expenses and liabilities in their efforts to determine whether a defendant is indigent.

Where judges struggle most is in deciding what constitutes the threshold for finding a person to be indigent. There is no statewide standard for making this determination in a criminal proceeding. By way of contrast, a person is considered to be indigent for purposes of receiving civil legal services without charge in Indiana when their "income is not more than one hundred twenty-five percent (125%) of the federal income poverty level as determined annually by the federal Office of Management and Budget under 42 U.S.C. 9902."<sup>585</sup> In the absence of an established threshold at which a person is indigent, judges rely on their own knowledge of the community<sup>586</sup> for the most part in deciding who is indigent, and the outcome can differ from county to county and even among the courts and judges within a single county. As one judge said, "there is so much variation among judges. Why should you get a lawyer one place and not another? I wish the state would get involved. It would make it so much easier."<sup>587</sup>

If a judge decides the person requesting appointed counsel *is not* indigent, Indiana law is silent about whether or how the defendant might appeal that decision. A court, though, can review the indigency determination at any time during the criminal case

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<sup>584</sup> Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980) (citations omitted).

<sup>585</sup> IND. CODE § 33-24-12-2 (2015).

<sup>586</sup> Some judges, for example, consider what it typically costs to hire a private criminal defense attorney in the locale. One Warrick County judge estimated it probably costs: \$750 to \$5,000 for a misdemeanor; \$2,500 to \$5,000 for a low level felony; and \$30,000 to \$50,000 for a serious felony. Montgomery County judges said private criminal defense attorneys in the county charge an upfront flat fee, which they estimated at \$500 to \$800 for a class B or C misdemeanor, \$1000 for class A misdemeanor, a range of \$1000 to \$2,000 for a level 6 felony, and \$5000 and up for more serious felonies.

<sup>587</sup> The lack of criteria to measure indigency and a threshold at which a person is determined to be indigent are a problem in all courts in the state. Recently, the Indiana University Public Policy Institute (PPI) worked with Marion County criminal justice stakeholders on an indigency screening project. The report, released in 2014, provides a two-page instrument for gathering financial information and determining indigency. It recommends a three-tiered classification system: presumptive eligibility for all defendants who receive need-based aid or whose income is below 125% of federal poverty guidelines, with no assessments made against the defendant; categorical eligibility for all defendants whose income is between 125 and 185% of federal poverty guidelines, with these defendants assessed \$50 for misdemeanors and \$100 for felonies; and, demonstrated eligibility, for defendants whose income exceeds 185% of federal poverty guidelines but who demonstrate it to be extremely unlikely they can secure private counsel on their own, with these defendants assessed contribution to the public defender fees of \$100 or more. Indiana University Public Policy Institute, Marion County Public Defender Agency Indigency Screening Project (July 2014). As of 2015, the suggestions had not been adopted in Marion County.

proceedings.<sup>588</sup> Judges throughout the state regularly deal with the situation of someone who had previously been found not indigent and yet has been unable to afford a private attorney. This occurs at all stages of a case right up to trial settings, but it means that indigent defendants are denied their right to counsel from arrest until whatever point a judge decides they truly are indigent enough.

*1. Eligibility for appointed counsel.* In many of the sample counties, virtually every defendant who requests appointed counsel is found eligible by the judicial officer. In Blackford County, judges orally ask defendants about their employment and income, bank accounts, cash on hand, monthly expenses, dependents, and living arrangements. Defense attorneys could think of only one instance when a person had been denied appointed counsel in Blackford County, and that defendant was earning approximately \$17 per hour with full-time employment. The Montgomery and Warrick County judges also ask defendants a stock series of questions about employment, assets, income, and expenses, but ultimately appoint counsel to most every defendant who requests one. In the words of Montgomery County public defense counsel, they “hand out public defenders too easily.” Defense counsel in Warrick County believe there are not many paying criminal cases in the county because “folks around here know how to get a public defender.” The Elkhart County judges all begin by asking defendants varied questions about their income, assets, and expenses, and if uncertain some of the judges have defendants complete written financial statements. The threshold at which the Elkhart County judges find defendants indigent ranges from having less than \$600 to \$2,000 in available liquid assets, but all criminal justice stakeholders in the county agree that most every defendant who requests appointed counsel will receive one.

In Scott County, before appearing before the judge for the initial hearing, each defendant who desires to have counsel appointed completes a form entitled “Pauper Attorney Affidavit.”<sup>589</sup> The form requests basic financial information, including: name, age, relationship, employment, and monthly income of all household members; whether bond was posted for the defendant and, if so, by whom; if the defendant is unemployed, when and where they last worked and whether they receive unemployment compensation; any other sources of household income; the value of household assets, including cash, checking, and savings accounts, real estate, and personal property; all other expenses; and “any other information about your finances that might aid the Courts.”<sup>590</sup> Judges have this same information for each defendant as they set about determining whether the defendant is indigent. Despite this, the judges do not have any standard threshold for what constitutes indigency. In the view of the prosecutors and defense attorneys, “what happens is you’re going to get an attorney if you ask for one.”

<sup>588</sup> Moore v. State, 401 N.E.2d 676, 679 (Ind. 1980) (“The court’s duty to appoint competent counsel arises at any stage of the proceedings when the defendant’s indigency causes him to be without the assistance of counsel.”); IND. CODE § 35-33-7-6(d) (2015).

<sup>589</sup> Pauper Attorney Affidavit, provided by the Scott County public defender administrator.

<sup>590</sup> *Id.*



The Lawrence County judges also have every defendant who wants an appointed attorney complete an “Affidavit of Financial Status” form.<sup>591</sup> The two-page form requests: name, date of birth, mailing address and phone number; marital status, number of children, and amount of child support paid if any; type and place of employment and amount of take-home pay for the defendant and their spouse; whether the defendant receives any income other than from employment, such as social security, pension, support, food stamps, AFDC, etc., and how much; bank account balance; all monthly expenses including rent/house payment, gas, water, electric, phone, cable, food, vehicle payment, gasoline, car insurance, credit card bills, judgments, medical bills; whether the defendant owns any real estate or property; and whether the defendant has family or friends who would help in paying for an attorney. Armed with this information, the judges appoint public defenders to the majority of the defendants who request one. In fact, the judges do not even question some defendants about whether they want appointed counsel and, instead, automatically appoint counsel based on the form the defendant completed.

*2. Posting bond and ineligibility for appointed counsel.* In some courts and counties, the judges will not appoint public counsel to any defendant who can post bond, in direct violation of Indiana Supreme Court case law stating, “[t]he fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.”<sup>592</sup> One Scott County judge said “if someone can post bond, I generally won’t appoint counsel.” In Lawrence County, a judge denied appointed counsel to a defendant because the \$2,000 bond she had posted would be enough to retain an attorney, though of course the bond money was tied up until the conclusion of the case.

In all the criminal division and county division courts in Lake County, the judges find every defendant who has posted bond to be *ineligible* for a public defender. The courts consider it irrelevant whether the defendant made bond with his own resources or whether someone else posted bond for the defendant. As the criminal division magistrate explained to one out-of-custody defendant, “You did [post bond] and regardless of whose money it is we do consider that.” The determining factor is literally whether the defendant is out-of-custody when they appear before the judge for their initial hearing. The judges do not ask out-of-custody defendants whether they are requesting appointed counsel. Instead, the judge asks them “have you hired your attorney yet?” If an out-of-custody defendant asks for a public defender, he is told: “No. You posted bond. You will be expected to hire an attorney. You have 20 days to hire one, so you’ll want to work on that right away.”

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<sup>591</sup> Affidavit of Financial Status form, provided by Lawrence County Superior Court Division 1.

<sup>592</sup> Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980) (citations omitted).

The Lake County judges offer these defendants a list of “bond attorneys” who will represent them for the amount of their bond that remains after costs are deducted.<sup>593</sup> Each judge has his own bond attorney referral list. The criminal division magistrate tells defendants: “Some attorneys will take lien on bond – have you called any? We have the Lake Bar Directory – call and ask an attorney. When you come next week the judge will ask if you’ve made efforts to hire an attorney. If you do hire an attorney, make sure to do it within the next 20 days [to meet filing deadlines].” One criminal division judge explained of the bond referral list, “I inherited mine. [I don’t actively review the names on the list,] but I will remove a lawyer if he doesn’t handle criminal cases.” Another criminal division judge gives defendants a list he compiled himself of 10 bond attorneys whom he considers as “quasi public defenders.” One county division judge compiles his bond attorney list from attorneys who hand their business cards to the judge and agree to represent defendants for the value of their bonds, whatever that is. Criminal and county division judges eventually appoint public defenders to some of these defendants at future court appearances if they can show they made efforts to retain an attorney but were unsuccessful.

Lake County judges or public defense attorneys warn defendants who are in-custody at the time of their initial hearing that, even if appointed an attorney at the initial hearing, if they subsequently post bail they have to try to hire their own attorney – their public defender may be removed from their case. One county division defender explains to in-custody defendants that it is better for them to stay in custody, because if they post bond they will have to pay for their own attorney and they will also have to pay court costs.

The Lake County criminal division participates in the non-capital expense reimbursement program. The practice of denying appointed counsel to a defendant based solely on the defendant having posted bond violates the criminal division’s comprehensive plan. The criminal division’s comprehensive plan, with which it must comply to be eligible for reimbursement, states in pertinent part: “Counsel will be provided to all persons who are financially unable to obtain adequate representation without substantial hardship to themselves or their families. Counsel will not be denied to any person merely because the person is able to obtain pretrial release through a surety bond, property bond, or a cash deposit.”<sup>594</sup> The Lake County criminal division practice of denying appointed counsel to defendants who make bond also violates the

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<sup>593</sup> The Lake County local rules establish the order in which money from a defendant’s cash bond is disbursed: restitution; LADOS fees; administration probation fee; probation user fees; countermeasure and/or any other fee; court costs. After these disbursements are made, any remaining balance is paid to the attorney pursuant to a bond assignment or released to the defendant if there is no assignment. Lake County Local Court Rules, Administrative Rules LR45-AR00-02 (as amended through Feb. 2, 2015).

<sup>594</sup> Comprehensive Plan for Indigent Defense Services in Lake County, para. C.1, C.1.a.

Commission *Standards*, which mandate in pertinent part, “Counsel will not be denied to any person merely because the person is able to obtain pretrial release through a surety bond, property bond, or a cash deposit.”<sup>595</sup>

#### **D. Requiring payment from the indigent accused.**

“Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.”<sup>596</sup> In other words, a defendant may have *some* resources to contribute to his own defense while still facing a substantial hardship if required to pay for all the costs of their own defense.<sup>597</sup> For example, some defendants may not have the full amount of needed cash on hand at the time their case begins, but could set aside some money from each future paycheck and so might be able to pay for their own defense if the case proceeds slowly enough and lasts long enough for them to do so. Additionally, a judge cannot always, at the outset of a case, predict with 100 percent certainty the full cost of the resources that will be needed by the defense as the case proceeds nor how quickly the case will proceed. Across the nation, these defendants are often referred to as being “partially indigent” or “near indigent.”

Thus a judge may determine that a defendant, while sufficiently indigent to be entitled to the appointment of counsel, can nonetheless pay *something* toward their representation. Under Indiana law, courts are allowed to assess certain fees against any defendant whom they find has the ability to pay them, and, to the extent the fees are actually collected, they are to be deposited into the county’s supplemental public defender services fund.<sup>598</sup> These could best be described as user fees that fall into four categories.

- *Partially indigent fee* – For a person whom a court finds to be indigent but “able to pay *part* of the cost of representation,” when the court appoints counsel it can order them to pay \$100 if they are charged with a felony or \$50 if they are charged with a misdemeanor.<sup>599</sup> This assessment can be made at the initial hearing or during a later stage of the proceeding.<sup>600</sup>

<sup>595</sup> Ind. Pub. Def. Comm’n, Standards for Indigent Defense Services in Non-Capital Cases, Standard C.1.a. (as amended through June 18, 2014)

<sup>596</sup> Hardy v. United States, 375 U.S. 277, 289 n.7 (1965) (Goldberg, J., concurring, joined by Warren, C.J., Brennan, J., and Stewart, J.).

<sup>597</sup> See 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 11.2(e) (1984) (“The appellate courts agree that indigency is not a synonym for ‘destitute.’ A defendant may have income and assets yet still be unable to bear the cost of an adequate defense.”).

<sup>598</sup> See *supra* p. 14.

<sup>599</sup> IND. CODE § 35-33-7-6(c) (2015) (added by Ind. Acts 1996, P.L. 216, § 11) (emphasis added). These assessments of \$100 and \$50 have remained at the same amount since the statute was enacted in 1996.

<sup>600</sup> See, e.g., Patterson v. State, 984 N.E. 256 (Ind. Ct. App. 2013).

- *Partially indigent costs* – For a person whom a court finds to be indigent but “able to pay part of the cost of representation,” upon conviction of a crime the court can order them to repay up to the full “cost of the defense services rendered.”<sup>601</sup>
- *Not indigent reimbursement of attorney fees and costs* – If a person receives appointed counsel for a felony, misdemeanor, or in a delinquency proceeding, and then at any later point in the case a court finds that the person has the “ability to pay the costs of representation,” the court must order the person to repay the full cost of their “reasonable attorney’s fees” and all “costs incurred by the county as a result of court appointed legal services rendered to the person.”<sup>602</sup>
- *All defendants under pretrial supervision fees* – When a person is charged with a crime and the court finds that supervision by a probation officer or pretrial services agency is necessary, the court can order a defendant who has the ability to do so to pay a supervision fee.<sup>603</sup>

For counties that participate in the non-capital indigent expense reimbursement program, the general assembly by statute required the Commission to adopt standards for “[t]he issuance and enforcement of orders requiring the defendant to pay for the costs of court appointed legal representation under IC 33-40-3.”<sup>604</sup> Pursuant to this statute, the Commission adopted a standard requiring that every participating county’s “comprehensive plan shall contain the policies and procedures for ordering indigent persons in criminal cases to pay some or all of the costs of defense services under I.C. 33-40-3-6, and shall specify the procedures for determining the actual costs to the county for defense services provided to the accused.”<sup>605</sup> Nonetheless, the Commission does not require counties to report any information about the criteria actually used by judges or the procedures in place, during the period for which reimbursement is sought, for ordering indigent defendants to pay some or all of the costs of the representation provided to them.

The extent to which judges assess any of these fees against indigent defendants varies wildly from courtroom to courtroom. Actual collection efforts are even more erratic.

*1. Blackford County.* The judges assess, against every indigent defendant, \$50 for every misdemeanor and \$100 for every felony. At the initial hearing after the court appoints counsel to represent the indigent defendant, the courts tell the defendant that

<sup>601</sup> IND. CODE § 33-37-2-3(e) (2015).

<sup>602</sup> IND. CODE §§ 33-37-2-3(a)-(b), 33-40-3-6 (2015).

<sup>603</sup> IND. CODE § 35-33-8-3.3 (2015).

<sup>604</sup> IND. CODE § 33-40-5-4(2)(B) (2015).

<sup>605</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard D (as amended through June 18, 2014).

appointment of a public defense attorney is “conditioned on payment of \$50/\$100 within 60 days.” There is no recrimination if the defendant does not make the payment within 60 days, and appointed attorneys tell their clients this. Instead, the assessment is typically collected from indigent defendants (whether acquitted, dismissed, or convicted) following disposition of their case. Most arrested defendants in Blackford County post at least \$500 in cash bail, because of the bail system used in the county. All court costs, fines, and assessments against a defendant, including public defender fees, are withheld from the cash bail before the remainder is paid to the defendant.

If an indigent defendant’s charges are dismissed or they are acquitted, they are not assessed anything further for their appointed counsel. Similarly, if a defendant goes to trial, is convicted, and is actually sent to prison, the defendant is not ordered to reimburse the cost of their appointed counsel.

If a defendant pleads guilty or is convicted at trial and is placed on probation, at the time of sentencing the defendant is ordered to pay the full actual cost of their public attorney’s representation. Amounts assessed against a defendant at sentencing are deducted first from any cash bail the defendant posted, then the probation officer collects any remainder as the defendant pays them over the course of probation. In the superior court, no defendant is ever required to pay more than \$50 per month toward all of the costs and fines, and their probation can be extended if they need additional time to pay. It is most often the case that, should a defendant be unable to complete payments by the time their probationary period ends, their probation is terminated unsatisfactorily, but in no instance is their probation revoked nor are they held in contempt of court for failure to pay the indigent defense reimbursement. As a practical matter, most defendants are in fact able to pay all of the assessments against them, and the amount of cash bail posted is usually sufficient to cover all assessments.

*2. Montgomery County.* The Montgomery County judges only assess public defender fees against indigent defendants who have posted a cash bond, and then only the statutory fee of \$50 for a misdemeanor or \$100 for a felony. Two of the judges assess this fee against all indigent defendants at the initial hearing, but the third judge imposes it at sentencing only on defendants who are convicted.

For most indigent defendants, the public defender fee is collected from their cash bond, though for defendants who are placed on probation it becomes part of the funds the probation officer collects. A prosecutor may include failure to pay the indigent representation fee as part of a petition to revoke probation, but it will never be the sole charge. In any event, the judges will not revoke a defendant’s probation for failure to pay this indigent representation fee. If a defendant has not paid the indigent representation fee at the conclusion of the probationary period, they are shown as having dissatisfactorily completed probation.

3. *Warrick County*. The Warrick County magistrate assesses the statutory fee from indigent defendants of \$50 for a misdemeanor or \$100 for a felony, though he does not always remember to do so. If a person is able to contribute more, the magistrate sometimes assesses an additional amount he finds appropriate, and if he is going to make this assessment he tells the defendant at the time he appoints counsel. "I try to assess a fee against indigent defendants," but there is no standard amount; it varies from zero to perhaps \$800 for a person who has some resources. Most indigent defendants who are assessed a fee for their public representation do pay the fee. If they fail to pay, it is reduced to a civil judgment but no efforts are made to collect.

4. *Elkhart County*. Judges in Elkhart County make assessments against indigent defendants at the conclusion of the case, but each has their own individual policies. One judge, by his own estimate, orders only about 25% of indigent defendants who are sentenced to probation (he does not charge defendants sentenced to jail or prison) to pay a public defender fee, since most indigent defendants are on disability or paying other court fees. "The public defender office is not going to go out of business if it does not get reimbursements," said the judge. Another judge orders indigent defendants to pay some amount if he finds that they have *some* money, and he has occasionally ordered indigent defendants to sell property to repay the cost of their public defender.

The probation officer collects public defender repayments from defendants who are on probation. One judge gives these defendants six to seven months to pay their public defender fees. If the defendant fails to complete payment within that time but is otherwise in compliance with supervision, the judge either gives the defendant another six months to finish paying or waives the fee. For any defendant that still owes public defender fees at the conclusion of the probationary period, the probation officer files a closing report showing the defendant was unable to pay but recommending discharge.

Public defender fee reimbursements that are collected in Elkhart County are shown as a line item receipt within the budget of the court that assessed the fee. As a result, the county council occasionally questions the judges about the extent to which they assess and collect these fees.

5. *Lake County, criminal division*. In routine practice, the public defender office attorneys in the criminal division actively seek reimbursement by all of their indigent clients who are not sentenced to jail or prison for the cost of their representation. Public defender office attorneys (all of them: staff, overflow, and conflict) track their hours spent on every case. The public defender office does not seek, and judges do not order, reimbursement by defendants who are sentenced to jail or prison. For defendants whose cases are dismissed, who are acquitted, or who are placed on probation, when the case is disposed of the public defender files an affidavit with the court seeking recoupment of attorney fees of \$25 for every hour spent in court and \$40 out of court. The public defender board set these hourly rates.

If the defendant posted a cash bond, the public defender office receives whatever remains of the bond after court costs and restitution are subtracted, up to the full amount claimed in the affidavit. If the case was dismissed or the defendant was acquitted, the public defender office can receive the entire bond. All of the money collected is deposited to the supplemental public defender services fund.

6. *Marion County*. Judges in Marion County do not regularly assess public defender fees in any amount against indigent defendants. The county's local rules specify that the public defender reimbursement can only be imposed after "judicial determination of ability to pay."<sup>606</sup> Even when assessed, the local rules specify that costs assessed against defendants are collected in a particular order of priority: administrative fee, probation user fee, alcohol and drug service fee, court costs, restitution, then public defender reimbursement.<sup>607</sup> Several years ago, the public defender board members exercised their influence with judges to get them to assess fees to fund the public defender office. Assessment and collection increased for a short time, but it did not last.

In one notable exception, the traffic court judge assesses \$50 per misdemeanor count against every indigent defendant who is appointed a public defender. There are some exceptions, but pure indigency or lack of financial ability is not one. "If you're a man, healthy, and just not working, I'm going to make them collect cans, cut grass, or whatever you need to do to come up with the \$50 PD [public defender] fee," the judge explained.

## **E. When and how defendants learn the identity of their lawyer.**

When a judge decides the person requesting appointed counsel is indigent, the judge "shall assign counsel to the person."<sup>608</sup> Indiana's statutory directive requiring the judge to assign counsel at the initial hearing for a person found indigent comports with the United States Supreme Court decision in *Rothgery v. Gillespie County*,<sup>609</sup> holding that a person's right to counsel attaches at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction."<sup>610</sup> The Supreme Court has never set out a specific formula for how or how quickly counsel should be appointed once the right to counsel has attached.<sup>611</sup> What *Rothgery* makes clear is that once the right to counsel has attached, as here at

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<sup>606</sup> Marion Super. Ct. Crim. Div. R., LR49-CR00-115(a) (2015).

<sup>607</sup> *Id.*

<sup>608</sup> IND. CODE § 35-33-7-6(a) (2015).

<sup>609</sup> 554 U.S. 191 (2008).

<sup>610</sup> *Id.* at 213.

<sup>611</sup> *Id.* at 212 n.15 ("We do not here purport to set out the scope of an individual's post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.").

the initial hearing in Indiana, “counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”<sup>612</sup> The manner in which an Indiana judicial officer goes about assigning a specific attorney to represent an indigent person varies from county to county.

*1. Appointing a public defender office or system.*

In counties that use public defender offices and in some counties that use contracts, at the initial hearing the judges consistently appoint “the public defender office” or generically “the public defender” to represent indigent defendants rather than appointing a specific attorney. As a result, indigent defendants leave their initial hearing not knowing the identity of the attorney who will defend them or how to contact that lawyer.

At initial hearings in Scott County, judges advise indigent defendants that a public defender is appointed to represent them and they will receive a notice telling them who their attorney is. The same day, the court faxes to the public defense administrator a list of the defendants found to be indigent and entitled to have counsel appointed. The administrator selects the specific attorney who will represent each defendant, by choosing the next attorney on the list for each court and case type. The administrator notifies the attorneys of the cases to which they have been assigned. For defendants who are in custody, the administrator faxes the attorney’s contact information to the jail for it to be provided to the defendant. Out of custody defendants must wait for their attorney to contact them to learn the identity of their lawyer.

In Montgomery County judges advise indigent defendants at the initial hearing that a public defender is appointed to represent them and they will receive a notice telling them who their attorney is. The judge notifies the public defense administrator of the appointments made each day, and the administrator assigns the case to a specific attorney (based on caseloads, qualifications, and what court the case will go before) that same day. The administrator emails the attorney, providing the defendant’s name, address, and the cause number in the case. For defendants who are in custody, the administrator faxes the attorney’s contact information to the jail for it to be provided to the defendant. By contract, the public defense attorneys are required to “provide written notice to all clients within 72 hours of the time the appointment is made” of the attorney’s name and contact information.<sup>613</sup>

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<sup>612</sup> *Id.* at 212.

<sup>613</sup> *See, e.g.*, Contract for Legal Services for Indigent Defendants, para. 6, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 6, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.



When the Elkhart County courts appoint counsel for a defendant at the initial hearing, they appoint the public defender office rather than a specific attorney. This is because the court making the appointment does not know which attorney will be assigned to each defendant's case. As a result, defendants both in and out of custody who have received appointed counsel do not know the name of their attorney or how to contact them until some later time. The public defender office assigns each of its attorneys to work in one or more specific courts.<sup>614</sup> Within a given court, some defenders split the indigent cases at random,<sup>615</sup> while others split the cases by case type (for example, felony and misdemeanor, or felony and probation violations). The public defender will eventually send the defendant a letter telling them who their specific attorney is.

The Lake County criminal division magistrates appoint the public defender office to represent indigent defendants, rather than a specific attorney. The public defender office employs a data quality analyst, who sits in on initial hearings and sets up a file for each new case, which is delivered to the paralegal for the courtroom to which the defendant's case is allotted. The analyst later makes the individual case appointments to attorneys based on the court they are assigned to and the attorney's caseload, using a spreadsheet that shows the active workload for each attorney. If an attorney is close to their caseload maximum for a quarter, the analyst notifies the chief public defender, who will skip making new assignments for the overloaded attorney until the next quarter.

In Marion County, when a judge finds a defendant indigent, the judge appoints the public defender office to represent the indigent defendant. The earliest time any defendant, whether in- or out-of-custody, will learn the identity of and have an opportunity to speak to the specific public defense attorney who will represent him is at his first formal appearance in the court to which his case has been allotted. This is because MCPDA assigns its lawyers to courtrooms, and then the lawyers within those courtrooms are assigned to specific cases in varying ways.

MCPDA has a representative present at the APC at all times when the initial hearing court is in session.<sup>616</sup> As MCPDA is appointed to represent defendants, the representative on duty creates a file that contains the probable cause information, the charging information, and the defendant's criminal history, and then brings the files to MCPDA at the end of the shift. The files are distributed to the conflict paralegal and

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<sup>614</sup> The public defender office attorneys usually remain assigned to the same court for so long as they are employed in the public defender office.

<sup>615</sup> For example, one superior court judge conducts initial hearings and says that if public defenders happen to be in the courtroom when counsel is appointed for an indigent defendant, the public defenders flip a coin to see which attorney will be assigned to the case.

<sup>616</sup> On Fridays from 8:00 am to 4:30 pm and on Saturdays, attorneys rotate being assigned to APC. When interns are available at MCPDA, they are used at APC during weekdays. At all other times and specifically Monday through Thursday from 9:00 pm to 5:00 am, MCPDA paralegals staff the APC initial hearing court.

to the specific paralegals that are assigned to each courtroom. The conflict paralegal and the paralegals for each courtroom input the information into the “PDIS” (public defender information system).

The paralegal for each courtroom assigns each case to a particular attorney, though the way the attorney is selected varies by department within MCPDA. At least by the evening before a daily court session, every attorney can see a list of the clients whose cases they have been assigned to defend the following day. In court on the morning of the defendant’s first appearance, the MCPDA paralegal assigned to the courtroom interviews each defendant and completes a client interview form. For a given defendant, this first appearance in court may be designated as the initial appearance, a bond review hearing, or a pretrial conference. No matter what its designation, this is the first time the defendant will learn the identity of and have any opportunity to meet with the specific attorney who will defend him on his charge. “Even if we are appointed at the APC, we really don’t talk to [the clients] until their first appearance in court,” said one attorney. After this court proceeding, the defense attorney files a written appearance form on behalf of each individual client.

## *2. Appointing a specific lawyer.*

In Blackford County, at the initial hearing judges select from a rotating list the specific attorney who is appointed to represent each individual defendant. The judge gives the defendant a copy of the *Order of Appointment of Public Defender* that tells him the name, phone number, and address of his appointed attorney. The attorneys receive notice of the appointment on the same day it is made at the initial hearing. For local attorneys, the judge’s secretary places the notice of appointment into their attorney folders at the courthouse and, if they so desire, also emails them. The secretary mails the notice of appointment to the out-of-county appointed attorneys.

At the initial hearing in Warrick County, the judge designates the specific attorney who is appointed to represent an indigent defendant and gives the defendant a referral slip with the attorney’s name and contact information. The judges for the most part assign the next attorney on the list, rotating through them in order. The minutes of the proceeding (also known as the “chronological case summary” or “CCS”) are printed and placed into the attorney’s courthouse box, typically within two to three days of the appointment and at most a week.

In the Lake County county division courts, the public defense attorneys are present in the courtroom when the judge conducts initial hearings. Each lawyer serves on a different day, and the judge assigns all indigent clients who receive appointed counsel on that day to that lawyer.

**FINDING #5: The State of Indiana’s constitutional obligation to provide counsel at all critical stages of a criminal proceeding is not consistently met on the local level, where some counties encourage defendants to negotiate directly with prosecutors before being appointed counsel, accept uncounselled pleas at initial hearings, and/or use non-uniform indigency standards to deny counsel to defendants who would otherwise qualify in another county. These are all examples of actual denial of counsel under *United States v. Cronin*.**

# CHAPTER 10

## ATTORNEY QUALIFICATIONS & TRAINING

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.<sup>617</sup> Specialties must be developed. Just as you would not go to a dermatologist rather than a heart surgeon for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot handle a complex felony case competently. Criminal defense is an especially complex specialty area of law.<sup>618</sup>

Rule 1.1 of the Indiana *Rules of Professional Conduct* requires all lawyers to be “competent” in carrying out their duties to clients,<sup>619</sup> and there are no exceptions to this rule. Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to do them. Failure to adhere to the state’s *Rules of Professional Conduct* may result in disciplinary action against the attorney, up to and including the loss of the attorney’s license to practice law.<sup>620</sup> National standards likewise declare that an attorney’s ability to provide effective representation depends

<sup>617</sup> Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) (“The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

<sup>618</sup> As the American Bar Association explained more than 20 years ago, “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.” ABA, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.5 and commentary (3d ed. 1992).

<sup>619</sup> IND. R. PROF. CONDUCT 1.1 (as amended through Apr. 30, 2015) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

<sup>620</sup> IND. R. PROF. CONDUCT 8.4(a) (as amended through Apr. 30, 2015) (“It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .”); *id.*, comment [1] (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . .”).

on his familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”<sup>621</sup>

Beyond the general requirement of competency, though, Indiana does not require any particular procedures for selecting the attorneys who provide public defense and does not mandate that they have any particular qualifications for being assigned to any cases except death penalty cases.<sup>622</sup> In other words, even an attorney newly graduated from law school and having just passed the bar examination could be assigned to represent an indigent defendant in a murder case where the defendant faces life without parole if convicted.

The Indiana *Rules of Professional Conduct* recognize that ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure and their competence to provide effective representation.<sup>623</sup> Similarly, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,<sup>624</sup> require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,<sup>625</sup> at which attorney attendance is compulsory, in order to maintain competence from year to year. Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the “knowledge and experience to offer quality representation to a defendant in a particular

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<sup>621</sup> NATIONAL LEGAL AID & DEFENDER ASSOCIATION, *PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION*, Guideline 1.2(a) (1995).

<sup>622</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, *Commentary* to Standard E (as amended through June 18, 2014) (“Except for capital cases, any attorney licensed to practice law in Indiana may be appointed as counsel for the accused in any criminal case.”).

<sup>623</sup> IND. R. PROF. CONDUCT 1.1, comment [6] (as amended through Apr. 30, 2015) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

<sup>624</sup> Building upon the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c.13 (The Defense) (1973).

<sup>625</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c.13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

matter,” then the attorney is obligated to move to withdraw from the case, or better yet to refuse the appointment at the outset.<sup>626</sup> Ongoing training, therefore, is an active part of the job of being a public defense provider.

All Indiana attorneys are required to have six hours per year of continuing legal education (CLE) and a total of 36 hours of CLE over each three-year period, of which at least three hours must be in professional responsibility.<sup>627</sup> There is no requirement that attorneys obtain CLE or training in any specific area of practice and, in particular, no requirement that the CLE be in the fields in which they practice. As one attorney said, “the CLE could be in admiralty law,” even for an attorney who practices exclusively criminal defense.

The extent to which Indiana counties’ public defense systems comply with national standards in the qualifications and training of attorneys seems unrelated to whether those counties and their courts participate in the state reimbursement program. Rather, the variations seem more related to the type of system the county uses and the size of the county’s criminal justice system.

Every county has some process for selecting and retaining the attorneys who provide public defense. In Blackford, Lake county and juvenile divisions, and Warrick, the judges control that process, and attorneys can be dismissed at the whim of a judge. In Scott and Montgomery, the public defender board is in charge of selecting attorneys year by year. In Elkhart, Lawrence, Lake criminal division, and Marion, the process is controlled by the chief public defender.

Without regard to whether counties participate in the reimbursement program, the attorneys in all of the sample counties by and large appear to have the qualifications required by the Commission *Standards* for the types and levels of cases to which they are appointed. Blackford County, because of the dearth of attorneys with offices in the county, struggles more than others to keep qualified attorneys in its public defense system.

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<sup>626</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c. 13 (The Defense), Standard 13.16 (1973); *see also* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2(b), 1.3(a) (1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and “[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”). The requirement of public defense lawyers to decline or withdraw from cases, rather than provide incompetent representation, is reflected in the IND. R. PROF. CONDUCT 1.16(a)(1) (as amended through Apr. 30, 2015).

<sup>627</sup> IND. R. ADMISSION AND DISCIPLINE 29 (as amended through Jan. 1, 2016).

Of greatest concern is the lack of training and supervision among most of the sample counties. In Blackford, Elkhart, Lake county and juvenile, Lawrence, Scott, and Warrick, there is no training provided for or required of the public defense attorneys and no supervision over their work. Montgomery County requires by contract that its attorneys obtain six hours of training annually in criminal law and provides \$150 toward the cost of a Council provided training program for each attorney during the term of the contract (but most recently these were three-year contracts, so that funding will not go far toward covering the required costs), and there is no supervision of the attorneys. The Lake County criminal division attorneys receive good training, but have almost no supervision. Marion County does not provide any funding at all to train its public defense attorneys, but the MCPDA has developed a thorough and extensive training program, and it has many layers of on-going supervision for all of its staff attorneys (but not for its conflict attorneys).

### **A. Non-participating courts and counties.**

*1. Scott County.* The Scott County contracts to provide public defense representation renew each year, but rarely does the personnel change. The public defender administrator regularly receives many resumes from attorneys who hope to get a contract to provide public representation when a vacancy arises, though most of the applicants maintain their private law offices in other counties. “We don’t even have 12 practicing attorneys in the county,” said the public defender administrator. When there is an opening, the three-person public defender board interviews candidates from among the resumes on file with the public defender administrator and fills the position.

There is very little turnover in these positions. In 2015, the county contracted with a total of seven lawyers, and only one of the attorneys is new since 2008.<sup>628</sup> Based on the attorney qualification information provided to the Commission in 2008, six of the current seven contract attorneys were all qualified to handle class A felonies and down,<sup>629</sup> meaning every criminal case of any type other than murder.

There is no process in place to train, supervise, or evaluate the contract attorneys. “Training isn’t an issue here,” said one judge, because “we have a super-experienced panel of lawyers.” Another judge acknowledged, though, that “[t]his is probably where being in a small county where everyone knows each other actually becomes a problem.”

*2. Montgomery County.* The contracts in place at the time of this evaluation were set to expire on December 31, 2015,<sup>630</sup> and they had been let during the county’s participation

<sup>628</sup> See Scott County reimbursement request for the third quarter of 2008, provided by the Commission.

<sup>629</sup> *Id.*

<sup>630</sup> See sample Contract for Legal Services for Indigent Defendants, provided by Montgomery County public defense administrator.

in the non-capital indigent expense reimbursement program. The county anticipated that it would continue to follow the same process it has used in the past for awarding new contracts. The public defender board issues an announcement, usually in June, that it is accepting contract proposals for a given period of time, typically either a two-year or three-year term.<sup>631</sup> The notice is placed in the courthouse mailboxes of the local attorneys and is mailed to the nearby courts for posting.

In past years, the attorneys who held the expiring contracts submitted a collective bid for the upcoming contracts to do all of the county's indigent representation in exchange for a total sum that they would agree upon the division of, and they expected to do so again during the 2015 contract renewal process. As one contracting attorney put it, "no one gives [the public defense contract] up."

Other attorneys who do not hold expiring contracts have typically also submitted bids. For example, an associate with a local law firm, who had not previously contracted with the board, submitted a bid for the 2011-2012 contract period proposing to provide full-time representation at the amount then being paid of \$40,000 annually and offering to the county the added benefit of speaking Spanish.

The public defender board considers the proposals it receives and makes a decision. There are no formal criteria that the board uses to determine which attorneys will be awarded a contract or how many contracts it will award. While participating in the reimbursement program, the board decided on the number of attorneys with which it sought to contract based on the total indigent caseload the county was experiencing, divided by the maximum caseload that an individual attorney was allowed to carry under the Commission standards. Now that the county is no longer bound by the Commission caseload standards, it is unclear whether the county will continue to use them as the basis for determining the number of attorneys needed, or whether it will seek to lessen the overall cost to the county by contracting with a lesser number of attorneys (which would require each attorney to handle more cases).

During the time that Montgomery County participated in the reimbursement program, it regularly reported the qualifications of each of the contracting attorneys. Six of the current contract attorneys held contracts then: three of them were qualified up to murder cases; three were qualified only for level 6 felonies and below as defined by the Commission qualification standards.

The county contracts require each attorney to "attend at least six (6) hours of continuing legal education in the criminal law field during each calendar year of the contract."<sup>632</sup> If the attorney produces proof of attendance, the county will reimburse the

<sup>631</sup> See, e.g., Montgomery County Public Defender Board, *Announcement* (Apr. 9, 2010) (soliciting contract proposals for public defender services for 2011 and 2012, seeking seven full-time attorneys or the equivalent).

<sup>632</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 15, between Sarah Dicks and



attorney “up to \$150” during the contract term for attending a seminar provided by the Indiana Public Defender Council.<sup>633</sup> Beyond this, there is no training provided for or required of the contract defenders.

Montgomery County does not have any method of supervising its contract public defense attorneys. The public defender administrator, by contract, is expressly excluded from doing so: “[t]he public defender administrator **shall not be** responsible for . . . the supervision, evaluation, or work performance” or “[t]he hiring, firing, or any other management” of the contract public defense attorneys.<sup>634</sup> The public defender board is similarly prohibited from supervising the contracting attorneys: “the Board shall not exercise any control, supervision or direction over the activities of the attorney in representing the clients under this agreement.”<sup>635</sup>

The public defender board could terminate the contract of any attorney if it chose to do so. Both the contracting attorney and the public defender board can terminate the contract “for cause” on 10 days written notice and “without cause” on 60 days written notice.<sup>636</sup>

3. *Warrick County.* Attorneys who would like to serve as public defense attorneys in Warrick County submit a letter request to one or more of the judges. When a vacancy comes open, meaning one of the current attorneys declines to be appointed for a given year, the judges meet to consider the applications they have received. As a general rule, the judges consider and accept the applicants in the order in which they have applied.

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Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 15, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>633</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 15, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 15, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>634</sup> Contract for Public Defender Administrator, between Sarah Dicks and Montgomery County Public Defender Board, para. 3, covering period of January 1, 2013 through December 31, 2015 (emphasis in original).

<sup>635</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 11, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 11, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>636</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 18, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 18, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

For example, everyone in the county was able to name the person who is “up next” for a public defense contract, although sometimes the next person in line does not get the job.

There are no formal criteria to be selected as a public defender, but the judges do have some preferences. They prefer attorneys who have an office in Boonville (the county seat), because they know the local system and are already at the courthouse regularly, but all agree there is an unwritten rule that an attorney must have an office in the county. The judges have given strong indications that going forward they will not contract with more than one attorney in a single law office. Beyond that, one defender thinks the judges just consider “are you good enough to do the job.”

Of the seven attorneys contracted to provide criminal and delinquency representation, each judge by agreement is allowed to name two of the attorneys and they jointly agree on the seventh; they also jointly agree on the CHINS/TPR contract attorney. At the beginning of every year, each judge issues an order appointing the same eight attorneys who will serve as public defenders in all of the courts for the coming year.<sup>637</sup>

There is very little turnover among the contracting attorneys. The most recent opening occurred when a contracting attorney became the magistrate in 2013, and the position was filled by an attorney who had first applied for it in 2009; in other words the least experienced of the contract attorneys has now been practicing law for over six years. One of the contracting attorneys has held the position since 1995, following his 16-year stint as the Warrick County prosecutor. Most Warrick County contract attorneys seem to see public defense as something of a civic duty – “there is a feeling of you are serving the public.”

There is no training or supervision at all required of or provided to the contracting attorneys. As one attorney put it, it is just “trial by fire.”

*4. Elkhart County.* Prior to the creation of the public defender board in 2012, the judges all met as a group and chose the next chief public defender. After the board was created, it reappointed the same chief public defender, who has now served for more than 20 years, for an indefinite term.

The current chief public defender has made it known that he will be retiring sometime soon. The public defender board has never had to select a chief public defender from scratch before, and the board is less than clear on what that process will look like. Thus far, they just know that they will cast a wide net to get as many applicants as possible.

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<sup>637</sup> See, e.g., Order Appointing Public Defenders for 2014, Cause No. 87C01-1401-MC-000001 (Jan. 2, 2014); Order Appointing Public Defenders for 2014, Cause No. 87D01-1401-MC-006 and Cause No. 87D02-1401-MC-006 (Jan. 3, 2014).

The chief public defender hires all attorney and support staff. Whatever criteria he may have for selecting public defender office attorneys is known only to him. His staffing has never raised any budgetary concern, so the county council and public defender board both just stay out of it. There is little turnover in the public defender office.

There is no process in place to train, supervise, or evaluate the public defender office attorneys. Rather, public defender training is “on the job.” There is no clear place for judges or defendants to go with complaints about defenders; some judges refer complaints to the chief public defender and some to the individual attorneys, but the public defender board does not receive any complaints and has no process for dealing with them.

*5. Lake County, county and juvenile divisions.* In Lake County’s county and juvenile divisions, the judges each individually contract orally with private attorneys to provide representation to indigent defendants in their courtrooms. There are no formal procedures for contracting with any of these attorneys and the attorneys serve at the pleasure of the judge who selected them. In the county division where attorneys are assigned to level 6 felonies and down, each of the four judges contract with five attorneys. The juvenile division judge contracts with ten attorneys who are assigned to juvenile delinquency, CHINS, and TPR cases.

Each judge has their own individual method of selecting the contract attorneys for their court. The juvenile division judge interviews attorneys for the contract positions and will not hire anyone with less than five years experience as an attorney and they must have a family law practice. One of the county division judges, when he first took the bench, sent letters to the various bar associations in the area and requested them to advertise that he was seeking to contract with attorneys to provide public defense in his court and also asking them to make recommendations. For the most part, though, the county division judges just offer the positions to attorneys who they believe will be good at the job. One county division contract defender believes her judge offered her the position because she is politically “well connected with the county folks,” despite the fact that she had never handled criminal cases and had a private civil practice, and she believes that is the reason why the other county court public defenders have their jobs as well.

There is very little turnover in these positions. As one county contract defender explained, these are “much sought-after” jobs, so once attorneys are hired they typically remain for several years until they choose to leave for outside reasons (usually death, retirement, or election to public office). The juvenile division judge believes he is able to hire much more qualified and competent attorneys by contracting with them on a part-time basis than if they were full-time employees, given the salaries he believes the county would be willing to offer.

There is no expectation that anyone will actively supervise or train these contract attorneys. One contract attorney, when first hired, shadowed another contract attorney with whom she was familiar in order to figure out how the court functioned, however this was entirely on her own initiative.

## **B. Participating courts and counties.**

For courts and counties that participate in the non-capital indigent expense reimbursement program, the Indiana general assembly set out statutes about the manner of choosing the attorneys who provide public defense, depending on the type of system the county uses.

- In an assigned counsel system, the public defender board “shall gather and maintain a list of attorneys qualified to represent indigent defendants.”<sup>638</sup> The courts “shall appoint” an attorney from that list.<sup>639</sup> Though a court can appoint an attorney other than one on the board provided list, if he does so the county cannot be reimbursed by the state for its expenses in that case.<sup>640</sup>
- In a contract system, either: the public defender board establishes the provisions of the contract and the county public defender chooses the attorneys with whom to contract;<sup>641</sup> or judges (other than in Lake and Marion counties) choose the attorneys with whom to contract and set the terms.<sup>642</sup>
- In a public defender office system, the chief public defender must have been admitted to practice law in Indiana for at least two years.<sup>643</sup> The public defender board selects the chief public defender for a term of not more than four years, and once chosen the chief public defender may only be removed during that term on a showing of good cause.<sup>644</sup> The chief public defender hires and supervises the attorneys in the public defender office.<sup>645</sup>

No matter the type of system, a public defense attorney can never be “a partner or an employee at the same law firm that employs the county’s prosecuting attorney or a deputy prosecuting attorney in a private capacity.”<sup>646</sup> The general assembly delegated to the Commission the responsibility to adopt guidelines and standards for the “[q]ualifications of attorneys to represent indigent defendants at public expense.”<sup>647</sup>

<sup>638</sup> IND. CODE § 33-40-7-9(1) (2015).

<sup>639</sup> IND. CODE § 33-40-7-9(2) (2015).

<sup>640</sup> IND. CODE § 33-40-7-10 (2015).

<sup>641</sup> IND. CODE § 33-40-7-8 (2015).

<sup>642</sup> IND. CODE §§ 33-40-8-1 through -4 (2015).

<sup>643</sup> IND. CODE § 33-40-7-6(b) (2015).

<sup>644</sup> IND. CODE § 33-40-7-6 (2015).

<sup>645</sup> IND. CODE § 33-40-7-7(2) (2015).

<sup>646</sup> IND. CODE § 33-40-7-12 (2015).

<sup>647</sup> IND. CODE § 33-40-5-4(2)(D) (2015).

Qualifications for attorneys to defend indigent death penalty cases are established by court rule.<sup>648</sup> Lead counsel must be “an experienced and active trial practitioner” with at least five years of criminal litigation experience, have served as lead or co-counsel in at least five felony jury trials that were tried to completion, have served as lead or co-counsel in at least one case in which the death penalty was sought, and have completed at least 12 hours of training in capital case defense within two years prior to being appointed.<sup>649</sup> Co-counsel must have three years of criminal experience, have served as counsel in at least three felony jury trials, and complete the same training requirements as lead counsel.<sup>650</sup>

In all non-capital cases, the Commission *Standards* require various combinations of years and types of experience<sup>651</sup> and training that trial attorneys must have before they can be appointed to represent an indigent defendant.<sup>652</sup>

- Murder cases (non-capital; adult and juvenile): be an experienced and active practitioner with at least three years of criminal litigation experience and have served as lead or co-counsel in at least three class C or level 5 or higher felony jury trials (or juvenile trials, for juvenile delinquency attorneys) that were tried to completion.<sup>653</sup>
- Level 1 to 4 felonies (adult and juvenile): be an experienced and active practitioner with at least two years of criminal litigation experience and either: have served as lead or co-counsel in at least two felony jury trials (or juvenile trials, for juvenile delinquency attorneys) that were tried to completion, or one felony jury trial and have attended an approved trial practice course.<sup>654</sup>

<sup>648</sup> IND. R. CR. P. 24(B)(1), (2) (as amended through Apr. 8, 2015).

<sup>649</sup> *Id.*

<sup>650</sup> *Id.*

<sup>651</sup> In response to questions from participating counties, the Commission has over time developed some guidelines about what constitutes “experience” that will meet the standards. IND. PUB. DEF. COMM’N, COMMISSION GUIDELINES RELATED TO NON-CAPITAL CASES, Standard E, 11/29/00 (as amended through Sept. 11, 2013). For example, judicial experience cannot be used in substitution for the experience requirements of Standard E, because “doing the work preparatory to a criminal trial was not equivalent to sitting as a judge in a criminal trial.” Ind. Pub. Def. Comm’n, *Minutes* (Nov. 29, 2000). Similarly, serving as stand-by counsel and time spent as a legal intern cannot be substituted for experience as a lawyer. Ind. Pub. Def. Comm’n, *Minutes* (Nov. 29, 2000).

<sup>652</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E (as amended through June 18, 2014). The Commission similarly has minimum qualification requirements for appellate attorneys. IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard F (as amended through June 18, 2014).

<sup>653</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E.1, 4.a (as amended through June 18, 2014).

<sup>654</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E.2, 4.b (as amended through June 18, 2014).

- Level 5 adult felonies: be an experienced and active practitioner with either: at least one year of criminal litigation experience, or have served as lead or co-counsel in at least three criminal jury trials that were tried to completion.<sup>655</sup>
- Juvenile delinquency status, infraction, misdemeanor, or level 5 felony: either have served as lead or co-counsel in at least one case of the same level that was tried to completion in adult or juvenile court, or have one year of juvenile delinquency proceeding experience, or have experience in two comparable cases tried to completion in juvenile court under the supervision of a qualified attorney.<sup>656</sup>
- CHINS and TPR CASES: completion of six hours of approved CHINS/TPR training; and must have qualified co-counsel in the trial of any TPR matter until acquiring one year TPR litigation experience or having litigated at least one TPR matter to completion.<sup>657</sup>

The Commission does not require any minimum qualifications for attorneys appointed to represent adult indigent defendants in level 6 felonies, misdemeanors, infractions, or ordinances.

When a county first applies to participate in the non-capital reimbursement program, the Commission verifies that the qualifications of the system’s attorneys as reported by the county match the qualifications for each level of representation that the *Standards* require. The Commission does not independently verify that the named attorneys actually have the claimed qualifications.

**A CLOSER LOOK**

IPDC QUARTERLY REIMBURSEMENT  
REQUEST FORMS

[ via 6AC website ]

With each quarterly reimbursement request, counties must provide a list by name of every attorney that was appointed to a case during that quarter and show the highest level of qualification the attorney has under the Commission qualification standards. The Commission also requires the counties to submit caseload worksheets showing the number and type

of appointments made to each attorney, by name, during the quarter. By comparing the caseload worksheets to the qualification sheets in a reimbursement request, the Commission can for the most part verify whether the attorneys being appointed in each type of case have the minimum qualifications required to handle that type of case.

The Commission *Standards* require that a county “provide for effective training, professional development and continuing education of all counsel and staff involved in

<sup>655</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E.3 (as amended through June 18, 2014).

<sup>656</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E.4.c (as amended through June 18, 2014).

<sup>657</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard E.5 (as amended through June 18, 2014).

providing defense services at county expense.”<sup>658</sup> The Commission does not, however, require counties to report any information about the annual or ongoing training that its public attorneys have actually received. The Commission believes it does not have statutory authority to require counties to provide this information.

*1. Blackford County.* Blackford County’s comprehensive plan says that “[t]he county public defender board will prepare and maintain a list of attorneys qualified to represent indigent defendants. . . . This list will be periodically updated by the board and provided to the judges. . . . [T]he judge shall appoint an attorney from the list maintained by the board to provide legal representation.”<sup>659</sup> Despite this provision, the public defender board does not prepare and maintain such a list.

Attorneys come to each of the Blackford County judges individually and request to be appointed in the types of cases for which they are qualified and desire appointment in that court. There are very few attorneys in all of Blackford County, and what few there are hold many of the elected and appointed county offices which prevents them from representing indigent defendants.<sup>660</sup> Barring some egregious reason not to appoint a particular attorney, each of the judges will add any attorney who so requests to the list from which they rotate appointments.

The superior court judge appoints the attorneys to represent indigent defendants in superior court, which hears misdemeanors and level 6 felonies.<sup>661</sup> The Commission does not have any minimum qualifications for the attorneys who can be appointed in these types of cases. Often the attorneys seeking to be appointed by the superior court judge have only just recently graduated from law school and have no experience. The court tries to help them get started as attorneys and gain experience by giving them appointments in these cases. As of February 2015, there were only three attorneys who were then willing to be appointed to level 6 felonies and misdemeanors in superior court: one who has an office in Blackford County; one in Jay County; and one in Grant County.

The circuit court judge appoints the attorneys to represent indigent defendants in circuit court, which hears murder and level 1 to 5 felonies, juvenile delinquency,

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<sup>658</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard M (as amended through June 18, 2014).

<sup>659</sup> Comprehensive Plan for Indigent Defense Services in Blackford County (Feb. 2, 1999), provided by the Commission.

<sup>660</sup> In fact, there may be less than ten lawyers in the county. Two are the circuit court judge and the superior court judge; two are the elected prosecutor and the deputy assistant prosecutor. One is the retired circuit court judge, who accepted assigned indigent cases from the time of his retirement until approximately 2014. One is the retired superior court judge who practices only civil law and does not accept assigned indigent cases. One other Blackford County attorney does not accept assigned cases. Two Blackford County attorneys accept assigned cases.

<sup>661</sup> Local Rules of Practice (Revised) for the Courts of Blackford County, Indiana, Rules LR05-AR1(E)-6, LR05-CR00-201 (rev. July 1, 2014).

CHINS and TPR, and mental health commitment cases.<sup>662</sup> At the time attorneys ask the judge to add them to the rotating list of appointments in circuit court, they provide to the judge a certification attesting that they meet the minimum qualifications for the type of appointments they seek. As of February 2015, there was only one Blackford County attorney who was willing to accept assignments to represent indigent people in circuit court. All other attorneys who accept indigent representation assignments in circuit court operate their law offices in the adjacent counties of Delaware, Grant, and Jay.

Although the Commission requires all counties to submit a form showing the qualifications of the attorneys who provided representation to indigent people during each quarter for which it requests reimbursement, Blackford County has not been providing this information for all of its public attorneys. For each of the ten quarters from the beginning of 2013 through the second quarter of 2015, the county's reimbursement request included the required attorney qualification form. But that form most often showed the qualifications of attorneys who did not receive appointments during the quarter and omitted to show the qualifications of attorneys who did receive appointments during the quarter. A total of eight attorneys received appointments during these ten quarters, but the county only provided the qualifications for one of those attorneys. It may well be that every attorney appointed in Blackford County is in fact qualified for appointment to the types of cases they received, but it may also be that they are not qualified. Importantly, the Commission does not have the information necessary to determine whether the appointed attorneys for Blackford County meet the qualifications set out in *Standard E*, and yet the Commission has consistently reimbursed the county.

Blackford County public defense attorneys do not receive any training or supervision at all.

2. *Lawrence County*. The Lawrence County public defender is responsible for hiring the chief public defender. In 2014, the county's first chief public defender left the office. The board advertised the position opening and published a detailed job description:

To lead the Lawrence County Public Defender's Office in accordance with the Comprehensive plan adopted by the Board on 12/9/14; to maintain the physical office of the Agency as approved by the Board; to hire and supervise adequate legal and support staff to remain in compliance with the Commission Standards; to keep and maintain records of all cases handled by the Agency, make all necessary reports to the Indiana Public Defender Commission and to report annually to the Board concerning the operation of the office, costs, and projected

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<sup>662</sup> *Id.*



needs; be deeply committed to client centered representation of the indigent, transparent and responsible fiscal management, and a commitment to partner with justice system leaders in innovative approaches to promote equity, justice, and safety in Lawrence County. The Chief Public Defender will be expected to handle a reduced caseload in addition to his/her leadership and management responsibilities; be familiar with the Indiana Public Defender Commission standards for reimbursement and should be qualified to handle at least class A felony cases; and be a leader in the use of Problem Solving Courts and should be familiar with the role of defense counsel in these courts.<sup>663</sup>

The board reviewed the resumes it received and identified three finalists. The board sought the input of the judges, prosecutor, and public defender office attorneys about these final candidates, but the decision was the board's alone. After interviewing two candidates, the board selected the new chief public defender for a four-year term, which he began with a six-month probationary period on March 23, 2015.<sup>664</sup>

The chief public defender hires all attorneys and support staff for the public defender office, after obtaining approval from the public defender board, and selects the attorneys for the assigned counsel list that are appointed on a case-by-case basis as needed. The assistant public defenders "are hired by interview and are subject to supervision by our chief; are county employees and are subject to the county rules, some of which are included in the county handbook; and are subject to the Code of Professional Responsibility. . . . There is no written document for the attorneys, more an informal understanding of job requirements and supervision by our chief." Because there are not many attorneys in Lawrence County, the public defender office heavily recruits law school interns who are hired after graduating. Of the public defenders in the office in May 2015, three are under 30, the other three are older, and all want to be career public defenders. Lawrence County reports to the Commission the qualifications of all of its public defender agency attorneys and assigned counsel as part of its reimbursement requests every quarter.

As of May 2015, the public defender office did not have any formal training or supervision in place for either its staff attorneys or its assigned counsel attorneys. The office staff attorneys meet together over lunch every Friday to check in about

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<sup>663</sup> See "The Lawrence County Public Defender Board, For the position of Chief Public Defender," provided by the Lawrence County Public Defender Office.

<sup>664</sup> John Haury passed away unexpectedly on May 17, 2015, less than two months after being appointed as chief public defender. David Shircliff Named New Chief Public Defender for Lawrence County, WBIW NEWS, Nov. 18, 2015, *available at* <http://www.wbiw.com/local/archive/2015/11/post-234.php>. Bruce Andis, a deputy public defender at the office, served as interim chief during the first quarter of 2015, prior to Haury being hired, and from Haury's death until the board hired a new chief public defender. In November 2015, the board selected David Shircliff as Haury's replacement. *Id.*

legal issues. The office's first chief public defender, who held that position from the office's founding in 2010 through the end of 2014, regrets that she did not establish more written policy for the office, but was unable to do so while carrying a caseload in addition to her administrative and supervisory duties. Despite this, many in the county believe the quality of representation has improved merely through the existence of the public defender office -- while previously if a public defense attorney performed inadequately there was no one who could do anything about it, now a judge or prosecutor or client can tell the chief public defender "this needs to change."

*3. Lake County, criminal division.* The public defender board is responsible for hiring the chief public defender. In 1999, when the county established the public defender board, the board advertised for and hired the current chief public defender. The chief public defender selected the current deputy chief in 2000. The current executive director was hired into his role in 2001.

The public defender office has very low turnover. Many of the current staff and contract attorneys have been with the office since before it joined the reimbursement program in 1999. When a staff attorney vacancy occurs, the chief public defender posts an ad with the bar association, and fifteen to twenty applicants typically apply. The chief and deputy chief narrow down the applicants and interview a few, from which the chief public defender selects the new hire. All of the attorneys who have joined the office in the past few years have previously clerked for the office.

Lake County reports to the Commission the qualifications of all of its attorneys (staff, overflow, and conflict) who are assigned to represent indigent defendants in the criminal division, as part of its reimbursement request every quarter. At the end of 2014, of the 47 attorneys who received any appointments during the year, two were qualified only up to class D felonies, one was qualified only up to class C felonies, and the other 44 were all qualified for murder cases. According to the office administrators, about half of the office attorneys are death penalty qualified.

New staff attorneys are first assigned to handle level 6 felonies and in time they work their way up to higher-level felonies, and they are all sent to the Indiana Public Defender Council's annual three-day training that is part of the Trial Practice Institute. The conflict supervisor accompanies new conflict attorneys to court and sometimes goes with them on jail visits when they are first starting out. The conflicts unit does not hold any regular meetings together, but the conflict attorneys are encouraged to attend training along with the staff attorneys and are required to attend certain training programs if they are handling specific case types the training will cover. All attorneys are encouraged to second-chair higher-level felony cases *pro bono* in order to meet the Commission's qualification standards for handling higher-level felonies. The office covers part of the cost for public defenders to attend CLEs related to criminal defense. All public defense attorneys (staff, overflow, and conflict) who are eligible to handle

death penalty cases go to a death penalty conference held every other year.

The office recently became a state bar authorized CLE provider, and it intends to hold more CLEs in-house so that attorneys do not have to travel out of town to attend Indiana Public Defender Council training. “We’re trying to move toward an in-house training department,” said the chief public defender. The office hosted two seminars in 2013, three in 2014, and had put on one seminar as of July 2015. The most recent CLE was on defending child abuse allegations, and 45 people attended. All seminars are free for all office attorneys (staff, overflow, and conflict), and they are open to the entire defense bar for a fee. The money the office raises is deposited into the non-reverting supplemental public defender services fund.

The office provides little to no supervision. In the past, the office has requested money from the county to hire an attorney supervisor for each courtroom, however the county denied this request. In 2012, the office began evaluating attorneys and support staff twice a year, using an evaluation form developed by the federal defenders office. The executive director observes each attorney in court and then meets with them to discuss their strengths and areas of improvement.

*4. Marion County.* When the former chief public defender resigned in 2007, the public defender board was responsible for hiring his replacement. One of the main qualities the board was looking for in a new chief public defender was the ability to raise office morale and get rid of the “good ol’ boys club” that existed within the office at that time. The board intended the hiring process to be handled entirely internally to the board, however due to the web of political connections within the county, the city-county council offered unsolicited advice and everyone knew whom the board was considering. The board interviewed six applicants and narrowed it down to two for a second round of interviews, from which they selected the current chief public defender.<sup>665</sup> Under the ordinance adopted by the city-county council in 1993, the chief public defender must stand for annual confirmation by the city-county council.<sup>666</sup> As a matter of practice though, the public defender board reapproves the chief public defender’s appointment by annual voice vote.

The chief public defender has authority over hiring staff attorneys, contract attorneys, and all support staff in the public defense system. Fifty to 60% of new attorneys to the office have worked in the office as an intern. MCPDA hires law student interns<sup>667</sup> in the fall, spring, and summer terms, with an average of ten interns over the course of a year. Law school graduates are paid hourly; those who have not yet graduated are unpaid but

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<sup>665</sup> The current Marion County chief public defender had served on the public defender board for eighteen years, and he resigned from the board in order to apply for the chief public defender position.

<sup>666</sup> Indianapolis – Marion County, Indiana, CODE OF ORDINANCES § 286-4(4) (2015).

<sup>667</sup> MCDPA also operates a paralegal internship program in the spring and fall of each year. Most participants are in the paralegal studies program. Interns typically participate for eight weeks, during which they are introduced to the work of all of MCDPA’s divisions.

they receive law school credit. Interns for the fall and spring must be certified,<sup>668</sup> and they work in the office either one or two days a week. Interns for the summer may be certified or uncertified. While at MCPDA, interns typically assist attorneys in visiting clients at the jail, interviewing clients, investigating crime scenes, and researching legal issues.

The MCPDA typically receives 100 to 150 applications for staff attorney positions each year. In the first round of screening applications, the office looks for whether applicants have shown a past interest in criminal defense. The office usually interviews 40 to 50% of the applicants, and about 75% of those<sup>669</sup> will be invited to the office to present a “practical.” Applicants receive a case problem one week in advance. The applicants develop a theme and theory that they send to the chief public defender on the day before the practicals begin. During the week that the office sets aside for these practicals, the applicants each present a five-minute voir dire on a designated topic, five minutes of objections to direct examination, five minutes of cross-examination, and five minutes of closing argument. A team of senior attorneys rank the applicants on a score sheet, and the results of the practicals are the primary determinant in who is offered a staff position with the office. The office hires new attorneys in large cadres each year so they can bond within their group.

Attorneys are hired for either the juvenile or the adult criminal sides of the office. MCPDA signs written contracts with each public defender employee, with slight modifications depending on the unit where the employee works. New attorneys at the public defender office are provided one-page descriptions of the scope of work expected from them in the division to which they are assigned. All staff attorneys follow a uniform path of progress through the various departments of the office.

The MCPDA employment contract with each staff attorney specifies that the office will provide free CLE accredited in-house training on criminal defense and requires every staff attorney to obtain at least half of their annual CLE requirements in defense-related topics. The office has a training unit that provides four types of training programs:<sup>670</sup> two-week training for new hires; monthly meetings for the domestic violence and level 6 felony attorneys; promotional practicals every six months; and 20 to 25 hours annually of continuing legal education.

Newly hired staff attorneys all participate in a two-week training program that usually occurs in mid-May. The first day involves completing human resources paperwork,

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<sup>668</sup> A “certified intern” is a law student or graduate who has not yet taken or received the results of their first sitting for the bar examination but who has been certified to appear in court under the supervision of a licensed attorney. IND. R. ADMISSION AND DISCIPLINE, R 2.1 (as amended through Jan. 1, 2016).

<sup>669</sup> In 2015, the office invited approximately 45 people for the practical.

<sup>670</sup> In 2015, the training department was developing a program to address attorney staff who are not meeting expectations. The chief public defender was also looking to develop an evidence boot camp geared toward excluding hearsay.

learning about the various computer systems in the office, and other logistical matters. At the beginning of the first week, the attorneys are introduced to the structure of the agency and the work performed by each of the agency's divisions. Then intensive training begins. The new attorneys are broken up into small groups and each group receives a mock case to work on. A full afternoon is dedicated to developing the theme and theory of a case. Over the course of several days, training staff teach the attorneys about each step of a trial, in bite-size pieces, in a three-part process where the attorneys first receive instruction, then apply that to the sample case, and finally present that stage of a mock trial in small groups. The attorneys usually spend a day or two shadowing the attorneys they will replace in misdemeanor or juvenile delinquency court. On the final Friday of the training program, the new attorneys receive the files from the attorneys they are replacing and are "ready to go" on the following Monday.

All attorneys hired into the juvenile delinquency division are generally expected to remain there because they intend to devote their careers to representing children and families. As one juvenile judge noted, though prosecutors typically remain in juvenile court for a short period of time, the juvenile defenders stay with the court for an average of nine to ten years. "We've been extremely lucky with how long juvenile attorneys will stay here in juvenile court." The division has a mixture of veteran leadership and invigorated youthful attorneys. The attorneys progress through three rankings: attorney 1 handling juvenile delinquency cases that would be considered misdemeanors and level 6 felonies if committed by an adult; attorney 2 handling major felony level juvenile delinquency; and attorney 3 handling waivers of children into adult courts. Supervision is taken seriously. "Everybody goes to the [Indiana Public Defender] Council's annual juvenile training." The division has four staff attorneys who are certified to provide Juvenile Training Immersion Program (JTIP) training<sup>671</sup> and is seen as a national leader in juvenile defense.

For attorneys who begin with the agency in adult criminal representation, there is also an established track. Attorneys begin in the misdemeanor division, where they typically remain for approximately one year. The misdemeanor division holds a staff meeting every Friday afternoon to discuss any cases and problems anyone is having.

The next stop is the domestic violence division, which handles both misdemeanors and felonies. Before attorneys receive their first domestic violence case, the department supervisor trains them on the distinctions between a misdemeanor case and a felony case, how to conduct a bail review hearing, the particular concerns about sentencing in felony cases, and the collateral consequences incurred by a defendant when convicted

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<sup>671</sup> The Council's Executive Director invited the National Juvenile Defender Center to Indianapolis in May 2015 to conduct the certification training; it was free to Marion County. The Marion County juvenile defenders must pay it forward by providing JTIP trainings regionally, and they are excited to do so.

of a crime of domestic violence. There is near constant staff turnover in this division. Attorneys usually remain in the domestic violence division for only three weeks to six months and during this time typically have their first jury trial experience.

Next attorneys move to the level 6 felony division, and they often stay there for three to five years, although some attorneys choose to remain in the level 6 felony division longer. In the level 6 felony division, attorneys engage in much more extensive discovery and motion practice. The training staff holds monthly meetings with all attorneys assigned to the domestic violence and level 6 felony divisions. These meetings are held on four days each month, so that every attorney can attend no matter what days they are in court, and roughly one-fourth of the attorneys participate on each of the days. In these meetings, the training staff instructs the attorneys on any relevant changes to the law and rules, have staff attorneys practice particular skills, and brainstorm current cases with the attorneys. On average, an attorney is employed with the office for a minimum of two to three years before moving into the major felony (level 5 and up) division.

In order to promote from one division to the next, an attorney must do a “promotional practical” where they develop and present portions of a mock case and are evaluated by the heads of the division into which they are seeking promotion and other senior office attorneys. The presentations are videotaped so that attorneys can see themselves and receive immediate feedback. Promotional practicals are offered every six months. Many judges think the office’s policy of assigning attorneys to specific courts where they can specialize and then promoting them to higher-level courts within a few years has been very successful, and that as a result the major felony attorneys are the best.

The MCPDA training staff also present two one-hour CLE programs each month that are available to all staff and contract attorneys for free and to outside attorneys for \$25. On the Columbus Day holiday each year, MCPDA presents a two-hour CLE program in conjunction with a golf tournament that serves as a major fundraiser for the training department. On the Veterans’ Day holiday each year, MCPDA presents a three-hour CLE program on ethics. Once every two years, the MCPDA and the Marion County prosecutor’s office jointly present a six-hour CLE program for newly licensed attorneys.

MCPDA consistently sends some number of its staff attorneys to highly-regarded outside training programs each year. Because the chief public defender is a frequent presenter at CLE programs across the country, the agency often receives one or two tuition-free slots at these programs. The agency tries to send relatively new domestic violence and level 6 felony division attorneys to the weeklong trial advocacy program presented by the Ohio Public Defender Office in Dayton, Ohio and to the 5 ½ day litigation persuasion institute presented by the Kentucky Department of Public

Advocacy at Faubush, Kentucky. The agency sends senior attorneys and team leaders to the two-week trial practice institute offered by the National Criminal Defense College at Macon, Georgia.

The chief operating officer also conducts a file review with every staff attorney at least once a year. The COO picks one file to review and the attorney picks one file to review. Each MCPDA division has a supervisor and most have one or more assistant supervisors. In all divisions except the misdemeanor unit, an experienced attorney is assigned as the team lead in every courtroom.

For the contract conflict attorneys, things are far less structured. Selection begins through word-of-mouth or expression of interest. The chief public defender and the conflicts supervisor jointly select attorneys to contract with as needed. The contract conflict attorneys can attend all of the monthly and annual CLE programs offered at the MCPDA at no cost, but they are not required to do so. There is no direct supervision, since the contract conflict attorneys all work out of their own private law offices. If there are complaints by judges or clients, those are funneled to the conflict supervisor who calls the attorney in to discuss the problem. But there are concerns about maintaining the independence of the conflict attorneys. “We don’t have a conflict system that takes [the chief public defender] out of the conflict system as much as we would like,” said the board chair. “It’s one of our biggest issues.” The office’s leadership has looked at other conflict defender models,<sup>672</sup> “but every one costs money.”

**FINDING #6: The State of Indiana does not consistently require indigent defense attorneys to: a) have specific qualifications to handle cases of varying severity; or, b) have training to handle specific non-capital case types. This is a constructive denial of counsel under *United States v. Cronin*. Counties and courts outside of the reimbursement programs do not have to abide by Commission standards at all. To the extent that participating counties must adhere to Commission attorney qualification and training standards, the Commission’s ability to ensure compliance is limited because of inadequate funding and insufficient staffing.**

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<sup>672</sup> The chair’s strong preference would be to have an entirely separate, parallel public defender office to handle all conflicts.

# CHAPTER 11

## INDEPENDENCE & SUFFICIENT TIME AND RESOURCES

Due process requires that the defense attorney subject the prosecution's case to "the crucible of meaningful adversarial testing," as the United States Supreme Court stated in *United States v. Cronin*.<sup>673</sup> No matter how complex or basic a case may seem at the outset, no matter how little or much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of the client in every case. Even in the simplest misdemeanor case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant's background and life, interviewing both lay and expert witness, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).<sup>674</sup>

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<sup>673</sup> 466 U.S. 648, 656 (1984).

<sup>674</sup> See generally NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).



One state supreme court observed over twenty years ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”<sup>675</sup>

The lawyer owes all of these duties to every client in every case, and so Indiana’s *Rules of Professional Conduct* require that “[a] lawyer’s workload must be controlled so that each matter can be handled competently.”<sup>676</sup> National standards, as summarized by the ABA, agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”<sup>677</sup> Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public defense cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.<sup>678</sup> In addition to considering the raw number of cases of each type that an attorney handles, all national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”<sup>679</sup>

The most common way governments interfere with effective representation is by inadvertently creating a series of conflicts of interest. “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>680</sup> Each and every defendant has a right to effective representation that is free from conflicts of interest. All lawyers have an ethical obligation to preserve the client’s confidence and trust. But for the appointed lawyer representing the criminally accused, loyalty is not a question of aspiration or ethics alone; it is a constitutional imperative foundational to the fairness of the entire criminal process.<sup>681</sup>

<sup>675</sup> State v. Wigley, 624 So.2d 425, 428 (La. 1993).

<sup>676</sup> IND. R. PROF. CONDUCT 1.3 comment [2] (as amended through Apr. 30, 2015).

<sup>677</sup> ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5, at 2 (Feb. 2002).

<sup>678</sup> ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 5, at 2 (Feb. 2002).

<sup>679</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

<sup>680</sup> IND. R. PROF. CONDUCT 1.7 comment [1] (as amended through Apr. 30, 2015).

<sup>681</sup> See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (“Defense counsel have

The Indiana *Rules of Professional Conduct* expressly prohibit all lawyers from representing a client whenever a conflict of interest exists.<sup>682</sup> As those *Rules* explain, a conflict of interest can arise in basically three ways: between two clients represented by a single lawyer at the same time; between a lawyer's current client and a lawyer's former client or a third person; and between the lawyer's personal interests and the interests of the lawyer's client.<sup>683</sup>

- *Conflicts between two clients represented by a single lawyer at the same time.* An attorney cannot represent two or more clients at the same time whose interests might be at odds with each other.<sup>684</sup> Separate representation must almost always be provided for each codefendant in a particular criminal case, for example.<sup>685</sup> Similarly, if an attorney already represents a client who happens to be the state's main witness to an offense allegedly committed by a potential new client, the attorney cannot represent the new client.<sup>686</sup> And, if a lawyer simply has so many clients that the lawyer no longer has sufficient time or sufficient funding to devote to the next client's case – a situation often referred to as “case overload” or “excessive workload” – then the attorney cannot represent the next new client.<sup>687</sup>

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an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942) (“[A]ssistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”).

<sup>682</sup> IND. R. PROF. CONDUCT 1.7 (as amended through Apr. 30, 2015).

<sup>683</sup> IND. R. PROF. CONDUCT 1.7, comment [1] (as amended through Apr. 30, 2015) (explaining that a “conflict of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person[,] or from the lawyer’s own interests”).

<sup>684</sup> IND. R. PROF. CONDUCT 1.7(a) (as amended through Apr. 30, 2015) (“[A] lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client; or . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . .”); IND. R. PROF. CONDUCT 1.8(b), (g) (as amended through Apr. 30, 2015) (“A lawyer shall not use information relating to representation of a client to the disadvantage of the client,” and “[a] lawyer who represents two or more clients shall not participate in making . . . in a criminal case an aggregated agreement as to guilty or nolo contendere pleas . . .”).

<sup>685</sup> IND. R. PROF. CONDUCT 1.7, comment [23] (as amended through Apr. 30, 2015) (“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”).

<sup>686</sup> IND. R. PROF. CONDUCT 1.7, comment [6] (as amended through Apr. 30, 2015) (“[A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client.”).

<sup>687</sup> IND. R. PROF. CONDUCT 1.16(a)(1) (as amended through Apr. 30, 2015) (“[A] lawyer shall not represent a client . . . if . . . the representation will result in violation of the Rules of Professional Conduct.”); IND. R. PROF. CONDUCT 1.16, comment [1] (as amended through Apr. 30, 2015) (“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.”).

- *Conflict between a lawyer’s current client and a lawyer’s former client or a third person.* An attorney cannot represent a client if that client’s case-related interests are likely to be at odds with the attorney’s duties to a former client or some third person.<sup>688</sup> If, for example, while the attorney was representing a former client, that client admitted confidentially to the lawyer that he alone had committed a crime and a potential new client was later charged with that same crime, the attorney could not represent the new client.<sup>689</sup> Likewise, if an attorney were elected to the county council that sets and limits the budget for public representation, the attorney’s duties to the county taxpayers who elected him would prevent that attorney from representing a potential client whose case required public financing beyond what the county budget allowed.
- *Conflict between the lawyer’s personal interests and the interests of the lawyer’s client.* An attorney cannot represent a client if the attorney’s own personal interests are likely to be at odds with the client’s case-related interests.<sup>690</sup> A lawyer could not, for example, represent a client who was charged with committing an offense against a member of the lawyer’s family. Lawyers from the same family should not represent different clients in the same case.<sup>691</sup> And, when the needs of a client’s case require the lawyer to spend

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<sup>688</sup> IND. R. PROF. CONDUCT 1.7(a)(2) (as amended through Apr. 30, 2015) (“[A] lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to . . . a former client or a third person . . .”); IND. R. PROF. CONDUCT 1.9 (as amended through Apr. 30, 2015) (prohibiting a lawyer from using or revealing information obtained during the course of representing a former client, and prohibiting a lawyer from representing a new client in a substantially related matter where the new client’s interests are “materially adverse to the interests of the former client”).

<sup>689</sup> IND. R. PROF. CONDUCT 1.6, comment [3] (as amended through Apr. 30, 2015) (“The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”); IND. R. PROF. CONDUCT 1.6, comment [18] (as amended through Apr. 30, 2015) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

<sup>690</sup> IND. R. PROF. CONDUCT 1.7(a)(2) (as amended through Apr. 30, 2015) (“[A] lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.”).

<sup>691</sup> IND. R. PROF. CONDUCT 1.7, comment 11 (as amended through Apr. 30, 2015) (“When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidence will be revealed and that the lawyer’s family relationship will interfere with both loyalty and independent professional judgment. . . . Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party . . .”).

money out of his own compensation, there is a conflict between the lawyer's personal interests and that of the client.

Consider, for example, a public defense system funded and administered at the state level where a state chief defender is a direct gubernatorial appointee who can be terminated at the will of the governor. The chief defender will feel the pressure of undue political interference if, for example, the governor calls for all executive departments to take a ten percent budget cut. Since the bulk of an indigent defense system's expenditures are in personnel, the cut must come at the expense of staff. Unlike other aspects of the criminal justice system, defense practitioners have no control over the number of new cases requiring their services.<sup>692</sup> Therefore, a ten percent budget cut will cause excessive caseloads unless it is met by a ten percent cut in public defender workload. If the public defender objects, the governor could replace him with someone willing to do what the executive says.<sup>693</sup> In short, any structure of services that places the attorney's personal financial wellbeing in direct competition with the stated interest of a defendant is a constructive denial of counsel.

As the U.S. Supreme Court stated in *Glasser v. United States*,<sup>694</sup> “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall

<sup>692</sup> A defender cannot control the number of defendants requiring public defense services. Those decisions are made elsewhere: the legislature could increase the number of statutory offenses in which jail time is a potential sentence; an increase in the number of police positions will correspondingly increase the number of arrests being made; and, prosecutors may choose to file charges rather than dismissing marginal cases. All of these choices are outside of the control of the indigent defense systems and the lawyers providing direct services, but all such choices will increase the number of clients the system must represent.

<sup>693</sup> Indeed, this scenario took place in New Mexico prior to the electorate amending their state constitution to require independence of the defense function. In February 2011, the New Mexico Governor terminated the state's chief public defender, in the middle of the legislative session, for suggesting that the state public defender department was underfunded. “I fear that I was not taking positions that the Governor liked in various obligations for the [Chief] Public Defender,” Dangler says. “We have a very, very bad budget crisis, and I was testifying last week in front of the various committees. In fact it's kind of interesting that my firing comes the week after my testimony. And I basically said, “We can't make it with the budget we've been offered by either the [Legislative Finance Committee] or the Governor.” And I think you're supposed to say that, “Of course, we support the Governor's option.”” Wren Abbot, *Chief Public Defender Dismissed: Testimony at State Legislature a Possible Trigger*, SANTA FE REPORTER, Feb. 17, 2011, available at <http://www.sfreporter.com/santafe/blog-2687-breaking-chief-public-defender-dismissed.html>.

Although the termination of then-chief public defender Hugh Dangler occurred under a Republican administration, undue political interference with the right to counsel in New Mexico is not a partisan issue. In fact, former New Mexico Governor Bill Richardson, a Democrat, vetoed a bill passed on an overwhelmingly bipartisan basis that would have removed the governor's authority to appoint the chief public defender and created an independent statewide public defender commission. Bill Richardson, *Governor Richardson Vetoes Legislation Creating New Public Defender Commission* (Feb. 28, 2008), available at <http://votesmart.org/public-statement/323912/governor-richardson-vetoes-legislation-creating-new-public-defender-commission#.VRApiVxHHds>.

<sup>694</sup> 315 U.S. 60 (1942).

simultaneously represent conflicting interests.”<sup>695</sup> Just as an individual attorney in these scenarios has to withdraw from representing the person with whom there is a conflict, so too does the entire law firm in which that attorney practices, other than in conflicts that relate solely to the personal interests of the lawyer.<sup>696</sup> Further still, U.S. Supreme Court case law is clear that all defendants have a right to representation without governmental interference.<sup>697</sup>

The State of Indiana, therefore, has a constitutional obligation to ensure the systems established for providing Sixth Amendment services are free from conflicts that interfere with counsel’s ability to render effective representation to each defendant.

### A. Understanding caseloads.

The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.<sup>698</sup> NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.<sup>699</sup>

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<sup>695</sup> *Id.* at 70.

<sup>696</sup> IND. R. PROF. CONDUCT 1.10 and 1.10 comment [1] (as amended through Apr. 30, 2015) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm” and unless waived by the affected client; “the term ‘firm’ denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”).

<sup>697</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”).

<sup>698</sup> Building on the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding, to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function.

<sup>699</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c. 13 (The Defense), Standard 13.12 (1973).

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and pro bono). It also assumes that the lawyer does not have any other duties, such as management or supervisory responsibilities. The NAC standards can be prorated for mixed caseloads; for example, an attorney could carry 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with national caseload standards. It is these NAC caseload maximums to which national standards refer when they say that "in no event" should national caseload standards be exceeded.

While the NAC caseload limits were established and remain as absolute maximums, policymakers in many states have since recognized the need to set localized workload standards that take into account additional demands made on defense attorneys in each case (such as the travel distance between the court and the local jail, or the prosecution's charging practices, or increased complexity of forensic sciences and criminal justice technology) – all of which increase the amount of time, beyond that contemplated by the 1973 NAC standards, that is necessary for the lawyer to provide effective representation. For exactly this reason, many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.<sup>700</sup>

Indiana does not have any statewide limits on the number of cases that an attorney representing indigent clients may handle in a year. For courts and counties that participate in the non-capital indigent expense reimbursement program, the Commission *Standards* establish the maximum number of cases that each attorney may be assigned during a rolling 12-month period.

Among the eight sample counties considered in this evaluation, only three (Elkhart, Lawrence, and Marion) have *any* attorneys who devote 100% of their professional time to representing their indigent clients. Even within these counties' public defense systems, some (or many) of the attorneys also have private law offices where they represent an unlimited number of private clients. With only one small exception,<sup>701</sup> no one keeps track of or can report the number of private cases handled by the attorneys appointed to represent indigent clients.

By far, most all of the attorneys in the eight sample counties who are appointed to represent indigent clients do so as a part-time job with no mandatory number of

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<sup>700</sup> AMERICAN COUNSEL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) ("In many jurisdictions, caseload limits should be lower than the NAC standards.")

<sup>701</sup> In Marion County, salaried staff attorneys are allowed to carry a minimal number of private cases, in addition to their public defense clients, calculated on a weighted points basis. They must report their private caseloads to the agency quarterly. As of 2015, only ten of the agency's staff attorneys had any private cases, and the maximum number they are allowed to handle is ten to eleven at a time.

hours they must devote to public defense. This is as true in counties that use a public defender office as their primary system (Elkhart and Lake County criminal division) as it is in counties that use contracts (Lake County county and juvenile divisions, Montgomery, Scott, Warrick) or assigned counsel (Blackford) as their primary system. In all eight counties, the secondary system of providing indigent defense is made up of attorneys who accept indigent case appointments only on a part-time basis, while maintaining a private practice where they represent any number of private clients. Nothing prevents any of these part-time indigent defense attorneys from accepting as many indigent defense appointments as they wish from other Indiana counties,<sup>702</sup> from nearby states, or from the federal courts as well.

For counties and courts that do not participate in the non-capital indigent expense reimbursement program, Indiana does not require anyone to report the number of indigent cases assigned to or carried by each attorney.<sup>703</sup> For counties and courts that do participate in the non-capital reimbursement program, the Commission requires each county, for every quarter that it seeks reimbursement, to report the number of new cases, broken down by type of case, assigned to each system attorney during each quarter for a 12-month period. However, the county reports do not show when cases commence and dispose, nor do they show the number of cases an attorney has open during any reporting period in addition to the newly assigned cases. So even for the full-time attorneys in the public defender offices in Elkhart, Lawrence, and Marion Counties, the caseloads are underreported for purposes of comparison to national standards.

As a result of all of this, what can be said for certain is that *every* public defense attorney in the eight sample counties is carrying *more* cases than are reflected in the 2014 caseload assignments discussed in this chapter.

## **B. Understanding compensation.**

In 2013, the National Association of Criminal Defense Lawyers published a comprehensive study of the rates of compensation paid to private attorneys to provide representation to indigent people, whether under contract or appointed on a case by case basis, in all fifty states<sup>704</sup> and found generally that the low compensation rates

<sup>702</sup> In 2015, the Commission began for the first time comparing its own records from participating counties to check the combined number of cases a single attorney is being assigned from two or more participating counties for the same quarters and the same rolling 12-month periods. But, if an attorney accepts indigent cases from a non-participating county or court, the Commission has no way of tracking this.

<sup>703</sup> All Indiana trial courts report case statistics to the Division of State Court Administration and these are publicly available in each year's Judicial Service Report, but the courts are not required to report the number of appointments made to individual attorneys.

<sup>704</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS (Mar. 2013).

provided to lawyers across America are a “serious threat to our criminal justice system.”<sup>705</sup> The requirement that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each client. Inadequate compensation “leads to a decrease in the overall number of attorneys willing to accept court appointments”<sup>706</sup> and can “encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet.”<sup>707</sup>

Flat fee contracts, in which a lawyer earns the same pay no matter how many cases he is required to handle, create financial incentives for a lawyer to dispose of cases as quickly as possible, rather than as effectively as possible for the client. Even where the defendant has a winnable case, the lawyer’s incentive nevertheless is to resolve it by plea. The attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Instead, the attorney is hurt financially the more he does for his clients.

The situation becomes worse still when the public defense attorney must pay for overhead and the case related expenses of his clients out of the compensation he receives. The financial resources needed for the defense of every indigent case fall into three categories: law office overhead; case-related expenses; and fair lawyer compensation.<sup>708</sup>

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, there are certain expenses that must be paid. These include: office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer can represent the first client.<sup>709</sup>

<sup>705</sup> *Id.*, at 12.

<sup>706</sup> *Id.*, at 15.

<sup>707</sup> *Id.*, at 16.

<sup>708</sup> See, e.g., ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002) (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . separately fund expert, investigative, and other litigation support services.”).

<sup>709</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013) (noting that “[t]he 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” and overhead tends to be a higher percentage of gross receipts as a law office gets smaller). See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary, at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in



- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are the expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case – some cases requiring very little in the way of expense, other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client’s case.
- *Fair lawyer compensation.* Since 1854 Indiana’s Supreme Court has held that attorneys must receive just compensation when they are appointed to represent indigent defendants.<sup>710</sup> Compensation is the attorney’s take home pay.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”<sup>711</sup> Further, “[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.”<sup>712</sup> The American Bar Association *Standards for Criminal Justice* explain that attorneys must have adequate resources and support staff in order to render quality legal representation.<sup>713</sup>

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smaller law offices).

<sup>710</sup> *Webb v. Baird*, 6 Ind. 11, 14 (1854) (relying on IND. CONST. of 1851, art. 1, § 21). The American Bar Association similarly advises that lawyers should not be required to provide *pro bono* legal services in criminal cases. ABA, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Standard 5-2.4 Commentary (3d ed. 1992). *See e.g.*, *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (finding that state constitution prevents an attorney from being forced to represent an indigent defendant for less than the compensation received by the average competent attorney operating on the open market); *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982) (holding that attorneys cannot constitutionally be compelled to represent indigent defendants without compensation); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987) (observing that the state is obligated to pay appointed counsel fair compensation); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (requiring attorneys to represent indigent defendants for no compensation constitutes a substantial deprivation of property without just compensation); *Kovarik v. County of Banner*, 224 N.W.2d 761 (Neb. 1975) (noting that attorneys appointed by the courts are entitled to reasonable compensation); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (stating courts lack power to appoint counsel without compensation).

<sup>711</sup> ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8, at 3 (Feb. 2002).

<sup>712</sup> ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8, at 3 (Feb. 2002).

<sup>713</sup> ABA, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Standard 5-1.4 Commentary (3d ed. 1992). “Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying,

For counties that participate in the non-capital indigent expense reimbursement program, the Commission *Standards* require the county to ensure that defense lawyers have “adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.”<sup>714</sup>

The Supreme Court has determined that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel.<sup>715</sup> Moreover, it is crucial that an investigator be available to assist the attorney with interviewing witnesses, else “the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses’ credibility if their testimony conflicts with statements previously given or withdrawing from the case.”<sup>716</sup> The U.S. Supreme Court has also held, for example, that an indigent accused is entitled to the assistance of a psychiatrist at public expense to assert an insanity defense.<sup>717</sup>

The government is responsible for providing the resources needed in each defendant’s case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the public attorneys for these expenses. What government cannot do, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the public attorneys.<sup>718</sup>

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and specialized equipment required to perform necessary investigations.” *Id.*

<sup>714</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standard I, Commentary (as amended through June 18, 2014).

<sup>715</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

<sup>716</sup> ABA, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Standard 5-1.4 Commentary (3d ed. 1992).

<sup>717</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>718</sup> *See, e.g., Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining that assigned counsel are entitled to a reasonable fee in addition to overhead expenses, in case where state’s Attorney General had issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying); *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993) (determining that indigent defense attorneys were entitled to overhead expenses, presumptively set at \$30 per hour, in addition to a reasonable fee); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (determining under the state constitution that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case); *State ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (observing that the state “has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses;” testimony showed the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour); *State v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that “in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs”); *Wilson v. State*, 574 So.2d 1338, 1340 (Miss. 1990) (determining that indigent defense attorneys are entitled to “reimbursement of actual expenses” in addition to a reasonable sum; defining “actual expenses” to include “all actual costs to the lawyer for the

When lawyers' compensation decreases with each additional case, or when forced to pay the overhead and case related expenses of every client's case out of a flat fee, lawyers often come to resent their clients or at least the number of clients they are appointed to represent. Put another way, the government's compensation structure creates a conflict between the lawyer's financial interests and the case-related interests of each of his court-appointed clients. As a result of that conflict, the lawyer may triage the time and energy he puts into his cases.<sup>719</sup> A federal court in 2013 called the use of such flat fee contracts an "[i]ntentional choice[]" of government that purposely leaves "the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable."<sup>720</sup>

Indiana's *Rules of Professional Conduct* require that "a lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer."<sup>721</sup> Indiana has a constitutional obligation to ensure that the systems its counties use to provide representation to the poor do not create these conflicts that interfere with counsel's ability to effectively represent their clients.

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purpose of keeping his or her door open to handle this case," and allowing defense attorneys to receive a "pro rata share of actual overhead"); *State v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses" and "provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses" in order "to place the counsel for the defense on an equal footing with counsel for the prosecution"); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (raising the hourly rate paid to court appointed attorneys on a finding that they were forced to "involuntarily subsidize the State with out-of-pocket cash," because the then-current rates did not cover attorney overhead shown to be \$35 per hour in West Virginia in 1989; and "[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial").

<sup>719</sup> And the attorney has no incentive to dedicate time toward developing his client's trust.

<sup>720</sup> *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, Memorandum of Decision at 15 (W.D. Wash. Dec. 4, 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

<sup>721</sup> IND. R. PROF. CONDUCT 1.7(a)(2) (as amended through Apr. 30, 2015).

### **C. Lack of workload standards and insufficient compensation affect representation.**

*1. Blackford County.* In Blackford County each of the two judges selects individual attorneys to appoint on a case-by-case basis to represent indigent defendants in their courtroom. In 2014, a total of seven attorneys received appointments across the two courts.

All of the assigned counsel attorneys work out of their own private law offices. The attorneys are responsible for providing all of their own overhead needs. To the extent that they have secretarial or paralegal support staff, the attorneys employ them privately and pay their salaries. Although attorneys can submit receipts for out-of-pocket expenditures for things like postage, long-distance telephone calls, mileage, and copies, they generally do not, and so they pay these costs of their clients' cases themselves. To use an investigator or an expert in a case, the attorney must file a motion with the court requesting one, and the court conducts a hearing to determine whether the expenditure is necessary. Prosecutors participate in these hearings, primarily out of concern for the county's budget. One defense attorney said he had rarely ever requested an expert, but had never been denied the use of one when requested, primarily for medical or psychiatric issues. To select the particular expert to be hired, the defense attorney said, "the judge has a list to pick from."

These assigned counsel attorneys are paid hourly for their representation of indigent defendants: \$45 per hour for misdemeanors and \$70 per hour for felonies. Like any private attorney, some percentage of their earnings goes to pay for overhead, and whatever is left after that (and unreimbursed out of pocket expenses) is the attorney's take-home pay. Attorneys and judges alike believe the misdemeanor compensation is likely too low to adequately compensate attorneys for their actual overhead and also allow them to make any profit. As a result, there is little if any incentive for out-of-county attorneys to agree to accept misdemeanor appointments. One attorney, who said he did not know what his actual overhead cost is, felt that the felony pay rate was likely sufficient to generate a profit. This attorney works in basically a one-man office, with volunteer secretarial support and monthly rent including utilities of \$450 per month – he believes his total monthly overhead is approximately \$600 per month, but he thinks his circumstances are unusual and that most attorneys must spend more on overhead.

As of February 2015, there were only three attorneys who were then willing to be appointed to level 6 felonies and misdemeanors in superior court and only one was from Blackford County; the other two maintain their offices in Jay County and Grant County. Similarly, there was only one Blackford County attorney who was willing to accept assignments to represent indigent people in circuit court. All other attorneys

who accept indigent representation assignments in circuit court are located in the adjacent counties of Delaware, Grant, and Jay. This makes it almost impossible for indigent clients to meet with their public defense attorney at any time other than when there is a hearing set in their case. The superior court judge confirmed that he prefers to appoint local in-county attorneys whenever possible because he is concerned that indigent defendants often do not have any way to travel to see out-of-county attorneys.

Indeed, after appointing counsel at the initial hearing the judges tell every defendant, “It is up to you to get in touch with [your public defender]. If you don’t show interest in your case, don’t expect him to show interest.” Further, the judges explain “you may be able to make arrangements to meet with [your public defender] here at this courthouse if they have other unrelated business here.” One appointed defense attorney confirmed that he does not make any effort to contact out-of-custody defendants when he is appointed to represent them. If the defendant calls him, then he will make an appointment to see them. For in-custody defendants he will make an effort to see them at the jail.

Blackford County participates in the non-capital reimbursement program, and so it submits to the Commission worksheets showing new case assignments to each of its attorneys on a quarterly basis. The county reports some of its attorneys as “part-time” and others as “full-time” -- even though all seven of the attorneys who accepted assigned cases during 2014 have private law offices, none of them work full-time as a public attorney in Blackford County, and they all receive exactly the same hourly rate of compensation.

Based on the Blackford County caseload worksheets submitted to the Commission, the number of cases assigned to each public defense attorney in Blackford County in 2014 is well within those allowed by both national standards and the Commission *Standards*.

However, each of these attorneys can represent an unlimited number of far more lucrative private clients, in addition to their public defense clients. Because the attorneys are paid less for misdemeanor cases than for felonies, many of them anticipate their income from public defense will decrease as a result of the revision to the Indiana criminal laws that took effect in July 2014. This is because many charges that were previously felonies are now misdemeanors, so attorneys will be paid less for handling them.

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## A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR ALL ATTORNEYS IN  
BLACKFORD COUNTY

[ via 6AC website ]

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2. *Scott County*. Scott County contracts annually with seven private attorneys to provide representation to indigent defendants in all cases except murder and appeals. All of the contracting attorneys work out of their own private law offices. They are

responsible for providing all of their own overhead needs. To the extent that the contract attorneys have secretarial or paralegal support staff, the attorneys employ them privately and pay their salaries. The contracts do not provide for the attorneys to be reimbursed for out-of-pocket expenses for things like postage, long-distance telephone calls, mileage, and copies, incurred in representing their indigent clients, so the lawyers must pay for these expenses in their clients' cases out of their flat fee compensation. This creates a disincentive on the part of the attorney to incur these expenses on behalf of their indigent clients.

One contract attorney calculated the actual rate of pay for Scott County indigent representation work during 2013. The contract rate that year, as now, was \$30,000. It did not reimburse the contract attorneys for out-of-pocket expenses incurred in representing indigent clients, and the contracts today do not do so either. This contract attorney incurred \$635 in postage and \$183.96 in paper costs alone, not considering file folders, envelopes, long distance phone calls, and the like. After these meager expenses of \$818.96, the income was reduced to \$29,181.04. This attorney devoted 552.52 hours to Scott County indigent clients in 2013, but the attorney also had overhead that contributed to the representation of those clients, paying a legal assistant \$11.75 per hour (and this does not take into account other overhead expenses such as office rent, utilities, bar dues, CLE, legal research, and other expenses necessary just to show up for work as an attorney). After deducting only the legal assistant overhead of \$6,492.11, the attorney's remaining take home pay was \$22,688.93 -- or \$41.06 per hour.

To use an investigator or an expert, the attorney has to request funds from the court, and Scott County contract attorneys very rarely request funds from the courts for their clients' cases. One contract defender advised he has never applied for an investigator or a social worker. "I'm reliant on my clients to act as investigator," said one contract lawyer. "I tell my clients, 'If you have witnesses, get them *here!*'" Occasionally an attorney might request an interpreter for a Spanish-speaking client or for an independent polygraph. When asked to do so, the judges typically grant the requested funds, "probably because we rarely ask." The lawyers rarely ever request experts, and then only in more serious cases. Indeed, the 2014 county expenditures reflect that only \$4,370.11 was spent in combination for attorneys appointed to cases on an hourly basis (at \$60 per hour) and all other case-related expenditures in indigent cases.

Six of the attorneys are paid \$30,000 annually to handle all of the primary and conflict criminal and juvenile delinquency indigent defense cases (excluding murder) and up to three conflict-based CHINS or TPR cases each year in the two courtrooms.<sup>722</sup> One

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<sup>722</sup> See, e.g., Contract for Public Defender Services, para. V, between Raleigh Campbell and Scott County Public Defender Board, covering term of January 1, 2015 through December 31, 2015; Contract for Public Defender Services, para. V, between Murielle S. Webster Bright and Scott County Public Defender Board, covering term of January 1, 2015 through December 31, 2015.

of these attorneys handles a reduced caseload but also serves as the public defender administrator.<sup>723</sup> One of these attorneys plus one more lawyer are paid \$17,500 per year to handle all indigent CHINS and TPR cases.<sup>724</sup>

These are fixed-fee contracts that require the contracting attorneys to handle an unlimited number of cases at a fixed annual rate of compensation – the compensation does not change no matter how many or how few cases the attorneys are required to handle. “You’re conditioned to spend a certain amount of time,” said one contract defender. “And if you get a little breathing room, you can pick up other work – divorce, etc. But you’re not spending more time on your public defender cases. You’re not getting any more money.”

Scott County does not participate in the non-capital reimbursement program. The Scott County public defender administrator provided the number of new cases assigned, by attorney and case type, in 2014.

The number of cases assigned to many of these attorneys is worrisome, given that these are part-time attorneys who can represent an unlimited number of private clients in addition to their public defense clients. For example, one attorney was assigned 121 CHINS/TPR cases (a number that exceeds the Commission’s allowed maximum in a single year for a full-time attorney with adequate support staff), but was additionally assigned 50 felonies, 25 juvenile delinquencies, and 27 other adult and juvenile cases.

The contract attorneys acknowledge that their private caseloads are always on their minds. Said one contract lawyer “We’re all private attorneys too, so we’re really busy with our other cases.” For example, the public defender administrator works in a private law firm where she handles all of the firm’s family law cases, in addition to administering the indigent representation system and carrying 2/3 of a caseload in superior court. At least one Scott County contract lawyer holds contracts in multiple counties. The strain of an excessive workload prompted this contract attorney to write to the Scott County Council in August 2014, and, after expressing her gratitude for the contract, said:

[M]y caseload in Superior Court is overwhelming. I currently have over one hundred open cases in Superior Court, and since April 2012, I have closed approximately another two hundred cases. This presents the

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**A CLOSER LOOK**

2014 CASELOAD ASSIGNMENTS  
 FOR ALL ATTORNEYS IN  
 SCOTT COUNTY

[ via 6AC website ]  
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<sup>723</sup> See, e.g., Contract for Public Defender Services, between Jennifer Lewis and Scott County Public Defender Board, covering term of January 1, 2007 through December 31, 2007.

<sup>724</sup> See, e.g., Contract for Public Defender Services, para. V, between John Dietrich and Scott County Public Defender Board, covering term of January 1, 2015 through December 31, 2015.

problem of being able to provide effective representation for my clients. At this time, I am confident that I do provide my clients with effective representation; however, it is a trying and difficult task to do so. If the Council would create and budget for another one or two public defender positions in Superior Court, I feel it would greatly reduce the current public defenders['] overwhelming caseload and also allow for more competent representation of each appointed client.

Attorneys make an effort to ensure that their clients who are in-custody know who they are. But for out-of-custody defendants, the attorneys write them a letter and wait to hear back. Many of the Scott County contract defenders have their offices in other counties, which makes it difficult for indigent defendants to go to their lawyer's office for meetings. The attorneys rarely meet with their clients other than at the courthouse preceding, during, or following a hearing in the client's case. The courts, whenever possible, allow the public attorneys to schedule their cases so that they can come to court just one day a week for all of their indigent cases. As a prosecutor observed, "that means [the attorneys are] often going to have 15 clients all on one day that they've never met before. Our public defenders would do a better job if they had more time."

The first time attorneys review discovery with their clients is often at the pretrial setting. "A lot of times, that's the first time [the indigent defense attorneys are] meeting the client – at the pretrial setting," said one prosecuting attorney. And the appointed attorneys are "reviewing the plea offer for the first time that day." As one defense attorney explained, "I don't get to spend any time getting their version of the facts. I just meet them at the trial setting and say, 'Here's the plea offer.'" If the plea offer is not agreeable, the attorney cannot discuss with their client a follow-up offer from the prosecutor until the next setting at the courthouse – some three or four weeks later.

The county prosecutor has concerns: "The one thing that worries me is [the public defenders] have a disincentive to take cases to trial. They're more likely to just plead them." Public defender data backs up the prosecutor's point. In ten years, "there have been three trials" in circuit court. One contract lawyer said, "I haven't had a trial in seven years."

3. *Montgomery County*. Montgomery County contracts with seven private attorneys to provide representation to indigent people in all cases in the county (primary and conflict), except: murder, class A felonies, appeals, habeas corpus, sentence modifications, post-conviction, and modification of marriage dissolution and paternity.<sup>725</sup>

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<sup>725</sup> See sample Contract for Legal Services for Indigent Defendants, provided by Montgomery County public defense administrator.



All of the contracting attorneys work out of their own private law offices. They are responsible for providing all of their own overhead needs, and to the extent that they have secretarial or paralegal support staff, the attorneys employ them privately and pay their salaries. The Montgomery County contracts expressly provide that the county will not reimburse the contracting attorneys for overhead expenses including “rent, office equipment, supplies, regular office employees, library expenses, or other ordinary and usual office expenditures.”<sup>726</sup> Similarly, the contract for the public defense administrator expressly states that the county will not pay or reimburse for “any secretarial or other employee expenses the Public Defender Administrator requires in order to perform the job, nor any other overhead costs such as office space, equipment, etc.”<sup>727</sup> The contracting attorneys are all contractually required to pay for their own malpractice insurance and provide proof to the county that they have it during the entire period of the contract.<sup>728</sup>

The county reimburses the contract attorneys for the costs of postage, copies at \$.20 per copy, and long distance telephone calls incurred by the contracting attorneys in representing their indigent clients, but only up to a maximum of \$1,500 per year.<sup>729</sup> To the extent that an attorney incurs out-of-pocket expenses in excess of \$1,500 per year in the representation of his indigent clients, the attorney is responsible for these expenses,<sup>730</sup> creating a disincentive on their part to incur these expenses on behalf of their indigent clients. One contract attorney estimates he spends \$3,500 to \$4,000 each year for these basic costs of his clients’ cases. To avoid printing and copying costs, some defenders print and mail a copy of discovery to their clients, but use only the digital version they receive from the prosecutors for themselves. Phone calls from clients who are in jail are toll calls, so defenders do not accept them.

<sup>726</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 10, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 10, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>727</sup> Contract for Public Defender Administrator, para. 5, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>728</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 11, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 11, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>729</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 9, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 9, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>730</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 9, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 9, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

By contract, the public defense attorneys are required to “provide written notice to all clients within 72 hours of the time the appointment is made” of the attorney’s name and contact information.<sup>731</sup> The contracts also require that the contracting attorneys visit any client who is in jail within five business days of being appointed and conduct an initial interview (by phone or in person) of any client who is not in custody within ten business days.<sup>732</sup> The contracts expressly state that, “[w]hile occasionally it cannot be avoided, initial interviews with clients on the day of hearing are not acceptable practice.”<sup>733</sup>

For investigation, the attorneys must file a motion to request funds from the courts. One attorney advises that he has never requested funds for an investigator on behalf of an indigent defendant, because “once you get a PI for one case, you need one for every case. I don’t think they would justify it for anything less than a serious felony.” One judge, though, says he always approves requests for investigators, whenever defense attorneys make those requests. Instead, most defenders investigate their cases themselves.

The contracts in place at the time of this evaluation were for a three-year term expiring December 31, 2015.<sup>734</sup> These are flat-fee contracts that require the contracting attorneys to handle an unlimited number of cases at a fixed annual rate of compensation – the compensation does not change no matter how many or how few cases the attorneys are required to handle. Three of the contracting attorneys are paid \$44,000 per year,<sup>735</sup> and the other four are paid \$40,000 per year.<sup>736</sup> One of the seven contracting attorneys

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<sup>731</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 6, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 6, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>732</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 6, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 6, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>733</sup> See, e.g., Contract for Legal Services for Indigent Defendants, para. 6, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015; Contract for Legal Services for Indigent Defendants, para. 6, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>734</sup> See sample Contract for Legal Services for Indigent Defendants, provided by Montgomery County public defense administrator.

<sup>735</sup> See, e.g., Contract for Legal Services for Indigent Defendants, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

<sup>736</sup> See, e.g., Contract for Legal Services for Indigent Defendants, between Christopher Redmaster and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

additionally serves as the public defense administrator and is paid an additional \$10,000 per year for these services.<sup>737</sup>

As a general rule, each defense contractor is assigned to a specific courtroom, though all of the attorneys from time to time are assigned to cases in other courtrooms. The younger attorneys are always assigned to Superior 2 because their lesser experience means they are not qualified to handle more serious cases.

**Montgomery County  
Public Defender Assignments**

	Circuit Court, serious felony	Superior Court 1, level 6 felony	Superior Court 2, misdemeanor	Circuit Court, juvenile	Circuit Court, CHINS / TPR	Superior Court 1, drug court	Superior Court 2, veterans court
Dicks	█						
Donaldson						█	
Homann		█					
Nichols							
Petrie			█				█
Redmaster		█					
Tanselle			█				

Note: During the first six months of 2015, Donaldson and Homann swapped courtrooms so that Homann would not be appearing before his former law partner Judge Dennison who was newly elected to the Superior 1 bench. During that time, Donaldson was assigned to Superior 1 and Homann was assigned to Circuit. Dicks is always assigned to the first indigent parent in a CHINS/TPR case. Other attorneys are assigned as needed to additional indigent parents or children.

The attorney who serves on the veterans’ court team does so as a *volunteer* with no compensation. When the judge asked him to volunteer, he said yes, because “when the Judge asks . . .” The attorney who serves on the drug court team is paid hourly for this work (approximately two hours per week), in addition to his flat fee contract.

Although the county no longer participates in the non-capital reimbursement program, the public defender administrator continues to use the same reporting form and provides a quarterly report of new case assignments to the circuit court judge. While

<sup>737</sup> Contract for Public Defender Administrator, between Sarah Dicks and Montgomery County Public Defender Board, covering term of January 1, 2013 through December 31, 2015.

participating in the reimbursement program, the Commission allowed Montgomery County to report its contract attorneys as full-time with inadequate support staff and, based on whatever percentage the attorney’s compensation was of the highest paid deputy prosecutor in the county, the county was allowed to assign them up to that same percentage of a full-time caseload. No contract attorney in Montgomery County has ever been full-time. Their contracts expressly provide that they “may continue to maintain separate law practices” and in fact each of them does so. For this reason, 6AC shows the contract attorneys as being part-time with inadequate support staff during 2014.

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### A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR ALL ATTORNEYS IN  
MONTGOMERY COUNTY

[ via 6AC website ]

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If the Montgomery County attorneys were full-time with adequate support staff, then the number of cases assigned to each of them in 2014 would be within those allowed by both national standards and the Commission *Standards*, but that is not the case. Each of these attorneys can represent an unlimited number of far more lucrative private clients, in addition to their public defense clients. The contract defense attorneys also have a right of first refusal to accept appointments to represent indigent defendants in murder, class A felonies, and appeals and be paid an hourly rate for

them, beyond their contract compensation.<sup>738</sup> None of the contracting attorneys accept public appointments in other counties, although there is no prohibition against their doing so.

One judge reported that the one problem with the public defense system is delay caused by the contracting attorneys, because they all have private civil practices. There are usually only one or two trials each year among all of the public defense attorneys, and some of the public defense attorneys have never tried a jury trial.

The contract attorneys believe their compensation is too low. As one defender said, it is “tough to make a living” because the defenders are underpaid and there is not much private work available. Montgomery County has a disproportionately large number of attorneys for the population – 30 full-time attorneys all competing for cases. By contrast, nearby Putnam County has a similar population and only ten attorneys. There is generalized fear that the compensation of the defense attorneys may decrease and their indigent caseloads may increase. The Commission was the only safety net to ensure that the public defense attorneys’ caseloads are not excessive. The public defender board cannot enter into contracts that, in total, provide more compensation than the county council has allocated, but the board could contract to pay less if

<sup>738</sup> See sample Contract for Legal Services for Indigent Defendants, provided by Montgomery County public defense administrator.

attorneys would accept those contracts. As one public defender board member explained, “my function is to get attorneys to work for as little as I can get them to work for,” and “I don’t look at being a public defender as a career profession.

*4. Lawrence County.* Lawrence County uses a public defender office as its primary method of providing representation in indigent cases.<sup>739</sup> The county provides a large office space for the agency located a short drive away from the courthouse and the jail. The public defender office thinks the physical separation from the courthouse is helpful in demonstrating to clients that the office is separate from the prosecutor’s office, and it allows defendants who have arrest warrants to meet with their attorneys without risking arrest. The public defender office budget includes funding for postage, telephone, mileage, copies, and similar out-of-pocket expenses needed in clients’ cases.

Public defender office policy requires every attorney (or an intern) to contact in-custody defendants within 72 hours of appointment to their cases. In-custody defendants are offered a slip of paper in the jail to fill out requesting a visit from their attorney, which is collected and sent to the public defender office every day. The public defender office does not accept collect calls from the jail because they do not trust the jail not to record their calls. Additionally, because no stamps are provided to indigent defendants (unless they have money to purchase them), the office does not receive much mail from in-custody clients.

The public defender office budget includes funding for case related needs such as investigators and experts. The office makes extensive use of student interns. For example, during the first quarter of 2013, it had three law students filling the roll of paralegal/law clerk, four criminal justice students performing clerical and investigative tasks, and one social work student who assisted clients with social service needs and assisted the attorneys with sentencing preparation.<sup>740</sup> The office attorneys do not often use investigators, instead using student interns to investigate cases.

As of May 2015, the office employed six full-time attorneys including the chief public defender, plus one full-time executive assistant and one full-time office manager. The public defender office attorneys are literally full-time. They cannot operate private law offices and they cannot represent clients outside of the Lawrence County public defender system.

Each of the six attorneys has primary responsibility for a particular court and case type: one is CHINS/TPR; one is juvenile delinquency; two divide the major felonies in one superior court; the chief public defender divides the felonies in the other superior court with the sixth attorney who also handles all appeals for the office. In addition to

<sup>739</sup> Where necessary, the public defender office uses an assigned counsel system of attorneys that it pays \$70 per hour plus travel costs as a secondary system.

<sup>740</sup> See Letter from Lawrence County Public Defender Agency, to Indiana Public Defender Commission (May 14, 2013).

this primary area of responsibility, all of the office attorneys represent codefendants in other courtrooms as needed, because the public defender office handles both primary and codefendant conflict cases. The county operates three problem-solving courts, and a public defender office attorney is assigned to each of them.

Lawrence County participates in the non-capital reimbursement program, and so it submits to the Commission worksheets showing new case assignments to each of its attorneys on a quarterly basis. The county reports all of its public defender office attorneys as having adequate support staff based on the number of student interns it has each quarter.

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### A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR ALL ATTORNEYS IN  
LAWRENCE COUNTY

[ via 6AC website ]

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The number of cases assigned to each Lawrence County attorney in 2014, as reported to the Commission, is within that allowed by both national standards and the Commission Standards.

Of concern, though, is that Lawrence County intentionally does not keep track of or report the number of indigent defendants on whose behalf it appears as “friend of the court” at initial hearings for the purpose of advising them about the strength of the prosecution case and any plea offer being made to them. (*See supra* pages 113 to 115). Also worrisome is

that the public defenders are advising defendants based on only a cursory glance at the prosecution file and without conducting any defense investigation of the facts.

Since approximately 2013, public defenders have been attending initial hearings to advise defendants without formally being appointed to their cases,<sup>741</sup> in a process the prosecution describes as “choreographed craziness.” Part of the motivation for the office policy of appearing at initial hearings but not enrolling on behalf of defendants is to decrease the public defenders’ caseloads. Prior to implementing this practice, many defendants received appointed counsel at their initial hearing, then they would only ask their public attorney a question or two before pleading guilty at the next hearing. The public defender office has “circumvent[ed] the whole process of assignment” (and undercounts the number of clients it is representing), by appearing only in a friend of the court capacity – after all, according to the then-chief public defender, the defendants “wanted to just plead.” The elected prosecutor confirms this, saying she and the office’s first chief public defender came up with the idea as “a way to keep public defenders’ numbers down” so they could have “one less on their books.” The office’s

<sup>741</sup> Prior to this, defendants, many of whom were held in-custody because of high bonds, would talk directly with prosecutors at initial hearings. Many defendants pled guilty, accepting the prosecutor’s plea offer that same day. Prosecutors felt uncomfortable about making plea deals with uncounseled defendants – “ethically, it’s a real issue” – and see the public defenders’ staffing of initial hearings as a step in the right direction.

first chief public defender considered entering oral appearances on the record for the defendants at the initial hearing, but ultimately decided not to because it would have thrown off the office's caseload numbers and jeopardized their compliance with the Commission.

The public defender office estimates that 50% of the defendants to whom plea offers are made plead guilty at the initial hearing. If every public defender reported twice as many misdemeanors as are now showing on the case assignment worksheet, several of them would be out of compliance with the Commission *Standards* on caseloads.

5. *Warrick County*. In Warrick County, the three judges orally contract on an annual basis with eight private attorneys to provide representation to indigent people in trial level cases, excluding murder cases and appeals.<sup>742</sup>

All of the contracting attorneys work out of their own private law offices, and they are responsible for providing all of their own overhead needs “including regular office overhead, staff or secretarial compensation, or otherwise.”<sup>743</sup> Typical rent for a law office in Warrick County is around \$1,000 per month. All of the contract attorneys have at least one secretary plus one or more other support staff, whom the attorneys employ and pay privately. The local rules expressly prohibit the attorneys from seeking reimbursement for work performed by their private office support staff.<sup>744</sup> Calls from the jail are toll calls, and so the contracting attorneys do not accept calls from their in-custody clients.

The judges reimburse the contracting attorneys for expenses such as certified mail or the cost of taking depositions, to the extent that the attorneys seek reimbursement. The 2014 county expenditures reflect that only \$3,973.86 was spent in combination for daily jury trial compensation and expense reimbursements to contract attorneys in indigent cases. To get an investigator or an expert for a case, the attorneys make a motion to the court. The contracting attorneys do not request funds for the defense of misdemeanor cases. “I have never seen a motion for defense expenses in appointed misdemeanor cases.” The prosecutor's office does not think the defenders use experts often in any type of case; “I haven't had a single *Frye* hearing,” said one prosecutor. One attorney said he has *threatened* to hire an expert in felony cases and gotten good outcomes through the threat, but has never actually hired one. When asking for investigative or expert assistance in a felony case, “I have never been declined,” said two different defense attorneys.

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<sup>742</sup> Warrick County Circuit and Superior Courts Local Rules of Practice and Procedure, LR87-CB-1 (July 2, 2014).

<sup>743</sup> *Id.* Although the contracts in Warrick County are oral, the local rules contain provisions governing the contracts.

<sup>744</sup> *Id.*

The contracting attorneys work under flat-fee contracts that require them to handle an unlimited number of cases at a fixed rate of compensation of \$31,875 per year<sup>745</sup> plus a daily jury trial rate of \$450 per day – the compensation does not change no matter how many or how few cases the attorneys are required to handle. The attorneys are paid monthly. Traditionally these monthly checks had been automatically generated and sent to the attorneys during the last week of each month.<sup>746</sup> A new county auditor was elected and took office in 2015 and changed this process.<sup>747</sup> Now each attorney must submit an invoice by the last day of the month for his work during that month. Each court approves the invoices for the particular attorneys it is responsible for paying, and on that approval the auditor will cut a check.

The reliability of the monthly paycheck is part of what attracts attorneys to take the public defense contracts. But the compensation is so low that, according to one contracting attorney, “if I looked at what I am making by the hour, I would probably want to walk away. . . . In nine years we’ve had one pay raise. The rate of pay is significantly lower than surrounding counties. They need to build something in for the cost of living or something.”

One of the eight attorneys is appointed in only civil cases, including CHINS, TPR, and child support collections that can result in incarceration. The other seven attorneys are appointed in adult criminal and juvenile delinquency cases, excluding murder and appeals. To the extent possible, the judges try to evenly appoint cases among the contracting attorneys. One attorney is appointed to the first parent in all civil proceedings, and additional attorneys are appointed on an hourly basis to represent additional parties in the same case as needed. Criminal and juvenile cases are assigned in as equal a rotation as possible to the other seven attorneys, except one attorney receives only half as many appointments because he also staffs the drug court. Conflicts also occasionally prevent the equal distribution of cases. For example, two of the contracting attorneys are members of the firm that serves as the Chandler Town Attorneys, so they are not appointed to cases arising out of the town of Chandler. Additionally, of the seven attorneys who take criminal cases, there are two law firms that each has two attorneys contracting as public defenders, so these attorneys cannot be appointed to represent codefendants.

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<sup>745</sup> Prior to 2006, the public defense contractors were paid only approximately \$11-12,000 per year, but they and their families were covered under the county health insurance plan. Two things happened: one of the county commissioners at the time was opposed to the county providing health insurance to what he saw as affluent attorneys; and many of the contracting attorneys went to the judges threatening to quit if the health insurance benefits were cancelled without any increase in compensation. Effective 2006, the contracting attorneys lost the health insurance benefits, but the annual contract compensation was increased to \$30,000 plus the \$450 per day jury trial rate, as reflected in the local rules.

<sup>746</sup> Notice from Superior Court 1 Judge, to Public Defenders paid by Superior Court No. 1 (Apr. 15, 2015).

<sup>747</sup> Email from Warrick County Auditor, to Warrick County Judges (Apr. 15, 2015).



To estimate the caseloads of the individual attorneys,<sup>748</sup> 6AC relied on publicly available data from the Indiana Judicial Service Report for 2014 for the numbers of cases assigned to pauper counsel for each court and case type.<sup>749</sup>

The estimated number of cases assigned to each Warrick County attorney in 2014 is less than half of that allowed by both national standards and the Commission *Standards*. It is not possible to know, though, the total number of cases each of these attorneys carry in a given year.

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**A CLOSER LOOK**

2014 CASELOAD ASSIGNMENTS  
 FOR ALL ATTORNEYS IN  
 WARRICK COUNTY

[ via 6AC website ]  
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All of the contracting attorneys can represent an unlimited number of private clients, in addition to their public defense clients. When attorneys are needed for indigent murder cases and appeals, the judges appoint lawyers and pay an hourly rate that each judge determines on a case-by-case basis.<sup>750</sup> There are no formal guidelines establishing the hourly rates that the judges pay (other than for death penalty cases where the rate is established by court rule). The contract public defense attorneys are eligible to be appointed to these cases and be paid the hourly rate for them, beyond their contract compensation.

The judges attempt to accommodate the contracting attorneys' schedules by letting them select one or two dates each month that all of their indigent cases will be set in each court. As one defense attorney explained it: "I started telling the judges 'I'm going to be in your court *one* day a month.'" Now the judges have started sending annual calendars and letting the attorneys pick dates to be in each courtroom.

The prosecutor does not see the defenders filing many motions. "They are not as savvy about motion practice. They don't typically cure by filing *in limine* motions in advance of trial," for example. Prosecution policies may have an effect on the extent to which defenders file substantive motions in cases. The prosecutor's policy is that, if a defender files a motion to suppress and loses, then the defendant must plead as charged or go to trial. One defense attorney said in two years he has not had a jury trial, has had perhaps six misdemeanor bench trials, and perhaps six evidentiary hearings.

The contract attorneys providing public defense are the same attorneys that people hire privately in Warrick County – "that important business people hire." "I don't see any difference in practice by the attorneys when representing private or appointed clients,"

<sup>748</sup> Only two of the four Warrick County judges made their caseload assignments available, and one judge had just taken the bench so could not provide caseload assignments for 2014.

<sup>749</sup> See SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT VOL. 2 at 722-23 (2014).

<sup>750</sup> For example, one judge pays \$70 to \$80 per hour in LWOP murder cases; another judge pays a flat rate of \$2,000 for appeals and pays \$75 per hour for CHINS, TPR, and murder cases.

said one judge. “We have a quality bar. They are on top of their game.” One private attorney described the public defense system as “functional; some of high ability and others not so.” But the prosecutor believes the Warrick County public defenders “are *very good* attorneys.”

6. *Elkhart County*. Elkhart County has two courthouses, one in Elkhart and one in Goshen, with a public defender office that handles the cases of all indigent defendants (both primary and conflict) charged with misdemeanors and felonies in the circuit and superior courts, as well as juvenile delinquency, CHINS, and TPR cases in the juvenile court. The office employs the chief public defender who is full-time, eight full-time attorneys, and seven part-time attorneys.

The office is divided into three units, each with its own office location: Elkhart Public Defender Office, Elkhart Juvenile Office, and Goshen Public Defender Office. The county provides office space: in Elkhart the juvenile and adult offices are located on two different floors of the courthouse; and in Goshen the office is also located in the courthouse. The public defender office budget includes funding for postage, telephone, mileage, copies, and similar out-of-pocket expenses needed in clients’ cases. The eight full-time office attorneys work out of the county-provided space. The seven part-time office attorneys work out of the county-provided space when they so desire; alternatively, they work from their private law offices.

Support staff is assigned to each of the three office units. All told, the sixteen attorneys share ten support staff.

- Elkhart Public Defender Office: Seven attorneys (three full-time and four part-time) have three legal assistants (two full-time and one 29 hours part-time). The office shares one full-time investigator with the juvenile defender office.
- Elkhart Juvenile Office: Two full-time attorneys have two legal assistants (one full-time and one 29 hours part-time). The office shares an investigator with the adult public defender office.
- Goshen Public Defender Office: Six attorneys (three full-time and three part-time) have three legal assistants (two full-time though one of those is only for 30 hours, and one 15-20 hours part-time). The office has one full-time investigator.

Public defense attorneys in Elkhart County rarely ever use experts in their clients’ cases. When a public defender needs an expert, they file a motion requesting the judge to authorize the expenditure. The only experts any judges recall the public defenders requesting were for competency evaluations, and even those extremely rarely.

**Elkhart County  
Public Defender Assignments**

**ELKHART PUBLIC DEFENDER OFFICE**

<b>Elkhart PD Office attorneys</b>	<b>Elkhart court assignments</b>	<b>Types of cases</b>
Bridgette Greene, P-T Theresa Heamon, P-T Philip Hesch, F-T Mark Manchak, F-T Christopher Petersen, P-T Kelley Schweinzger, P-T Michelle Voirol, F-T	Circuit Court, Juvenile Division	Juvenile, CHINS & TPR
Christopher Petersen, P-T Michelle Voirol, F-T	Superior 1	rape, criminal deviant conduct, sexual battery, criminal recklessness; level 3 and 4 not otherwise assigned; level 5 battery; level 6 domestic battery
Bridgette Greene, P-T Mark Manchak, F-T	Superior 2	burglary, welfare fraud, forgery, arson; level 5 theft and level 5 not otherwise assigned
Theresa Heamon, P-T Mark Manchak, F-T	Superior 5	1/3 of all level 6 and misdemeanors; 1/2 of habitual traffic offenses
Philip Hesch, F-T Kelley Schweinzger, P-T	Superior 6	1/3 of all level 6 and misdemeanors; non-support

**ELKHART JUVENILE OFFICE**

<b>Elkhart Juv Office attorneys</b>	<b>Elkhart court assignments</b>	<b>Types of Cases</b>
Holly Curtis, F-T Kelly Stansbury, F-T	Circuit Court, Juvenile Division	Juvenile, CHINS & TPR

**GOSHEN PUBLIC DEFENDER OFFICE**

<b>Goshen PD Office attorneys</b>	<b>Goshen court assignments</b>	<b>Types of Cases</b>
Jeffrey Majerek, F-T Peter Todd, F-T	Circuit Court	murder, attempted murder, manslaughter, vehicular homicide, robbery, reckless homicide; 1/2 of level 1 to 5 controlled substance offenses
Christopher Crawford, P-T Matthew Johnson, F-T	Superior 3	all child victim cases (except murder), kidnapping, confinement; level 1 and 2 not otherwise assigned; 1/2 of level 1 to 5 controlled substance offenses
Luke Krizek, P-T Ryan Mehl, P-T	Superior 4	1/3 of all level 6 and misdemeanors; 1/2 of habitual traffic offenses; all infractions and ordinance violations

Each attorney is assigned to handle indigent cases in one or more specific courtrooms. Within a given court, some defenders split the indigent cases at random,<sup>751</sup> while others split the cases by case type (for example, felony and misdemeanor, or felony and probation violations). For any conflict in a particular courtroom, the chief public defender appoints a public defender who is regularly assigned to a different courtroom.

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## A CLOSER LOOK

### 2014 CASELOAD ASSIGNMENTS FOR ALL ATTORNEYS IN ELKHART COUNTY

[ via 6AC website ]

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Elkhart County does not participate in the non-capital reimbursement program and did not make its caseload assignments available during the course of this evaluation.<sup>752</sup> To estimate the caseloads of the individual attorneys, 6AC relied on publicly available data from the Indiana Judicial Service Report for 2014 for the numbers of cases assigned to pauper counsel for each court and case type.<sup>753</sup>

The estimated number of cases assigned to each Elkhart County public defender office attorney in 2014, applying the Commission *Standards* for attorneys without adequate support staff, are startlingly high – in some instances more than 5 times the maximum allowed for an attorney in a year. National standards allow attorneys to carry a greater number of cases, and still the caseloads for nearly all of the attorneys exceed these standards.

<sup>751</sup> For example, one superior court judge conducts initial hearings and says that if public defenders happen to be in the courtroom when counsel is appointed for an indigent defendant, the public defenders flip a coin to see which attorney will be assigned to the case.

<sup>752</sup> The Elkhart County Public Defender Office, in June 2016, provided to 6AC information about the number of cases assigned in each courtroom for the period of Dec. 11, 2014 through Dec. 11, 2015. Because the information provided does not allow for an apples-to-apples comparison with other counties' caseloads during the 2014 calendar year, 6AC continues to rely on the publicly available data reported to and compiled in the Indiana Judicial Service Report.

<sup>753</sup> SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 2 at 698-701 (2014). To calculate estimates for each defender's caseload, 6AC divided caseloads within each court by the number of defenders assigned to cover that court. Most courts are assigned two attorneys -- where both attorneys assigned to a court are full-time, 6AC divided the cases equally between them; where one attorney is full-time and one part-time, 6AC allotted 2/3 of the cases to the full-time attorney and 1/3 to the part-time attorney. Based on interviews and court observations, 6AC apportioned the juvenile delinquency and juvenile status cases equally between the two full-time attorneys assigned solely to the juvenile court. For CHINS and TPR cases, 6AC estimated that the two full-time juvenile court attorneys are always assigned to the first parent in any case, then the seven attorneys who are additionally assigned to juvenile court represent additional parties in the same case as needed. As a result, 6AC apportioned 1/3 of the CHINS and TPR cases to each of the two lead juvenile attorneys and the remaining 1/3 shared equally amongst the other seven attorneys. The chief public defender does carry a caseload (he often takes one codefendant in conflict cases and also handles high-level circuit court cases), but because he is not assigned to a specific court there is no reasonable method of estimating the type and number of cases he carries.

**2014 New Cases  
Elkhart County public defense attorneys**

	Adult non-cap murder, fel 1-5	Adult fel 6	Adult misdemeanor (non-reimb)	Adult other	Juvenile delinquency	Juvenile status offense	CHINS & TPR	Other (non-reimb)	Appeal	TOTAL ATTORNEY	% of Comm'n Stds	% of Nat'l Stds
<b>FULL-TIME with inadequate support staff (salaried office):</b>												
Cliff Williams (Chief)												
Jeffrey Majerek (Circuit)	49.5	4.0	6.5	3.0			65.5	5.0	133.5	517%	91%	
Peter Todd (Circuit)	49.5	4.0	6.5	3.0			65.5	5.0	133.5	517%	91%	
Michelle Voirol (Sup I, Juv)	72.7	220.7	55.3	2.0		8.2	15.3	0.7	374.9	253%	224%	
Mark Manchak (Sup II, Sup V, Juv)	140.7	245.3	222.0	25.3		8.2	13.3		654.9	398%	330%	
Matthew Johnson (Sup III)	12.7	3.3		0.7			1.3	2.0	20.0	22%	20%	
Philip Hesch (Sup VI, Juv)	32.7	247.3	177.3	155.3		8.2	54.7		675.6	330%	301%	
Holly Curtis (Juv)					208.0	33.0	57.7		298.7	149%	149%	
Kelly Stansbury (Juv)					208.0	33.0	57.7		298.7	149%	149%	
<b>PART-TIME with in(salaried office):</b>												
Christopher Petersen (Sup I, Juv)	36.3	110.3	27.7	1.0		8.2	7.7	0.3	191.6	261%	114%	
Bridgette Greene (Sup II, Juv)	64.0	18.0	12.7	12.7		8.2	6.0		121.6	188%	68%	
Christopher Crawford (Sup III)	6.3	1.7		0.3			0.7	1.0	10.0	22%	10%	
Luke Krizek (Sup IV)	7.5	134.5	142.0				0.5		284.5	289%	130%	
Ryan Mehl (Sup IV)	7.5	134.5	142.0				0.5		284.5	289%	130%	
Theresa Heamon (Sup V, Juv)	6.3	104.7	98.3			8.2	0.7		218.2	235%	103%	
Kelley Schweinzger (Sup VI, Juv)	16.3	123.7	88.7	77.7		8.2	27.3		341.9	339%	153%	

As borne out by the data, all criminal justice system personnel agree that the public defenders’ caseloads are too high; this was reiterated by every judge, public defender board member, council member, and even sheriff’s deputies. One judge summed up the sentiments throughout the county: public defenders get overwhelmed due to excessive caseloads “when you’re so busy you kind of lose that personal touch, and that undermines efficiency and leads to more continuances.”

The eight full-time attorneys do not represent any clients other than those they are appointed as part of their Elkhart County public defense work. The office’s seven part-time attorneys, though, are allowed to maintain their own private law offices and can represent an unlimited number of private clients, in addition to their public defense clients. Several of the part-time public defense attorneys also accept appointments in indigent cases in city and town courts, in addition to their county public defender office employment.

Judges report numerous complaints about the public defender office attorneys, though they did not specify whether problems were with the part-time attorneys or the full-time attorneys or both. One judge said some defendants are dissatisfied with their public attorneys and claim the attorneys do not make time to see them. A different judge also says in-custody defendants regularly complain their lawyers do not visit them and explains that the prosecutor's office often takes 30 days following the initial hearing to produce discovery to the defenders; the defenders do not see their clients in the jail until they receive discovery, so this leaves defendants waiting for 30 days or more before they get to meet with their public attorney for the first time. Yet another judge has had to talk to the defenders assigned to his court about not meeting frequently enough with their in-custody clients, not preparing cases, and needing to have more backbone in their relationships with their clients.

7. *Lake County, county division.* Each of the four judges in the Lake County Superior Court county division orally contracts with five attorneys to provide representation to all indigent defendants in that judge's courtroom.

All of the contract attorneys work out of their own private law offices. They are responsible for providing all of their own overhead needs. To the extent that they have secretarial or paralegal support staff, the attorneys employ them privately and pay their salaries. Because of the policy of the judges in Lake County that every defendant who has posted bond is considered ineligible for a public defender (*see supra* pages 123 to 125), the indigent clients that the contract attorneys are appointed to represent are almost exclusively in custody. There is no indication that the attorneys ever use investigators in their indigent clients' cases, nor for that matter that they perform any investigation themselves.

The contracting attorneys work under flat-fee contracts that require them to handle an unlimited number of cases at a fixed rate of compensation per year – the compensation does not change no matter how many or how few cases the attorneys are required to handle. The annual compensation for each county contract attorney is \$28,500, except for one attorney who is paid only \$22,000 per year.<sup>754</sup>

Typically, each lawyer serves one day a week in the courtroom of the judge with whom they have a contract. There is no indication that these attorneys meet with their indigent clients or work on their indigent clients' cases outside of the courtroom. In other words, these attorneys devote at most 20% of their available professional time to their indigent clients. All of the contract attorneys can represent an unlimited number of private clients, in addition to their public defense clients.

<sup>754</sup> In Lake County, county division 2, of the five public defenders, four are listed as attorneys and the fifth is listed (and thus paid) as a "paralegal." Instead of the \$28,500 most contract attorneys are paid, the fifth lawyer receives \$22,000 per year. Because they are all considered private contractors, however, none knows of the disparity.

The county division of the Lake County superior court does not participate in the non-capital indigent expense reimbursement program, so Lake County does not report information about the county divisions courts to the Commission. Lake County did not make its caseload assignments available for these courts. To estimate the number of cases assigned to the individual attorneys in 2014, 6AC relied on publicly available data from the Indiana Judicial Service Report and divided the caseloads within each court by the number of defenders contracted in that court.<sup>755</sup>

## A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR COUNTY & JUVENILE DIVISION  
ATTORNEYS IN LAKE COUNTY

[ via 6AC website ]

The average number of new cases assigned to each county division contract defender in 2014 is:

Court	Total Cases	Level 6 Felonies	Misdemeanors
County Division 1	181.8	42.0	139.8
County Division 2	237.0	136.0	101.0
County Division 3	89.4	16.4	72.8
County Division 4	139.6	37.8	101.8

Under Commission caseloads standards for attorneys with inadequate support staff, as these attorneys would be considered by the Commission to be, the maximum allowable caseload for an attorney in a rolling 12-month period is 150 level 6 felonies *or* 300 misdemeanors. Under national standards, the maximum allowable caseload is 150 felonies *or* 400 misdemeanors. The new indigent cases assigned to these attorneys, on average, in 2014 are then the following percentage of the maximum allowed caseload:

Court	Commission standards	National standards
County Division 1	74%	63%
County Division 2	122%	116%
County Division 3	35%	29%
County Division 4	59%	50%

In short, these attorneys who devote approximately 20% of their professional hours to indigent clients are carrying caseloads far in excess of that allowed under any possible measure.

<sup>755</sup> SUPREME COURT OF INDIANA, 2014 INDIANA JUDICIAL SERVICE REPORT Vol. 2 at 708-09 (2014).

8. *Lake County, criminal division.* The four courts of the criminal division of the Lake County superior court use a public defender office as the primary system of providing public defense, and the public defender office contracts with a number of attorneys to provide conflict and overflow representation at an hourly rate with a maximum annual cap.

Lake County provides inadequate office space for the criminal division public defense system, in four separate physical locations spread throughout the courthouse. One area is an administrative and executive office. One area is for the staff public defender attorneys and their support staff. One large room is used collectively by all of the conflict attorneys and their support staff, but there is no space for the law school interns who are assigned to the conflict panel to work. A fourth area is called the “court reporter office” and is used for taking depositions. None of the areas allocated to the public defense system allow for confidential meetings between attorneys and clients, so they are relegated to search out any empty rooms they can find in the courthouse for this purpose. Despite the inadequacy of the available space, it is there for the system attorneys (staff, overflow, and contract) to use on the days they are at court representing their clients. To the extent that office space provided by the county is insufficient, the attorneys can work from their private law offices, but at their own law offices they are responsible for providing all of their overhead needs.

Because of the policy of the judges in Lake County that every defendant who has posted bond is considered ineligible for a public defender (*see supra* pages 123 to 125), the indigent clients that the public defender system attorneys are appointed to represent are almost exclusively in custody. Public defenders often visit in-custody clients on weekends. The conflicts paralegal visits in-custody clients at the jail to collect information from them following the conflict attorneys’ assignment. The Lake County criminal division public defender office has a system in place to receive calls from clients who are in jail. The county commissioners pay for a phone line and the office directs clients to call on Wednesdays and Fridays.

The public defender office budget includes funding for postage, telephone, mileage, copies, and similar out-of-pocket expenses needed in clients’ cases, as well as for larger case related needs such as court reporters, social workers, extra investigators, and experts. This funding covers the clients of staff, overflow, and conflict attorneys alike, but the bulk of this funding is spent in death penalty cases.

As of 2015, in addition to three executive administrators, the public defender office had a total of 51 attorneys and 14 support staff. All 51 attorneys devote only part of their professional hours to representing indigent defendants. Although the county treats some of them as full-time county employees, none of these attorneys actually work



full-time in the county’s public defense system. All of the attorneys maintain their own private law offices and can represent an unlimited number of private clients, in addition to their public defense clients.

Focusing on the trial attorneys, nineteen are considered “staff attorneys.” As of 2015, they are each paid an annual salary of \$34,505 (this represents an increase of \$3,000 per year over 2014). The 19 staff trial attorneys share three secretaries, three paralegals, and two investigators. The staff trial attorneys are each assigned to one court day a week in a particular courtroom.

Eight trial attorneys are considered “overflow attorneys,” and each one is assigned to one court day a week in a particular courtroom. Nineteen trial attorneys are considered “conflict attorneys” who are assigned to specific cases as needed. Both the overflow attorneys and the conflict attorneys are paid \$90 per hour for their time, with a yearly cap on the maximum amount they can be paid depending on the level of felony case they have the qualifications to handle. The annual cap is \$20,000 for class D and C felonies; \$25,000 for class C and B felonies; and \$30,000 for class B and A felonies. The 27 overflow and conflict attorneys share one paralegal and one investigator.

The Lake County criminal division participates in the non-capital reimbursement program, and so it submits to the Commission worksheets showing new case assignments to each of its attorneys on a quarterly basis. Lake County reports all of its criminal division attorneys (staff, overflow, and contract) as having adequate support staff. Under the Commission *Standards*, it would seem they should be reported as having inadequate support staff, as no matter how one counts there is not a 3:4 ratio of support staff to attorneys. Under Commission caseloads standards for attorneys with adequate support staff, as the Commission allowed these attorneys to be reported, the maximum allowable caseload for an attorney in a rolling 12-month period is: 120 level 5 or higher felonies, *or* 200 level 6 felonies, *or* 400 misdemeanors. Under national standards, the maximum allowable caseload is 150 felonies *or* 400 misdemeanors.

The number of new indigent cases assigned to hourly rate conflict attorneys in 2014 ranged from a low of ten felonies for one lawyer to a high of 27 felonies plus one unspecified type of adult case for another lawyer. Since the county provides all necessary resources for the cases of these conflict attorneys, and since the conflict attorneys are paid \$90 per hour for their work, there is small cause to be concerned about these attorneys triaging private clients over indigent clients. Though there is an annual maximum cap on the income an hourly rate attorney can earn, the office has always

.....  
**A CLOSER LOOK**

2014 CASELOAD ASSIGNMENTS FOR  
 CRIMINAL DIVISION ATTORNEYS  
 IN LAKE COUNTY

[ via 6AC website ]  
 .....

successfully received permission from the county to exceed that cap and pay the lawyer in full when their work on cases to which they were already assigned resulted in billing in excess of the annual cap.

The new case assignments to hourly rate overflow attorneys in 2014 ranged from a low of 12 cases (11 felonies and one unspecified type of other adult case) for one attorney to a high of 44 felonies<sup>756</sup> to another lawyer. These attorneys are required to appear in court as a public defender one day each week and they are additionally assigned cases, but they are paid \$90 per hour for their work and the county provides all necessary resources for the cases of these overflow attorneys.

Of much greater concern are the salaried staff attorneys. In many ways, the compensation and caseload arrangements for the Lake County criminal division staff attorneys operate like flat fee contracts. (*See table, next page.*)

The lawyers in 2014 were paid a salary of \$31,505 per year, and they could be assigned any number of felony cases up to the maximum allowed under the Commission standards, which for these attorneys was 60 level 5 and above cases or 100 level 6 cases (or a prorated mixture). Since each of these lawyers are required to appear in court as a public defender one day each week, they have a financial incentive to handle all of their indigent case work on that one day a week (20% of their professional working hours), leaving the other four days available for more lucrative private cases (80% of their professional working hours). The fewer indigent cases they are assigned, the greater the likelihood of completing their indigent case work on their public defender court day. As his indigent caseload rises, the lawyer earns less money per indigent case, and the lawyer also has less time available for paying clients; all creating a financial incentive for the lawyer to devote as little time as possible to each indigent client.

The Lake County public defender office permits all of its attorneys (staff, overflow, and contract) to maintain private practices. The only limitation at all on the attorneys' private practices is that the staff and overflow attorneys must appear in court as a public defender on their one day each week. The executive administrators of the public defender office acknowledge that the most difficult issue the system faces is getting the system attorneys to "subordinat[e] private practice to their public defender work." Though the public defender office sets the expectation of the lawyers it hires that public defender work comes first and the ability to take private clients on the side is a bonus, "a lot of attorneys are frustrated when it eats into their private work." The Lake County public defender office administration has discussed limiting private caseloads

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<sup>756</sup> This lawyer received appointment only during the fourth quarter of 2014, but during that time he was appointed to 11 cases – an annual equivalent of 44.

**2014 New Cases**  
**Lake County criminal division staff attorneys**

	Adult capital murder	Adult non-cap murder	Adult fel 6	Adult misdemeanor (non-reimb)	Adult other	TOTAL ATTORNEY	% of Comm'n Stds	% of Nat'l Stds
Karen Coulis	27	10			2	39	28%	25%
Matthew Fech	21	14			4	39	26%	24%
Teresa Hollandsworth	30	11			6	47	32%	29%
Angela Jones	30	22			2	54	37%	35%
Derrick Julkes	26	15	1		4	46	35%	29%
Gojko Kasich	27	20	3		5	55	35%	33%
Linda Kollintzas	34	27	1	10		72	45%	43%
Casey McCloskey	28	20		8		56	35%	34%
Timothy Ormes	29	13		6		48	32%	30%
Edward Page	13	18		3		34	21%	21%
Stephen Scheele	27	19	1	4		51	33%	32%
Sonay Scott-Dix	35	20		2		57	40%	37%
Susan Severtson	27	23	1	7		58	36%	35%
Herbert Shaps	24	10		2		36	26%	23%
Lemuel Stigler	31	13		11		55	35%	32%
Adam Tavitias	32	21		4		57	38%	36%
Robert Varga	1	14	7	2		24		
Richard Wolter	1	20	8	6		35		
Brian Woodward		33	31		3	67	44%	43%

but believes it would have to triple attorneys' salaries in order to make up for the loss in income. Since the county would not be willing to do this, they fear they would lose good attorneys.

9. *Marion County, conflict attorneys.* As of June 2015, MCPDA contracts with 28 private attorneys to provide conflict representation in adult criminal and juvenile delinquency cases,<sup>757</sup> and one of the 28 attorneys serves as the conflicts supervisor.

All of the conflict attorneys work out of their own private law offices and are responsible for providing all of their own overhead needs. To the extent that the

<sup>757</sup> MCPDA contracts with another 54 attorneys to provide conflict representation in CHINS/TPR cases and in appeals.

conflict contract attorneys have secretarial or paralegal support staff, the attorneys employ them privately and pay their salaries. The conflict contract attorneys are not reimbursed for their out-of-pocket expenses such as postage, telephone, mileage, and copies, creating a disincentive on their part to incur these expenses on behalf of their indigent clients. Calls from clients who are held in the Marion County jail are toll calls for the conflict contract attorneys. The conflict supervisor accepts toll calls from the jail, and he is not reimbursed for these calls – the cost comes out of his flat-fee compensation. A single MCPDA paralegal supports all of the 28 conflict trial attorneys, so she is unable to do much more than assist with matching attorneys to clients and transmitting the files from the public defender office to the conflict attorneys. The conflict attorneys can use the public defender office court reporters, at no cost, to take depositions. When a conflict attorney needs an investigator or an expert in a case, he requests one through the conflicts supervisor. The conflicts supervisor forwards that request to the MCPDA chief public defender, who determines whether there are funds available in the public defender office budget to provide an investigator or expert for the client of the conflict attorney.

The contract attorneys all work under flat-fee contracts.

- Ten of these contract attorneys handle major felonies. Two are paid a flat annual fee of \$42,000-\$43,000 per year and can be assigned up to 80% of a full-time caseload. The other eight are paid roughly \$35,000 and can be assigned up to 50% of a full-time caseload.
- Twelve of these contract attorneys including the conflicts supervisor handle level 6 felony and misdemeanor cases, for which they are paid a flat annual fee of approximately \$30,000. All except the supervisor can be assigned up to 50% of a full-time caseload. The supervisor takes a smaller level 6 felony caseload and handles all conflict hearings on competency to stand trial in the probate court.
- Six of these contract attorneys handle juvenile cases. They are paid a flat annual fee of either \$30,000 or \$25,000 per year. Each of them can be assigned up to 50% of a full-time caseload.

All of the conflict attorneys can represent an unlimited number of private clients, in addition to their public defense work.

MCPDA reports the case assignments for these conflict attorneys to the Commission in three different ways. MCPDA reports the cases assigned to all of the juvenile, misdemeanor, and level 6 felony conflict attorneys using the “part-time without adequate support staff” worksheets. The agency reports six of the major felony contract attorneys as “part-time with adequate support staff,” though under Commission policies it would seem they should be reported as having inadequate support staff. The

agency reports the remaining four major felony conflict attorneys (for quarters 1 to 3; and three of them for quarter 4)<sup>758</sup> as full-time attorneys with inadequate support staff and shows that they are allowed .81 of a full-time inadequate support staff caseload.

All 28 attorneys are under part-time flat-fee contracts. The attorneys do not work in the public defender office. They are all private attorneys who work out of their own private law offices and may carry an unlimited private caseload. The only actual difference among these part-time flat-fee contract attorneys is the amount of money they are paid under their annual flat fee contracts and the types of cases to which they are appointed.

*10. Marion County, staff attorneys.* The Marion County Public Defender Agency (“MCPDA”) is a large and highly structured public defender office. It is responsible for representation of indigent people in all of the courts in Marion County. The county provides extensive office space to the MCPDA on several floors of a building located about half a block from the county courthouse. The county also provides separate office space for the agency’s juvenile delinquency and CHINS/TPR attorneys in a new building located approximately one block from the juvenile court and detention center. The MCPDA budget includes funding for postage, telephone, mileage, copies, and similar out-of-pocket expenses needed in the staff attorney’s cases. Calls from clients who are held in the Marion County Jail are toll free to the MCPDA.

As of June 2015, the office employs (or has openings for) at least 78 support staff, including: three court reporters;<sup>759</sup> two interpreters; two investigators;<sup>760</sup> 49 paralegals;

<sup>758</sup> In the fourth quarter of 2014, Ted Minch was reported as a part-time attorney with inadequate support staff. The agency explained: “Ted Minch moved from a .81 contract to a regular part time contract due to his representation of one of the co-defendants in the Richmond Hills explosion case. The Marion County Public Defender Board approved an hourly payment rate for Ted’s work on the Richmond Hill’s case due to its complexity. His regular conflict case assignments were correspondingly reduced and he moved to a regular part time contract.” Letter from Marion County Public Defender Agency, to Indiana Public Defender Commission, transmitting reimbursement submission for the fourth quarter of 2014 (Feb. 7, 2015).

<sup>759</sup> The court reporters take and transcribe depositions and taped statements. The court reporters are available to all staff and contract attorneys. As a practical matter, though, only the attorneys handling major felonies regularly use the court reporters. From time to time the level 6 felony and domestic violence attorneys schedule the court reporters to take depositions or taped statements.

<sup>760</sup> These two investigators are used primarily to locate witnesses and videos and to serve subpoenas. In 2014, the two investigators served 865 subpoenas and fulfilled 384 investigative requests. The two investigators provide their own cellphones, and they share one agency car so they alternate days when one of them is in the office and the other is in the field. MCPDA investigators are used almost exclusively by the level 6 felony attorneys, although the misdemeanor and domestic violence attorneys can use them.

## A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR ALL ATTORNEYS IN  
MARION COUNTY

[ via 6AC website ]

16 social workers; two receptionist/office managers; three non-attorney administration staff; one training director; and a varying number of interns each quarter. The MCPDA budget includes funding for experts. It is primarily the major felony staff attorneys who use experts. To get an expert, the staff attorney submits a request to the major felony supervisor, who reviews it and recommends either approval or disapproval to the chief public defender. The office has never been in a position of exhausting its funding for experts for staff attorney cases, so the attorneys have never had to go to the courts for funding.

As of June 2015, the office employs (or has openings for) in excess of 150 staff attorneys (not including conflict attorneys). By far most of the staff attorneys are full-time salaried employees who do not have outside law practices.<sup>761</sup> The staff attorneys are assigned to specialized departments within the agency. The attorneys in each department are assigned to specific courts. Individual cases allotted to those courts are assigned to individual attorneys within the departments that staff them in varying ways depending on the department and courts. All agency staff attorneys *except* those in the misdemeanor unit track their time for all cases *except* probation revocation cases.

- The misdemeanor unit has three supervisors, nine or ten attorneys, and another approximately nine certified interns. Misdemeanor attorneys do not use the MCPDA court reporters and can only do so in any event with approval from a supervisor. They rarely use investigators and they do not use experts in their cases. Eight paralegals are assigned to the misdemeanor unit. Seven of the eight paralegals are assigned to courtrooms to assist the attorneys assigned to those courtrooms, and one is a floater. The misdemeanor unit is responsible for staffing at the APC initial hearing court. MCPDA has a representative present at the APC at all times when the initial hearing court is in session. Most of the time this is a paralegal, but occasionally it is an attorney or an intern. There is one attorney and one paralegal assigned to traffic court. Three attorneys (actually a mix of attorneys and interns) and one paralegal are assigned to each of the five non-traffic misdemeanor courts, so every attorney is in court five days a week.
- The domestic violence unit has one supervisor and eight attorneys. Occasionally they use court reporters to take taped statements or depositions. They rarely use investigators or experts in their cases. The unit has three

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<sup>761</sup> Salaried staff attorneys are allowed to carry a minimal number of private cases, in addition to their public defense clients, calculated on a weighted points basis. They must report their private caseloads to the agency quarterly. As of 2015, only ten of the agency's staff attorneys had any private cases, and the maximum number they are allowed to handle is ten to eleven at a time. A very small number of staff attorneys are engaged through flat-fee contracts and are limited to only 50% of a full-time caseload because they work out of their private law offices and are allowed to have a private practice. As these lawyers leave the public defender office, the chief public defender intends to replace them with salaried employees.

paralegals who are all assigned to courtrooms to assist the attorneys assigned to those courtrooms (though one of these paralegals is shared with the level 6 felony unit). Four attorneys are assigned to each of the two courts. Within a court, each attorney has one weekday as lead attorney, and the courtroom paralegal assigns all individual cases to the attorney who is lead on the day of the first setting for that case in court. Each attorney also has one day a week as backup attorney. Each court devotes one day each week to violation of probation cases, and two of the four staff attorneys assigned to that court appear to handle those cases (the attorneys alternate weeks). This means every attorney is in court all day for two days every week and an additional third day every other week.

- The level 6 felony unit has two supervisors and 33 attorneys (one of whom handles only Title IV-D cases). Occasionally they use court reporters to take taped statements and depositions. They regularly use the office investigators, but almost never use experts in their cases. Seven paralegals are assigned to this unit. Six of the seven paralegals are assigned to courtrooms to assist the attorneys assigned to those courtrooms, and one is a floater. Within a court, each attorney has responsibility for one weekday, and the courtroom paralegal assigns to that attorney all individual cases that have their first court setting on that day. Each court devotes one day per week to violation of probation cases, and the attorneys assigned to that court rotate one at a time for these violation of probation days. This means every attorney is in court all day on one day per week and an additional full day every four to six weeks.
- The major felony drug and major felony (non-drug) teams combined have two supervisors, 54 trial attorneys, 20 paralegals, and one mitigation specialist. They constantly use court reporters to take depositions. Of the 20 paralegals, 13 are investigative paralegals who serve as the investigators for the major felony cases. The other seven paralegals are assigned to courtrooms to assist the attorneys assigned to those courtrooms. For the major felony drug courts, the attorneys are divided among the three benches. For the six general major felony courts, each court is assigned a team. Within each court, the courtroom paralegal assigns cases to individual attorneys in rotation within five categories: murder; sex crimes; level 1 and 2 felonies; level 3 and 4 felonies; and level 5 felonies. All of the major felony courts hear probation violations one day a week. The attorneys assigned to each court rotate one at a time for these probation violation days.
- The juvenile delinquency unit has one supervisor, 12 full-time attorneys, two paralegals, and two social workers. They rarely use court reporters. The two paralegals serve as the investigators for the juvenile delinquency cases.
- There is also a problem solving court unit; CHINS/TPR unit; and appeals unit.

The earliest time any defendant, whether in- or out-of-custody, will learn the identity of and have an opportunity to speak to the specific public defense attorney who will represent him is at his first formal appearance in the court to which his case has been allotted. For most clients, whether in or out of custody, they will meet with their attorney almost exclusively at the courthouse preceding, during, or following hearings in their case.

Marion County participates in the non-capital reimbursement program, and so MCPDA submits to the Commission worksheets showing new case assignments to each of its attorneys on a quarterly basis. It reports the caseloads for these attorneys to the Commission broken down by divisions of the public defender office.

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### A CLOSER LOOK

2014 CASELOAD ASSIGNMENTS  
FOR ALL ATTORNEYS IN  
MARION COUNTY

[ via 6AC website ]

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With over 150 attorneys and 78 support staff, the agency has a ratio of .52 support staff for every one attorney, or approximately two support staff for every four attorneys. In its reports to the Commission, though, the county shows the attorneys in certain divisions as having adequate support staff and shows the attorneys in other divisions as having inadequate support staff. It appears to do this by attributing near all of its support staff to certain of its divisions, without regard to whether those support staff actually serve the attorneys in those divisions. The divisions

reported under “adequate support staff” are: major felony (non-drug); CHINS/TPR; and appeals. The divisions reported under “inadequate support staff” are: misdemeanor & domestic violence (combined in 2014 reporting); D felony; major felony drug; juvenile; and problem solving.

The rolling 12-month caseloads for MCPDA as a whole and for most of the individual attorneys are significantly underreported to the Commission each quarter. There are three primary reasons for this.

First, the agency uses what it refers to as “calculation rule 6” in reporting its caseloads and calculating its non-reimbursable expenses. This “rule” says, in relevant part:

Attorneys that transfer from one division to another will, only in the quarter of divisional change, have case assignments reported on both divisions’ spreadsheets. For the relevant quarter, the old division’s spreadsheet will contain only cases assigned in that division. The new division’s spreadsheet will contain no other data whatsoever, except cases assigned in the new division for the relevant quarter. In succeeding quarters, only the spreadsheet for the division of assignment will be required. . . .



Application of this rule results in MCPDA accurately reporting the case assignments made to attorneys during any single quarter, but it significantly underreports the rolling 12-month caseload for every attorney who changes divisions during any 12-month period. This is because, in quarters after the transfer, the cases that were assigned to the attorney during the quarters preceding the transfer disappear from that attorney's caseloads as reported to the Commission. Agency attorneys transfer relatively quickly from the misdemeanor division to the domestic violence division to the D felony division, so a very large number of misdemeanors disappear from the caseloads of individual attorneys as they make these transfers. Though transfers occur into the major felony division with less frequency, when they do occur they result in underreporting the attorneys' felony caseloads. Also, because the agency reports some divisions as having "adequate support staff" and some as having "inadequate support staff," the movement of attorneys between these divisions and the disappearing cases mean the Commission cannot accurately determine the caseload limits that should apply to these attorneys.

This is all difficult to detect because the caseloads are reported by division, rather than alphabetically by attorney name for all agency attorneys. The disappearing cases only appear by back-tracking through the quarterly caseload worksheets for every division (1) to identify attorneys who appear in two worksheets because they transferred divisions, and then (2) to review the caseloads attributed to each of those individual attorneys for the preceding quarters in the division they transferred from and for the ensuing quarters in the division they transferred to. Through no fault of the individual attorneys, the caseloads of 13 attorneys were underreported to the Commission on the caseload worksheets for the fourth quarter 2014, as a result of the attorney transferring from one division to another during 2014.<sup>762</sup>

Second, the agency does not count or report probation revocation cases, even though within every agency division the attorneys rotate staffing the days on which their courts hear probation revocations. Commission policy likely contributes to this situation. As previously mentioned, under the Commission's caseload *Guidelines*, a county may only count a probation revocation as a "case" if the public defense system did not represent the defendant on the underlying charge. In other words, the only instance when a county may be reimbursed by the state for the time its public defense lawyers spend representing indigent defendants in probation revocation proceedings is when: (a) the defendant was either unrepresented or represented by a private attorney on the charge for which he was placed on probation, *and* (b) the public defense system is formally appointed to represent the defendant on the probation violation allegations.

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<sup>762</sup> Courtney Benson-Kooney, Jim Comerford, Annie Alonso, Ian Fleming, Amanda Frantz, Kendal Gulbrandsen, Christopher Kunz, Yoni Moise, Josh Puryear, Jesse Sanchez, Ashley Schneider, David Staples, and Kathy Stinton-Glen.

Third, the agency does not appear to count the number of cases actually assigned to individual attorneys in the misdemeanor division and in the CHINS/TPR division. Rather, it appears that the agency averages or estimates the number of cases assigned to the attorneys in these divisions in a given quarter. The CHINS/TPR division is made up of some full-time salaried agency employee attorneys and some part-time contract private attorneys. It appears that the agency averaged or estimated the caseloads for all of these attorneys rather than actually counting the number of cases assigned to them, as nearly every full-time attorney shows 120 cases for the year and nearly every part-time attorney shows 50 cases for the year. It is difficult to detect the averaging or estimating for misdemeanor attorneys because the agency reports the caseloads of the misdemeanor division (including attorneys and certified interns) and the domestic violence division together in a single worksheet, and over time the caseloads of the individual attorneys begin to vary. By focusing, though, on the first quarter of a year and looking only at the misdemeanor attorneys, it becomes apparent. For example, the first quarter 2014 caseload worksheets for the misdemeanor division show that 13 of the misdemeanor attorneys had exactly 217 cases in the fourth quarter of 2013 and 208 cases in the first quarter of 2014.<sup>763</sup>

The misdemeanor division of the MCPDA includes licensed attorneys and certified interns. A “certified intern” is a law student or graduate who has not yet taken or received the results of their first sitting for the bar examination.<sup>764</sup> An intern, once certified, may represent defendants in court “provided all activities undertaken are supervised and approved by” a licensed attorney who is personally present whenever the intern is representing a client “in any proceeding in open court.”<sup>765</sup> The intern “shall inform each client of his or her intern status, and that the intern is not a licensed attorney.”<sup>766</sup> The certified interns are paid hourly by the agency. It appears that during the second and third quarters of 2014, during which the agency employed nine certified interns handling misdemeanors, MCPDA averaged or estimated their caseloads rather than actually counting the number of cases assigned to each of these interns, as every intern shows 270 misdemeanor cases for those two quarters. In the fourth quarter 2014, it appears the agency reported the actual number of cases handled by each of the attorneys (they would have received their bar results during the fourth quarter) who had been certified interns during the preceding quarters.

The State of Indiana does not reimburse counties, cities, or towns for their expenses in providing constitutionally required Sixth Amendment representation to indigent people charged with misdemeanors (and facing time in jail as a potential penalty). Because of this, the Commission has decided it lacks authority over attorneys who handle

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<sup>763</sup> Caitlin Brown, Stepheni Ennis, John Gallo, Shannon Garvey, Dan Hageman, Richard Mantel, Ryan O’Connell, Mason Riley, Katherine Robinson, Kelly Starling, Larry Stropes, Dan Thomas, and Joshua Vincent.

<sup>764</sup> IND. R. ADMISSION AND DISCIPLINE, R 2.1 (as amended through Jan. 1, 2016).

<sup>765</sup> *Id.*

<sup>766</sup> *Id.*

only misdemeanors. (See *supra* pages 27 to 28). MCPDA, and for that matter public defense systems throughout the state, lack any financial incentive to provide effective representation in misdemeanor cases; in fact, it makes fiscal sense (if not constitutional sense) to provide as few attorneys as possible to handle as many misdemeanors as possible.

In Marion County, non-traffic misdemeanors are heard in five courtrooms. A combination of attorneys and certified interns are assigned to all of the indigent cases in each courtroom. As discussed *supra*, MCPDA may simply be estimating or averaging the case assignment numbers for the attorneys in these misdemeanor courtrooms. Nonetheless, the caseload worksheets that MCPDA provided to the Commission show the misdemeanor attorneys were assigned caseloads of:

### 2014 New Cases

#### Marion County public defender office misdemeanors

	Adult misdemeanor (non-reimb)	Full Year equivalent	Percentage of National Standards
FULL-TIME public defenders, with inadequate support staff			
Nick Bennett (qtr 2-4 only) **	369	492	123%
Caitlin Brown	902	902	226%
Brandon Byers (qtr 2-4 only) **	380	507	127%
Kate Cook (qtr 2-4 only) **	384	512	128%
Tyler Doane (qtr 2-4 only) **	394	525	131%
Stepheni Ennis	731	731	183%
Shannon Garvey	812	812	203%
Angka Hinshaw (qtr 4 only)	228	912	228%
Myeda Hussain (qtr 2-3 only) **	270	540	135%
Richard Mantel	1333	1333	333%
Alicia Miller (qtr 2-4 only) **	376	501	125%
Taylor Perkins (qtr 2-4 only) **	379	505	126%
Kathryn Robinson (qtr 1-2 only)	410	820	205%
Joel Schneider (qtr 2-4 only) **	379	505	126%
Sonya Seeder (qtr 3-4 only)	319	638	160%
Albert Serrano (qtr 4 only)	106	424	106%
Ryan Shepherd (qtr 2-4 only) **	350	467	117%

Those shown with \*\* were certified interns during the second and third quarters of 2014 – they had not yet passed the Indiana bar exam. MCPDA provides one attorney and one paralegal to staff the Marion County Traffic Court. In 2014 that one attorney handled 1,333 cases in a single 12-month period. This is more than three times the

maximum annual caseload allowed for misdemeanors under national standards.

**FINDING #7: The public defense systems in many Indiana counties have undue judicial interference, undue political interference, flat-fee contracts, or all three, that produce conflicts between the lawyer's self-interest and the defendant's right to effective representation. These conflicts result in public defense attorneys throughout Indiana carrying excessive caseloads and spending insufficient time on their public cases. To the extent that participating counties must adhere to Commission caseload standards, many counties have found and implemented methods that, while giving the appearance of compliance, impede rather than enhance effective assistance of counsel. The ability of the Commission to ensure compliance with standards is limited because of inadequate funding and insufficient staffing. This results in the constructive denial of counsel under *United States v. Cronin*.**

# PART III

## CONCLUSION

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“It is my aspiration, and the aspiration of my fellow judges, to create a system of justice that leads people all across America to appreciate Indiana for the decent place that it is – and lead our own citizens as they encounter their courts to regard them as places where judges and their staffs do as much as human beings can do to deliver on the promise of substantial justice. On that point, ‘good enough’ can never be good enough.”

then-Chief Justice Randall T. Shepard,  
State of the Judiciary, January 19, 2005

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# CHAPTER 14

## RECOMMENDATIONS

The Sixth Amendment right to counsel is a right of individuals. It does not matter if a state, county, or city provides effective representation to the first co-defendant, if not to the second; or to people charged with felony offense, if not to those charged with misdemeanors; or to those charged in certain courts, if not to those charged in other courts. It does not matter even if a state or county or city *generally* provides adequate counsel to *most* people. If indigent defense services are structured so as to actually or constructively deny counsel to any person facing jail time, the system itself is constitutionally deficient.

The Indiana Model for providing Sixth Amendment right to counsel services is inherently flawed. It both institutionalizes and legitimizes the choice of counties to not fulfill the minimum parameters of effective representation. Counties are free to – and do – forgo state money in order to avoid state oversight. With no state oversight, counties actually and constructively deny counsel for the indigent accused. What Indiana counties have realized is that they can contract with private counsel on a flat fee basis for less money than it would cost them to comply with state standards (even factoring in the state reimbursement). Though the Indiana Model could potentially work in counties that participate in the non-capital reimbursement program, the state's failure to provide sufficient Commission staff to verify counties' compliance with standards, along with the failure to fund misdemeanor cases at all, undermines the state's intent to construct indigent defense systems that provide minimal constitutional effectiveness.

Indiana policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, should make informed decisions about how best to implement the following recommendations. There is no uniform cookie-cutter indigent defense services model that can or should be applied to each and every state. Where appropriate, examples from other states are provided to show the variety of ways in which the recommendations can be effectively carried out.

**Recommendation 1: Indiana must require all courts in all counties to meet the parameters of effective indigent defense systems as defined in *United States v. Cronic*. At a minimum, binding standards must be promulgated and applicable at trial and on direct appeal for all adult criminal and juvenile delinquency cases, including conflict cases, related to: a) presence of counsel at all critical stages of a criminal proceeding; b) indigency determination; c) attorney performance; d) attorney qualification, training, and supervision; and, e) attorney workload.**

Whether an indigent defendant receives the effective assistance of counsel should not vary from county to county and from courtroom to courtroom. Binding indigent defense standards ensure that basic parameters of effective representation are met and do so without infringing on the independence of counsel and without dictating the method by which indigent defense services are provided. Colorado, Massachusetts, and Oregon are three states that have systemic safeguards similar to those recommended above, even though all three states provide services differently. Colorado primarily uses attorneys employed as staff in public defender offices, Massachusetts predominantly pays an hourly rate to private attorneys who are appointed on a case-by-case basis, and Oregon nearly exclusively contracts annually with private attorneys.

Similar to commissions in those three states, the Indiana Public Defender Commission currently meets national standards for independence<sup>767</sup> by having diverse entities appointing the Commission members such that no single branch of government can have undue influence over policy.<sup>768</sup> Therefore, the Indiana legislature can either empower the Commission to develop standards *binding* on all courts in all counties that align with the minimum constitutional requirements of *Cronic*<sup>769</sup> or require the Commission to promulgate such standards for adoption by the Indiana Supreme Court. The Indiana Rules of Court apply to all courts and attorneys, and Indiana has been largely successful at causing courts and attorneys to comply with Rule 24 addressing capital cases<sup>770</sup> and Rule 25 addressing juvenile delinquency proceedings.<sup>771</sup>

*Standards promulgated by commission.* Other states have commissions empowered to promulgate attorney performance standards that are approved by the state's courts. For example, in 2013, Michigan created an independent statewide commission with authority to, among other things, investigate, audit, and review the provision of local right to counsel services to “assure compliance with the commission’s minimum

<sup>767</sup> ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (Feb. 2002); ABA, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES 5-1.3 (3d ed. 1992); NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 2.10 (1976).

<sup>768</sup> IND. CODE § 33-40-5-2 (2015).

<sup>769</sup> *United States v. Cronic*, 466 U.S. 648 (1984). See discussion *supra* pp. 96 to 104.

<sup>770</sup> IND. R. CR. P. 24 (as amended through Apr. 8, 2015).

<sup>771</sup> IND. R. CR. P. 25 (as amended through Apr. 8, 2015).

standards, rules, and procedures.”<sup>772</sup> The Michigan Indigent Defense Commission is required to promulgate standards “designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel,” and the proposed standards are then reviewed for adoption by the Michigan Supreme Court.<sup>773</sup>

*Standards as court rule.* Several other states have indigent defense standards enforced through court rules. For example, in 2008, the Nevada Supreme Court issued an administrative order (ADKT 411) instituting statewide performance standards for indigent defense attorneys in adult criminal and juvenile delinquency cases at trial, on appeal, and in post-conviction.<sup>774</sup> The impact was immediate. Prior to the court’s performance standards, Washoe County (Reno) had a very problematic early case resolution program, in which public defenders did not always have discovery from the state before discussing plea offers with indigent defendants and sometimes only had a statement of probable cause.<sup>775</sup> On top of this, the Washoe County District Attorney imposed stringent time requirements forcing defendants to either accept the offered plea bargain or it would be taken off the table. When ADKT 411’s performance standards were handed down by the Nevada Supreme Court, the Washoe County Public Defender recognized that participation in the early case resolution program violated the court’s performance standards, and he immediately terminated the office’s participation in the program.

### **A. Presence of counsel at all critical stages standards.**

In many ways, this standard is the simplest one to promulgate. The U.S. Supreme Court is clear that “counsel must be appointed within a reasonable time” after the right to counsel attaches so that “adequate representation at any critical stage before trial, as well as at trial itself” can occur.<sup>776</sup> Although the Court has never purported to cap the list of events that constitute a critical stage, it has plainly identified the many that

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<sup>772</sup> Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Acts 93 (codified at MICH. COMP. LAWS §§ 780.981 *et seq.*, 780.989(1)(b) (2015).

<sup>773</sup> MICH. COMP. LAWS § 780.985(3) (2015).

<sup>774</sup> Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. filed Jan. 4, 2008 and amended Oct. 16, 2008).

<sup>775</sup> In many ways, the inappropriate Washoe County, Nevada early case resolution program resembled the current practices at initial hearings in Lawrence County, Indiana, where public defender office attorneys advise indigent defendants as a “friend of the court” about the prosecution’s plea offers after only a cursory glance at the prosecution’s file and without formally enrolling on behalf of the indigent defendants. *See* discussion *supra* pp. 113 to 115.

<sup>776</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).



do,<sup>777</sup> including during plea negotiations and at the entry of a guilty plea.<sup>778</sup> Standards must include clear language that prosecutors must not engage in plea negotiations with uncounselled defendants.

## **B. Indigency determination standards.**

Judges throughout Indiana struggle in deciding what constitutes the threshold for finding a person to be indigent and therefore entitled to appointed counsel. An indigent defendant should not be denied appointed counsel in one county but qualify for appointed counsel in a neighboring county. Rather, there should be statewide standards by which judges determine whether a defendant is sufficiently indigent to receive appointed counsel and whether and how much a partially indigent defendant may be required to reimburse the public defense system for his representation. Standards should incorporate Indiana’s substantial hardship test as set out in *Moore v. State*<sup>779</sup> and should prohibit the denial of appointed counsel to a defendant solely on the basis of the defendant having bonded out of jail.

Critically, though, Indiana’s judges need specific criteria and procedures.<sup>780</sup> A launching point for determining appropriate statewide criteria could be the report of the Indiana University Public Policy Institute (“PPI”) released in 2014.<sup>781</sup> PPI suggests a two-page instrument for gathering financial information and determining indigency. It recommends a three-tiered classification system:

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<sup>777</sup> Brewer v. Williams, 430 U.S. 387, 399 (1977) (custodial interrogations both before and after institution of prosecution); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (preliminary hearings prior to institution of prosecution where “potential substantial prejudice to defendant[s]’ rights inheres in the . . . confrontation”); Moore v. Illinois, 434 U.S. 220, 231 (1977) (lineups and show-ups at or after initiation of prosecution); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); Brewer v. Williams, 430 U.S. 387, 398-399 (1977) and Powell v. Alabama, 387 U.S. 45, 57 (1932) (pretrial period between arraignment and beginning of trial); Alabama v. Shelton, 535 U.S. 654, 662 (2002) and Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972) (misdemeanor trials); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (felony trials); *In re Gault*, 387 U.S. 1, 36-37 (1967) (juvenile trials); Laffer v. Cooper, 132 S. Ct. 1376, 1386 (2012) and Wiggins v. Smith, 539 U.S. 510, 538 (2003) and Glover v. United States, 531 U.S. 198, 203-204 (2001) and Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing); Halbert v. Michigan, 545 U.S. 605, 621 (2005) (direct appeals as of right); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (probation revocation and parole revocation proceedings to some extent).

<sup>778</sup> Laffer v. Cooper, 132 S. Ct. 1376, 1386 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).

<sup>779</sup> 401 N.E.2d 676, 678-79 (Ind. 1980).

<sup>780</sup> A 2014 report of the National Association of Criminal Defense Lawyers compiles the indigency determination standards from all fifty states. NACDL, REDEFINING INDIGENCE: FINANCIAL ELIGIBILITY GUIDELINES FOR ASSIGNED COUNSEL (Mar. 2014).

<sup>781</sup> INDIANA UNIVERSITY PUBLIC POLICY INSTITUTE, MARION COUNTY PUBLIC DEFENDER AGENCY INDIGENCE SCREENING PROJECT (July 2014).

- presumptive eligibility for all defendants who receive need-based aid or whose income is below 125% of federal poverty guidelines,<sup>782</sup> with no assessments made against the defendant;
- categorical eligibility for all defendants whose income is between 125 and 185% of federal poverty guidelines, with these defendants assessed \$50 for misdemeanors and \$100 for felonies; and,
- demonstrated eligibility for defendants whose income exceeds 185% of federal poverty guidelines but who demonstrate it to be extremely unlikely they can secure private counsel on their own, with these defendants required to contribute \$100 or more toward their cost of their public defense.

### **C. Attorney performance standards.**

Judges and indigent defense providers must know what is expected of them in each case in order to meet those expectations. The United States Supreme Court has said that the measure of whether an attorney provides effective assistance of counsel is “reasonableness under prevailing professional norms.”<sup>783</sup> Thus an attorney must know what professional norms prevail in the defense of each type of case he handles, in order to make reasonable decisions about how best to fulfill those requirements.

For example, attorneys are generally expected to meet with the client, review discovery produced by the prosecution, determine the support services needed such as investigators and experts, and file motions to protect the defendant’s legal interests, among other things. Performance guidelines promulgated by many states, though, go much further by detailing the specific steps the attorney should consider within each general obligation. Beyond merely establishing that attorneys are generally expected to file necessary pretrial motions, performance standards guide attorneys in knowing how they should go about exploring which pretrial motions should be filed and which have no merit. Or, beyond establishing that attorneys should explore generally whether to enlist the assistance of an investigator, performance standards guide attorneys point-by-point on specific aspects of investigation that may be essential to the defense. As the Supreme Court has stated: “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”<sup>784</sup>

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<sup>782</sup> Notably, this is the threshold at which a person is considered to be indigent for purposes of receiving civil legal services without charge in Indiana. IND. CODE § 33-24-12-2 (2015).

<sup>783</sup> Strickland v. Washington, 466 U.S. 668, 688 (1984).

<sup>784</sup> Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting Strickland v. Washington, 466 U.S. 688, 690 (1984)).

Performance standards localized to Indiana, that take into consideration the procedures and substantive law of the state, will provide invaluable guidance to indigent defense attorneys about how to make reasonable strategic decisions in representing indigent defendants.<sup>785</sup> As the Supreme Court observes: “We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable.’ Although they are ‘only guides,’ and not ‘inexorable commands,’ these standards may be valuable measures of the prevailing professional norms of effective representation.”<sup>786</sup>

#### **D. Attorney qualification, training, and supervision standards.**

Rule 24 establishes mandatory qualifications for attorneys appointed to represent indigent defense in capital cases in all of Indiana’s courts.<sup>787</sup> For non-capital cases in courts and counties that participate in the reimbursement program, Commission *Standards* establish the years and types of experience and training an attorney must have before being appointed to represent an indigent defendant, based on the type of case.<sup>788</sup> But for indigent defendants who are prosecuted in the many courts across

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<sup>785</sup> Opponents of performance standards often claim that *Strickland* specifically prohibits any comprehensive checklist of measures that bind a defender to performing specific tasks in every single case. Indeed, *Strickland* does prohibit the use of checklists in that exact manner. The *Strickland* Court is clear that a mandatory checklist does not pass constitutional muster – not because performance standards are meaningless, but because mandatory checklists “interfere with the constitutionally protected independence of counsel.” *Id.* at 689. Imposing universal and mandatory actions that must be taken always and forever in every case would, in the words of the *Strickland* Court, “restrict the wide latitude counsel must have in making tactical decisions.” *Id.* That is, there may be perfectly legitimate reasons for a defense attorney in a particular case to decide against, for example, filing a specific motion or interviewing a particular witness. To the *Strickland* Court, the freedom to make those independent strategic decisions, in consultation with the defendant, is preeminent and a core principle of due process.

The Court consistently looks to performance standards, in the first instance, to determine the prevailing professional norms. *See, e.g.,* Missouri v. Frye, 132 S.Ct. 1399, 1408-09 (2012) (relying in part on ABA Standards for Criminal Justice and various state bar professional responsibility rules to hold that “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused” and failure to do so is unreasonable); Padilla v. Kentucky, 559 U.S. 356, 366-69 (2010) (relying in part on NLADA Performance Guidelines for Criminal Defense Representation, DOJ Compendium of Standards for Indigent Defense Systems, and ABA Standards for Criminal Justice to hold that failure to advise a client regarding the risk of deportation is unreasonable); Wiggins v. Smith, 539 U.S. 510, 523-25, 533-34 (2003) (relying in part on ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and prevailing Maryland professional standards to hold that counsel’s decision to limit its investigation was not reasonable); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (relying in part on ABA Standards for Criminal Justice to hold that counsel’s failure to uncover and presenting mitigating evidence at sentencing was not a reasonable tactical decision because “trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”).

<sup>786</sup> Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010) (citations omitted).

<sup>787</sup> IND. R. CR. P. 24(B)(1), (2) (as amended through Apr. 8, 2015).

<sup>788</sup> IND. PUB. DEF. COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES, Standards E and F (as amended through June 18, 2014). *See* discussion *supra* pp. 143 to 144.

Indiana that do not participate in the reimbursement program, there are no mandatory procedures for selecting the attorneys who provide public defense and no particular qualifications those attorneys must possess. In other words, even an attorney newly graduated from law school and having just passed the bar examination can be assigned to represent an indigent defendant charged with murder and facing life without parole if convicted. The qualifications of attorneys appointed to represent the poor should not vary based on geography within the state.

Similarly, all public defense attorneys should receive on-going mandatory training in the areas of law in which they provide public defense. (*See* Recommendation 2 below).

### **E. Workload standards.**

For performance standards to have an effect, lawyers must be given the time to consider the appropriateness of each standard in relation to the specific circumstances of each case. Attorneys must also be provided adequate resources to carry out the steps that, in their independent judgment, are necessary under those standards. None of that can be achieved without some maximum limit on the number of cases a public lawyer can be required to handle and a process for defense attorneys to decline new appointments above those limits.

But before caseload limits can be established, Indiana needs to create a uniform definition of a “case.” Numerous states have established statewide definitions of what constitutes a case. For example, the Washington Supreme Court, by court order, defines a case in the simplest and clearest way possible as “the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation.”<sup>789</sup> The workloads of private attorneys who accept appointed cases (whether case by case or under contract) must be controlled just as the workloads of full-time public defenders must be. Toward this end, the Washington Supreme Court requires that “[p]rivate attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted.”<sup>790</sup>

Indiana should establish a firm statewide definition of what constitutes a “case” and establish maximum caseload limits applicable to every lawyer who provides public defense services in any courtroom in the state.

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<sup>789</sup> Order, *In re Adoption of New Standards for Indigent Defense and Certification of Compliance*, No. 25700-A-1004 (Wash. filed June 15, 2012) (Standards for Indigent Defense 3.4).

<sup>790</sup> *Id.* at Standard 13.

But what should those maximums be? The Commission should require attorney time tracking against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client’s advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby limiting) workload than any other available. More than that, however, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base). In implementing a time-tracking system, however, Indiana must carefully avoid merely institutionalizing bad practice by assuming that the time public attorneys are presently spending defending their clients is adequate to provide the effective assistance of counsel required by the federal and state constitutions.

**Recommendation 2: The State of Indiana must create a comprehensive and mandatory training and supervision system for all indigent defense providers based on standards.**

Without a rigorous standards-based training structure, any local defense organization will develop its own set of values from within. Over time, that which may have once been grudgingly accepted, like saving investigation for only the most serious cases, will become the established standard.

Because the Indiana Public Defender Council already provides training, it seems to be the appropriate place to develop and house the new mandatory training needs. However, because much of the new training will be based on standards promulgated by the Commission, it may be appropriate to merge the two independent government entities. This will allow for a seamless transition from training to compliance enforcement.

**Recommendation 3: The State of Indiana must create an independent system to evaluate compliance with, and enforce adherence to, all standards (capital and non-capital).**

There are a number of ways to enforce compliance with standards, including: creating a unified state system; basing enforcement of standards on state funding; affording local systems the choice to have the state run the local system; or creating penalties for non-compliance.

*Unified state system.* When Montana created its statewide indigent defense commission in 2005,<sup>791</sup> the state struggled with how to pay for the improved services, including compliance with standards. After exploring many options, Montana elected to cap the

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<sup>791</sup> Montana Public Defender Act, 2005 Mont. Laws ch. 449 (codified as amended at MONT. CODE ANN. §§ 47-1-101 *et seq.* (2015)).

amount that counties were required to spend on indigent defense at the amount they had spent during the immediate prior year. The state adjusted the matrix by which it provides funding to counties for all obligations, and essentially lowered the state's financial obligations to the counties by the capped amount.

In effect, Montana's public defense system became 100% state funded, though the state did not have to come up with the entire funding amount in year one. This is a good deal for counties, because the counties are assured that their spending on indigent defense is never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court or increased responsibilities based on standards. And, it is easier to enforce state standards, because everything is under the auspices of the state commission and it is incumbent on the commission to argue for adequate resources to meet standards through the normal state budgeting process.

*Enforcement based on state funding.* The Michigan legislature did something similar to Montana in terms of capping costs to counties. There, counties are required to annually spend no less than the average of the funding they spent in the three fiscal years preceding the adoption of the Michigan Indigent Defense Commission Act.<sup>792</sup> Any new monies to meet standards above and beyond that required local spending amount are the responsibility of the state.

As each new standard is promulgated and approved by the Supreme Court, the Act requires each Michigan county to submit a plan for how they intend to meet the new standard. For example, if the MIDC requires counties to implement continuous representation by the same attorney appointed to represent a defendant, and if County A traditionally uses horizontal representation (i.e., one attorney handles the arraignment, a different lawyer handles preliminary hearings, a third attorney handle trial, etc.), then County A might submit a plan to MIDC stating that they need to hire additional attorneys at an additional cost of say \$500,000 to move away from horizontal representation and comply with state standards. If MIDC then approves the county's plan, the additional costs get factored into a statewide plan presented to the governor and legislature during budget negotiations. So, if county compliance with state standards requires additional funding, the state is the responsible party.

However, if a local unit of government fails to meet MIDC standards, the MIDC is authorized to take over the administration of indigent criminal defense services for the local unit of government. As a disincentive for counties to purposefully fail to meet standards, the Act mandates that county government in jurisdictions taken over by MIDC will pay a percentage of the costs the MIDC determines are necessary to meet

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<sup>792</sup> Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Acts 93 (codified at MICH. COMP. LAWS §§ 780.981 *et seq.* (2015)).

standards, *in addition to* the county’s originally required local contribution – in the first year, the county will have to pay 10% of the state costs, increasing to 20% in year two of a state take-over, and 30% in year three.

*Penalties for non-compliance.* In 2014, the Idaho legislature created the Idaho State Public Defender Commission (“SPDC”) within the Department of Self-Governing Agencies<sup>793</sup> – under a constitutional provision in Idaho that means the commission, though technically in the executive branch, does not have to answer directly to the governor. The SPDC is empowered to promulgate standards consistent with *Cronic* and the *ABA Ten Principles*.<sup>794</sup>

Counties can apply to the SPDC for financial assistance in meeting state standards, though they must comply with the standards without regard to whether they seek state funding.<sup>795</sup> The hammer to compel compliance with standards is significant. If the SPDC determines that a county “willfully and materially” fails to comply with state standards, and if the SPDC and county are unable to resolve the issue through mediation, the SPDC is authorized to step in and remedy the specific deficiencies, including by taking over all services and charging the county for the cost.<sup>796</sup> If the county does not pay within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” the intercepted funds go to reimburse the commission, and the “intercept and transfer provisions shall operate by force of law.”<sup>797</sup>

**Recommendation 4: The State of Indiana must prohibit contracts that create financial disincentives for attorneys to provide effective representation.**

The contracts currently used in many Indiana counties cause conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant. Indiana should follow the lead of other states that have banned these practices, including:

- *Idaho.* County commissioners may provide representation by contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”<sup>798</sup>

<sup>793</sup> Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at IDAHO CODE §§ 19-848 *et seq.* (2015)).

<sup>794</sup> IDAHO CODE § 19-850(a)(vii) (2015).

<sup>795</sup> IDAHO CODE § 19-862A (2015).

<sup>796</sup> IDAHO CODE § 19-862A(11) (2015).

<sup>797</sup> IDAHO CODE § 19-862A(12) (2015).

<sup>798</sup> IDAHO CODE § 19-859 (2015).

- *Michigan*. The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation.”<sup>799</sup>
- *Washington*. The Washington *Rules of Professional Conduct* decree that “A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”<sup>800</sup>
- *Nevada*. Announcing that the “competent representation of indigents is vital to our system of justice,” the Nevada Supreme Court banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for extra fees in extraordinary cases.<sup>801</sup>

Not all contract systems produce financial conflicts of interests. Oregon is the only statewide system in the country that relies entirely on contracts for the delivery of public defense services. The Oregon Public Defender Services Commission (“OPDSC”) is an independent body in the judicial branch that is responsible for overseeing and administering the delivery of right to counsel services in each of Oregon’s counties.<sup>802</sup> The commission is statutorily responsible for promulgating standards regarding the quality, effectiveness, and efficiency by which public counsel services are provided.<sup>803</sup>

With all funding provided by the state, the commission’s central office handles the day-to-day management of the system. OPDSC lets individual contracts with private not-for-profit law firms, individual private attorneys, and consortia of private attorneys. The contracts are the enforcement mechanism for the OPDSC standards. Should indigent defense providers fail to comply with their contractual obligations, the contract is terminated and not renewed.

Importantly, the contracts set a precise total number of cases each contractor will handle during the contracting period, thereby ensuring that attorneys have sufficient time to fulfill the state’s performance criteria. But more than that, the contracts

<sup>799</sup> MICH. COMP. LAWS § 780-991(2)(b) (2016).

<sup>800</sup> Washington Rules Prof’l Conduct 1.8(m)(1) (as amended through Sept. 2015).

<sup>801</sup> Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. filed July 23, 2015).

<sup>802</sup> OR. REV. STAT. § 151.213 (2015).

<sup>803</sup> OR. REV. STAT. § 151.216 (2015).



safeguard the local service providers as well, by allocating cases across case types according to the number of hours generally required to meet the performance demands of each type of case. In other words, rather than focusing solely on the number of cases assigned, the Oregon system is built around the concept of “workload” by assigning “weights” to specific types of cases, adjusted for availability of non-attorney support staff and for other non-representational duties of the attorney (such as travel or attending continuing legal education training).

Each service provider’s workload is tracked on an ongoing basis, down to the week, enabling the contract defenders to accurately predict when they will reach their workload maximums for a given month, all the while keeping the local court informed. In practice, a service provider can project that he will reach his maximum allowed under the contract on a Tuesday and will inform the court that he will be declaring unavailability starting Wednesday and onward through the end of week. With all stakeholders kept informed, there are no surprises – the extra cases are simply assigned to one of the other service providers available in that county under contract with the OPDS.

**Recommendation 5: The State of Indiana should create a statewide appellate defender office as a check against inadequate trial-level representation.**

Many states have found it appropriate to separate the public defense appeals system from the public defense trial system to ensure that the direct appeal is a check against potentially ineffective trial representation. For example:

- *Florida.* Each of the state’s 20 judicial circuits (covering 67 counties in total) has a public defender office, overseen by an elected chief public defender, with full-time attorneys who provide representation to indigent defendants at trial. However, five independent state appellate defender offices provide representation in all appeals.
- *Louisiana.* The Louisiana Public Defender Board (“LPDB”) is a statewide commission that oversees all indigent defense services throughout the state. Each of Louisiana’s 43 judicial districts (together comprising the 64 parishes of the state) has a local chief defender who oversees the public defender office or the contract defenders that provide representation to indigent defendants at trial. For all indigent appeals, LPDB contracts with a non-profit that itself contracts with individual attorneys to provide representation.

- *Massachusetts.* The Committee for Public Counsel Services (CPCS) is a judicial branch agency that oversees the delivery of indigent defense services in all courts across the state. Full-time staff public defenders (felonies and delinquencies) and private assigned counsel (misdemeanors) provide trial level services. CPCS uses private attorneys who are paid hourly to ensure independent appellate review.
- *Michigan.* The State Appellate Defender Office (“SADO”) provides appellate representation to indigent defendants. SADO is overseen by the Appellate Defender Commission, which is entirely separate from and independent of the newly established Michigan Indigent Defense Commission that oversees trial representation.
- *North Carolina.* The North Carolina Office of Indigent Defense Services (“OIDS”) is a judicial branch agency that oversees the provision of right to counsel services throughout the state. OIDS employs staff public defenders in a centralized unit to provide appellate representation, separate and apart from the trial services.
- *Oregon.* As explained above, Oregon provides trial level indigent defense services through a 100% contract model. However, the Office of Public Defense Services has an appellate division of full-time staff attorneys to provide representation in direct appeals. The state has a separate Oregon Capital Resource Center to work on capital appeals and assist trial level counsel.

Appellate indigent defense services in Indiana should be state-run and separate from trial services. The Indiana legislature may choose to create a state appellate defender office as part of a new state level right to counsel agency (combining the Commission, the Council, and the State Public Defender) or alternatively could simply expand the purview of the State Public Defender to include direct appeals. Under either scenario, services could be provided by full-time staff lawyers or by private attorneys paid hourly or under contracts that do not create financial conflicts of interest.

## A CLOSER LOOK

The online companion for this report can be found via the Sixth Amendment Center (6AC) website at <http://www.sixthamendment.org/indiana-report>.

Capital Reimbursement by IPDC, 1990 to 2014

Non-Capital Reimbursement by IPDC, 1995 to 2014

IPDC, sample Comprehensive Plans and Model Ordinance

IPDC Quarterly Reimbursement Request forms

Commission Members to Do the Work of the Commission

Staff to Do the Work of the Commission

Indigent Defense Services in the Sample Counties

Counsel at All Critical Stages of a Delinquency Proceeding

2014 Caseload Assignments for All Attorneys in Blackford County

2014 Caseload Assignments for All Attorneys in Scott County

2014 Caseload Assignments for All Attorneys in Montgomery County

2014 Caseload Assignments for All Attorneys in Lawrence County

2014 Caseload Assignments for All Attorneys in Warrick County

2014 Caseload Assignments for All Attorneys in Elkhart County

2014 Caseload Assignments for County & Juvenile Division Attorneys in Lake County

2014 Caseload Assignments for Criminal Division Attorneys in Lake County

2014 Caseload Assignments for All Attorneys in Marion County

