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## ARTICLE

### CRIME DOES NOT PAY: UNDERSTANDING CRIMINAL DEBT

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#### INTRODUCTION

Crime doesn't pay; it costs. In addition to serving a sentence or probation, a convicted criminal may be ordered to pay for his or her crime(s), literally. This Article will address the various forms of criminal debt that a defendant may be ordered to pay, including: court costs and fees, fines, and restitution. It will set forth the applicable statutory authority providing for the collection of each type of debt and a synopsis of relevant case law. Our goal is to have this Article serve as a one-stop guide to trial court judges and practitioners about the types of criminal debt that defendants may be ordered to pay and the requirements and guidelines for imposing each.

#### I. COSTS & FEES<sup>1</sup>

##### *A. General Overview*

“[C]osts and Fees are not part of the defendant's sentence and are separate from fines.”<sup>2</sup> However, like sentencing decisions, “decisions to impose restitution, fines, costs, or fees, are generally left to the trial court's discretion. . . . As long as the trial court imposes fees within the statutory limits, there is no

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1. This Article recognizes that costs, fees, and fines may be imposed in criminal, civil, and administrative actions. The scope of this Article, however, is limited to criminal actions.

2. *Jackson v. State*, 968 N.E.2d 328, 333 (Ind. Ct. App. 2012).

abuse of discretion.”<sup>3</sup>

An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. An abuse of discretion also occurs when the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute.<sup>4</sup>

“Making indigency determinations is something that courts frequently do, with respect to whether a defendant is entitled to a public defender or whether he or she may be incarcerated for failure to pay court costs, fees, or a fine associated with a criminal conviction.”<sup>5</sup> It is of note that “[a] defendant’s indigency does not shield him from all costs or fees related to his conviction.”<sup>6</sup> “An indigency determination merely prevents the defendant from being imprisoned for his inability to pay.”<sup>7</sup> Further, the Court of Appeals of Indiana has concluded the appointment of counsel affords only a presumption of indigency at the time of sentencing.<sup>8</sup>

#### *B. Costs/Filing Fees*

The Indiana Division of State Court Administration<sup>9</sup> compiled a list of fees typically assessed for particular types of cases.<sup>10</sup> In making this list public, the Indiana Supreme Court Division of State Court Administration cautions individuals that although its compilation includes the types of costs/fees commonly assessed in the particular case type, other fees may be assessed.<sup>11</sup>

*1. Costs/Filing Fees for Juvenile Cases.*—With respect to juvenile cases, Indiana Code section 33-37-4-3(a)-(b)<sup>12</sup> provides as follows:

- (a) The clerk shall collect a juvenile costs fee of one hundred twenty dollars (\$120) for each action filed under any of the following:
  - (1) IC 31-34 (children in need of services).

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3. *Bex v. State*, 952 N.E.2d 347, 354 (Ind. Ct. App. 2011) (citing *Kimrough v. State*, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009)).

4. *Id.*

5. *Mueller v. State*, 837 N.E.2d 198, 205 (Ind. Ct. App. 2005).

6. *Bex*, 952 N.E.2d at 354 (quoting *Banks v. State*, 847 N.E.2d 1050, 1051 (Ind. Ct. App. 2006)).

7. *Meunier-Short v. State*, 52 N.E.3d 927, 931 (Ind. Ct. App. 2016).

8. *Jackson v. State*, 968 N.E.2d 328, 333 (Ind. Ct. App. 2012).

9. The Division of State Court Administration is now one division of the newly created Indiana Office of Judicial Administration. See IND. ADMIN. R. 20.

10. *Indiana Trial Court Fee Manual*, IND. SUP. CT., <https://secure.in.gov/judiciary/admin/files/courtmgmt-pubs-trial-court-fee-manual.pdf> [<https://perma.cc/BM6Z-3GAT>] (last visited May 10, 2017).

11. *Id.*

12. All statutes cited herein are current as of July 1, 2016.

- (2) IC 31-37 (delinquent children).
- (3) IC 31-14 (paternity).
- (b) In addition to the juvenile costs fee collected under this section, the clerk shall collect the following fees, if they are required under IC 33-37-5:
  - (1) A document fee (IC 33-37-5-1, IC 33-37-5-3, or IC 33-37-5-4).<sup>13</sup>
  - (2) A marijuana eradication program fee (IC 33-37-5-7).<sup>14</sup>
  - (3) An alcohol and drug services program fee (IC 33-37-5-8(b)).<sup>15</sup>
  - (4) A law enforcement continuing education program fee (IC 33-37-5-8(c)).<sup>16</sup>
  - (5) An alcohol and drug countermeasures fee (IC 33-37-5-10).<sup>17</sup>
  - (6) A document storage fee (IC 33-37-5-20).<sup>18</sup>
  - (7) An automated record keeping fee (IC 33-37-5-21).<sup>19</sup>

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13. Indiana Code section 33-37-5-1 provides that unless the legislative body of a county has adopted, by ordinance, a fee schedule indicating otherwise, the clerk of the court shall collect a fee of one dollar per page, including a page that is only partially covered with writing. If a county has adopted an alternative fee schedule, such fee may not exceed one dollar per page, again including a page that is only partially covered in writing. *See* IND. CODE § 33-37-5-1(c) (2016). Further, the clerk shall collect a document fee “of one dollar (\$1) for each certificate under seal attached in authentication of a copy of any record, paper, or transcript.” *Id.* § 33-37-5-3. The clerk shall also collect a document fee of three dollars “for preparing or recording a transcript of a judgment to become a lien on real estate.” *Id.* § 33-37-5-4.

14. In criminal matters, a clerk shall collect a marijuana eradication program fee of no more than \$300, as set by the county, if a “weed control board” has been established in the county and the individual has been convicted of an offense for under Indiana Code chapter 35-48-4 (offenses relating to controlled substances).

15. Indiana Code section 33-37-5-8(b) provides that the clerk shall collect a alcohol and drug services program fee of not more than \$400, as set by the county, if the county has established an alcohol and drug services program. IND. CODE § 33-37-5-8(b) (2016).

16. Indiana Code section 33-37-5-8(c) provides that “[i]n each action in which a defendant is found to have: (1) committed a crime; (2) violated a statute defining an infraction; or (3) violated an ordinance of a municipal corporation; the clerk shall collect a law enforcement continuing education program fee of four dollars (\$4).” *Id.* § 33-37-5-8(c).

17. Indiana Code section 33-37-5-10 provides that the clerk shall collect an alcohol and drug countermeasures fee of \$200 in each action in which a person is found to have committed an offence, infraction, or has been adjudicated delinquent for committing an act under Indiana Code chapter 9-30-5 (operating a vehicle while intoxicated) and the person’s driving privileges are suspended. This also includes cases where the individual has pled guilty and agreed to pay the fee. *Id.* § 33-37-5-10(b).

18. Indiana Code section 33-37-5-20 provides that prior to July 1, 2017, a clerk shall collect a document storage fee of five dollars. Starting July 1, 2017, the fee will decrease to two dollars. *Id.* § 33-37-5-20.

19. Indiana Code section 33-37-5-21 provides that prior to July 1, 2017, the clerk shall collect an automated record keeping fee of nineteen dollars. The exception is that prior to July 1, 2017, the fee is five dollars for actions resulting in the accused person entering into a pretrial diversion

- (8) A late payment fee (IC 33-37-5-22).<sup>20</sup>
- (9) A public defense administration fee (IC 33-37-5-21.2).<sup>21</sup>
- (10) A judicial insurance adjustment fee (IC 33-37-5-25).<sup>22</sup>
- (11) A judicial salaries fee (IC 33-37-5-26).<sup>23</sup>
- (12) A court administration fee (IC 33-37-5-27).<sup>24</sup>
- (13) A DNA sample processing fee (IC 33-37-5-26.2).<sup>25</sup>

2. *Costs/Filing Fees for Criminal Cases.*—With respect to criminal cases, Indiana Code section 33-37-4-1(a)-(c) provides as follows<sup>26</sup>:

- (a) For each action that results in a felony conviction under IC 35-50-2 or a misdemeanor conviction under IC 35-50-3, the clerk shall collect from the defendant a criminal costs fee of one hundred twenty dollars (\$120).
- (b) In addition to the criminal costs fee collected under this section, the clerk shall collect from the defendant the following fees if they are required under IC 33-37-5:
  - (1) A document fee (IC 33-37-5-1, IC 33-37-5-3, or IC 33-37-5-4).
  - (2) A marijuana eradication program fee (IC 33-37-5-7).
  - (3) An alcohol and drug services program fee (IC 33-37-5-8(b)).
  - (4) A law enforcement continuing education program fee (IC 33-37-5-8(c)).
  - (5) A drug abuse, prosecution, interdiction, and correction fee (IC 33-37-5-9).<sup>27</sup>

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program agreement or a deferral program. *Id.* § 33-37-5-21. The fee for all actions will be five dollars starting on July 1, 2017. *Id.*

20. Indiana Code section 33-37-5-22 provides that the clerk of a court in a county which has adopted a local rule imposing a late payment fee on a defendant who is not indigent and has been found to have violated an ordinance or to have committed a crime, infraction, or delinquent act shall collect a late payment fee of twenty-five dollars if the defendant fails to pay fines and fees as ordered. A trial court may suspend a late payment fee if the court finds the defendant has demonstrated good cause for the failure to make timely payment. *Id.* § 33-37-5-22.

21. Indiana Code section 33-37-5-21.2 provides that the clerk shall collect a public defense administration fee of five dollars. *Id.* § 33-37-5-21.2.

22. Indiana Code section 33-37-5-25 provides that the clerk shall collect a judicial insurance adjustment fee of one dollar. *Id.* § 33-37-5-25.

23. Judicial salaries fees range from ten dollars to twenty dollars depending on the type of action. *See id.* § 33-37-5-26.

24. Indiana Code section 33-37-5-27 provides that the clerk shall collect a court administration fee of five dollars. *Id.* § 33-37-5-27.

25. Indiana Code section 33-37-5-26.2 provides that “[i]n each action in which a person is: (1) convicted of an offense; (2) required to pay a pretrial diversion fee; (3) found to have committed an infraction; or (4) found to have violated an ordinance; the clerk shall collect a DNA sample processing fee of two dollars (\$2).” *Id.* § 33-37-5-26.2.

26. *Id.* § 33-37-4-1.

27. Indiana Code section 33-37-5-9(b) provides that in criminal actions, the trial court “shall

- (6) An alcohol and drug countermeasures fee (IC 33-37-5-10).
- (7) A child abuse prevention fee (IC 33-37-5-12).<sup>28</sup>
- (8) A domestic violence prevention and treatment fee (IC 33-37-5-13).<sup>29</sup>
- (9) A highway work zone fee (IC 33-37-5-14).<sup>30</sup>
- (10) A deferred prosecution fee (IC 33-37-5-17).<sup>31</sup>
- (11) A document storage fee (IC 33-37-5-20).
- (12) An automated record keeping fee (IC 33-37-5-21).
- (13) A late payment fee (IC 33-37-5-22).
- (14) A sexual assault victims assistance fee (IC 33-37-5-23).<sup>32</sup>

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assess a drug abuse, prosecution, interdiction, and correction fee of at least two hundred dollars (\$200) and not more than one thousand dollars (\$1,000)” against a person convicted of an offense under Indiana Code chapter 35-48-4 (i.e., offenses relating to controlled substances). “In determining the amount of the drug abuse, prosecution, interdiction, and correction fee assessed against a person under subsection (b), a court shall consider the person’s ability to pay the fee.” *Id.* § 33-37-5-9(c).

28. Indiana Code section 33-37-5-12 provides that a court shall order a person to pay a child abuse prevention fee of \$100 in cases where the victim of a crime is a person less than eighteen years of age and the person has been found to have committed one of the following offenses: (1) murder; (2) causing suicide; (3) voluntary manslaughter; (4) reckless homicide; (5) battery; (6) strangulation; (7) domestic battery; (8) aggravated battery; (9) rape; (10) criminal deviate conduct; (11) child molesting; (12) child exploitation; (13) vicarious sexual gratification; (14) child solicitation; (15) incest; (16) neglect of a dependent; (17) child selling; or (18) child seduction. *Id.* § 33-37-5-12.

29. Indiana Code section 33-37-5-13 provides that a court shall order a person to pay a domestic violence prevention and treatment fee of fifty dollars in cases where the victim of the crime was the person’s spouse, living as the person’s spouse, or has a child in common with the person, and the person has been found to have committed one of the following offenses: (1) murder; (2) causing suicide; (3) voluntary manslaughter; (4) reckless homicide; (5) battery; (6) domestic battery; (7) strangulation; or (8) rape. *Id.* § 33-37-5-13.

30. Indiana Code section 33-37-5-14 applies to criminal, infraction, and ordinance violations that are traffic offenses. It provides that the clerk shall collect a highway worksite zone fee of fifty cents. *Id.* § 33-37-5-14(b).

However, the clerk shall collect a highway worksite zone fee of twenty-five dollars and fifty cents (\$25.50) if: (1) the criminal action, infraction, or ordinance violation is: (A) exceeding a worksite speed limit . . . ; or (B) failure to merge . . . ; and (2) the judge orders the clerk to collect the fee for exceeding a worksite speed limit or failure to merge.

*Id.*

31. Indiana Code section 33-37-5-17 provides that “[i]n each action in which prosecution is deferred, the clerk shall collect from the defendant a deferred prosecution fee of one hundred twenty dollars (\$120) for court costs.” *Id.* § 33-37-5-17.

32. Indiana Code section 33-37-5-23 provides that a court “shall assess a sexual assault victims assistance fee of at least five hundred dollars (\$500) and not more than five thousand dollars (\$5,000)” against a person who is convicted of any of the following offenses: (1) rape; (2) criminal deviate conduct; (3) child molesting; (4) child exploitation; (5) vicarious sexual

(15) A public defense administration fee (IC 33-37-5-21.2).

(16) A judicial insurance adjustment fee (IC 33-37-5-25).

(17) A judicial salaries fee (IC 33-37-5-26).

(18) A court administration fee (IC 33-37-5-27).

(19) A DNA sample processing fee (IC 33-37-5-26.2).

(c) Instead of the criminal costs fee prescribed by this section, except for the automated record keeping fee (IC 33-37-5-21), the clerk shall collect a pretrial diversion program fee if an agreement between the prosecuting attorney and the accused person entered into under IC 33-39-1-8 requires payment of those fees by the accused person. The pretrial diversion program fee is:

(1) an initial user's fee of fifty dollars (\$50); and

(2) a monthly user's fee of ten dollars (\$10) for each month that the person remains in the pretrial diversion program.

In addition, Indiana Code section 33-37-5-19 provides that the clerk "shall collect a jury fee of two dollars (\$2) in each action in which a defendant is found to have committed a crime, violated a statute defining an infraction, or violated an ordinance of a municipal corporation."<sup>33</sup>

*3. Costs/Filing Fees for Pre-Trial Diversion Cases for Certain Misdemeanors and Level 5 and Level 6 Felonies.*—Indiana Code section 33-39-1-8(d)-(g) provides:<sup>34</sup>

(d) A prosecuting attorney may withhold prosecution against an accused person if:

(1) the person is charged with a misdemeanor, a Level 6 felony, or a Level 5 felony;

(2) the person agrees to conditions of a pretrial diversion program offered by the prosecuting attorney;

(3) the terms of the agreement are recorded in an instrument signed by the person and the prosecuting attorney and filed in the court in which the charge is pending; and

(4) the prosecuting attorney electronically transmits information required by the prosecuting attorneys council concerning the withheld prosecution to the prosecuting attorneys council, in a manner and format designated by the prosecuting attorneys council.

(e) An agreement under subsection (d) may include conditions that the person:

(1) pay to the clerk of the court an initial user's fee and monthly

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gratification; (6) child solicitation; (7) child seduction; (8) sexual battery; (9) sexual misconduct with a minor; (10) incest; (11) promotion of human trafficking; (12) promotion of human trafficking of a minor; (13) sexual trafficking of a minor; or (14) human trafficking. *Id.* § 33-37-5-23.

33. *Id.* § 33-37-5-19.

34. *Id.* § 33-39-1-8.

user's fees in the amounts specified in IC 33-37-4-1;<sup>35</sup>

(2) work faithfully at a suitable employment or faithfully pursue a course of study or career and technical education that will equip the person for suitable employment;

(3) undergo available medical treatment or mental health counseling and remain in a specified facility required for that purpose, including:

(A) addiction counseling;

(B) inpatient detoxification; and

(C) medication assisted treatment, including a federal Food and Drug Administration approved long acting, nonaddictive medication for the treatment of opioid or alcohol dependence;

(4) receive evidence based mental health and addiction, intellectual disability, developmental disability, autism, and co-occurring autism and mental illness forensic treatment services to reduce the risk of recidivism;

(5) support the person's dependents and meet other family responsibilities;

(6) make restitution or reparation to the victim of the crime for the damage or injury that was sustained;

(7) refrain from harassing, intimidating, threatening, or having any direct or indirect contact with the victim or a witness;

(8) report to the prosecuting attorney at reasonable times;

(9) answer all reasonable inquiries by the prosecuting attorney and promptly notify the prosecuting attorney of any change in address or employment; and

(10) participate in dispute resolution either under IC 34-57-3 or a program established by the prosecuting attorney.

(f) An agreement under subsection (d)(2) may include other provisions reasonably related to the defendant's rehabilitation, if approved by the court.

(g) The prosecuting attorney shall notify the victim when prosecution is withheld under this section.

*4. Costs/Filing Fees for Infraction and Ordinance Violation Cases.*—With respect to infraction or ordinance violations, Indiana Code section 33-37-4-2 provides as follows<sup>36</sup>:

(a) Except as provided in subsections (d) and (e), for each action that results in a judgment:

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35. Indiana Code section 33-37-4-1(c) provides that the clerk shall collect a pretrial diversion program fee if the prosecuting attorney and the accused person enter into a pretrial diversion agreement, which requires payment of a program fee. "The pretrial diversion program fee is: (1) an initial user's fee of fifty dollars (\$50); and (2) a monthly user's fee of ten dollars (\$10) for each month that the person remains in the pretrial diversion program." *Id.* § 33-37-4-1(c).

36. *Id.* § 33-37-4-2.

- (1) for a violation constituting an infraction; or
  - (2) for a violation of an ordinance of a municipal corporation (as defined in IC 36-1-2-10);
- the clerk shall collect from the defendant an infraction or ordinance violation costs fee of seventy dollars (\$70).
- (b) In addition to the infraction or ordinance violation costs fee collected under this section, the clerk shall collect from the defendant the following fees, if they are required under IC 33-37-5:
- (1) A document fee (IC 33-37-5-1, IC 33-37-5-3, or IC 33-37-5-4).
  - (2) An alcohol and drug services program user fee (IC 33-37-5-8(b)).
  - (3) A law enforcement continuing education program fee (IC 33-37-5-8(c)).
  - (4) An alcohol and drug countermeasures fee (IC 33-37-5-10).
  - (5) A highway work zone fee (IC 33-37-5-14).
  - (6) A deferred prosecution fee (IC 33-37-5-17).
  - (7) A jury fee (IC 33-37-5-19).<sup>37</sup>
  - (8) A document storage fee (IC 33-37-5-20).
  - (9) An automated record keeping fee (IC 33-37-5-21).
  - (10) A late payment fee (IC 33-37-5-22).
  - (11) A public defense administration fee (IC 33-37-5-21.2).
  - (12) A judicial insurance adjustment fee (IC 33-37-5-25).
  - (13) A judicial salaries fee (IC 33-37-5-26).
  - (14) A court administration fee (IC 33-37-5-27).
  - (15) A DNA sample processing fee (IC 33-37-5-26.2).

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(e) Instead of the infraction or ordinance violation costs fee prescribed by subsection (a), except for the automated record keeping fee (IC 33-37-5-21), the clerk shall collect a deferral program fee if an agreement between a prosecuting attorney or an attorney for a municipal corporation and the person charged with a violation entered into under IC 34-28-5-1 (or IC 34-4-32-1 before its repeal) requires payment of those fees by the person charged with the violation. The deferral program fee is:

- (1) an initial user's fee not to exceed fifty-two dollars (\$52); and
- (2) a monthly user's fee not to exceed ten dollars (\$10) for each month the person remains in the deferral program.

(f) The fees prescribed by this section are costs for purposes of IC 34-28-5-5 and may be collected from a defendant against whom judgment is entered. Any penalty assessed is in addition to costs.

*5. Costs/Filing Fees for Seatbelt/Child Restraint System Violation Cases.—*

*a. Seatbelt violation.*—“Each occupant of a motor vehicle equipped with a safety belt . . . shall have a safety belt properly fastened about the occupant's

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37. Again, the clerk “shall collect a jury fee of two dollars (\$2) in each action in which the defendant is found to have committed a crime, violated a statute defining an infraction, or violated an ordinance of a municipal corporation.” *Id.* § 33-37-5-19.

body at all times when the vehicle is in forward motion.”<sup>38</sup> Indiana Code section 9-19-10-8 provides that “[a] person who: (1) is at least sixteen years old; and (2) violates [Indiana Code section 9-19-10-2]; commits a Class D infraction.”<sup>39</sup> “A judgment of up to twenty-five dollars (\$25) may be entered for a violation constituting a Class D infraction.”<sup>40</sup>

*b. Child restraint system violation.*—“A person who operates a motor vehicle in which there is a child less than eight (8) years of age who is not properly fastened and restrained according to the child restraint system manufacturer’s instructions by a child restraint system commits a Class D infraction.”<sup>41</sup> However,

A person may not be found to have violated this subsection if the person carries a certificate from a physician, physician’s assistant, or advanced practice nurse stating that it would be impractical to require that a child be fastened and restrained by a child restraint system because of:

- (1) a physical condition, including physical deformity; or
  - (2) a medical condition;
- of the child and presents the certificate to the police officer or the court.<sup>42</sup>

In addition,

A person who operates a motor vehicle in which there is a child and that is equipped with a safety belt meeting the standards stated in the Federal Motor Vehicle Safety Standard Number 208 (49 CFR 571.208) commits a Class D infraction if:

- (1) the child is at least eight (8) years of age but less than sixteen (16) years of age; and
- (2) the child is not properly fastened and restrained according to the child restraint system manufacturer’s instructions by a:
  - (A) child restraint system; or
  - (B) safety belt.<sup>43</sup>

Again, “A judgment of up to twenty-five dollars (\$25) may be entered for a violation constituting a Class D infraction.”<sup>44</sup>

*6. Court Reporter Fees.*—It is important to note that additional fees may be applied for the completion of transcripts. An individual requesting a copy of the transcript should consult with the local rules of the county in which the action is pending to determine the current fees that may be imposed for completion of a transcript. Transcript fees do vary from county to county in Indiana.

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38. *Id.* § 9-19-10-2.

39. *Id.* § 9-19-10-8.

40. *Id.* § 34-28-5-1(d).

41. *Id.* § 9-19-11-2(a).

42. *Id.*

43. *Id.* § 9-19-11-3.6(a).

44. *Id.* § 34-28-5-1(d).

*C. Additional Types of Fees Which May Be Imposed*

*1. Community Corrections/Home Detention Fees.*—If an individual is placed in community corrections or on home detention following a criminal conviction, a trial court may impose both an initial user fee and a monthly user fee pursuant to Indiana Code section 31-38-2-1.<sup>45</sup>

If the individual was convicted of a felony, the initial user fee shall be “no less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100).”<sup>46</sup> The monthly user fee for an individual convicted of a felony shall be “not less than fifteen dollars (\$15) nor more than thirty dollars (\$30)” for each month that the individual remains in community corrections or on home detention.<sup>47</sup> The trial court shall also impose an administrative fee of one hundred dollars.<sup>48</sup>

If the individual was convicted of a misdemeanor, the initial user fee shall be “not more than fifty dollars (\$50).”<sup>49</sup> The monthly user fee for an individual convicted of a misdemeanor shall be “not less than ten dollars (\$10) nor more than twenty dollars (\$20)” for each month that the individual remains in community corrections or on home detention.<sup>50</sup> The trial court shall also impose an administrative fee of fifty dollars.<sup>51</sup>

If the individual is a juvenile who was adjudicated delinquent for committing what would be a crime if committed by an adult, the initial user fee may be “at least twenty-five dollars (\$25) but not more than one hundred dollars (\$100).”<sup>52</sup> The monthly user fee for a juvenile adjudicated to be a delinquent for committing what would be a crime if committed by an adult may be “at least ten dollars (\$10) but not more than twenty-five dollars (\$25)” for each month that the juvenile remains in community corrections or on home detention.<sup>53</sup> The trial court may also order an administrative fee of \$100 if the delinquent child is supervised by a juvenile probation officer.<sup>54</sup> A court may order a juvenile’s parent, guardian, or custodian to pay these fees if the juvenile is unable to pay.<sup>55</sup>

*2. Drug Abuse, Prosecution, Interdiction, and Correction Fee.*—Indiana Code section 33-37-5-9 provides as follows<sup>56</sup>:

- (a) This section applies to criminal actions.
- (b) The court shall assess a drug abuse, prosecution, interdiction, and correction fee of at least two hundred dollars (\$200) and not more than

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45. *See id.* §§ 33-12-2-12, 35-38-2.5-6.

46. *Id.* § 35-38-2-1(d).

47. *Id.*

48. *Id.*

49. *Id.* § 35-38-2-1(e).

50. *Id.*

51. *Id.*

52. *Id.* § 31-40-2-1(a).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* § 33-37-5-9.

one thousand dollars (\$1,000) against a person convicted of an offense under IC 35-48-4.<sup>57</sup>

(c) In determining the amount of the drug abuse, prosecution, interdiction, and correction fee assessed against a person under subsection (b), a court shall consider the person's ability to pay the fee.

(d) The clerk shall collect the drug abuse, prosecution, interdiction, and correction fee set by the court when a person is convicted of an offense under IC 35-48-4.

Indiana Code section 33-37-5-9(c) explicitly provides that a trial court shall consider a defendant's ability to pay in determining the amount of fee to impose.<sup>58</sup> In considering a prior version of the above-quoted statute,<sup>59</sup> the Court of Appeals of Indiana has concluded the statute allows for a maximum fee of \$1000 per person, "regardless of the number of applicable offenses of which [a defendant was] convicted in any one proceeding."<sup>60</sup>

3. *Probation Fees.*—

a. *Initial and monthly probation user fees.*—

(i) *Adult probationers.*—Indiana Code section 31-38-2-1 sets forth initial and monthly probation user fees, which a trial court may impose when placing an individual on probation.<sup>61</sup>

If the individual was convicted of a felony, the initial user fee shall be "no less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100)."<sup>62</sup> The monthly user fee for an individual convicted of a felony shall be "not less than fifteen dollars (\$15) nor more than thirty dollars (\$30)" for each month that the individual remains on probation.<sup>63</sup> The trial court shall also impose an administrative fee of \$100.<sup>64</sup> If the individual was convicted of a misdemeanor, the initial user fee shall be "not more than fifty dollars (\$50)."<sup>65</sup> The monthly user fee for an individual convicted of a misdemeanor shall be "not less than ten dollars (\$10) nor more than twenty dollars (\$20)" for each month that the individual remains on probation.<sup>66</sup> The trial court shall also impose an administrative fee of fifty dollars.<sup>67</sup>

(ii) *Juvenile probationers.*—Indiana Code section 31-40-2-1 sets forth initial

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57. Indiana Code chapter 35-48-4 covers offenses relating to controlled substances.

58. IND. CODE § 33-37-5-9 (2016).

59. The court considered a fee imposed under Indiana Code section 33-19-6-9. The language of Indiana Code section 33-49-6-9 appears to be substantially the same as the language of Indiana Code section 33-37-5-9.

60. *Goffinet v. State*, 775 N.E.2d 1227, 1235 (Ind. Ct. App. 2002).

61. IND. CODE § 31-38-2-1.

62. *Id.* § 35-38-2-1(d).

63. *Id.*

64. *Id.*

65. *Id.* § 35-38-2-1(e).

66. *Id.*

67. *Id.*

and monthly probation user fees which a trial court may impose when placing a juvenile who has been adjudicated to be delinquent for committing what would be a crime if committed by an adult on probation.<sup>68</sup>

If the individual is a juvenile who was adjudicated delinquent for committing what would be a crime if committed by an adult, the initial user fee may be “at least twenty-five dollars (\$25) but not more than one hundred dollars (\$100).”<sup>69</sup> The monthly user fee for a juvenile adjudicated to be a delinquent for committing what would be a crime if committed by an adult may be “at least ten dollars (\$10) but not more than twenty-five dollars (\$25)” for each month that the juvenile remains on probation.<sup>70</sup> The trial court may also order an administrative fee of \$100 if the delinquent child is supervised by a juvenile probation officer.<sup>71</sup> A court may order a juvenile’s parent, guardian, or custodian to pay these fees if the juvenile is unable to pay.<sup>72</sup>

*b. Timely determination regarding ability to pay.*—Upon imposing probation fees, a trial court is required to conduct an indigency hearing to determine whether the individual has the ability to pay said fees.<sup>73</sup> However, a trial court acts within its authority when it chooses to wait and see if an individual can pay probation fees before it finds the defendant indigent.<sup>74</sup> “At the latest, an indigency hearing for probation fees should be held at the time [an individual] completes his sentence.”<sup>75</sup>

*c. Additional fees imposed as a condition of probation.*—In addition, a trial court may, as a condition of the individual’s probation, order an individual to make restitution or reparation to the victim for damage or injury sustained by the victim, so long as the order of restitution or reparation does not exceed an amount the person can or will be able to pay.<sup>76</sup> A trial court may also, as a condition of the individual’s probation, execute a repayment agreement with the appropriate governmental entity to repay the full amount of public assistance wrongfully received or pay a fine.<sup>77</sup>

*d. Revocation of probation for failure to pay fees or fines.*—It is well-settled that failure to pay a probation user fee where the probationer has no ability to pay “certainly cannot result in a probation revocation.”<sup>78</sup> In this vein, the Supreme Court of Indiana has recognized that

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68. *Id.* § 31-40-3-2-1.

69. *Id.* § 31-40-2-1(a).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Johnson v. State*, 27 N.E.3d 793, 795 (Ind. Ct. App. 2015).

74. *Id.*

75. *Id.*

76. IND. CODE § 35-38-2-2.3(a) (2016).

77. *Id.*

78. *Woods v. State*, 892 N.E.2d 637, 641 (Ind. 2008); *see also Johnson v. State*, 62 N.E.3d 1224, 1229 (Ind. Ct. App. 2016).

[a]s provided by Indiana’s statutory scheme, probation may be revoked for violation of a probation condition but, for violations of financial conditions, only if the probationer recklessly, knowingly, or intentionally fails to pay. As to the fact of violation, the statute expressly imposes the burden of proof upon the State. . . . Where the claimed violation is that the probationer failed to comply with financial conditions of probation, the trial court must be convinced both that the condition was violated and that the failure to pay was reckless, knowing, or intentional.<sup>79</sup>

Because proof of both of these components is required before a trial court may revoke probation, the Supreme Court of Indiana held “it is the State’s burden to prove both the violation and the requisite state of mind in order to obtain a probation revocation.”<sup>80</sup> The Supreme Court of Indiana further observed “that, because the phrase ‘recklessly, knowingly, or intentionally’ appears in the disjunctive and thus prescribes alternative considerations, the state of mind requirement may be satisfied by adequate evidence that a defendant’s failure to pay a probation imposed financial obligation was either reckless, knowing, or intentional.”<sup>81</sup> The Supreme Court of Indiana held, however, that it is the probationer’s burden “to show facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered.”<sup>82</sup>

4. *Problem Solving Courts.*—

a. *Problem solving courts defined.*—Indiana Code section 33-23-16-8 defines a “problem solving court” as follows:

As used in this chapter, “problem solving court” means a court providing a process for immediate and highly structured judicial intervention for eligible individuals that incorporates the following problem solving concepts:

- (1) Enhanced information to improve decision making.
- (2) Engaging the community to assist with problem solving.
- (3) Collaboration with social service providers and other stakeholders.
- (4) Linking participants with community services based on risk and needs.
- (5) Participant accountability.
- (6) Evaluating the effectiveness of operations continuously.<sup>83</sup>

Types of problem solving courts include: “(1) drug court; (2) mental health court; (3) family dependency drug court; (4) community court; (5) reentry court; (6) domestic violence court; (7) veteran’s court; or (8) any other court certified as a

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79. Runyon v. State, 939 N.E.2d 613, 616 (Ind. 2010).

80. *Id.*

81. *Id.*

82. *Id.* at 617.

83. IND. CODE § 33-23-16-8 (2016).

problem solving court by the Indiana judicial center.”<sup>84</sup>

Pursuant to Indiana Code section 33-23-16-20(a), a problem solving court may provide the following services to individuals participating in problem solving court programs:

- (1) Screening for eligibility and other appropriate services.
- (2) Assessment.
- (3) Education.
- (4) Referral.
- (5) Service coordination and case management.
- (6) Supervision.
- (7) Judicial involvement.
- (8) Program evaluation.
- (9) Rehabilitative services.<sup>85</sup>

However, a problem solving court may not provide direct treatment services unless:

- (1) the problem solving court is certified by the division of mental health and addiction under IC 12-23-1-6;
- (2) the problem solving court uses licensed medical professionals who provide mental health treatment to individuals with psychiatric disorders; and
- (3) the court that establishes the problem solving court determines that existing community resources are inadequate to respond satisfactorily to the demand for services from the court.<sup>86</sup>

A problem solving court may require an individual participating in the court to receive: “(1) addition counseling; (2) inpatient detoxification; (3) case management; (4) daily living skills; and (5) medication assisted treatment, including a federal Food and Drug Administration approved long acting, nonaddictive medication for the treatment of opioid or alcohol dependence.”<sup>87</sup>

*b. Fees associated with problem solving courts.—*

*(i) Adult participant.—*“A court that has established a problem solving court . . . may require eligible individuals to pay a fee for problem solving court services.”<sup>88</sup> If a fee is required, the court “shall adopt by local court rule a schedule of fees . . . to be assessed for problem solving court services.”<sup>89</sup> A non-exhaustive<sup>90</sup> sampling of such fees set forth by local court rules are as follows:

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84. *Id.* § 33-23-16-11.

85. *Id.* § 33-23-16-20(a).

86. *Id.* § 33-26-16-20(b).

87. *Id.* § 33-23-16-24.5.

88. *Id.* § 33-23-16-23(b).

89. *Id.* § 33-23-16-23 (c).

90. This list is not intended to be an exhaustive list of the fees associated with all county problem-solving courts in Indiana, or even an exhaustive list of all of the problem-solving courts present in each of the highlighted counties. Rather, this list is intended only to provide an overview

Allen County	<b>Drug Court/Problem-Solving Court</b> – “Criminal Division Services urine drug screen fees shall be reasonably assessed utilizing Problem-Solving Court sanctions/incentives as appropriate and based upon specific lab costs and administrative processing fees.” <sup>91</sup>
Bartholomew County	<b>Veterans Treatment Court</b> – “\$100 felon/\$50 misdemeanor initial fee” which is due upon entry into the program followed by a \$30 felon/\$20 misdemeanor monthly fee which “commenc[es] in the second month of participation and [is due] each month thereafter for the duration of participation in the [program].” <sup>92</sup>
Clark County	<b>Drug Treatment Court</b> – “[P]ersons directed to participate in the Clark County Drug Treatment Court Program shall pay a \$100 administrative fee per admission to the problem-solving court for . . . court services regardless of the length of participation . . . .” <sup>93</sup> Participants “in the Clark County Drug Treatment Court Program shall also pay \$50 per month beginning with the second month of participation and for each month thereafter for the duration of participation in the” program. <sup>94</sup> However, a “ <i>fee may be waived by Order of the Court</i> to avoid a financial hardship, upon termination, subsequent disqualification from the program, or for any other reasonable circumstances determined by the court.” <sup>95</sup>
Kosciusko County	<b>Drug Court</b> – “[P]ersons directed to participate in the Kosciusko County Drug Court may be assessed with the following” fees: (1) a \$100 administration fee; (2) a \$50 monthly user fee; (3) a \$20 drug testing fee; and (4) a \$25 transfer fee. <sup>96</sup>
Madison County	“The following fees are assessed to participants [in the Madison County] Problem Solving Courts: <b>Drug Court</b> – Monthly Court User Fee of \$40.00 <b>Mental Health Court</b> – Monthly Court User Fee of \$40.00 <b>Re-entry Court</b> – Monthly Court User Fee of \$40.00 . . . .” <sup>97</sup>

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of the types of problem-solving courts present in Indiana and to give the reader an idea of the fees associated with participation in services offered by some of these special courts.

91. LR02-TR00-49(2) (2015).

92. LR03-CR2.2-2 (2017).

93. LR10-AR00-17(C) (2016).

94. *Id.* at -17(D).

95. *Id.* at -17(E) (emphasis added).

96. LR43-AR-8 (2015).

97. LR48-CR2.2-13.5 (2015).

Marion County	<p>The following fees are assessed to participants in the Madison County Problem Solving Courts:</p> <p><b>Drug Court</b> – “[A] \$100 administrative fee as well as a problem-solving court fee of \$25 for each month of problem-solving court participation . . . . The monthly fee, however, shall not exceed \$600 in total assessment.”<sup>98</sup></p> <p><b>Re-entry Court</b> – “[A] \$100 administrative fee as well as a problem-solving court fee of \$25 for each month of problem-solving court participation . . . . The monthly fee[, however,] shall not exceed \$600 in total assessment.”<sup>99</sup></p> <p>The Marion County local court rules also provide for the existence of a mental health court, but do not specifically set forth additional fees related to cases filed/pending in this court.<sup>100</sup></p>
Monroe County	<p><b>Drug Treatment Court</b> – Persons directed to participate in the Monroe County Drug Treatment Court may be assessed the following fees: (1) an administration fee of not more than \$100 per admission and (2) a monthly participation fee of \$50 or less, “beginning with the second month of participation and continuing for each month thereafter for the duration of participation in the problem-solving court.”<sup>101</sup></p>

Again, this non-exhaustive list represents only a sampling of fees associated with local problem-solving courts in Indiana. Practitioners should consult the local court rules of each county in which they practice to determine whether the county has established problem-solving courts, and, if so, what fees might be associated with participation in these local problem-solving courts.

(ii) *Juvenile participant*.—Indiana Code section 33-23-16-23.5 provides:

- (a) A parent or guardian of a child:
- (1) who is:
    - (A) adjudicated a delinquent child; or
    - (B) in a program of informal adjustment approved by a juvenile court under IC 31-37-9; and
  - (2) who is accepted into a problem solving court program; is financially responsible for the problem solving court services fee and chemical testing expenses assessed against the child by the problem solving court under this chapter.
- (b) A parent or guardian of a child described in subsection (a) shall, before a hearing under subsection (c) concerning payment of fees and expenses assessed against the child, provide financial information to the problem solving court as ordered by the problem solving court.

98. LR49-CR00-115(b) (2016).

99. *Id.*

100. LR49-CR2.2-100 (2016).

101. LR53-AR00-0154(C) (2017).

(c) The problem solving court shall hold a hearing and may order the parent or guardian to pay fees and expenses assessed against a child described in subsection (a) unless the problem solving court makes a specific finding that:

- (1) the parent or guardian is unable to pay the fees or expenses; or
- (2) justice would not be served by ordering the parent or guardian to pay the fees or expenses.

(d) If a parent or guardian is ordered to pay fees or expenses under this section, the parent or guardian shall pay the fees or expenses to the problem solving court or the clerk of the court. The problem solving court shall keep a record of all payments made under this section by each parent or guardian. When a child is discharged from a problem solving court program, the problem solving court shall determine the amount of any unpaid fees or expenses a parent or guardian owes under this section. The problem solving court may reduce the unpaid balance to a final judgment that may be enforced in any court that has appropriate jurisdiction.<sup>102</sup>

5. *Public Defender Fees.*—Three statutes provide authority to the trial court to impose a fee on a defendant for the cost of his appointed counsel. These statutes are Indiana Code sections 33-37-2-3, 33-40-3-6, and 35-33-7-6.

a. *Indiana Code section 33-37-2-3.*—Indiana Code section 33-37-2-3 provides:

(a) Except as provided in subsection (b), when the court imposes costs, *it shall conduct a hearing to determine whether the convicted person is indigent.* If the person is not indigent, the court shall order the person to pay:

- (1) the entire amount of the costs at the time sentence is pronounced;
- (2) the entire amount of the costs at some later date; or
- (3) specified parts of the costs at designated intervals.

(b) A court may impose costs and suspend payment of all or part of the costs until the convicted person has completed all or part of the sentence. If the court suspends payment of the costs, the court shall conduct a hearing at the time the costs are due to determine whether the convicted person is indigent. If the convicted person is not indigent, the court shall order the convicted person to pay the costs:

- (1) at the time the costs are due; or
- (2) in a manner set forth in subsection (a)(2) through (a)(3).

(c) If a court suspends payment of costs under subsection (b), the court retains jurisdiction over the convicted person until the convicted person has paid the entire amount of the costs.

(d) Upon any default in the payment of the costs:

- (1) an attorney representing the county may bring an action on a debt for the unpaid amount;

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102. IND. CODE § 33-23-16-23.5 (2016).

(2) the court may direct that the person, if the person is not indigent, be committed to the county jail and credited toward payment at the rate of twenty dollars (\$20) for each twenty-four (24) hour period the person is confined, until the amount paid plus the amount credited equals the entire amount due; or

(3) the court may institute contempt proceedings to enforce the court's order for payment of the costs.

(e) If, *after a hearing* under subsection (a) or (b), the court determines that a convicted person is able to pay part of the costs of representation, *the court shall order the person to pay an amount of not more than the cost of the defense services rendered on behalf of the person.* The clerk shall deposit the amount paid by a convicted person under this subsection in the county's supplemental public defender services fund established under IC 33-40-3-1.

(f) A person ordered to pay part of the cost of representation under subsection (e) has the same rights and protections as those of other judgment debtors under the Constitution of the State of Indiana and Indiana law.<sup>103</sup>

With regard to the cost of representation, the plain language of Indiana Code section 33-37-2-3 provides that if, after holding a hearing, the trial court determines an individual has the financial ability to pay part of the costs of representation, the trial court shall order the individual to pay an amount of not more than the total cost of defense services rendered.<sup>104</sup> The trial court shall conduct a hearing to determine whether a defendant has an ability to pay at the time the fees are due.<sup>105</sup>

*b. Indiana Code section 33-40-3-6.*—Indiana Code section 33-40-3-6 provides:

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

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

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

(b) The clerk of the court shall deposit costs collected under this section

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103. *Id.* § 33-37-2-3 (emphasis added).

104. *Id.* § 33-37-2-3(e).

105. *See* *Bex v. State*, 952 N.E.2d 347, 355-56 (Ind. Ct. App. 2011); *see also* *Rich v. State*, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008) (providing the trial court did not abuse its discretion in failing to conduct a hearing regarding the defendant's ability to pay the assessed public defender fee under Indiana Code section 33-37-2-3 because payment of the fee was not yet due).

into the supplemental public defender services fund established under section 1 of this chapter.

(c) A person ordered to pay any part of the costs of representation under subsection (a) has the same rights and protections as those of other judgment debtors under the Constitution of the State of Indiana and under Indiana law.

(d) The sum of:

- (1) the fee collected under IC 35-33-7-6;
  - (2) any amount assessed by the court under this section; and
  - (3) any amount ordered to be paid under IC 33-37-2-3;
- may not exceed the cost of defense services rendered to the person.<sup>106</sup>

Under the clear language of Indiana Code section 33-40-3-6, a trial court may order a defendant or an alleged delinquent juvenile's parents to pay attorney's fees at any stage of a prosecution for a criminal case or juvenile delinquency proceeding if an attorney has been appointed for the defendant or alleged juvenile delinquent and the trial court determines the defendant or alleged juvenile delinquent, or his parents, have the ability to pay.<sup>107</sup> Again, any fee ordered under this section may not exceed the total of defense services rendered on the individual's behalf.<sup>108</sup>

"A trial court abuses its discretion if a fee is imposed under [Indiana Code section 33-40-3-6] without a determination of the ability to pay."<sup>109</sup> In determining whether an indigent defendant or a child has the ability to pay costs incident to his or her representation, the trial court shall consider:

- (1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated;
- (2) the person's income;
- (3) the person's liabilities; and
- (4) the extent of the burden that payment of costs assessed under section 6 of this chapter would impose on the person and the dependents of the person.<sup>110</sup>

If the trial court determines the person is able to pay a part of the costs of representation, the court shall enter a finding that the person is able to pay those additional costs.<sup>111</sup>

*c. Indiana Code section 35-33-7-6.*—Indiana Code section 35-33-7-6 provides:

- (a) Prior to the completion of the initial hearing, the judicial officer shall

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106. IND. CODE § 33-40-3-6 (2016) (emphasis added).

107. *Id.*

108. *Id.*

109. *Bex*, 952 N.E.2d at 354.

110. IND. CODE § 33-40-3-7 (2016).

111. *Id.*

determine whether a person who requests assigned counsel is indigent. If the person is found to be indigent, the judicial officer shall assign counsel to the person.

(b) If jurisdiction over an indigent defendant is transferred to another court, the receiving court shall assign counsel immediately upon acquiring jurisdiction over the defendant.

(c) If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court *shall* order the person to pay the following:

(1) For a felony action, a fee of one hundred dollars (\$100).

(2) For a misdemeanor action, a fee of fifty dollars (\$50).

The clerk of the court shall deposit fees collected under this subsection in the county's supplemental public defender services fund established under IC 33-40-3-1.

(d) The court may review the finding of indigency at any time during the proceedings.<sup>112</sup>

Under the clear language of Indiana Code section 35-33-7-6, a trial court shall make a determination as to whether the defendant is indigent prior to the completion of the initial hearing.<sup>113</sup> If a defendant is found to be indigent, the trial court shall assign counsel to that person.<sup>114</sup> A trial court may review a finding of indigency at any time during the proceedings.<sup>115</sup> If a defendant is found to be indigent, a trial court may still find the defendant is able to pay a portion of the cost of representation.<sup>116</sup> If such a finding is made, the trial court may then order the defendant to pay a public defender fee.<sup>117</sup> Indiana Code section 35-33-7-6 limits this amount to \$100 for a felony action and fifty dollars for a misdemeanor action.<sup>118</sup> Similar to Indiana Code sections 33-37-2-3 and 33-40-3-6, the trial court must make a determination regarding the ability to pay before imposing such a fee under Indiana Code section 33-33-7-6.<sup>119</sup>

## II. FINES: IMPOSITION OF FINES AS CRIMINAL SANCTIONS

### *A. Statutory Limits of Fines That May Be Imposed*

The Indiana Code provides that fines may be imposed as part of an individual's sentence following a criminal conviction.<sup>120</sup> Sentencing decisions,

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112. *Id.* § 35-33-7-6 (emphasis added).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See generally* Whitewater Valley Canoe Rental, Inc. v. Bd. of Franklin Cty. Comm'rs, 507 N.E.2d 1001, 1009 (Ind. Ct. App. 1987) (providing "[r]easonable penalties may be imposed

including the imposition of fines, are generally left to the trial court's discretion.<sup>121</sup> The Indiana Supreme Court has held,

While fines and penalties should not be excessive, and must be proportioned to the nature of the offense, that does not mean that this court can set aside a conviction and sentence, within the statute, merely because on the record it may seem severe.<sup>122</sup>

The Indiana Supreme Court has further stated that because a fine that falls within the amount allowed by the applicable statute is generally proper, a reviewing court "cannot interfere on account of its severity."<sup>123</sup>

It is important to note that while a fine, although severe, may be proper, Indiana's Rules of Appellate Procedure apply to appellate review of fines as well as incarceration.<sup>124</sup> Indiana Appellate Rule 7(B) states that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."<sup>125</sup> As such, when an appellant challenges the appropriateness of his or her sentence, Indiana Appellate Courts have the authority to revise a sentence, including a fine, which is authorized by statute if the Court finds the sentence is inappropriate in light of the nature of the appellant's offense or the appellant's character.<sup>126</sup>

The following chart provides the maximum fine that may be imposed for each level of criminal offense:

Level of Crime	Maximum Fine Permitted
Murder <sup>127</sup>	\$10,000
Class A Felony/Level 1 Felony <sup>128</sup>	\$10,000
Level 2 Felony <sup>129</sup>	\$10,000

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by ordinances and statutes when authorized in order to induce compliance with their terms").

121. *Bex*, 952 N.E.2d at 354.

122. *Blue v. State*, 224 Ind. 394, 400 (1946).

123. *Id.*

124. *Johnson v. State*, 845 N.E.2d 147, 152 (Ind. Ct. App. 2006); *see also Like v. State*, 760 N.E.2d 1188, 1192 (Ind. Ct. App. 2002) (citing *Austin v. State*, 528 N.E.2d 792, 795 (Ind. Ct. App. 1988)).

125. IND. R. APP. P. 7(B).

126. *Johnson*, 845 N.E.2d at 152.

127. IND. CODE § 35-50-2-3.

128. *Id.* § 35-50-2-4.

129. *Id.* § 35-50-2-4.5.

Class B Felony/Level 3 Felony <sup>130</sup>	\$10,000
Level 4 Felony <sup>131</sup>	\$10,000
Class C Felony/Level 5 Felony <sup>132</sup>	\$10,000
Class D Felony/Level 6 Felony <sup>133</sup>	\$10,000
Class A Misdemeanor <sup>134</sup>	\$5000
Class B Misdemeanor <sup>135</sup>	\$1000
Class C Misdemeanor <sup>136</sup>	\$500

With respect to criminal convictions resulting in pecuniary gain to the defendant or a pecuniary loss to the victim, the Indiana General Assembly has also dictated that in the alternative to the provisions concerning fines in article 50 of title 35, “a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by victims of the offense he committed.”<sup>137</sup> Further, if a defendant is placed on probation as part of a criminal sanction, a trial court may order an individual to pay a fine authorized by statute as a condition of the individual’s probation.<sup>138</sup>

### *B. Inquiry into Ability to Pay*

*1. Statutory Authority.*—Indiana Code section 35-38-1-18 provides:

(a) Except as provided in subsection (b), whenever the court imposes a fine, it shall conduct a hearing to determine whether the convicted person is indigent. If the person is not indigent, the court shall order:

- (1) that the person pay the entire amount at the time sentence is pronounced;
- (2) that the person pay the entire amount at some later date;
- (3) that the person pay specified parts at designated intervals; or
- (4) at the request of the person, commitment of the person to the county jail for a period of time set by the court in lieu of a fine. If the court orders a person committed to jail under this subdivision, the person’s total confinement for the crime that resulted in the conviction must not exceed the maximum term of imprisonment prescribed for the crime under IC 35-50-2 or IC 35-50-3.

130. *Id.* § 35-50-2-5.

131. *Id.* § 35-50-2-5.5.

132. *Id.* § 35-50-2-6.

133. *Id.* § 35-50-2-7.

134. *Id.* § 35-50-3-2.

135. *Id.* § 35-50-3-3.

136. *Id.* § 35-50-3-4.

137. *Id.* § 35-50-5-2.

138. *Id.* §35-38-2-2.3(8).

(b) A court may impose a fine and suspend payment of all or part of the fine until the convicted person has completed all or part of the sentence. If the court suspends payment of the fine, the court shall conduct a hearing at the time the fine is due to determine whether the convicted person is indigent. If the convicted person is not indigent, the court shall order the convicted person to pay the fine:

(1) at the time the fine is due; or

(2) in a manner set forth in subsection (a)(2) through (a)(4).

(c) If a court suspends payment of a fine under subsection (b), the court retains jurisdiction over the convicted person until the convicted person has paid the entire amount of the fine.

(d) Upon any default in the payment of the fine:

(1) an attorney representing the county may bring an action on a debt for the unpaid amount;

(2) the court may direct that the person, if the person is not indigent, be committed to the county jail and credited toward payment at the rate of twenty dollars (\$20) for each twenty-four (24) hour period the person is confined, until the amount paid plus the amount credited equals the entire amount due; or

(3) the court may institute contempt proceedings or order the convicted person's wages, salary, and other income garnished in accordance with IC 24-4.5-5-105<sup>139</sup> to enforce the court's order for payment of the fine.<sup>140</sup>

2. *Applicable Case Law.*—The Supreme Court of Indiana has observed that the Indiana General Assembly requires indigency hearings following the imposition of a fine.<sup>141</sup> Such a hearing is required because an indigent defendant may not be imprisoned for failure to pay any fine imposed as a result of his or her conviction.<sup>142</sup> However, a trial court's sentence order need not include the express statement that the defendant cannot be imprisoned for failing to pay his or her fine.<sup>143</sup> Further, a person may be found indigent and still be ordered to pay a fine if the court determines after a hearing that the individual has the ability to pay.<sup>144</sup> This is because a finding of indigency does not shield a defendant from all fines, costs, or fees related to his or her conviction, but merely prevents the defendant

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139. Indiana Code section 24-4.5-5-105 sets forth the limitations on garnishment of an individual's earnings.

140. IND. CODE § 35-38-1-18 (2016).

141. Whedon v. State, 765 N.E.2d 1276, 1279 (Ind. 2002).

142. *Id.*

143. *Id.*

144. *See* Henderson v. State, 44 N.E.3d 811, 815 (Ind. Ct. App. 2015); *see also* Mueller v. State, 837 N.E.2d 198, 205 (Ind. Ct. App. 2005) (citing Ratliff v. State, 741 N.E.2d 424, 435 (Ind. Ct. App. 2000)) (providing a finding of indigency with respect to court-appointed counsel may not necessarily be dispositive of whether a defendant can afford to pay a fine).

from being imprisoned for his or her inability to pay.<sup>145</sup>

Consistent with Indiana Code section 35-38-1-18, applicable case law provides that payment of a fine may be ordered to be made at the time a defendant is sentenced or suspended until after the defendant is released from incarceration.<sup>146</sup> Specifically, the applicable case law indicates that if the trial court suspends payment of the fine until after a defendant is released from incarceration, then the hearing regarding ability to pay should be held at the time payment will be due, i.e., once the defendant is released from incarceration.<sup>147</sup> However, if the payment of the fine is not suspended, the hearing regarding a defendant's ability to pay should be held at the time the fine is imposed.<sup>148</sup>

3. *Summary—Tips for Trial Courts and Practitioners.*—With regard to the imposition of fines, the applicable authority is fairly clear. A trial court may impose any fine allowed by statute as part of a defendant's sentence following a criminal conviction.<sup>149</sup> If a trial court chooses to do so, it must conduct an indigency hearing to determine the defendant's ability to pay.<sup>150</sup> This hearing should be conducted at the time payment of the fine becomes due (i.e., either when the fine is imposed, or, when the defendant is released from incarceration if payment of the fine is suspended until that time).<sup>151</sup> Further, while a finding of indigency does not automatically shield a defendant from the responsibility to pay fines, an indigent defendant may not be imprisoned for his or her failure to pay any fines imposed.<sup>152</sup> It is also of note that the Court of Appeals of Indiana has concluded that because the applicable statutes do not expressly allow for such, a trial court may not impose a community service requirement in lieu of fines.<sup>153</sup>

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145. *Meunier-Short v. State*, 52 N.E.3d 927, 931 (Ind. Ct. App. 2016) (citing *Banks v. State*, 847 N.E.2d 1050, 1051 (Ind. Ct. App. 2006); *Henderson*, 44 N.E.3d at 815).

146. *See Berry v. State*, 950 N.E.2d 798, 801 (Ind. Ct. App. 2011) (providing while a trial court may suspend payment of costs and fees until the executed portion of the defendant's sentence has been served, a trial court is not required to do so).

147. *See Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002) (describing "a defendant's financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration, thus allowing consideration of whether the defendant may have accumulated assets through inheritance or otherwise").

148. *See Berry*, 950 N.E.2d at 800-01.

149. *See Whitewater Valley Canoe Rental, Inc. v. Bd. of Franklin Cty. Comm'rs*, 507 N.E.2d 1001, 1009 (Ind. Ct. App. 1987) ("Reasonable penalties may be imposed by ordinances and statutes when authorized in order to induce compliance with their terms.").

150. IND. CODE § 35-38-1-18(a) (2016).

151. *Id.* § 35-38-1-18(b).

152. *See Whedon*, 765 N.E.2d at 1279.

153. *Griffin v. State*, 997 N.E.2d 375, 381 (Ind. Ct. App. 2013); *Vaughn v. State*, 982 N.E.2d 1071, 1075 (Ind. Ct. App. 2013).

### III. RESTITUTION

#### *A. General Overview*

In addition to court costs, fees, and fines, a trial court has the authority to order a defendant convicted of a crime to make restitution<sup>154</sup> to the victims<sup>155</sup> of the crime.<sup>156</sup> The purpose of a restitution order is twofold; first, to impress upon the criminal defendant the magnitude of the loss he has caused, and second, to defray costs to the victims caused by the offense.<sup>157</sup> Restitution may be ordered as part of a sentence or as a condition of probation.<sup>158</sup> However, except for in some limited circumstances,<sup>159</sup> a trial court is not required to enter a restitution order, and thus, a victim has no right to receive restitution.<sup>160</sup> The trial court is also bound to comply with the applicable restitution statutes when ordering restitution.<sup>161</sup> Further, because restitution is penal in nature, the statute providing for restitution must be strictly construed against the State to avoid enlarging it beyond the fair meaning of the language used.<sup>162</sup>

#### *B. The Restitution Order*

Indiana Code section 35-50-5-3 sets forth the requirements for a restitution order:

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154. This Article addresses financial restitution (not community restitution, the term used to describe community service).

155. Under certain circumstances, a state entity or an insurer may be considered a “victim” for purposes of restitution. *Gonzalez v. State*, 3 N.E.3d 27, 29 (Ind. Ct. App. 2014). Also, a trial court may determine a custodial parent is a “victim” entitled to criminal restitution in the amount of the child-support arrearage. *Sickels v. State*, 982 N.E.2d 1010, 1014 (Ind. 2013).

156. IND. CODE § 35-50-5-3 (2016); *Wolff v. State*, 914 N.E.2d 299, 303 (Ind. Ct. App. 2009).

157. *Henderson v. State*, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006).

158. *Morgan v. State*, 49 N.E.3d 1091, 1093 (Ind. Ct. App. 2016); IND. CODE § 35-50-5-3 (2016).

159. For instance, Indiana Code section 35-48-4-17 provides that “a court shall order restitution under IC 35-50-5-3 to cover the costs, if necessary, of an environmental cleanup incurred by a law enforcement agency or other person as a result of the offense” (manufacture or intent to manufacture methamphetamine). Similarly, Indiana Code section 35-42-3.5-2 provides that “the court shall order the person convicted [of a human and sexual trafficking crime] to make restitution to the victim of the crime under IC 35-50-5-3.” Indiana Code section 9-30-5-17 provides that a defendant sentenced for either misdemeanor or felony operating a vehicle while intoxicated shall be ordered to make restitution to the emergency medical services restitution fund.

160. *Kelley v. State*, 11 N.E.3d 973, 976 (Ind. Ct. App. 2014). However, pursuant to Indiana Code section 35-40-5-7, a victim has the right to *pursue* an order of restitution as well as other civil remedies.

161. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008).

162. *Morgan v. State*, 49 N.E.3d 1091, 1094 (Ind. Ct. App. 2016) (citing *Cherry v. State*, 772 N.E.2d 433, 439 (Ind. Ct. App. 2012)).

(a) Except as provided in subsection (I), (j), (l), or (m), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

(b) A restitution order under subsection (a), (I), (j), (l), or (m), is a judgment lien that:

- (1) attaches to the property of the person subject to the order;
- (2) may be perfected;
- (3) may be enforced to satisfy any payment that is delinquent under the restitution order by the person in whose favor the order is issued or the person's assignee; and
- (4) expires;

in the same manner as a judgment lien created in a civil proceeding.

(c) When a restitution order is issued under subsection (a), the issuing court may order the person to pay the restitution, or part of the restitution, directly to:

- (1) the victim services division of the Indiana criminal justice institute in an amount not exceeding:
  - (A) the amount of the award, if any, paid to the victim under IC 5-2-6.1; and
  - (B) the cost of the reimbursements, if any, for emergency services provided to the victim under IC 16-10-1.5 (before its repeal) or IC 16-21-8; or
- (2) a probation department that shall forward restitution or part of restitution to:
  - (A) a victim of a crime;
  - (B) a victim's estate; or
  - (C) the family of a victim who is deceased.

The victim services division of the Indiana criminal justice institute shall deposit the restitution it receives under this subsection in the violent crime victims compensation fund

established by IC 5-2-6.1-40.

(d) When a restitution order is issued under subsection (a), (I), (j), (l), or (m), the issuing court shall send a certified copy of the order to the clerk of the circuit court in the county where the felony or misdemeanor charge was filed. The restitution order must include the following information:

(1) The name and address of the person that is to receive the restitution.

(2) The amount of restitution the person is to receive.

Upon receiving the order, the clerk shall enter and index the order in the circuit court judgment docket in the manner prescribed by IC 33-32-3-2. The clerk shall also notify the department of insurance of an order of restitution under subsection (I).

(e) An order of restitution under subsection (a), (I), (j), (l), or (m), does not bar a civil action for:

(1) damages that the court did not require the person to pay to the victim under the restitution order but arise from an injury or property damage that is the basis of restitution ordered by the court; and

(2) other damages suffered by the victim.

(f) Regardless of whether restitution is required under subsection (a) as a condition of probation or other sentence, the restitution order is not discharged by the completion of any probationary period or other sentence imposed for a felony or misdemeanor.

(g) A restitution order under subsection (a), (I), (j), (l), or (m), is not discharged by the liquidation of a person's estate by a receiver under IC 32-30-5 (or IC 34-48-1, IC 34-48-4, IC 34-48-5, IC 34-48-6, IC 34-1-12, or IC 34-2-7 before their repeal).

(h) The attorney general may pursue restitution ordered by the court under subsections (a) and (c) on behalf of the victim services division of the Indiana criminal justice institute established under IC 5-2-6-8.

(i) The court may order the person convicted of an offense under IC 35-43-9 to make restitution to the victim of the crime. The court shall base its restitution order upon a consideration of the amount of money that the convicted person converted, misappropriated, or received, or for which the convicted person conspired. The restitution order issued for a violation of IC 35-43-9 must comply with subsections (b), (d), (e), and (g), and is not discharged by the completion of any probationary period or other sentence imposed for a violation of IC 35-43-9.

(j) The court may order the person convicted of an offense under IC 35-43-5-3.5 to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of the amount of fraud or harm caused by the convicted person and any reasonable expenses (including lost wages) incurred by the victim in correcting the victim's credit report and addressing any other issues caused by the commission of the offense under IC 35-43-5-3.5. If, after a person is sentenced for an offense under IC 35-43-5-3.5, a victim, a victim's estate, or the family of a victim discovers or incurs additional expenses that result from the convicted

person's commission of the offense under IC 35-43-5-3.5, the court may issue one (1) or more restitution orders to require the convicted person to make restitution, even if the court issued a restitution order at the time of sentencing. For purposes of entering a restitution order after sentencing, a court has continuing jurisdiction over a person convicted of an offense under IC 35-43-5-3.5 for five (5) years after the date of sentencing. Each restitution order issued for a violation of IC 35-43-5-3.5 must comply with subsections (b), (d), (e), and (g), and is not discharged by the completion of any probationary period or other sentence imposed for an offense under IC 35-43-5-3.5.

(k) The court shall order a person convicted of an offense under IC 35-42-3.5 to make restitution to the victim of the crime in an amount equal to the greater of the following:

(1) The gross income or value to the person of the victim's labor or services.

(2) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of:

(A) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or

(B) IC 22-2-2 (Minimum Wage);  
whichever is greater.

(l) The court shall order a person who:

(1) is convicted of dealing in methamphetamine under IC 35-48-4-1.1; and

(2) manufactured the methamphetamine on property owned by another person, without the consent of the property owner; to pay liquidated damages to the property owner in the amount of ten thousand dollars (\$10,000) or to pay actual damages to the property owner, including lost rent and the costs of decontamination by an inspector approved under IC 13-14-1-15.

(m) The court shall order a person who:

(1) is convicted of dealing in marijuana under IC 35-48-4-10(a)(1)(A); and

(2) manufactured the marijuana on property owned by another person, without the consent of the property owner; to pay liquidated damages to the property owner in the amount of two thousand dollars (\$2,000).<sup>163</sup>

*1. Calculating Restitution.*—Restitution must reflect the actual loss incurred by a victim.<sup>164</sup> The harm or loss must come as a direct and immediate result of the criminal acts of defendant.<sup>165</sup> The trial court may consider only those expenses

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163. IND. CODE § 35-50-5-3 (2016).

164. *Batarseh v. State*, 622 N.E.2d 192, 196 (Ind. Ct. App. 1993).

165. *Rich*, 890 N.E.2d at 44, 51-52 (finding installation of a home security system in victim's home following defendant's burglary is not an expenditure compensable through restitution); Wolff

incurred by the victim prior to the date of sentencing in formulating a restitution order.<sup>166</sup>

The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence.<sup>167</sup> The evidence supporting a restitution order is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.<sup>168</sup> “[T]here is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense.”<sup>169</sup> Further, evidence supporting restitution is not limited to the evidence the prosecutor used to obtain a conviction and thus, additional evidence may be presented at the restitution hearing.<sup>170</sup>

2. *Trial Court Discretion and Appeals from Restitution Orders.*—As mentioned supra in Part III.A, an order of restitution is left to the trial court’s discretion and will only be reversed upon a finding of abuse of discretion.<sup>171</sup> An order of restitution is as much a part of a criminal sentence as a fine or other penalty.<sup>172</sup> Because restitution is part and parcel to our system of criminal punishment, its application cannot be precluded by the existence of a civil settlement agreement.<sup>173</sup> Whether to take a civil settlement into account when ordering restitution falls within the discretion of the sentencing court.<sup>174</sup> However, while a civil judgment does not bar the entry of a restitution order, a victim is

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v. State, 914 N.E.2d 299, 303-04 (Ind. Ct. App. 2009) (finding victim of the offense of criminal recklessness was not entitled to restitution for lost earnings after his employer, the defendant’s father, fired him following the incident, because while defendant’s acts set in motion the chain of events that led to the termination, the termination was not a direct and immediate result of the criminal acts of the defendant).

166. *Carswell v. State*, 721 N.E.2d 1255, 1259 (Ind. Ct. App. 1999) (reversing trial court’s order of restitution for counseling expenses that the victims *might* incur in the future when the victims had not at the time of sentencing ever been to counseling); cf. *Roach v. State*, 695 N.E.2d 934, 943-44 (Ind. 1998) (holding restitution order requiring defendant convicted of murder to pay for the victim’s burial monument, which had not yet been purchased, was properly part of the funeral and burial expenses authorized by the restitution statute because the monument was not some nebulous future expense that might not actually be incurred), *rev’d on other grounds*, 711 N.E.2d 1237 (Ind. 1998).

167. *Rich*, 890 N.E.2d at 49.

168. *Garcia v. State*, 47 N.E.3d 1249, 1252 (Ind. Ct. App. 2015) (finding State failed to present reasonable evidence of victim’s loss where State asked the court to enter restitution in an amount reflected in the probable cause affidavit, offered no other proof of the amount of victim’s loss, and victim was not present at the sentencing hearing), *trans. denied*, 46 N.E.3d 1240 (Ind. 2016).

169. *Smith v. State*, 990 N.E.2d 517, 521 (Ind. Ct. App. 2013).

170. *Id.* at 522.

171. *Edsall v. State*, 983 N.E.2d 200, 208 (Ind. Ct. App. 2013).

172. *Haltom v. State*, 832 N.E.2d 969, 971 (Ind. 2005).

173. *Id.*

174. *Kelley v. State*, 11 N.E.3d 973, 979 (Ind. Ct. App. 2014).

entitled to only one recovery.<sup>175</sup> Thus, it has been held that if a defendant has already paid all or part of a civil judgment, the amount of restitution must be offset by the amount already recovered.<sup>176</sup>

Where restitution is not mentioned in the plea agreement or at the guilty plea hearing, the general rule is that the trial court may not order restitution.<sup>177</sup> However, if a plea agreement implicitly incorporates restitution required by statute, restitution is warranted.<sup>178</sup> Also, courts have allowed for restitution orders where the guilty pleas were “open,” meaning the parties left sentencing entirely to the court’s discretion.<sup>179</sup> Absent an agreement to pay restitution, a defendant may not be ordered to pay restitution for an act that did not result in a conviction.<sup>180</sup>

Because an order of restitution is part of the criminal sentence, a claim by the defendant that the trial court violated its statutory authority in imposing the sentence may be raised for the first time on appeal.<sup>181</sup> Thus, a defendant’s failure to object at the time the restitution order was entered does not preclude him or her from challenging restitution on appeal because it is the duty of the appellate courts to bring illegal sentences into compliance.<sup>182</sup>

*3. Ability to Pay.*—Under Indiana Code section 35-38-2-2.3(a)(6),

As a condition of probation, the court may require a person to . . . [m]ake restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.<sup>183</sup>

Our courts have recognized that the duty of the trial court to inquire into an ability to pay differs depending on whether restitution is ordered as a condition of probation or is ordered as part of executed sentence. That is, when the trial court enters a restitution order as a condition of probation, it is required to inquire into defendant’s ability to pay in order to prevent an indigent defendant from being imprisoned because of a probation violated based on a defendant’s failure to pay restitution.<sup>184</sup> However, when restitution is ordered as part of an executed sentence, no inquiry into defendant’s ability to pay is required because restitution is merely a money judgment and a defendant cannot be imprisoned for non-

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175. *Id.* at 978 n.4; IND. CODE § 35-50-5-3 (2014).

176. *Kimbrough v. State*, 911 N.E.2d 621, 639 (Ind. Ct. App. 2009).

177. *Fisher v. State*, 52 N.E.3d 871, 873 (Ind. Ct. App. 2016).

178. *Id.*

179. *Morris v. State*, 2 N.E.3d 7, 8 (Ind. Ct. App. 2013).

180. *Polen v. State*, 578 N.E.2d 755, 756-57 (Ind. Ct. App. 1991).

181. *Gonzalez v. State*, 3 N.E.3d 27, 30 (Ind. Ct. App. 2014).

182. *Bell v. State*, 59 N.E.3d 959, 962 (Ind. 2016).

183. IND. CODE § 35-38-2-2.3(a)(6) (2016).

184. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008).

payment.<sup>185</sup>

Indiana Code section 35-38-2-2.3(a)(6) does not set forth a particular procedure the trial must follow in determining a defendant's ability to pay. However, some form of inquiry *by the trial court* is required.<sup>186</sup> The trial court may consider factors such as the defendant's financial information, health, and employment history.<sup>187</sup> Social security benefits may also be considered by a trial court when determining ability to pay; however, this does not mean the State could levy social security income to collect the restitution.<sup>188</sup> Also, although factors that led the court to determine a defendant was indigent for other purposes will likely be considered when determining defendant's ability to pay, a prior determination that a defendant is indigent does not create a blanket rule exempting indigent defendants from ever being ordered to pay restitution as a condition of probation.<sup>189</sup>

As for the parties' burdens, if the defendant is asserting an inability to pay restitution, the defendant must provide evidence regarding his or her inability to pay in addition to answering questions or providing information to the trial court.<sup>190</sup> A bald claim of indigency, without more, is insufficient to preserve this issue for appeal.<sup>191</sup> Once a defendant presents or the trial court elicits information from defendant demonstrating an inability to pay, the burden shifts to the State to rebut evidence of defendant's inability to pay.<sup>192</sup> Without any evidence that defendant can or will be able to pay, a restitution order cannot stand.<sup>193</sup>

4. *Juvenile Restitution*.—Pursuant to Indiana Code section 31-37-19-5(b)(4), if a juvenile is found to be a delinquent child, “the juvenile court may . . . [o]rder the child to pay restitution if the victim provides reasonable evidence of the victim's loss, which the child may challenge at the dispositional hearing.”<sup>194</sup> The “victim” is not limited to the person or entity actually subjected to the commission of the crime.<sup>195</sup> Instead, a “victim” also includes a person who is shown to have suffered an injury, harm, or loss as a direct and immediate result of the criminal acts of a defendant.<sup>196</sup>

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185. *Id.* at 773.

186. *Bell*, 59 N.E.3d at 964 (citing *Smith v. State*, 471 N.E.2d 1245, 1249 (Ind. Ct. App. 1984)); *see also* *Sales v. State*, 464 N.E.2d 1336, 1340 (Ind. Ct. App. 1984) (explaining the restitution statute “clearly requires that the trial court ascertain defendant's ability to pay”).

187. *Champlain v. State*, 717 N.E.2d 567, 570 (Ind. 1999).

188. *Bell*, 59 N.E.3d at 963 (citing *Kays v. State*, 963 N.E.2d 507, 510-11 (Ind. 2012)).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*; IND. CODE § 35-38-2-2.3(a)(6) (2016).

194. IND. CODE § 31-37-19-5(b)(4) (2016).

195. *J.P.B. v. State*, 705 N.E.2d 1075, 1077 (Ind. Ct. App. 1999) (citing *Reinbold v. State*, 555 N.E.2d 463, 470 (Ind. 1990)).

196. *Id.*

The adult statute is instructive when the juvenile statute is silent.<sup>197</sup> Also, just as with an adult defendant, before ordering restitution for a juvenile defendant as a condition of probation, the trial court must inquire into the juvenile's ability to pay.<sup>198</sup> However, there are some differences between the adult and juvenile restitution statutes. For instance, while a restitution order for an adult in addition to a sentence for a felony or misdemeanor committed by an adult becomes a judgment lien,<sup>199</sup> a trial court does not have the authority to order a juvenile to pay restitution owed to his victims as a civil judgment.<sup>200</sup>

### *C. Collection and Enforcement*

A restitution order is a judgment lien that attaches to the property of the person subject to the order, it may be perfected and it may be enforced in the same manner as a judgment lien created in a civil proceeding.<sup>201</sup> The restitution statute does not limit the property subject to the lien to real property, but rather gives a crime victim the right to enforce the lien by means of attachment of personal property or garnishment of wages.<sup>202</sup> A victim is entitled to enforce judgment from a restitution order against a defendant in civil proceedings even if the suit was brought after the defendant is discharged from probation and even if a judgment lien has expired, provided the judgment itself has not expired by the time the victim files his complaint.<sup>203</sup>

Generally, once a term of probation has expired, the court loses all jurisdiction over the defendant and is powerless to enforce any conditions of the probation, even though it is aware the defendant has failed to meet a condition.<sup>204</sup> However, the expiration of a probation period does not terminate an obligation to make restitution to a crime victim.<sup>205</sup> This is because unlike other conditions of probation, fines and restitution can stand alone as a sentencing alternative,

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197. *S.G. v. State*, 956 N.E.2d 668, 683 (Ind. Ct. App. 2011).

198. *T.H. v. State*, 33 N.E.3d 374, 376 (Ind. Ct. App. 2015) (describing it is well established that when a juvenile court orders restitution as part of a juvenile's probation, it must inquire into the juvenile's ability to pay the restitution).

199. IND. CODE § 35-50-5-3 (2016).

200. *J.B. v. State*, 55 N.E.3d 831, 834 (Ind. Ct. App. 2016) ("There is no judgment lien provision in the juvenile statute, and we decline to read into the juvenile code a provision not explicitly stated.").

201. *Wininger v. Purdue Univ.*, 666 N.E.2d 455, 459 (Ind. Ct. App. 1996).

202. *Id.*

203. *Webb v. Yeager*, 52 N.E.3d 30, 38 (Ind. Ct. App. 2016) (explaining although a *judgment lien* expires after ten years, a *judgment* still exists, and the judgment does not expire for twenty years). See IND. CODE § 34-11-2-12 (2016) (titled "Satisfaction of judgment after expiration of twenty years" and providing that "[e]very judgment and decree of any court of record of the United States, of Indiana, or of any other state shall be considered satisfied after the expiration of twenty (20) years").

204. *White v. State*, 560 N.E.2d 45, 46 (Ind. 1990).

205. *Wininger*, 666 N.E.2d at 457.

because they are considered “independent dispositions,” which survive the expiration of the period of probation.<sup>206</sup>

An order of restitution does not bar a civil action for: (1) damages that the court did not require the person to pay to the victim under the restitution order but arise from an injury or property damage that is the basis of restitution ordered by the court; and (2) other damages suffered by the victim.<sup>207</sup>

When a restitution order is issued pursuant to Indiana Code section 35-50-5-3(a), the issuing court may order the person to pay the restitution, or part of the restitution, directly to (1) the Victim Services Division of the Indiana Criminal Justice Institute; or (2) a probation department that will forward restitution or part of restitution to a victim of a crime; a victim’s estate; or the family of a victim who is deceased.<sup>208</sup> The Victim Services Division of the Indiana Criminal Justice Institute must deposit the restitution it receives under this provision in the violent crime victims compensation fund established by statute.<sup>209</sup>

There are special provisions with respect to restitution orders by persons convicted of the conversion or misappropriation of title insurance escrow funds,<sup>210</sup> identity deception,<sup>211</sup> human and sexual trafficking,<sup>212</sup> dealing and manufacturing methamphetamine,<sup>213</sup> and dealing and manufacturing marijuana.<sup>214</sup> Also, when a restitution order is issued under certain provisions,<sup>215</sup> the issuing court must send a certified copy of the order to the clerk of the circuit court in the county where the felony or misdemeanor charge was filed; the restitution order must include the name and address of the person that is to receive the restitution and the amount of restitution the person is to receive.<sup>216</sup> Additionally, the attorney general may pursue restitution ordered by the court pursuant to Indiana Code sections 35-50-5-3(a), (c) on behalf of the Victim Services Division of the Indiana Criminal Justice Institute established pursuant to statute.<sup>217</sup>

While a defendant’s probation may be revoked for failure to pay his restitution as a condition of probation, it cannot be revoked for failure to comply with “conditions of a sentence that impose[ ] financial obligations on the person

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206. *Id.*

207. IND. CODE § 35-50-5-3(e) (2016).

208. *Id.* § 35-50-5-3(c).

209. *Id.* (referring to Indiana code section 5-2-6.1-40, the statute establishing violent crime victims compensation fund).

210. *Id.* § 35-50-5-3(l).

211. *Id.* § 35-50-5-3(j).

212. *Id.* § 35-50-5-3(k).

213. *Id.* § 35-50-5-3(l).

214. *Id.* § 35-50-5-3(m).

215. *Id.* § 35-50-5-3(a), (l), (j), (l), (m).

216. *Id.* § 35-50-5-3(d) (providing upon receiving the order, the clerk shall enter and index the order in the circuit court judgment docket in the manner prescribed by Indiana Code section 33-32-3-2 and the clerk must also notify the Department of Insurance of an order of restitution under Indiana Code section 35-50-5-3(l)).

217. *Id.* § 35-50-5-3(h) (referring to Indiana Code section 5-2-6-8).

unless the person recklessly, knowingly, or intentionally fails to pay.”<sup>218</sup>

*D. Summary—Tips for Trial Courts and Practitioners*

In sum, while trial courts are obligated to comply with applicable restitution statutes, they are given discretion over when to order restitution.<sup>219</sup> Thus, on the one hand, a victim is not entitled to restitution, and on the other, there is no ceiling on the amount a trial court may order if the amount of damage and injury that comes as a direct and immediate result of the defendant’s criminal conduct warrants such an order.<sup>220</sup>

The State has the burden of presenting reasonable evidence of the victim’s actual loss.<sup>221</sup> “The State could accomplish this in a number of ways, including: (1) eliciting sworn testimony from the victim at the trial or sentencing hearing, (2) obtaining an affidavit from the victim, or (3) introducing documentation of the claimed damages, such as photographs, appraisals, estimates, or receipts, into evidence.”<sup>222</sup> Defense counsel should make contemporaneous objections (for example, hearsay and lack of foundation) as appropriate.<sup>223</sup>

Restitution may be ordered in addition to the imposition of civil remedies; however, a victim is only entitled to one recovery.<sup>224</sup> Restitution may only be ordered if: it is incorporated into or referenced in a guilty plea hearing or agreement; a guilty plea is left open to the court’s discretion; or defendant has agreed to pay restitution for an act that did not result in a conviction.<sup>225</sup>

The court is not required to inquire into a defendant’s ability to pay if restitution is ordered as part of an executed sentence.<sup>226</sup> If restitution is ordered as part of probation, the trial court is required to inquire into defendant’s ability

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218. *Mauch v. State*, 33 N.E.3d 387, 390 (Ind. Ct. App. 2015) (quoting Indiana Code section 35-38-2-3(g)) (describing Defendant did not knowingly, intentionally, and willfully fail to pay his restitution when he failed to apply for and obtain a reverse mortgage on his home because his wife refused to give the required consent, and Defendant was a seventy-six-year-old with health problems).

219. *Edsall v. State*, 983 N.E.2d 200, 208 (Ind. Ct. App. 2013); *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008).

220. *Kelley v. State*, 11 N.E.3d 973, 976 (Ind. Ct. App. 2014); *Smith v. State*, 990 N.E.2d 517, 521 (Ind. Ct. App. 2013); *Rich*, 890 N.E.2d at 44.

221. *Garcia v. State*, 47 N.E.3d 1249, 1252 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 1240 (Ind. 2016).

222. *Iltzsch v. State*, 972 N.E.2d 409, 414 (Ind. Ct. App. 2012), *trans. granted, opinion vacated*, 981 N.E.2d 1214 (Ind. 2013), *opinion vacated in part, on other grounds*, 981 N.E.2d 55 (Ind. 2013).

223. *Iltzsch v. State*, 981 N.E.2d 55, 56 (Ind. 2013).

224. IND. CODE § 35-50-5-3 (2016); *Kelley*, 11 N.E.3d at 971-72.

225. *Fisher v. State*, 52 N.E.3d 871, 873 (Ind. Ct. App. 2016); *Morris v. State*, 2 N.E.3d 7, 8 (Ind. Ct. App. 2013); *Polen v. State*, 578 N.E.2d 755, 756-57 (Ind. Ct. App. 1991).

226. *Pearson v. State*, 883 N.E.2d 770, 773 (Ind. 2008).

to pay.<sup>227</sup> If the defendant is asserting an inability to pay restitution, defense counsel must provide evidence regarding defendant's inability to pay in addition to answering questions or providing information to the trial court.<sup>228</sup> Once a defendant presents or the trial court elicits information from defendant demonstrating an inability to pay, the burden shifts to the State to rebut evidence of defendant's inability to pay.<sup>229</sup>

Juveniles found to be delinquent may also be ordered to pay restitution and the adult restitution statute is instructive when the juvenile statute is silent, but, a trial court does not have the authority to order a juvenile to pay restitution as a civil judgment.<sup>230</sup>

An adult restitution order is, however, a judgment lien that attaches to the defendant's property and may be perfected and enforced as if it were a civil judgment lien.<sup>231</sup> Restitution is not discharged by the end of probation or completion of a sentence.<sup>232</sup> Victims may collect on a judgment lien as long as the judgment itself has not expired by the time the victim files his complaint.<sup>233</sup> As for where restitution should be paid, generally, to the Victim Services Division of the Indiana Criminal Justice Institute or to the probation department to forward to the victim, victim's family or victim's estate.<sup>234</sup>

The trial court may revoke a defendant's probation for failure to pay restitution but only where the person recklessly, knowingly or intentionally fails to pay.<sup>235</sup> The State "bears the burden of proving that (1) a defendant violated a term of probation involving a payment requirement and (2) the failure to pay was reckless, knowing, or intentional [and] the defendant bears the burden of showing facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered."<sup>236</sup>

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227. *Id.* at 772.

228. *Bell v. State*, 59 N.E.3d 959, 963 (Ind. 2016).

229. *Id.*

230. IND. CODE § 31-37-19-5(b)(4) (2016); *J.B. v. State*, 55 N.E.3d 831, 834 (Ind. Ct. App. 2016); *S.G. v. State*, 956 N.E.2d 668, 683 (Ind. Ct. App. 2011).

231. *Winger v. Purdue Univ.*, 666 N.E.2d 455, 459 (Ind. Ct. App. 1996).

232. IND. CODE § 35-50-5-3(f) (2016).

233. *Webb v. Yeager*, 52 N.E.3d 30, 38 (Ind. Ct. App. 2016).

234. IND. CODE § 35-50-5-3(c) (2016).

235. *Mauch v. State*, 33 N.E.3d 387, 390 (Ind. Ct. App. 2015).

236. *Id.* at 391.