An Examination of Indiana Trial Courts

Howard W. Anderson III[1]

Abstract: *This Report will focus on only one aspect of Indiana's judicial system: its trial courts, which resolve the overwhelming number of cases filed in Indiana's courts. This Report will first briefly introduce the trial courts, then turn to their financial status, and finally consider whether it may be appropriate to revise their funding situation.*

[1] Howard W. Anderson III graduated from Indiana University's Maurer School of Law with a juris doctor magna cum laude in 2005. He then practiced law in Chicago and most recently Indianapolis, where he currently serves as law clerk for the U.S. District Court for the Southern District of Indiana. He will receive his MPA from SPEA in August 2012. The views expressed in this article are solely his own.

Like other states,[2] Indiana has had to make painful and difficult decisions to bring its finances into balance following the "Great Recession."[3] And the need for those decisions will likely to continue in the next budgetary biennium.

Despite the gravity of the financial situation, Indiana's judicial system has received very little budgetary attention from lawmakers. The relative insignificance of the judiciary to the state's overall spending may explain much of the legislative inattention to the judiciary's budget. For example, in fiscal year 2008-09, only 0.3180% of overall state spending went toward Indiana's judicial system. But because that percentage is close to double the percentage that occurred in fiscal year 2001-02 (.1753%), attention to spending on Indiana's judicial system is appropriate.

Indiana's judicial system contains many parts. It obviously contains courts: one Supreme Court, one Court of Appeals, one Tax Court, and, located throughout the state, trial courts of various types. But the judicial system also encompasses various ancillary bodies that handle different tasks necessary to help the courts run smoothly: the Board of Law Examiners, the Disciplinary Commission, the Commission on Judicial Qualifications (judicial misconduct), the Indiana Judicial Center, the Indiana Commission for Continuing Legal Education, Division of Supreme Court Administration, the Division of State Court Administration, and the State Public Defender.

Introduction to Indiana Trial Courts

There are two types of trial courts in Indiana: courts "of record" and courts not "of record." Courts of record encompass circuit, superior, and probate courts. They are "of record" because appeals from these courts proceed to either the Court of Appeals or the Supreme Court, and their decisions will be reversed if not supported by an adequate evidentiary and legal record.[4] These courts are organized along county lines. With the exception of Dearborn and Ohio Counties, which each share a circuit court with one of their larger neighboring counties, all Indiana counties have at least one circuit court.[5] Many counties also have one or more superior courts, which generally exercise concurrent jurisdiction with the circuit court(s) for that county.[6] St. Joseph County also has a probate court, which handles only probate matters for that county; it represents the only probate court in the state.

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[2] *See generally* Nicholas Johnson, *et al.*, Center on Budget and Policy Priorities, *An Update on State Budget Cuts* (updated Nov. 5, 2010), *available at* http://www.cbpp.org/files/3-13-08sfp.pdf (last visited December 4, 2010).

[3] *See id.* The recession officially began in December 2007 and ended in June 2009. *See* untitled press release dated September 20, 2010, from the Business Cycle Dating Committee, National Bureau of Economic Research, *available at* http://www.nber.org/cycles/sept2010.html (last visited December 4, 2010).

[4] *See generally* DIVISION OF STATE COURT ADMINISTRATION, INDIANA COURTS IN BRIEF, 9 (2009) *available at* http://issuu.com/incourts/docs/indiana-courts-in-brief (last visited December 4, 2010). A very narrow category of cases must be appealed directly to the Supreme Court, without going through the Court of Appeals. *See* Ind. R. App. Pro. 4(a)(1). Most cases, however, are appealed to the Court of Appeals as of right and may, in the Supreme Court's discretion, be appealed to the Supreme Court. *Id.* R. 4(A)(2).

[5] *See* Ind. Code §§ 33-33-1-1 *to* 33-33-92-6.

[6] *See id.*

There are also trial courts that are not of record. Decisions from those courts are appealed *de novo* to the county circuit or superior court, meaning that the losing party can ask the reviewing court to actually re-hear the entire case, rather than merely reviewing the ruling of the lower court and giving deference to its factual findings. Marion County has the state's only small claims court, which hears all small claims in the county, which are defined to include most non-jury cases involving controversies valued at $6,000 or less.[7] Cities and towns may also set up courts of their own, which can hear cases involving ordinance infractions, traffic infractions, and misdemeanors.[8]

Indiana's trial courts are very busy. From 2007 through 2009, approximately two million new cases were filed each year; new case filings peaked in 2008.[9]

After a case is filed, trial courts must often rule upon motions and conduct one or more hearings or conferences before the trial courts can resolve the cases' merits. Merit dispositions include bench or jury trials, the latter of which tend to be relatively time-consuming given the extra-work necessary to summon, select, and present evidence to a jury. Many cases are, however, also resolved by settlement (or in the criminal context, a guilty plea) or voluntary dismissal, often shortly before trial.

The Financial Status of Indiana's Trial Courts

In considering the financial status of Indiana's trial courts, this Report will discuss the funding mechanisms for trial courts, the revenues they generate, the expenses they incur, and finally the current funding shortage between their actual and needed resources.

Funding of Indiana's Trial Courts

Among Indiana state and local government entities, Indiana's trial courts have an unusual, hybrid funding mechanism. With perhaps a minor exception for their handling of violations of local ordinances,[10] trial courts dispense justice on behalf of the State of Indiana. Nonetheless, the costs of Indiana's trial courts are shared among state, county, and local governments.

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[7] Ind. Code § 33-34-3-2. Many circuit and superior courts maintain a small claims docket. Small claims in those courts are "of record" and are appealed to the Court of Appeals. Small claims proceed under very informal evidentiary and procedural rules, unlike regular civil actions. *See* Ind. Small Claims Rules.

[8] Ind. Code § 33-35-2-3. Additionally, localities can create ordinance violations bureaus, which are not courts, but rather accept admissions of violations and fines of up to $250, thereby saving defendants who do not contest liability from the need for a court appearance. Ind. Code § 33-36-2-3.

[9] By way of comparison, in 2009 Indiana's Supreme Court resolved 1,163 actions, typically without a written opinion. *See* 2009 JSR, Vol. I at 50. The Court of Appeals resolved 3,901 actions, typically by written opinion. *Id.* at 62.

[10] Even in that circumstance, however, trial judges may be called to decide whether the ordinances, and their enforcement, comply with state and federal law.

The state pays the salaries of trial judges and of most magistrates,[11] a type of judicial officer that presides over cases under the supervision of trial judges.[12] It also pays for expenses of senior judges or special judges, either of which is appointed to preside over a case in the absence of an available active trial judge.[13] Further, the state provides funds to partially defer the costs of trial court guardians ad litem (often called "GALs") / court appoint special advocates (often called "CASAs"), and it will reimburse a portion of the cost of public defender services for counties that implement a qualified public defender program.[14] Finally, the state provides funding for some "back office" functions that benefit all courts, including Indiana's Judicial Center, an entity that (among other things) provides continuing legal education to judges and suggests improvements to the judicial system.[15]

The rest of the funds necessary to fund the trial courts come from county coffers or, in the case of city and town courts, from municipal funds.[16] Counties have the option of augmenting the salaries of trial judges by up to $5,000 per year.[17]

The split of funding responsibilities means that the state funds only a fraction of the costs of Indiana's trial courts. In 2009, the state's share of trial court funding amounted to 31% of the total. Local governments contributed the remaining $261,967,056.

Revenues Generated by Indiana's Trial Courts

Indiana's trial courts collect substantial amounts of revenues from litigants—for example, $230,368,063 in 2009. The revenue falls into four broad categories.

The first, and largest, represents the basic case filing fee, which is split between state and local governments according to a statutory formula.[18] For crimes, infractions, and ordinance violations, the case filing fee is only charged upon a judgment against the defendant.[19] The fee is

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[11] 2009 JSR, Vol. I, at 175. Counties that have a juvenile court magistrate are, however, responsible for $41,393 of that magistrate's salary. Ind. Code § 33-38-5-7. Magistrates are entitled to a salary equal to 85% of that of trial judges. *Id.* § 33-23-5-10. Full-time trial judges earn a base salary of $110,500 plus an allowance for inflation since June 2006. *Id.* § 33-38-5-6(a). Once a trial judge assumes office, his or her salary may not be diminished. Ind. Const. Art. VII, § 19.

[12] Ind. Code §§ 33-23-5-5, 33-23-5-9.

[13] *See* Ind. Admin. R. 5. For example, the regular trial judge(s) for the county might face a conflict of interest and thus cannot participate.

[14] 2009 JSR, Vol. III, at 1. Qualified county public defense programs are able to receive up to 50% of the defense costs for capital cases and 40% of the costs for non-capital felony cases. Ind. Code § 33-40-6-5. In 2009, only fifty of Indiana's ninety-two counties had public defense programs eligible to receive state funding. 2009 JSR, Vol. III, at 2.

[15] Ind. Code § 33-38-9-6 (establishing statutory mission).

[16] 2009 JSR, Vol. III, at 1.

[17] Ind. Code §§ 36-2-5-14, 36-3-6-3.

[18] For filing fees collected by circuit court clerks, 70% goes to the state, 27% to the county, and 3% to qualified local governments within the county. *See* Ind. Code §§ 33-37-7-2, -4, -6. For filing fees collected by city or town court clerks, only 55% goes to the state, 20% goes to the county, and 25% goes to the city of town. *Id.* § 33-37-7-8.

[19] Ind. Code §§ 33-37-4-1 *to* -2.

$120 for crimes, and $70 for infractions and ordinance violations.[20] Private litigants filing juvenile and most civil and probate cases are charged $120 at the time of filing;[21] those filing small claims are charged $35;[22] and those filing other civil actions are charged $100.[23] While the overall amount collected has generally increased, the increased revenue has resulted from additional cases. The fees themselves have not changed since 1995.[24]

Next, trial courts assess a variety of fees designed to—at least partially—recoup specific expenditures on the judiciary. Unlike the filing fees, these fees have occasionally increased since 1995, and the General Assembly has also enacted new ones at various times. Among the fees currently charged for all case types are the following:

- $5 court administration fee (to offset judicial pension costs);
- $1 judicial insurance adjustment fee; and
- $3 public defense administration fee.[25]

Various other fees in this category are only charged in criminal, infraction, or ordinance violation cases, for example a $2 DNA sample processing fee.[26] And a variety of "user" fees are assessed depending on the particular case.[27] Depending on the nature of the fee, it may be shared between the state and local jurisdictions, it may be entirely remitted to the state, or it may be entirely kept at the local level.[28]

The third category represents criminal fines and forfeitures, which can only possibly be assessed upon conviction of a criminal offense. Indiana's constitution requires that these funds be paid to the state, for the common school fund.[29]

Finally, trial court clerks perform miscellaneous services for which they charge a fee, including copying records ($1 or, if certified, $3 per page), and they earn interest on moneys paid to the trial courts.[30]

Because of the way state spending on the judicial system as a whole is reported—including by not allocating the "back office" funding described above among the trial and appellate courts—it is difficult to calculate how much of a return the state realizes from its expenditures on trial courts in particular. But calculations based upon county and municipal

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[20] *Id.*

[21] *Id.* §§ 33-37-4-3, 33-37-4-7.

[22] *Id.* § 33-37-4-6.

[23] *Id.* § 33-37-4-4.

[24] *See* Ind. P.L. 279-1995. Exhibit 10 shows how the failure to increase the filing fees since that time has decreased their real value.

[25] All of these fees, as well as many others, are discussed in 2009 JSR, Vol. III at 4-13.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Ind. Const. Art. VIII, § 2. Figures on the exact amount remitted to the state for criminal fines and forfeitures are not readily available. They are, however, included among the other funds returned to the State. *See* 2009 JSR, Vol. III at 10.

[30] *Id.* at 12-13.

funds are easily performed. Those latter calculations reveal that local jurisdictions have long faced declining returns, even though cities and towns still currently receive more back in funding than they contribute to trial court expenses; counties do not.

Expenditures on Indiana's Trial Courts

The expenditures necessary to run Indiana's trial courts break down into several categories: personnel salaries; non-salary personnel services; non-personal services and charges; capital outlays; and travel.

These expenditures understate the true costs of Indiana's trial courts because they do not reflect the cost of providing courthouses, which is where Indiana's trial courts operate. Those costs are not reported to the Division of State Court Administration and are not readily determinable.

Shortage of Resources Devoted to Indiana's Trial Courts

Despite the increasing number of case filings in recent years, the number of judicial officers assigned to Indiana's trial courts has remained relatively constant, placing an increasing strain on Indiana's trial courts. One measure of this strain is the average weighted caseload for Indiana's trial courts, which Indiana's Division of State Court Administration computes every year. That caseload measure accounts for the relative complexity of each type of case assigned to the court, assigning more complex cases more weight. For example, Indiana's current formula assumes that a capital murder case will require 2,649 minutes of judicial officer time, while a small claim will only require thirteen minutes.[31] Each judicial officer in Indiana's trial courts during 2009 had a weighted caseload sufficient to merit 1.35 judicial officers, up from 1.24 in 2005.

Given the staffing strain for judicial officers, it is not surprising Indiana's trial courts as a whole have, since 2005, resolved fewer cases each year than were filed. A backlog thus grows in Indiana's courts.

III. Rethinking the Funding of Indiana's Trial Courts

Indiana currently requires its counties to heavily subsidize Indiana's trial courts. For 2009, the subsidy—the difference between what Indiana's counties expended on trial courts and what moneys the trial courts returned to the counties—equaled $148,987,794; the present funding regime permitted Indiana's counties to recoup only $0.3926 for each dollar expended on the trial courts. That funding regime raises two questions: What amount, if any, ought the government subsidize the state's trial courts; and regardless as to whether any level of subsidy is appropriate, which level(s) of government should fund Indiana's trial courts? Both questions will be considered below.

A. Analyzing the Potential Need for a Public Subsidy

Indiana could easily adjust its filing and other case fees so as to make trial courts self-sufficient. Civil plaintiffs who do not pay the filing fee upfront can generally be precluded from

[31] For a complete list of the case types and their estimated levels of judicial time, see http://www.in.gov/judiciary/admin/courtmgmt/wcm/index.html (last visited Dec. 4, 2010).

filing their case, saving trial courts the expense of having to resolve it.[32] And the State can forcibly seize a convicted defendant's property to satisfy court costs (and any fines and forfeitures) that are imposed.[33] Thus, self-sufficiency simply requires setting the filing fee high enough to recoup the full costs of the trial-court system.[34]

Not every activity that can be self-sufficient, should be. Sometimes the price assigned to a good or service fails to accurately reflect the true costs or benefits to society of that good or service; in other words, the price fails to reflect externalities—if all the costs are not factored in, the price will be artificially low and people will demand too much of the good or service. Likewise, if the costs fail to account for benefits third-parties receive from the good or service, the price will be too high and not enough people will purchase the good or service.[35] In the former circumstance, an efficient-minded government should correct for the negative externalities by imposing a tax on the good or service. In the latter circumstance, it should subsidize the activity to the extent of the positive externalities.[36]

Litigating cases results in positive externalities, thus suggesting that the government ought to use taxpayer dollars to subsidize the activity—perhaps in the form of reduced filing fees. Professor Rubenstein has divided the positive externalities from litigation into four categories: "1) decree effects; 2) settlement effects; 3) threat effects; and 4) institutional effects."[37]

Decree effects arise because the "legal principle developed in the case will create more certainty in structuring social behavior and lower the need for future adjudication concerning the

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[32] Although Indiana's Bill of Rights guarantees that "[j]ustice shall be administered freely, and without purchase," Ind. Const. Art. I, § 12, the Indiana Supreme Court has long held that that guarantee protects against judges selling a favorable ruling in a case to the party who was willing to pay the most for it. *Indiana v. Laramore*, 94 N.E. 761, 763 (Ind. 1911). Thus filing fees are permissible. *Id.* It has, however, suggested that the guarantee might come into play "were costs and fees imposed on those who resort to the courts for justice so burdensome as to result in a practical denial of justice to a large number of our people." *Id.* Except in very narrow circumstances, the U.S. Constitution permits states to deny even indigent litigants access to the courts if they do not pay the filing fee. *Compare Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that the Constitution requires states to waive filing fees for divorce petitions of the indigent), *with United States v. Kras*, 409 U.S. 434 (1973) (holding that the Constitution permits bankruptcy courts to condition a bankruptcy petition on the pre-payment of the filing fee). *See also Lewis v. Sullivan*, 279 F.3d 526 (7th Cir. 2001) (upholding constitutionality of federal statute requiring prisoners filing most types of civil cases to pre-pay filing fees, even though they may be indigent).

[33] *See* Ind. R. Crim. Pro. 21; Ind. T.R. 69. Of course, many criminal defendants may have little or no property to seize.

[34] The fee need not be uniform. For example, the filing fee could vary based upon the type, and thus projected complexity, of the case, as Indiana already does with respect to the lower filing fee charged for small claims. *Compare* Ind. Code § 33-37-4-4, *with* Ind. Code § 33-34-4-6. Or courts might use a two-part tariff, like Michigan does in civil cases, by charging a filing fee and then charging an additional fee based on each motion that the parties file. *See* Mich. Comp. L. § 600.8371(10) ("A sum of $20.00 shall be assessed for all motions filed in a civil action.").

[35] *See generally* JOHN L. MIKESELL, FISCAL ADMINISTRATION 7-9 (6th ed. 2011).

[36] *See id.* at 9.

[37] William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709, 723 (2006).

decided issue. If future litigation does arise, the decree from the initial case will serve as stare decisis, hence making resolution of later cases more efficient."[38] Further, even if a decision does not announce a new rule of law, it can preclude a party from re-litigating facts in subsequent cases, also increasing the efficiency of later litigation.[39] And a decision may cause a defendant to stop an ongoing course of conduct that is harming a group of individuals, even though only one individual filed suit.[40]

Settlement effects also can produce behavior-changing behavior.[41] A defendant can settle with one plaintiff and voluntarily agree to stop challenged conduct that harms a group of individuals, rather than being forced to do so by a judicial decree.[42] "Similarly, settlements by some defendants within an industry could encourage other defendant/competitors to settle," reducing litigating costs in future lawsuits.[43]

Third, "[t]he very threat of individual litigation, absent settlement or decree, may also produce positive social benefits. The risk of litigation is a cost that parties must factor into decision-making in any sphere."[44] In other words, an actor may choose not to violate the law if it knows that it will likely forfeit any benefits that it obtains from its violation through litigation, criminal and/or civil.

Finally, in a point related to the third, when private individuals sue a defendant for violating the law, the government can be more selective about which lawsuits or criminal prosecutions it will use its attorneys to pursue.[45] The state can ensure violations of its laws are vindicated, without necessarily having to foot the expense of the litigation and instead devote its resources to other priorities.

Of course, litigation can also impose crushing costs on the parties to it. Under the so-called "American rule," which applies in most cases, each party to a lawsuit must bear its own legal costs.[46] Some have argued—most notably former Solicitor General Rex Lee—the government ought to charge filing fees that reflect the true costs of resolving the parties'

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[38] *Id.* "Stare decisis" means that once a court has decided a point of law in one case, it should not decide the same point of law differently in another case, so as to provide stability and predictability in the law. Decisions by trial courts are only binding on the parties. The decisions can, however, serve as "persuasive" authority to other judges. Decisions by trial courts also are a prerequisite to appeals, which provide rules of law binding not only on the parties, but also on the lower courts unless and until they are overturned—which stare decisis cautions against.

[39] For example, imagine that Adams is the driver of a car and that Baker is his passenger, and they get into a wreck with Chambers. If Adams sues Chambers and proves that Chambers negligently caused the wreck, Chambers could not deny his negligence in a subsequent suit brought by Baker.

[40] *Id.* Imagine an injunction against a defendant from further polluting a river.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] For a background of the American rule, its exceptions, its justifications, and its criticisms, see *State Bd. of Tax Comm'nrs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001).

disputes, and thereby discourage costly litigation.[47] But those that hold that position often overlook the positive externalities described above.[48] Furthermore, they overlook that relatively small increases in the already modest filing fees would essentially eliminate the public subsidy. For example, ignoring potential elasticities of demand, merely tripling the filing fee—in other words, charging between $105 and $360 depending on the case type—would have more than eliminated the public subsidy for Indiana's trial courts in 2009. It is hard to see how even such a "heightened" fee would discourage many plaintiffs, especially given that plaintiffs can recover their filing fees from defendants if they prevail.[49] Concerns about run-away litigation costs may be better directed toward reconsidering the American rule than toward determining an appropriate filing fee.

Given the positive externalities associated with litigation, the General Assembly has concluded that Indiana taxpayers should at least partially subsidize Indiana's trial courts. As Indiana continues to confront a bleak budgetary picture, it may, however, be time for the General Assembly to revisit the extent of that subsidy—and possibly eliminate it altogether given other priorities.

Analyzing the Proper Level of Government to Fund Trial Courts

The Indiana Commission on Local Government Reform—commonly called the Kernan-Shepard Commission, after its co-chairs—released a report in 2007 suggesting ways to streamline and improve local government.[50] Included among their recommendations was one relating to Indiana's current trial-court funding model: end it.[51] Instead, the Commission recommended that the state take sole responsibility for Indiana's trial courts and their funding, including for public defenders and probation services. Doing so would lead to three positive changes to the current situation.

First, it would help to better allocate judicial resources. Localities raise most of their finances, which are used to subsidize the trial courts, from property taxes. The property wealth of counties varies considerably. Thus some counties have a difficult time adequately funding their trial courts, creating "inequities…among counties' caseloads, personnel and probation and public defender programs. This means that some Hoosiers are denied prompt access to courts and court services simply because they live in a county unable to support its local courts at the

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[47] Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U.L. REV. 267 (1985). Although Solicitor General Lee argues that the civil justice system is a public good, that view is technically incorrect. Public goods must be non-rivalrous and non-excludable. MIKESELL, FISCAL ADMINISTRATION 5. Judicial decisions can be excludable: The law might abandon stare decisis, thus deciding each case without reference to any cases that have come before. Subject to possible constitutional limitations, they could even be made confidential, like arbitration awards. Solicitor General Lee's broader point is, however, a subject for legitimate debate.

[48] *See id.*

[49] Ind. Code § 34-52-1-1.

[50] INDIANA COMMISSION ON LOCAL GOVERNMENT REFORM, STREAMLINING LOCAL GOVERNMENT (2007), *available at* http://indianalocalgovreform.iu.edu/assets/docs/Report_12-10-07.pdf (last visited December 11, 2010).

[51] *Id.* at 23.

same level as others."[52] Now that the Indiana Constitution has been amended to significantly limit the property taxes localities may assess, those disparities may increase.[53]

Second, the Commission noted the current system of hybrid funding creates tensions between local jurisdictions and the state.[54] For example, state trial court judges have the authority to order local jurisdictions to increase their funding of trial court operations, and thereby reduce some of the inequities described above.[55] Doing so, of course, forces localities to divert resources away from other budgetary priorities. Further, because localities have no control over the fees the trial courts charge, localities are powerless to handle the increasing subsidies of trial courts that result from the General Assembly's longstanding failure to increase filing fees.

Finally, the Commission also believed consolidated judicial operations would permit economies in purchasing and administration.[56]

According to the Commission, "[b]ecause state money, court costs and user fees already finance so much of court expenses, and because implementation [of making the state solely responsible for the trial courts] should be a multi-year project, the fiscal impact should be manageable."[57] But given the present constraints on the state budget, it seems unlikely that the state would want to assume the additional costs of Indiana's trial courts that are currently funded locally, without increasing filing fees, redirecting all the revenues generated from trial courts to state coffers, or both. The General Assembly has been largely unwilling to increase the fees he trial courts charge. And cities and towns—which generally recoup more in revenue than they contribute to the courts—would likely oppose any effort to alter the funding formula. The fate of the Commission's proposal is, therefore, uncertain at best in the short term.

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[52] *Id.*

[53] Ind. Const. Art. X, § 1.

[54] INDIANA COMMISSION ON LOCAL GOVERNMENT REFORM, STREAMLINING LOCAL GOVERNMENT 23.

[55] *E.g.*, *St. Joseph County Comm'rs v. Nemeth*, 929 N.E.2d 703 (2010).

[56] INDIANA COMMISSION ON LOCAL GOVERNMENT REFORM, STREAMLINING LOCAL GOVERNMENT 23.

[57] *Id.*