

# A Race to the Bottom

Speed & Savings Over  
Due Process:  
A Constitutional Crisis

June 2008

TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN

EVALUATION



# **Evaluation of Trial-Level Indigent Defense Systems in Michigan**

## **A Race to the Bottom** Speed & Savings Over Due Process: A Constitutional Crisis

June 2008

Researched & Written by:  
National Legal Aid & Defender Association



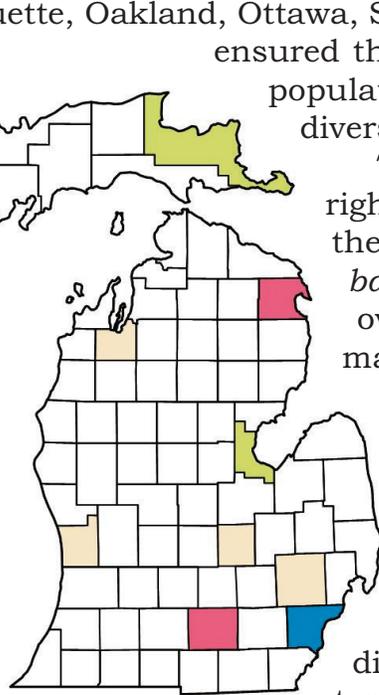
# Executive Summary

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan’s denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one’s crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

These conclusions were reached after an extensive year-long study of indigent defense services in ten representative counties in partnership with the State Bar of Michigan and on behalf of the Michigan Legislature under a concurrent resolution (SCR 39 of 2006 ). To ensure that a representative sample of counties was chosen to be studied, and to avoid criticism that either the best or worst systems were cherry-picked to skew the results, NLADA requested that an advisory group be convened to choose the sample counties. Created by SCR 39-sponsor Senator Alan Cropsey, the advisory group was composed of representatives from the State Court Administrator’s Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges. Ten of Michigan counties were studied: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. The advisory group ensured that the county sample reflected geographic, population, economic and defense delivery model diversity.

The report opens with a retelling of the first right to counsel case in America – the case of the “Scottsboro Boys” in 1932, (*Powell v. Alabama*). Chapter I (pp. 1-4) presents an overview of our findings and concludes that many of the systemic deficiencies identified over three quarters of a century ago in the Scottsboro Boys’ story permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in public courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trials or sentencings; attorneys violating their ethical canons to zeal-

Scope of NLADA Study in Michigan



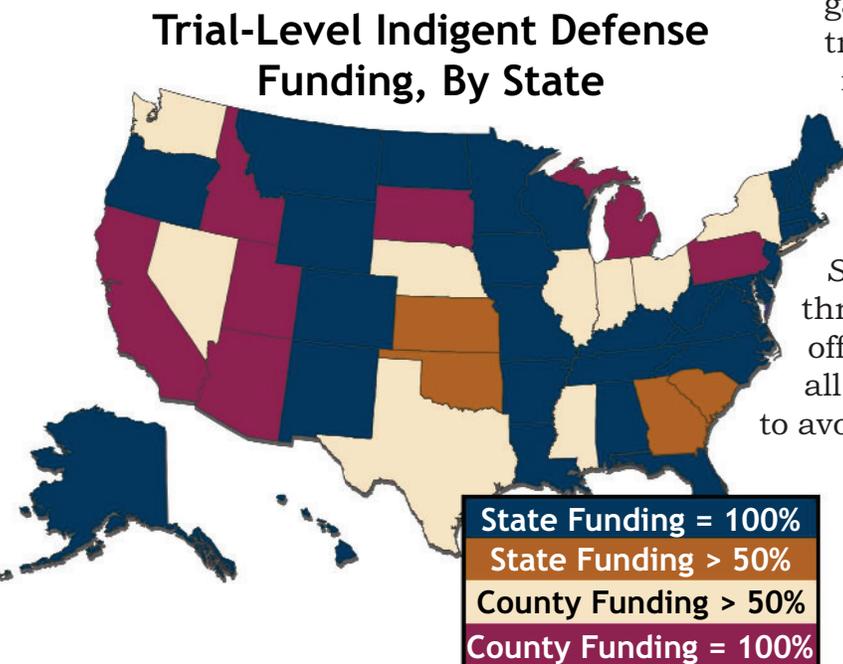
## EXECUTIVE SUMMARY

ously advocate for clients; inadequate compensation for those appointed to defend the accused; and, a lack of sufficient time, training, investigators, experts and resources to properly prepare a case in the face of a state court system that values the speed with which cases are disposed of over the needs of clients for competent representation.

Chapter II (pp. 5-14) presents the obligations that all states face under *Gideon v. Wainwright* – the mandate to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation. Unfortunately, the laws of Michigan require county governments to pay for the state’s responsibilities under *Gideon* at the trial-level without any statewide administration to ensure adequacy of services rendered. This stands in contradistinction to the majority of states, thirty of which relieve their counties entirely from paying for the right to counsel at the trial-level.

Collectively, Michigan counties spend \$74,411,151 (or \$7.35 per capita) on indigent defense services; 38 percent less than the national average of \$11.86. Michigan ranks 44th of the 50 states in indigent defense cost per capita. The practical necessity of state funding and oversight for the right to counsel is premised on the fact that the counties most in need of indigent defense services are often the ones that least can afford to pay for it. The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs. In low-bid, flat-fee contract systems an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer’s ethical duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit. Chapter II ends with a documentation of Michigan’s historic, but ultimately ineffective, struggles to implement *Gideon*, including previous reports, case law, state bar actions and pending litigation.

The United States Supreme Court extended the right to counsel to misdemeanor cases in two landmark cases: *Argersinger v. Hamlin* and *Alabama v. Shelton*. The third chapter of the report (pp. 15-34) documents abuses of the right to counsel found throughout Michigan’s misdemeanor courts – the district courts. People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to “get out of jail” for time served prior to meeting or being approved for a publicly-financed de-



## EVALUATION OF MICHIGAN’S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

fense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution. In fact, the emphasis on speed of case processing has led one jurisdiction – Ottawa County – to colloquially refer to the days on which the district court arraigns people as “McJustice Day” (their terminology, not ours). Our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michigan’s valuing of speed over substance.

The American Bar Association’s *Ten Principles of a Public Defense Delivery System* constitute the fundamental standards that a public defense delivery system should meet if it is to deliver – in the ABA’s words – “effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.” To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of the *Principles* and to document how Michigan counties fail to meet them. That analysis, set forth in Chapter IV (pp. 35-56) extensively details how judicial interference impacts attorney workload and performance. In so doing, Jackson County becomes the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, but because they fail to

### Per-Capita Spending

33.	Tennessee	\$9.30
34.	Alabama	\$9.17
35.	North Dakota	\$8.80
36.	Rhode Island	\$8.67
37.	Kansas	\$8.53
38.	Hawaii	\$8.26
39.	Maine	\$8.20
40.	Pennsylvania	\$8.10
41.	Oklahoma	\$8.02
42.	Idaho	\$7.83
43.	South Carolina	\$7.65
44.	Michigan	\$7.35
45.	Texas	\$7.04
46.	Indiana	\$6.77
47.	Arkansas	\$6.65
48.	Utah	\$5.22
49.	Missouri	\$5.20
50.	Mississippi	\$4.15
	<b>NATIONAL AVERAGE</b>	<b>\$11.86</b>

Comparing indigent defense systems across state lines is difficult, at best, given jurisdictional variances related to: delivery model, population, geographical expanse, prosecutorial charging practices, crime rates, county versus state funding, three strikes laws, and the death penalty (among others). For example, the state of Alaska has the highest cost per capita indigent defense spending (\$40.96) due almost entirely to the fact that public defenders must travel by air for many court appearances. So, whereas a high cost per capita may not necessarily guarantee that a state is providing adequate representation, a low indigent defense cost per capita certainly is an indicator of a system in trouble. Michigan ranks 44th of the 50 states.

## EXECUTIVE SUMMARY

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provide constitutionally adequate services despite their desire to do so.

Chapter V (pp. 57-82) is a documentation of how the other representative counties fail the ABA *Ten Principles* highlighted in the previous chapter. This section begins with an analysis of how Bay County is devolving from a public defender model into a flat-fee contract system because of undue political interference. The chapter also recounts the lack of an adversarial process in Ottawa County, where indigent defense services has devolved to the point where defense attorneys call the prosecuting attorney and ask him to have law enforcement conduct further investigations rather than conducting independent investigations themselves. Despite the overall dedication and professionalism of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime and mete out accurate and just sentences in every instance. Without a functioning adversarial justice system, everyday human error is more likely to go undiscovered and result in the tragedy of innocent people being tried, convicted and imprisoned.

In addition, Chapter V discusses many other systemic deficiencies in the delivery of the right to counsel across the state, including:

- The failure of the representative counties to ensure that their public defenders are shielded from undue judicial interference, as required by *Principle 1*. In Grand Traverse County, for example, the judiciary forces public defense attorneys to provide certain legal services for which they are not compensated if they wish to be awarded public defender contracts.
- The failure of the representative counties to manage and supervise its public defense attorneys' workload as required by ABA *Principles 5* and *10*. In Oakland County, one judge indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance and sometimes struggle with. Beyond that nothing is done to ensure the rendering of quality representation.
- The failure of the representative counties to provide public defense attorneys with sufficient time and confidential space to attorney/client meetings as required by *Principle 4*. The district court in Chippewa County, for example, provides no confidential space within which an attorney may meet with clients. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor.
- The failure of Michigan counties to adhere to ABA *Principles 6* and *9* requiring that public defense attorneys have experience and training to match the complexity of the case. It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses.
- The failure of the representative counties to provide indigent defense clients with vertical representation, i.e., continuous representation by the same attorney from the time

## EVALUATION OF MICHIGAN’S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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counsel is appointed until the client’s case is resolved as recommended in ABA *Principle 7*. Judges in Wayne County, for example, spontaneously appoint attorneys in courtrooms as “stand-ins” when attorneys fail to appear or remove the appointed attorney from the case and appoint an attorney who happens to be in the courtroom.

One of the reasons why *Gideon* determined that defense lawyers were “necessities” rather than “luxuries” was the simple acknowledgement that states “quite properly spend vast sums of money” to establish a “machinery” to prosecute offenders. This “machinery” – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without appropriate resources, the defense is unable to play its role of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching. Chapter VI (pp. 83-90) looks specifically at the ABA *Ten Principles*’ call for parity of the defense and prosecution functions. In detailing the great disparity in resources all across the state, the report notes that an NLADA representative had the privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in which prosecuting attorneys made presentations on how prosecutors are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. The deficiencies of the prosecution function highlight how exponentially worse is the underfunding of the defense function.

Our constitutional rights extend to all of our citizens, not merely those of sufficient means. The majority of people requiring appointed counsel are simply the unemployed or underemployed – the son of a co-worker, the former classmate who lost her job, or the member of your congregation living paycheck-to-paycheck to make ends meet. Though we understand that policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed due to insufficient funds. The issues raised in this report illustrate the failure on the part of the state of Michigan to live up to the mandate of the U.S. Supreme Court’s *Gideon* decision. Though some may argue that it is within the law for state government to pass along its constitutional obligations to its counties, it is also the case that the failure of the counties to meet constitutional muster regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision.

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# Acknowledgements

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The National Legal Aid & Defender Association (NLADA) extends our heartfelt appreciation to a number of people for making this report possible. First and foremost, many thanks to all individuals interviewed in the ten counties we surveyed. We found the vast majority of those we visited to be welcoming, forthright and concerned about the state of the right to counsel in Michigan.

Much of the reception we received is directly attributable to the Michigan State Court Administrative Office, and in particular to Dawn Childress. Ms. Childress encouraged the active participation of judges and court administrators and was invaluable in securing data and educating us on court rules, caselaw and other jurisdictional-specific issues.

NLADA also thanks the Michigan Judicial Institute and the Prosecuting Attorneys Association of Michigan for inviting Mr. David Carroll, NLADA's director of research, to make presentations on separate occasions regarding our preliminary findings before their respective memberships. Conversations with the state's trial judges and prosecuting attorneys at these events helped shape the tone and structure of our report.

Throughout this endeavor, the State Bar of Michigan has been an important collaborator and contributor, especially in regard to insights on the historical context of past reform efforts. NLADA specifically recognizes the assistance of Elizabeth Lyon for making the necessary logistical arrangements to ensure the report's successful release.

Finally, we thank the Michigan State Legislature for the concurrent resolution supporting this evaluation. We would like to express specific gratitude to Senator Alan Cropsey for introducing the resolution and his leadership in securing its final adoption..

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## *Powell v. Alabama*

*“The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant ... must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”*

The United States Supreme Court  
*Powell v. Alabama*, 287 U.S. 45 (1932)

On March 25, 1931, a fight broke out between a group of poor whites and black youths aboard a freight train bound for Memphis, Tennessee via Huntsville, Alabama. Outnumbered, all but one of the white young men jumped off the train a short distance over the Alabama line where they promptly alerted local law enforcement. Wires were sent to detain the train near the town of Scottsboro, where the nine black youths were arrested. Two white females in their early twenties, fearing punishment for catching a free ride on the train and society’s reprisal for associating with non-white males, told the sheriff they had been raped by the boys. The lone remaining white participant of the fracas became an eyewitness to the “crime.” Twelve days later, the trial of the so-called “Scottsboro Boys” commenced.

One half hour before the trial, the judge appointed a local, elderly attorney – who had not tried a case in decades – to represent the young men. A Chattanooga real estate attorney also volunteered to assist – though he had never tried a criminal case, was not admitted to the Alabama Bar and was completely unfamiliar with Alabama law. Neither attorney was to be paid for their work. Though the defense attorneys did not meet their clients until just before the trial’s opening remarks, they did not move to postpone the trial to allow for a thorough investigation of the facts. They asked to have all nine tried together despite the prejudice such a tactic would cause each individual defendant. The prosecution, understanding this risk better than the defense and fear-

ing reversal on appeal, chose instead to try the defendants in four groups of two or three – as if such random groupings eliminated the ethical conflicts of having the same two unqualified lawyers representing all nine co-defendants.

The four trials lasted a cumulative total of three days. Defense counsel offered little or no cross-examination of the accusers and prosecution experts and failed to even make a closing argument. The youngest of the nine – a 12-year old named Roy White – received life imprisonment in an adult correctional facility without the possibility of parole. The other eight were sentenced to death.

With the assistance of volunteer private counsel, the Scottsboro Boys’ cases were appealed to the United States Supreme Court. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court reversed the convictions, finding that the inadequate representation had violated the rights of the Scottsboro Boys to due process in violation of the fourteenth amendment to the United States Constitution. The ruling established the right to counsel as an “immutable principle of justice” that inheres “in the very idea of free government which no member of the Union may disregard.” Though the Court’s ruling was limited to death penalty cases, the legal rationale in *Powell* has become the constitutional foundation for virtually every subsequent case extending the scope of the right to counsel in America.

*“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”*

The United States Supreme Court  
*Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)



or other quality-assurance standards. In fact, most counties have a multitude of public counsel delivery systems – one for circuit court, one for district court, a third for juvenile representation and, in some cases, a different indigent defense delivery model for each district court and/or each judge. Without uniform oversight, each of these systems has become institutionally Balkanized over time.

As a result, a review of indigent defense services – conducted on behalf of the Michigan Legislature per joint resolution (SCR 39 of 2006) – in a representative sample of counties shows that few Michigan counties have evolved beyond the parameters of the early twentieth century systemic defense delivery model described above in the Scottsboro Boys case.<sup>4</sup> Indeed, many have devolved (or are in the process of devolving) into low-bid, flat-fee contract systems, as a means of controlling costs, in which an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer’s ethical duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit.

NLADA finds that the state of Michigan has abdicated its constitutional obligation to provide for adequate representation of poor people facing a potential loss of liberty in its criminal courts by passing on its financial responsibility to its counties as an unfunded mandate and then failing to provide any administrative oversight of services rendered. The state of Michigan’s denial of its federal obligations has produced a myriad of public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one’s crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

### How The Counties Were Chosen

To ensure that a representative sample of counties was chosen to be studied - and to avoid criticism that either the best or worst systems were cherry-picked to skew the results - NLADA requested that an advisory group be convened to choose the sample counties. Created by SCR 39 of 2006-sponsor Senator Alan Cropsey, the advisory group was composed of representatives from the State Court Administrator’s Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan and trial-level judges. Ten of Michigan counties were studied: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. The advisory group ensured that the county sample reflected geographic, population, economic and defense delivery model diversity.

## How to Assess Uniform Quality

The concept of using standards to assess uniform quality is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school, or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the individual against the undue taking of his liberty by the state merits no less consideration.

The use of national standards of justice in this way also reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard* 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."<sup>a</sup>

The American Bar Association's *Ten Principles of a Public Defense System* present the most widely accepted and used version of

national standards for indigent defense. Adopted in February 2005, the ABA *Ten Principles* distill the existing voluminous ABA standards for indigent defense systems to their most basic elements, which officials and policy-makers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."<sup>b</sup>

<sup>a</sup> Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the Strickland test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards "are only guides," *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

<sup>b</sup> American Bar Association. *Ten Principles of a Public Defense System*. From the introduction at: <http://www.abanet.org/legalservices/downloads/sclaid/indigent-defense/tenprinciplesbooklet.pdf>

## The Human Impact

EQUAL JUSTICE UNDER LAW

### The Legacy of *Gideon v. Wainwright*

*“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”*

**The United States Supreme Court**

*Gideon v. Wainwright*, 372 U.S. 335 (1963)

On June 3, 1961, someone broke into a Panama City, Florida pool hall and stole alcohol and some change from a cigarette machine and a juke box. Clarence Earl Gideon, a fifty-one-year-old drifter, was charged with a felony – breaking and entering the pool hall with the intent to commit a misdemeanor. Trial commenced on August 4, 1961.

Gideon informed the trial judge that he was not ready to proceed because he was without counsel. Gideon asked that the court appoint an attorney for him, but the trial judge summarily denied the request. Too poor to hire an attorney, he was forced to go it alone. Attempting to mount his own defense, Gideon emphasized his innocence throughout the trial. But it was no use. The jury convicted him and he was sentenced to five years in prison – the maximum sentence for the crime.

With the aid of the prison library, Gideon drafted a five-page petition to the U.S. Supreme Court asking that the Court consider his appeal on constitutional grounds. The Court agreed to hear his case, and assigned him an attorney from the prominent Washington, DC, law firm of Arnold & Porter – Abe Fortas, who later became a Supreme Court Justice himself – to assist him in his appeal.

Justice Hugo Black delivered the unanimous opinion of the Court in the watershed case of *Gideon v. Wainwright*. Calling it an “obvious truth” that lawyers in criminal cases are “necessities, not luxuries,” the Court held that the Sixth Amendment’s guarantee of counsel is a fundamental and essential right made obligatory upon the states by the Fourteenth Amendment. Citing *Powell*, the Court reaffirmed that a meaningful right to counsel requires an attorney with the “skill and knowledge” that even an “intelligent” layman lacks.

*Gideon’s* “obvious truth” was made very apparent when Clarence Earl Gideon’s case was sent back to Florida for a new trial. This time, Gideon proceeded with the “guiding hand of counsel.” Fred Turner, a local attorney appointed by the court, spent three full days investigating the case before trial. He skillfully exposed the weaknesses in the testimony of the state’s witnesses, demonstrating how the state’s eyewitness was likely the real culprit. Turner called Gideon to the stand where Gideon denied any role in the break-in and provided evidence of his innocence, effectively rebutting testimony that went unchallenged during the first trial. The jury took merely an hour of deliberations to acquit Gideon of all charges.

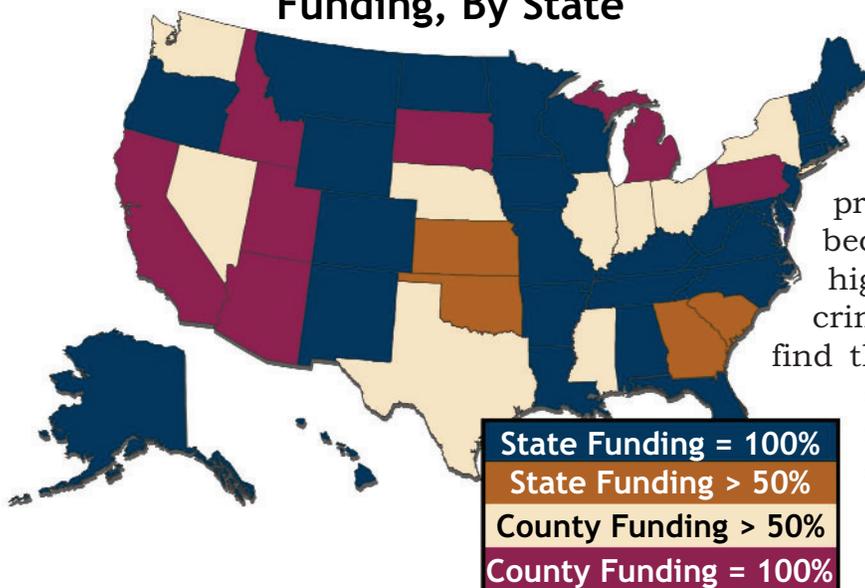
## Michigan’s History of Muting *Gideon’s* Trumpet

In response to a request from the state of Florida for amicus briefs supporting its denial of the right to counsel to Clarence Earl Gideon, then-Minnesota Attorney General Walter Mondale spearheaded an effort to get other state Attorneys General to file an amicus brief in support of Gideon. The Attorneys General in 22 states – including Michigan – agreed that the right to counsel was a basic tenet of fairness in the court system, stating: “[The Right of Counsel] is indispensable to the idea of justice under law. An essential assumption of our Constitution, it transcends the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation.”

One of the critical but often overlooked aspects of the Court’s landmark ruling in *Gideon v. Wainwright* is that the Sixth Amendment’s guarantee of counsel was “made obligatory upon the States by the Fourteenth Amendment” – not upon county or local governments.<sup>5</sup> National standards incorporate this aspect of the decision, emphasizing that state funding and oversight are required to ensure uniform quality.<sup>6</sup> Unfortunately, the laws of Michigan require county governments to pay for the state’s responsibilities under *Gideon* at the trial-level<sup>7</sup> without any statewide administration of to ensure adequacy of services rendered.

This stands in contradistinction to the majority of states, 30 of which relieve counties entirely from paying for the right to counsel at the trial-level.<sup>8</sup> Another three states assume the vast majority of funding their right to counsel systems.<sup>9</sup> Michigan is one of only seven states that still place the entire burden for funding trial-level right to counsel services on its counties as an unfunded mandate.<sup>10</sup>

**Trial-Level Indigent Defense Funding, By State**



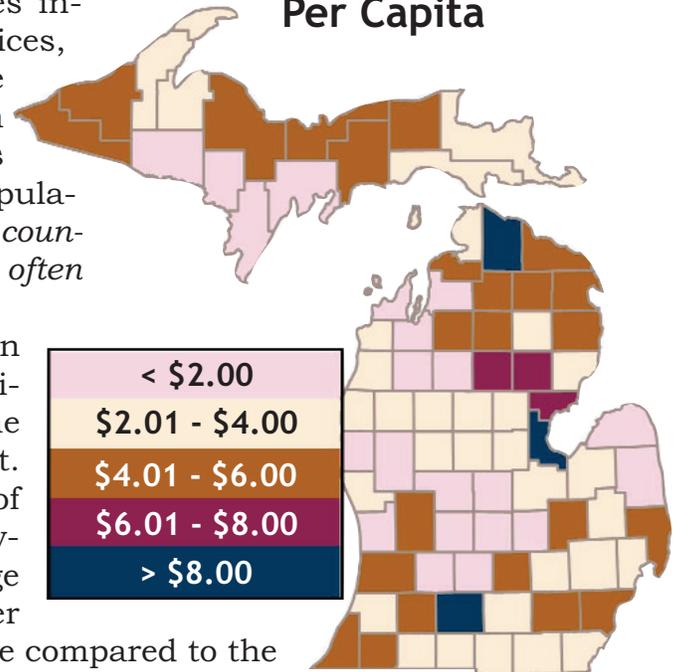
The practical necessity of state funding for the right to counsel is premised on the fact that county governments rely primarily on property tax as their main source of revenue. When property values are depressed because of factors such as high unemployment or high crime rates, poorer counties find themselves having to dedicate a far greater percentage of their budget toward criminal justice matters than more affluent counties. This, in turn, limits

CHAPTER III

the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could positively affect and/or retard rising crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime – further devaluing income possibilities from property taxes. And, since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, *the counties most in need of indigent defense services are often the ones that least can afford to pay for it.*<sup>11</sup>

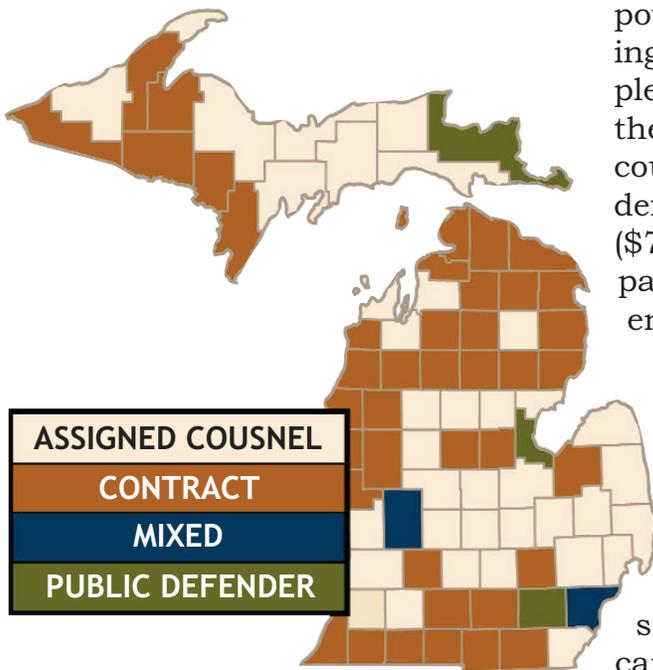
To see if this national phenomenon held true in Michigan, the NLADA site team studied comparison crime statistics and economic indicators. The median poverty rate for Michigan is 10.5 percent. The 38 counties that have a lower percentage of their population living in poverty than the state average also have a lower crime index percentage than the state average (8.21 index crimes per

### Indigent Defense Spending Per Capita



1,000 people compared to the state average of 9.28). By contrast, the 44 counties with higher percentages of poverty than the state average have a correspondingly higher crime index (10.23 crimes per 1,000 people, or a 10 percent greater frequency of crime than the state average). Correspondingly, the poorer counties in Michigan indeed spend more on public defense services than the more affluent communities (\$7.88 per person in the poorer communities compared to a state average of \$7.35 and the more affluent county average of \$6.19).<sup>12</sup>

### County-By-County Defender Systems



This dynamic puts a financial strain on less affluent counties – or in a state like Michigan experiencing an on-going recession – the majority of counties. Collectively, Michigan counties spend \$74,411,151<sup>13</sup> (or \$7.35 per capita) on indigent defense services; 38 percent less than the national average of \$11.86). Michigan counties are significantly behind the national mean for per capita spending on defender services of \$10.39

(Michigan counties collectively spend 29 percent less than the national mean). Indeed, Michigan ranks 44th of the 50 states in indigent defense cost per capita). Michigan, for example, would need to spend approximately \$104,366,050 to meet the state funding per capita spending of a state like Alabama – a state that is generally seen as not providing

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

constitutionally adequate representation.<sup>14</sup> Indeed, the state of Michigan would need to spend \$120,033,400 to match the national average indigent defense cost-per-capita.<sup>15</sup>

### *County Attempts to Fund the State's Constitutional Mandate*

Although national standards recommend the use of staffed public defender offices wherever the population and caseload are sufficient to support such programs,<sup>16</sup> assigned counsel and contract attorneys provide most of the indigent defense services in Michigan. In fact, there are only five staffed public defender offices<sup>17</sup> in the entire state. The Kent County Public Defender's Office maintains a staff of 13 attorneys and contracts with the county to handle about 50 percent of the cases for that jurisdiction each year. The other 50 percent are handled by assigned counsel holding annual contracts with the county. The Legal Aid and Defender Association of Detroit, a not-for-profit corporation,<sup>18</sup> receives 25 percent of the assignments from Wayne County, while the rest are handled by assigned counsel. In Oakland and Macomb counties, both of which are heavily populated portions of the greater Detroit metropolitan area, there is no public defender office at all.

### Per-Capita Spending

33.	<b>Tennessee</b>	\$9.30
34.	<b>Alabama</b>	\$9.17
35.	<b>North Dakota</b>	\$8.80
36.	<b>Rhode Island</b>	\$8.67
37.	<b>Kansas</b>	\$8.53
38.	<b>Hawaii</b>	\$8.26
39.	<b>Maine</b>	\$8.20
40.	<b>Pennsylvania</b>	\$8.10
41.	<b>Oklahoma</b>	\$8.02
42.	<b>Idaho</b>	\$7.83
43.	<b>South Carolina</b>	\$7.65
44.	<b>Michigan</b>	\$7.35
45.	<b>Texas</b>	\$7.04
46.	<b>Indiana</b>	\$6.77
47.	<b>Arkansas</b>	\$6.65
48.	<b>Utah</b>	\$5.22
49.	<b>Missouri</b>	\$5.20
50.	<b>Mississippi</b>	\$4.15
	<b>NATIONAL AVERAGE</b>	\$11.86

Comparing indigent defense systems across state lines is difficult, at best, given jurisdictional variances related to: delivery model, population, geographical expanse, prosecutorial charging practices, crime rates, county versus state funding, three strikes laws, and the death penalty (among others). For example, the state of Alaska has the highest cost per capita indigent defense spending (\$40.96) due almost entirely to the fact that public defenders must travel by air for many court appearances. So, whereas a high cost per capita may not necessarily guarantee that a state is providing adequate representation, a low indigent defense cost per capita certainly is an indicator of a system in trouble. Michigan ranks 44th of the 50 states.

As recently as of the early 1990s when 34 counties paid by the hour, Michigan was known as a state that followed the assigned counsel model of indigent defense delivery. That is no longer the case, as most now rely on a mixture of assigned counsel and flat fee contracts. Twenty-nine counties (of 83 total, or 35 percent) rely exclusively on individual assigned counsel for trial level representation of indigent defendants. In addition, Wayne and Kent counties assign private counsel in 75 percent and 50 percent of their cases respectively.

Some courts set rates by the hour and others by event with so-called fee schedules. As of April 2006, twenty circuits pay their assigned counsel solely by an hourly rate. Hourly rates vary widely from one county to another; as high as \$88.82 in Ottawa County to as low as \$40 in Eaton County – a rate last reviewed in 1978.

A fee (or event) schedule pays an attorney a fixed amount per task, regardless of the number of hours actually spent completing that task. An attorney in Leelanau County,<sup>19</sup> for example, will earn \$200 for the client interview and case preparation, \$100 for the preliminary hearing, another \$100 for a hearing on motion, \$600 for the first day of trial, and \$200 for each subsequent half-day in trial. Events tend to be further categorized in larger counties based on the seriousness of the charge. The use of fee schedules, it has been noted, rests “on the premise that if a lawyer handles enough assignments, things average out ... while fee schedules effectively pay at higher or lower rates depending on the number of hours invested in a given case, most will always pay more for a trial than a guilty plea.”<sup>20</sup> Often these fee schedules are adopted in jurisdictions with heavy caseloads as a cost-saving measure. Counties seeking to cut costs even further have often implemented low-bid flat-fee contracts.

Flat-fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation.<sup>21</sup> Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled “Conflicts

### Michigan's Financial Strains

Michigan counties may be the least suited to handle the burden of providing the right to counsel because of the serious financial strains of the local economy. State and local economists and policy-makers have been attempting to cope with an economy that has lagged toward the bottom of the nation for over a decade.<sup>a</sup> In fact, the state's growth rate since 1997 has ranked 48th in the nation.<sup>b</sup> Michigan ended 2006 with an unemployment rate of 7.1 percent (well above the national average of 4.5 percent).<sup>c</sup> Since 2001, an estimated 346,500 jobs have vanished in Michigan as manufacturers have shed 25 percent of their workforce in that time-span.<sup>d</sup> Michigan's flat tax rate on personal income is 3.90 percent giving it one of the lowest top brackets in the nation. Some cities impose additional income taxes. There is single business tax on small businesses that is set to expire by 2009,<sup>e</sup> and a corporate tax is levied on larger concerns. Michigan's state sales tax is six percent. The state does not allow city or local sales taxes. Property taxes are assessed on the local, not state, level.

At the same time, Michigan imprisons significantly more of its population than the majority of the 50 states. In 2004, Michigan had 263,100 adults under correctional supervision and a supervision rate of 3,527 per 100,000 persons, which ranked 4th among the

states and was about 27 percent above the national average.<sup>f</sup> That same year, the state's incarceration rate was 483 per 100,000 people, ranking 13th. The result of this reliance on the corrections system is a heavy cost to Michigan's taxpayers. Indeed in 2001, Michigan taxpayers paid 26 percent more per inmate than the national average; a cost per inmate of \$32,525 placed the state 8th nationwide.<sup>g</sup>

<sup>a</sup> Aguilar, Louis. “Economic Funk Won't End in 2006: As nation's outlook improves, Michigan will see 6th straight year of job losses, analysts say.” The Detroit News (Sunday, December 4, 2005). See: <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20051204/BIZ/512040341>

<sup>b</sup> See “Table 1. Growth Rates in Real GDP by State, 1997-2005” <http://www.bea.gov/bea/newsrel/gspnewsrelease.htm>

<sup>c</sup> Michigan Department of Labor & Economic Growth. ([http://www.milmi.org/admin/uploadedPublications/463\\_econsit.htm](http://www.milmi.org/admin/uploadedPublications/463_econsit.htm)).

<sup>d</sup> See Aguilar.

<sup>e</sup> [http://www.detroitchamber.com/public\\_affairs/index.asp?id=4&scid=&rcid=498](http://www.detroitchamber.com/public_affairs/index.asp?id=4&scid=&rcid=498)

<sup>f</sup> Correctional supervision statistics include prisons, jails, probations, and parole.

<sup>g</sup> National Institute of Corrections (<http://www.nicic.org/Features/StateStats/?State=MI>).

of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.<sup>22</sup> For attorneys wanting to practice criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area where they prefer to live.

The trial courts of 41 Michigan counties ranging in size from Muskegon (pop 174,401) to Baraga (pop. 8,728) use flat-fee contracts with private firms, consortia of attorneys, individual attorneys, or some combination thereof. Contracts vary widely in the number of attorneys or firms who are parties and in the nature of the representation to be provided. Some cover misdemeanor and/or felony defense, and some include other assigned cases such as delinquency, neglect and abuse, and mental health. Not all contracts specify how many cases are to be handled for the contract fee. Some contracts include reimbursement for office expenses and additional fees for experts, while some do not. A few contracts do provide for year-end adjustments. Contracts for indigent defense services in Michigan are sometimes awarded primarily on the basis of cost, without regard to qualifications or any other considerations – an indictment of trial-level indigent defense services throughout the state.

## How Michigan Counties Respond to Financial Strains

For counties in poor economic standing, there are only two ways to cut costs related to indigent defense: either reduce the number of cases coming into the system or cut spending on salaries and case-related expenses. Since public defenders do not control their own caseload, less affluent jurisdictions often turned to low-bid, flat fee contract systems in which an attorney takes all of the indigent defense cases in a jurisdiction for a single fixed fee. Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled "Conflicts of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.<sup>a</sup> For attorneys wanting to practice criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area where they prefer to live and work. Currently, 41 of Michigan's 83 counties (or 49 percent) favor this delivery method.

<sup>a</sup> The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or "to waive a client's rights for reasons not related to the client's best interests." For these reasons, all national standards, as summarized in the eighth of the ABA's *Ten Principles*, direct that: "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services."

## ***The Documentation of Michigan's Historic Struggles to Implement Gideon***

This report is not the first instance in which the constitutionality of Michigan's indigent defense system has been called into question. In fact, it is not even the first NLADA report. In 1974, NLADA undertook a review of a federally-funded Wayne County Juvenile Defender Services project under a grant from the United States Department of Justice, Law Enforcement Assistance Administration. After noting several difficulties in case overload and political interference, and based on fears that the project would not survive beyond the federal grant period, NLADA recommended that the only answer to the problems plaguing juvenile justice representation in Detroit was enactment of statewide trial-level represen-

tation legislation.<sup>23</sup> When NLADA returned three years later – again under a United States Department of Justice grant – our comments were much more blunt and foreboding: “The juvenile system needs massive assistance. Unless serious changes are made in funding to provide adequate staff and facilities, especially social service programs, and unless programs in diversion, remedial schooling, and other approaches are tried, today’s juveniles will become alienated and impoverished adults who will flood the jails and infect our entire social existence.”<sup>24</sup>

State actors have provided other documentation of systemic deficiencies. On July 10, 1975, the Honorable Thomas G. Kavanagh – then Chief Justice of the Michigan Supreme Court – appointed bar leaders to serve on a Defense Services Committee of the Michigan State Bar in order to review the entire trial and appellate procedure for legal representation of indigent defendants in criminal proceedings, and make such recommendations for improvement as they think best. Composed of judges, prosecutors, defenders, and court officials, the Committee met in ten all-day sessions in Lansing, heard oral testimony from a variety of witnesses, and then ultimately issued its report, subtitled *A Review of the Legal Representation of Indigent Defendants in Criminal Proceedings*.<sup>25</sup>

At a final meeting on May 13, 1977, the Committee voted to make a set of recommendations to the Michigan Supreme Court. Among ten recommendations for reforming indigent defense services, the committee called for the following: “Appointed counsel shall receive reasonable adequate compensation to permit effective representation.” The committee also urged: “[t]he right of an indigent defendant to hire necessary expert witnesses is fundamental to the right to a fair trial.” As of this writing, some 30 years later, neither of these recommendations has been fulfilled.

In 1980, Public Acts 438 and 443 reorganized the trial courts in Wayne County, purportedly to provide state funding for three of Wayne County’s trial courts, and proposed to establish a timetable for funding all of the trial courts. Despite the legislation, state funding did not cover a range of expenses, including those associated with indigent defense counsel and witness fees. Interestingly, the House Legislative Analysis accompanying the

### State Appellate Defender Office

**T**hough the state provides no funding or oversight to the trial level indigent defense system, Michigan does provide a small amount of state funding to support the appellate defender system (in 2005, the state provided \$5,634,400).<sup>a</sup> These funds are controlled by an independent seven-member Appellate Defender Commission,<sup>b</sup> charged with the development and adoption of standards for all appellate counsel, and oversight of the two statewide divisions: the State Appellate Defender Office (SADO), and the Michigan Appellate Assigned Counsel System (MAACS). Such is the system created by the Appellate Defender Act of 1978 (effective 1979).<sup>c</sup> Established in 1969, SADO actually predates the Appellate Defender Act. Indeed, the legislation was seen as a major reform for appellate representation when it was enacted 30 years ago, as it gave the independent commission the authority to set performance standards and control the workload of the

SADO attorneys.<sup>d</sup>

<sup>a</sup> ABA, *50 State and County Expenditures for Indigent Defense Services, Fiscal Year 2005*, available at <http://www.abanet.org/legalservices/sclaid/defenders/reports.html>

<sup>b</sup> The Appellate Defender Commission is housed within the office of the state court administrator. Though the governor directly appoints all commissioners, the governor has no discretion to reject names offered by the nominating authorities.

<sup>c</sup> Michigan Appellate Defender Act of 1978, MCL 780.705; MSA 28.1287 (105)

<sup>d</sup> The Appellate Defender Act requires that SADO be assigned no less than 25 percent of all indigent criminal appeals, but limits the total cases the office accepts to “only that number of cases that will allow it to provide quality defense services consistent with the funds appropriated by the Legislature” (MCL 780.716(c)). All overflow cases are assigned to private attorneys on the MAACS roster.

bill that became Public Act 438, stated: “[t]he need for state government to streamline the operations and assume the costs of the state’s judicial system has been recognized for some time now. The increase in case backlogs throughout the state and the lessened ability of local units of government to meet the costs of court operation point toward the desirability of such an approach. However, nowhere is the need for court reorganization and state assumption of the costs of court operations more urgent than in the Detroit-Wayne County area.” The Act called for funding of all court operational expenses by October 1, 1988, through a phased-in process over eight years. Despite this seeming clear call for and progress toward state financing of the courts, including indigent defense services, broad reform never happened and even the state funding of the three Wayne County courts was eventually abandoned.

Frequent calls for reform were heard throughout the 1980s and ’90s. For example, in 1986, Chief Justice G. Mennen Williams, in his State of the Judiciary speech, called for a statewide system of “equal justice.” “This system remains to be fully implemented,” he said, “and it only can be fully implemented through state financing.” Acknowledging that the 1980 pledge to fully fund the trial courts had failed, he emphasized that counties could not live up to the task of funding the courts: “[f]unding units previously disinterested in state assistance for trial courts are faced with adverse financial circumstances and many are most interested in our 1986 program of state funding.” He urged the state to support funding for assigned trial and appellate counsel, as well as witness fees and various other court costs.

In her 1986 State of the Judiciary speech, then Chief Justice Dorothy Comstock Riley similarly urged the state to step in and relieve the counties of a burden that they could not afford to meet. She urged comprehensive reform of the courts, making the point again in her 1988 and 1990 State of the Judiciary speeches. Subsequent Chief Justices Michael Cavanagh and James H. Brickley also voiced these concerns, and in 1995 Chief Justice Brickley released the Michigan Supreme Court’s report entitled *Justice in Michigan, A Report to the People of Michigan from the Justices of the Michigan Supreme Court*, in which the court declared,

### Financial Disincentives to Due Process

“The current system of court assignment and payment has gone far to do what it was designed to do, namely speed the court docket. It does however, as the plaintiffs allege, encourage defense attorneys to persuade their clients to plead guilty. The incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed. Under the current system, a lawyer can earn \$100 an hour for a guilty plea, whereas if he or she goes to trial the earnings may be \$15 an hour or less. Essential motions are neglected. In short, the system of reimbursement of assigned counsel as it now exists creates a conflict between the attorney’s need to be paid fully for his services and obtaining the full panoply of rights for the client. Only the very conscientious will do the latter against his or her own interests ....

The system of payment according to the seriousness of the crime rather than on hours spent or work performed (events) is not reasonable or just and is a disincentive to due process ....

There is another problem in that each of the 55 circuits has a different plan for compensation of assigned counsel for trial in that circuit. Even the Recorder’s Court and the Third Circuit for Wayne County have slight differences in their plans. As a result of these differences, all Michigan defense representation is not equal. Indigent defendants charged in counties that pay assigned counsel very low rates are treated differently than those defendants who can afford to hire their own attorneys. They are also treated differently than defendants in counties that provide skilled representation.”

**The Hon. Tyrone Gillispie**  
*Report of the Special Master, April 3, 1991*

among other things, that: “[t]he state should assume the core costs of the court system, including judicial salaries and benefits, the salaries and benefits of court staff, due process costs including the cost of indigent representation, and the cost of statewide information technology.”

### State Bar Leaders Speak Out

“We must finally recognize and value the critical role of indigent services in the criminal justice system .... Our system of justice will only work if we provide every defendant with competent, fully trained, and adequately paid defense counsel.”

**Thomas W. Cranmer**

**President, State Bar of Michigan, 2005-06**

“Our justice system works best with both a strong prosecution and a strong defense. This ensures that the rights of all citizens are protected .... Our belief in justice for all should not become justice for only those who can afford to pay.”

**Nancy J. Diehl**

**President, State Bar of Michigan, 2004-05**

In 1992, the Michigan Bar Journal devoted an edition of its magazine to addressing the woes of its state’s indigent defense system.<sup>26</sup> The publication focused on inadequate compensation for appointed counsel as the chief systemic flaw responsible for compromising the quality of representation provided the indigent accused. The problem, the authors argued, was only compounded when one considered the state’s failure to provide support services (investigators, expert witnesses, etc.) and training for defense attorneys; or the intrinsic lack of independence and freedom from judicial control; or the lack of supervision and qualification standards for appointed counsel; or the lack of a general and statewide institutional presence. In his forward, then Michigan Supreme Court Chief Justice Michael Cavanaugh remarked, “[i]t is unfortunate that as we mark the 200th Anniversary of the *Bill of Rights* and extol its important guarantees, we at the same time witness the failure to secure

those guarantees, adequately or at all, to significant segments of society.”<sup>27</sup>

In 2003, following the racial tensions and civil unrest occurring in Benton Harbor, Governor Granholm established a Benton Harbor Taskforce that subsequently produced a report recommending, among other things, the substantial overhaul of the indigent defense system in Berrien County and the creation of an institutional public defender’s office. The reforms never happened.

According to a 2005 report of the ABA Standing Committee on Legal Aid & Indigent Defendants, “local elected officials are downright indifferent to indigent defense reform at best and opposed at worst.” During a public hearing regarding the right to counsel, a witness from Michigan related, “I once addressed the Michigan Association of Counties meeting, and a county commissioner raised his hand in the back and said: ‘Is there any way we could get defendants from the jail to the prison without going to court? Because you would save a lot of money.’ And that kind of sums up the attitude, especially in the rural counties.”<sup>28</sup>

Despite historical support by the Michigan Supreme Court for state legislative funding for indigent criminal defense, relief through litigation and judicial decision has not been forthcoming. Less than a year after a June 2001 Administrative Order had decreased assigned counsel fees by 10 percent statewide (fees were increased again in 2003), the Criminal Defense Attorneys of Michigan and the Wayne County Criminal Defense Bar

Association (with *pro bono* assistance from the law firm of Kirkland & Ellis LLP) filed an unsuccessful lawsuit in the Michigan Supreme Court seeking an increase in assigned counsel fees in Wayne County (468 Mich. 1244, 663 N.W.2d 471).<sup>29</sup> The plaintiffs, arguing a statutory right to “reasonable fees,” sought an hourly rate of \$90 in Wayne County. The court disagreed, ruling that then-current rates of about \$67.50 did not “present the systemic failure to provide reasonable compensation that was found in the fixed fee schedule at issue in *In re Recorder’s Court Bar Association v. Wayne Circuit Court*, 443 Mich. 110, 503 N.W.2d 885 (1993).”<sup>30</sup> Since the court’s 2003 ruling on the Wayne County litigation, there have been no other complaints filed with the Michigan Supreme Court.

In an effort to spark indigent defense reform, in 2002 a core group of criminal and juvenile justice professionals formed the Michigan Public Defense Task Force,<sup>31</sup> a broad-based citizens’ coalition. An *ABA Gideon Initiative* grant was awarded to support the Task Force. The Task Force developed a model plan for the state’s indigent defense services, based on the *ABA Ten Principles for the Delivery of Indigent Defense Services*, and began working to implement the plan through public education and advocacy programs. That same year, the State Bar of Michigan adopted the Task Force’s *Eleven Principles* for the delivery of indigent defense in the state.<sup>32</sup> In 2003, the State Bar of Michigan’s Executive Committee adopted a resolution encouraging the legislature to establish a commission with the responsibility of investigating indigent defense services in Michigan and making recommendations for improvement. The Task Force even went so far, in May 2005, as to draft a Michigan Public Defense Act.<sup>33</sup> The public education and advocacy efforts of the coalition continue today.

In 2007, some local and national advocates thought the time had passed for the state of Michigan to reform indigent defense services legislatively and filed a class action lawsuit against Governor Granholm for failing to provide adequate services. The Michigan Coalition for Justice (MCJ) in the case *Duncan et al v. State of Michigan* argues that the failure of the state to ensure an adequate constitutional right to counsel is so stark in Berrien, Genessee, and Muskegon Counties that it has asked the court to compel the state to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation.<sup>34</sup>

## Eddie Joe Lloyd

In 1985, Eddie Joe Lloyd was convicted in Detroit of the rape and murder of an under-aged girl. The evidence of his guilt was overwhelming – Eddie Joe Lloyd’s written confession gave specific information about the crime scene only the perpetrator could have known. Police also had him on tape admitting to the brutal act. It was a slam dunk case; the jury took less than an hour to convict him of 1st degree felony murder. Lamenting the lack of the death penalty in Michigan, the judge sent Eddie Joe to a maximum security prison for the remainder of his life without the possibility of parole – a measured and appropriate sentence for such a heinous crime. Justice was served .... Except for one small problem – Eddie Joe Lloyd was innocent.

The road to Mr. Lloyd’s wrongful conviction began with a letter he drafted to the police suggesting that he had pertinent information on the case. The letter was not unique. Eddie Joe was convinced that he had the supernatural ability to solve crimes and wrote letters to the police offering his services on previous occasions. The particular letter that set in motion his wrongful conviction was written from his bed at the Detroit Psychiatric Institute where he was non-voluntarily committed. The police interrogated Eddie Joe on at least three separate occasions at the mental health facility. Mr. Lloyd was never offered a lawyer during these interviews, during which time, as it turned out, the police officers “allowed Lloyd to believe that, by confessing and getting arrested, he would help them ‘smoke out’ the real perpetrator.” They fed him salient information about the crime scene to make his confession more believable.

The high ethical demands of representing a capital case combined with the paltry compensation paid to lawyers in 1985 Detroit left the Wayne County district court two pools of attorneys from which to fulfill Mr. Lloyd’s constitutional right to counsel – 1) those that saw accepting court-appointments and zealously defending poor people as part of an attorney’s professional and ethical duty to the Bar, despite the significant personal financial loss it imposed; or, 2) those that maximized their economic return on court-appointed cases by taking on as many assignments as the courts would allow while disposing of them as quickly as possible. With such a high profile case as this – Detroit had been under curfew in the months that followed the crime – the appointing judge assigned a lawyer that would not put up too many hurdles to getting Mr. Lloyd off the streets and behind bars for good.

Aiding the goal of quick convictions, Wayne County only paid a single flat fee of \$150 to court appointed attorneys to cover the entire cost of pre-trial preparation and investigations. In Eddie Joe Lloyd’s case, his attorney gave \$50 to a convicted ex-felon to serve in the capacity of investigator and pocketed the extra \$100 to cover the rest of his pre-trial expenses. Not surprisingly, the “investigator” conducted no independent inquiry into Mr. Lloyd’s confession or his mental state. The lawyer too failed to interview both Mr. Lloyd’s doctors and his family members about Eddie Joe’s history of delusions of grandeur. And, no independent of the police can-

vass of the crime scene occurred – a simple endeavor that would have shown that a number of “facts” in Mr. Lloyd’s original letter were incorrect and that later admissions only matched the police’s prevailing theory of the case at the time and not the true particulars of the crime. No expert was retained to explain Mr. Lloyd’s mental history to the jury or to challenge the state’s expert testimony that Eddie Joe was competent despite his non-voluntarily committed status at the state facility. In 1985 Detroit, such defense expert witnesses were rarely granted by the court, and if they were, the measly reimbursement basically eliminated any decent expert unwilling to donate his time from testifying. Whether or not Eddie Joe’s attorney knew this to be the case from past experience, he never bothered to ask the court for an expert. And, despite the U.S. Supreme Court’s ruling in *Miranda v. Arizona*, Lloyd’s court-appointed attorney never appropriately challenged the non-counseled custodial interrogations at the mental health facility at pre-trial hearings.

Then, eight days before trial, Eddie Joe Lloyd’s attorney suddenly withdrew from the case. But that apparently was a mere inconvenience to the court which quickly hand-selected another attorney who saw no ethical problem with starting the trial in approximately one week’s time since the original attorney had done “all the necessary” pre-trial work. This second attorney did not even bother to meet with Mr. Lloyd’s original court-appointed attorney before trial or to cross-examine the police officer who was most responsible for Eddie Jo’s coerced confession on the stand. In fact, Mr. Lloyd’s new defense lawyer did not call a single defense witness to testify. His closing argument clocked in at less than five minutes. Post-conviction, Mr. Lloyd’s received another court-appointed lawyer to conduct his direct appeal. This one never even bothered to make a cursory visit to Eddie Joe in prison or to raise ineffective assistance of counsel claims against the two trial attorneys. After his direct appeal, Eddie Joe wrote the court to suggest he had not received an adequate defense, and act that spurred his appellate attorney to write a letter to the judge saying that Eddie Joe’s claims should not be taken seriously because he was “guilty and should die.”

Eddie Joe Lloyd fortunately experienced a few years of freedom after serving 17 years in prison before passing away from medical complications at the age of 54. Eddie Joe’s freedom was secured thanks to the efforts of The Innocence Project – a non-profit legal clinic at the Benjamin N. Cardozo School of Law that handles post-conviction cases where DNA evidence still exists in cases tried before the advent of DNA sciences – working in conjunction with local Michigan attorney Saul Green. For failing to provide an adequate defense up front, Wayne County cost its tax payers \$4 million in a settlement agreement with Mr. Lloyd’s estate. Sadly, the DNA evidence that completely exonerated Eddie Joe Lloyd has not led to a match on any law enforcement database. More than 20 years after the crime, the whereabouts of the real perpetrator remains unknown.

## Prioritizing Speed in Michigan's District Courts

In 1972, the U.S. Supreme Court extended the right to counsel in *Gideon* to any misdemeanor cases involving the possibility of incarceration in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Thirty years later in *Shelton v. Alabama*, 535 U.S. 654 (2002), the Court mandated that governments must provide counsel to not only those indigent defendants who are sentenced to any term of incarceration, but to defendants who receive probationary or suspended sentences which may be subsequently converted into incarceration by virtue of violation of the terms of the probationary or suspended sentences.

Five staff members of the National Legal Aid & Defender Association plus 10 criminal defender contractors – the majority of whom are members of the American Council of Chief Defenders – went to Michigan at various times and sat in various courtrooms in each of the 10 survey counties. There was one singular experience that defined all of our experiences: the opinion that a large gap exists between the promise of both *Argersinger* and *Shelton* and the day-to-day realities in the district courts of Michigan. And, unlike the Eddie Joe Lloyd case, there is no national Innocence Project for the hundreds of thousands of misdemeanor cases that lack DNA evidence.

People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to “get out of jail” for time served prior to meeting or being approved for a publicly-financed defense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution.

In fact, the emphasis on celerity of case processing has led many of the criminal justice stake holders we interviewed in one jurisdiction – Ottawa County – to colloquially refer to the district court arraignment dockets as “McJustice Day” (their terminology, not ours). The fact that clients are arraigned, pretrial conferences held, and, if a plea can be worked with the clients, sentences imposed generally all in a single day without defense counsel present led one defense attorney to tell us that the philosophical problem with “McJustice Day” is that it is “assembly line justice.” To be clear, many of the criminal justice stakeholders expressed some embarrassment at the use of the term. Still, our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michi-

gan's valuing of speed over substance. The failure to adequately implement the right to counsel in Michigan's district courts is entirely related to the desire to cut costs.

### A. *The Failure to Provide Counsel At All*

The constitution grants a defendant the option to waive her right to counsel and represent herself.<sup>35</sup> To be valid, however, a waiver of counsel must be voluntary, knowing, and intelligent.<sup>36</sup> Therefore, before finding that a defendant has waived her right to an attorney, the criminal court judge has an obligation to make a thorough inquiry into the particular defendant's abilities and understanding. This inquiry includes whether the accused understands the nature of the charges against her, the range of allowable punishments, possible defenses to the charges, and any other essential facts to ensure that the defendant understands the consequences of the waiver. Moreover, although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation – all factors that tend to foster recidivism. Before a client knowingly waives her right to counsel, she must be fully aware of the consequences that a guilty plea may hold.

A simple enumeration of rights posted on a sign by the clerk's office does not amount to a knowing and valid waiver of rights. Too often, people in need of public defender services are undereducated, illiterate, mentally ill, and/or developmentally delayed. Without counsel to advise them and assess their competency to waive counsel, the Court is not guaranteeing that these waivers are valid. The U.S. Supreme Court most recently addressed the requirements for an effective waiver of the right to counsel prior to entry of a guilty plea in *Iowa v. Tovar*, 541 U.S. 77 (2004). Citing *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938), the Court confirmed that any waiver of the right to counsel must be knowing, voluntary, and intelligent, and must ensure that the defendant possesses sufficient information to make an intelligent election dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.<sup>37</sup> *Tovar* confirms that the warnings of the pitfalls of proceeding uncounseled must be "rigorous[ly]" conveyed per *Patterson v. Illinois*, 487 U. S. 285, 298 (1988). Toward this end, the Sixth Circuit United States Court of Appeals has suggested an extensive colloquy for every federal district judge to follow whenever a defendant desires to waive their right to counsel and represent themselves at trial.<sup>38</sup> Most assuredly, any waiver of the right to counsel must protect against the danger that "innocent men pitted against trained prosecutorial forces may waive counsel and plead guilty to crimes they have not committed, if they think that by doing so they will avoid the publicity of trial, secure a break at the sentencing stage, or simply get the whole thing over with."<sup>39</sup> Moreover, taking the time to ensure that a defendant actually knows what he is doing before accepting his waiver and allowing him to plead guilty without counsel protects the criminal justice system from unnecessary appeals, post-conviction, and retrials.<sup>40</sup>

Upon arrival at district court in Alpena County, defendants are checked-in at the front clerk's window and receive an *Advice of Rights* form. District court clerks instruct misdemeanor defendants to read the form, sign-it, and return it to the front window. Once it is returned to the court's clerks, the form is placed in the court's file and it is available to the

judge for review. With regard to the right to counsel, item Number 1 on the form informs the misdemeanor defendant that s/he has three basic rights: a. to plead guilty/not guilty/or stand mute, in which case a not guilty plea will be entered, or a no contest plea with the permission of the court; b. to have a trial by judge or jury; and c. to have the assistance of an attorney;

Number 2 on the *Advice of Rights* form tells the defendant that s/he has the right to an attorney appointed at public expense if indigent and if the offense requires a minimum jail sentence or the court determines that it might sentence the defendant to jail. Under Number 3, it also states that the defendant “may have to repay” the expense of the court appointed attorney. Numbers 4 and 5 explain basic trial rights and the burden of proof for the state and what happens if the defendant pleads guilty or no contest. Number 6 references the right to be released on bond, while Number 7 advises probationers/parolees that a guilty/no contest finding violates probation or parole. Number 8 outlines the potential penalty for non-DWI/substance abuse cases up to 93 days in jail and a fine of up to \$100, plus costs and/or fines. It also states that the Court will advise if the crime involves a minimum sentence. Number 9 requires that all financial obligations be paid at time of assessment. Number 10 references the rear of the form for DWI/substance abuse/driving offenses, with the fine range, jail time, and community service and personal screening requirements, and the licensure implications. Number 11 outlines the right to a circuit court appeal taken within 21 days from sentence. Number 12 addresses special accommodation for disabilities and for foreign language interpreter through immediate notice to the court.

Despite the lengthy information, the form is absolutely not a waiver of counsel. Although the form advises misdemeanor defendants of their “basic rights,” including to an attorney, it does not explain waiver of counsel nor does it provide for waiver of counsel signatures by the defendant or counsel or the judge. The *Advice of Rights* form is signed by the defendant alone. So clients sign off and walk into district court where there are no public defenders (or prosecutors for that matter). Courtroom staff includes a court clerk and a sheriff who is armed. Felony defendants, including those participating in television/video arraignments from the county jail, receive quick, cursory, and perfunctory information from the judge regarding the charges, the setting of bail, and their preliminary hearing date. The judge is quick and perfunctory with the misdemeanor arraignments set for an initial appearance. Defendants are informed of the charges and asked how they want to

## Alabama v. Shelton

In *Alabama v. Shelton* 535 U.S. 654 (2002), Justice Ginsburg opined that the extension of the right to counsel to all misdemeanor cases even when the threat of imprisonment is not immediate shall not cause undue financial strain because jurisdictions can opt for pre-trial probation programs. Pre-trial probation programs typically are structured whereby prosecutors and defendants agree to the participation in a pre-trial rehabilitative program which includes conditions typical of post-trial probation. As Justice Ginsburg states, “[a]djudication of guilt and the imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions.”<sup>a</sup>

<sup>a</sup> *Shelton* held that an accused person has a right to counsel at trial even if he is ultimately sentenced to a totally suspended period of incarceration, with the defendant’s continued freedom conditioned upon meeting one or more probationary requirement. Should the state accuse the probationer of violating the terms of his probation, the judge cannot punish him by locking him up unless the probationer was afforded the right to be represented by a lawyer when he originally went to trial or pled guilty. Moreover, the Court explained, the failure to initially provide the lawyer cannot be remedied by providing an attorney at the hearing where the judge determines whether to revoke the suspended sentence because, at that point, the attorney can only challenge the facts surrounding the probationer’s alleged failure to meet the conditions of the suspended sentence and not the facts of the underlying conviction.

## Overview of Alpena County

Alpena is a smaller county in the Lower Peninsula's (LP) north-eastern corner. As of 2005, the county had an estimated 30,428 people, ranking it 35th among Michigan's counties.<sup>a</sup> Alpena County has an 83.1 percent high school graduation rate and a median household income of \$34,177. Its poverty rate of 10.5 percent ranks in the middle among Michigan's counties. The county is extremely rural, as the Mackinaw State Forest occupies large tracts of land in the county. In fact, there is only one city in the entire county - the county seat, Alpena. The City of Alpena (pop. 11,304) sits on the shore of Lake Huron's Thunder Bay. Alpena is by far the largest city in the sparsely-populated northeast corner of Michigan's Lower Peninsula; it serves as the region's commercial and cultural hub.

Alpena County is home to the 26th Circuit and 88th District Courts.<sup>b</sup> All public defender services in the county are handled via flat-fee contract with a private law firm based in Alpena.

Prior to the current contract system, all defender services for misdemeanor and delinquency cases were delivered through an assigned counsel program fully and completely administered by the district and probate court judges. Assigned counsel through that program were paid a rate of \$50 an hour. Felony representation was provided by the Office of the Public Advocate (OPA), which was initially funded in 1981 by a special \$80K federal grant obtained by then-Circuit Court Judge Swallow. OPA was a 501(c)(3) organization with a board of directors that handled the felony caseload of the then four counties that made up the 26th Circuit Court.

In 2003, the 26th Circuit Court was reorganized into just the two counties - Alpena and Montmorency - at which time it was determined that the OPA was costing Alpena County \$420K per year for felonies alone. The OPA was closed and the law firm of Lamble, Pfeifer & Bayot (LPB) was formed.<sup>c</sup> A three-attorney firm, LPB maintains an office about a block away from the circuit and district courts in Alpena.

In 2004, LPB was awarded its first annual contract with Alpena County and another with Montmorency. While NLADA was visiting Alpena, LPB was in the second year of a three-year contract with the county (\$264K for 2006, \$269K for 2007, and \$276K for 2008). The county placed supervisory responsibility over the contract in the circuit court judge and merely pays monthly installments to LPB. Still, the circuit court judge does not supervise either LPB practices or its fiscal management. The only report from LPB is the firm's final calendar year statistics on number of cases handled for each court and the amount under the contract allocated to that court. LPB provided no per-attorney caseload information.

One attorney acts as lead felony attorney in Alpena and maintains a private practice for divorce and child custody representation. A second LPB attorney also takes felony cases in Alpena, but further handles the firm's contract cases with Presque Isle County (to the north of Alpena) and has a private practice with separate offices from his LPB office. He is also a part-time Alpena city attorney, but affirmed that he does no city work that would place him in conflict with representation under the criminal defense contract. The third LPB attorney primarily does probate, family, and some district court work. He also teaches at a local community college. LPB assigns conflict cases to two "conflict counsel." LPB attorneys try to match case severity with practice experience (including assignments to the two assigned conflict counsel).

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26007.html>.

<sup>b</sup> Both the circuit court and district court have jurisdiction over both Alpena and neighboring Montmorency Counties.

<sup>c</sup> Mike Lamble, Bill Pfeifer, and Ron Bayot all served as staff attorneys in the Office of the Public Advocate.

plea. Only if they plead not guilty are they asked if they want counsel. Without the presence or advice of counsel and without any oral colloquy regarding waiver of counsel and without signing of a waiver of the right to counsel form, the judge accepts guilty pleas in misdemeanor cases.

One female defendant pled guilty without counsel or any oral or written waiver of counsel to disorderly conduct surrounding an incident at McKinley and Washington streets in Alpena. The judge accepted her plea after listening to her story of what had happened on the street outside her home. Supposedly a second woman broke the front window of the defendant's house and then began fighting on the street with a third woman. (Neither of these two women were in the courtroom.) The defendant admitted to pulling one woman off the other, but not to screaming or yelling. The judge seemed to question the factual basis for accepting the plea and asked the sheriff to go out and get the police report on the case. After setting aside the case and reading the police report, the judge reconvened, basically stated that the police report supports disorderly conduct, and accepted the plea. The woman was given a delayed adjudication with one year unsupervised probation, ordered to pay fines and costs, and told not to drink -- all despite clearly having legal aspects of her case that would raise questions with a defense attorney.

In Oakland's 47th District Court a judge will deny appointment of counsel if he deems the client's income to be "way too high." But this determination is only made in those cases where a defendant requested appointment of counsel and completed the petition and the petition was sent to the judge's court reporter. There are many cases where the petition is never even sent to the judge for review. One judge advised that considerations

are based on “what little information I know” in determining whether to appoint counsel to a defendant who has requested appointed counsel. As a rule of thumb, if the charge is punishable by more than 93 days the defendant will receive an attorney; if the charge is punishable by less than 93 days the judge will try to decide (at time of arraignment and before having any input from prosecution or defense) whether the defendant will actually go to jail. The judges *will not* appoint counsel in any case where they do not intend to send the defendant to jail, even if the charge carries a potential jail sentence. One judge will not appoint counsel for driving with license suspended 1st offense, urinating in public, disorderly person, and trespassing, “because he will not sentence defendant to jail.” The other judge *will not* appoint counsel for driving with license suspended 1st offense and for urinating in public, and makes a case-by-case decision on charges of disorderly person and trespassing. For those cases where the judges will not appoint counsel, the court personnel are instructed “do not even send the petition (if completed at arraignment)” to the court reporter. A court administration employee noted anecdotally that perhaps 5 percent of petitions are denied.

### District Court Room Observation: Alpena County

An African American female appeared as a walk-in off of a bench warrant issued in November 2006 for probation violation. She had failed to pay fines and cost and had failed to do anger management counseling. There was no attorney present and no probation officer. After offering her explanations, the judge continued her probation, restated the fines and costs that must be paid, and ordered her to again complete anger management. Failure to comply with his probation requirements would result in a thirty day jail sentence.

We were troubled by this practice and, when meeting with the judge after the morning docket in his chambers, discussed these guilty pleas and the probation violation case with him. He still follows *Argersinger*: if people are not going to go to jail, then the state doesn't have an obligation to provide a free attorney. He only mentioned jail to “scare” the probationer into compliance. We brought up *Shelton* and its consequences, which change *Argersinger* if there is possible jail/loss of liberty consequences down the line. The judge just smiled at us....

There are several problems here. First, the defendants are constitutionally entitled to appointment of counsel if they cannot afford their own attorney because the charges carry potential jail time. Second, the defendant may later be revoked on any imposed probation and additionally does not have an attorney to advocate for them with regard to length of probation, conditions of probation, and monetary assessments. Third and perhaps most importantly, the defendant is left without any understanding of why they did not receive an attorney and this is likely to deter them from requesting appointment of counsel in the future.

The process contributes mightily to the problem. The defendant is advised of his or her right to counsel at arraignment. If they want appointed counsel, they are given a form to complete providing basic financial information. The defendant is given a date to return to court for the pretrial and leaves the courthouse understanding that s/he will be given an appointed attorney. Then the defendant returns to the courthouse for the pretrial. If the defendant in fact received an appointed attorney, the defendant will likely meet their attorney at the courthouse in the hallway prior to the pretrial. But if the defendant did not receive an appointed attorney, s/he will only find that out when his or her name is called for the pretrial. The judge may or may not tell the defendant why they are not receiving an appointed attorney. The defendant who does not receive an attorney after requesting one will be directed to meet personally with the prosecutor to discuss the possibility of a

plea agreement.

The NLADA team observed one defendant who was in jail, having been arrested on a show cause warrant for failure to appear and pay traffic tickets for no proof of insurance and a license plate charge. The total due on the tickets was \$612, but the defendant could not pay. The magistrate set the defendant's *bond* at \$612 and told the defendant that if he could post the bond the matter would be concluded (i.e., the bond would substitute for payment of the tickets), but if he could not post the bond then he would remain in jail at least until he returned to court on July 13, which was three days later. Although theoretically a defendant cannot be incarcerated on a traffic offense, this defendant was in jail without counsel and was *de facto* being incarcerated for failure to pay. At no time was this defendant advised of a right to counsel, even though he was being held in jail in essence for contempt of court.

In Grand Traverse County, our site team observed several probation revocations in which the defendant appeared pro se and was sent to jail. There was no prosecutor present. In one case, a judge informed a defendant that he could plead guilty or request a hearing for his alleged probation violation for missing a urine sample test and having marijuana in his system, and that he was entitled to an attorney. The defendant pled guilty to missing the urine screen, said nothing about an attorney, and denied using marijuana. The court conducted no colloquy on the waiver of counsel. The judge, saying that one does not test positive unless one has smoked marijuana, that being around second hand smoke "is not enough," sent the defendant to jail and said that he would lose his driving privileges for six months.<sup>41</sup>

We observed one district court judge in Ottawa engage in a series of questions with defendants on "McJustice Day," apparently for the purpose of determining whether they would be continued on the bond previously posted and what their conditions of bond

### Overview of Grand Traverse County

**G**rand Traverse County is a population center in the LP's north-western corner with an estimated population of 84,952, ranking it 24th among Michigan's counties.<sup>a</sup> Grand Traverse County has an 89.3 percent high school graduation rate, which ranks near the top for the state, and a median household income of \$43,169. Its poverty rate - a low 5.9 percent - cracks the top ten of Michigan's counties. Traverse City, the county seat, has a population of 14,532. The city functions as the major commercial nexus for a seven-county area, and (along with Alpena) is one of Michigan's two anchor cities. Traverse City is a hub of tourism, with fresh-water beaches along Lake Michigan, a mild summer climate, and skiing during the winter. Agriculture is Grand Traverse County's other major economic force, as the countryside around Traverse City is renowned for its grape production and vineyards. Traverse City is also famous for its annual cherry festival.

Grand Traverse is home to the 13th Circuit Court and the 86th District Court. Both courts also encompass Antrim and Leelanau Counties. Indigent defense services in the county are provided exclusively by members of the private bar. There is no public defender office in the county. There is no full-time attorney administrator for this system and thus the delivery systems in both the circuit court and the district court are administered by the judges of the respective courts.

The attorneys accepting appointments are under the direct control of the judges. For example, although competitive bids for the district court contract are solicited, the attorneys have joined together as a single group and only one bid is submitted. For 2007-08, the attorneys' request for an increase in the compensation rate from \$350 to

\$400 per case was rejected by the judges and the group was told that the judges would find other attorneys to do the work if they would not accept the existing rate.

A smaller and more select group of attorneys are on the roster of attorneys who are approved to receive appointments in circuit court cases. There are currently seven such attorneys and two alternates who are approved by the judges.

Attorneys are required to have five (5) criminal jury trials to participate in the district court contract. The circuit court attorneys are the same attorneys who handle the majority of the privately retained cases in the court. Many of the circuit court roster attorneys also participate in the district court contract. Supervision of assigned counsel is limited to the court's exercise of its supervisory authority over these attorneys as members of the bar or to monitoring compliance with the provisions of the district court contract or the handling of individual cases. Systematic review for quality and efficiency does not take place. Review of attorney performance is done on an ad hoc basis by the judges to ensure that the attorneys are meeting the judges' expectations. The circuit court judges indicated that one attorney was removed from the roster in recent years because "he wasn't getting the job done" and was filing too many "frivolous motions," and another attorney was removed for an ethical breach. No attorney has been removed from the district court contract in at least four years.

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26055.html>.

would be. This judge asked every defendant: (1) have you ever failed to appear for court?; (2) if we give you a drug test, are you going to be clean – it stays in your system for 30 days and it would not be in your best interest to lie to me?; (3) have you ever been convicted of any offense? The judge has their “LEIN” (Law Enforcement Information Network) sheet in front of them while asking these questions, so after they answer the judge then proceeds

to tell them everywhere they were mistaken (in our words, or “lied” in his words) about failures to appear and convictions. Understandably, defendants often had some confusion about these questions, as they forget that they paid a traffic ticket somewhere a long time ago or that some court showed them as having failed to appear when in fact the matter had already been resolved.

Regardless of whether a defendant says they will be clean when drug tested, this judge orders them as a condition of bond to be drug tested; the only difference is that if they say they will test clean he makes them be drug tested on the spot, and if they identify a date on which they last used he sets a drug test for them almost exactly 30 days later. The only time this judge refrained from asking these questions of a defendant was when there was a lawyer present with the defendant at court during arraignment, and – not surprisingly –

## District Court Room Observation: Grand Traverse County

In one case, after being advised that he had the right to a lawyer, the defendant said “I’m pretty sure I’m guilty,” and then the judge asked a series of questions about what the defendant had done. He admitted punching his friend “through a wall.” The judge imposed a 60 day jail term, with an allowance for revision after ten days. There was no colloquy or waiver of rights and the entire proceeding took six minutes.

## Overview of Ottawa County

Located in the LP’s center-west, Ottawa County maintains an assigned counsel program. Of note, it spends more per-capita on indigent defense than any other county in Michigan each year. As of 2005, the county had an estimated population of 255,406, ranking it 8th among Michigan’s counties.<sup>a</sup> A small county by land-size, its 566 sq. miles ranks Ottawa County 48th of 83 in the state and yields 421.3 persons per sq. mile. The county has an above-average high school graduation rate (86.6 percent) and a median household income of \$52,347. Its poverty rate – a low 5.5 percent – is fifth among Michigan’s counties.

Ottawa County has 30 miles of Lake Michigan shoreline and this makes it a popular destination for visitors. Grand Haven (pop. 11,168), the county seat, is situated on the Grand River and was once a major fur-trading post between the Ottawa Tribe and the French. The city is now a resort and boating community and has a major charter fishing fleet. The U.S. Coast Guard operates out of Grand Haven. Inland Ottawa County is rich farmland.

The 20th Circuit Court is located in Grand Haven and the 58th District Court is made up of four district court judges, elected county-wide, operating out of three different cities (Holland, Grand Haven, and Hudsonville). The current indigent defense delivery system has been in place since the mid-1960s, when then Circuit Court Judge Raymond Smith established an assigned counsel panel intended to mimic private practice as closely as possible, including early appointment of counsel and hourly rates of pay. All felony (circuit court) and misdemeanor (district court) defenders in Ottawa County are appointed. Each of the sixteen attorneys are on the approved list to receive court appointments and they are paid an hourly rate for their work and maintain their own private offices. One attorney has held the nominal title of Chief Public Defender more or less since the system’s creation – he is said to handle 30 to 45 percent of all of the felonies in the county.<sup>b</sup>

Of the 16 attorneys on the list: two are “Level I” attorneys who are paid \$91.75 per hour; nine are “Level II” attorneys who are paid \$79.84 per hour; and five are “Level III” attorneys who are paid \$72.55 per hour and handle only misdemeanors and non-capital felonies.<sup>c</sup> As a practical

matter, most of these attorneys generally only work in one of the three cities, although they are all technically available to be appointed anywhere in the county.<sup>d</sup>

The line item for indigent defense is the 2nd largest line item in the court budget, second only to employee payroll. The court administrator confirmed that they have not received any resistance at all from the county commissioners about the indigent defense budget.<sup>e</sup>

Still, Ottawa County’s assigned counsel program is, in every aspect, controlled by the court. The court decides which attorneys will be admitted to the panel, whether they will be allowed to stay on the panel, what level they are rated at, what cases they are assigned, and the hourly rates they are paid. The court (thru a staff person who is not an attorney) reviews and approves the claims submitted by attorneys. The Court formally evaluates the attorneys on the panel on a yearly basis. The court resolves issues arising from client complaints. In short, this is a court run appointed counsel system.

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26139.html>.

<sup>b</sup> Juvenile defenders are on contract.

<sup>c</sup> An additional attorney is not on the official list but was identified as an attorney who is available to be appointed in conflict situations. There is no formal system for getting onto the approved appointment list. One judge advised that a person does not have to be on the approved list in order to be appointed for misdemeanors. There is no formal system for removing attorneys from the approved appointment list.

<sup>d</sup> One of the five Level III attorneys is also the City Attorney for the City of Grand Haven. No one was able to explain how a person who prosecutes for the City of Grand Haven could (or should) be defending in district or circuit court; but this attorney does not show up on the appointment rotation in either Holland or Hudsonville in any event.

<sup>e</sup> The indigent defense budget has increased from approximately \$500,000 to approximately \$800,000 over about 5 years, due to an increase in the number of indigent defendants because of the economy and the expansion of the constitutional right to counsel in misdemeanor cases.

this only occurred when the defendant had been able to hire an attorney. The bailiff then walks the defendant over to the pretrial services officer to set them up for drug testing while on bond. This series of questions occurred only in Hudsonville. We discussed this situation with one of the appointed counsel in Hudsonville, who seemed unaware that this was occurring and had never thought about the fact that defendants were being forced to inculcate themselves in ways that could result in prosecution or increased sentence and in violation of their right to counsel.

If the defendant wants to plead guilty and waive their right to counsel, the judge will accept their plea to a misdemeanor without the defendant ever speaking to an attorney. In one court, the client will be required to make whatever payments are due that very day. If they cannot pay in full on that date, the judge requires them to surrender their driver's license to the court in order to have a payment plan. Again, all of this occurs without the defendant ever speaking to an attorney. There is an assigned "McJustice Day" attorney present at the courthouse, but because he or she is conducting pre-preliminary examination in a conference room with the prosecutor, s/he is never present to observe any of this or to warn defendants that this will occur.

### ***B. Non-Uniformity of Eligibility Screening Processes Threaten Due Process***

Though *Gideon v. Wainwright* and its progeny require states to provide counsel for those unable to afford counsel, none of the major right to counsel cases explicitly state how to determine financial eligibility. Jurisdictions across the country have weighed various in-

## **Holistic & Community Defense: The Alternative to McJustice**

**B**y investing in defender services for clients at the "entry" end of a criminal career, even when facing misdemeanor charges, jurisdictions may be able to retard the rate of more serious crimes and the consequent costs for indigent defense and the rest of the system. By investing up front in more staff but also particular types of staff, such as social workers, the cost of running a criminal justice system at the back end can be reduced.

As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders have a unique chance to not only address a client's specific criminal charges but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. For instance, the client may have substance abuse issues, public housing issues, immigration issues, or, in the case of children, educational needs that are not being met. By addressing the full array of client issues, public defenders can both reduce justice expenditures and, more importantly, potentially reduce the chances that a client will re-offend. Client-centered offices typically have lawyers, investigators,

social workers, and psychologists on staff to offer this fuller range of services.

Such client-centered services work best when the defender office is woven into the fabric of the community that the public defender program represents. The most effective way to achieve this is to physically locate the public defender office in the community it serves. The community defender office is thereby seen as a safe-haven where anyone can seek legal advice or air community concerns of any nature. Some community-based offices around the country provide community education on what a juvenile or adult should do when arrested, understanding the court process, or advising persons on their rights and responsibilities even before an arrest has occurred. Because these suggestions come from a known and trusted source that is non-adversarial, public education campaigns by community-based public defender offices may result in the police encountering less hostility during arrests, courts experiencing defendants with more knowledge of the justice system, and the community at large experiencing a greater stability.

terests when considering how best to make such determinations. Many jurisdictions have determined that important fiscal goals of cost-control and accountability are served by implementing procedures to ensure that no one who can afford counsel is appointed one at public expense. In these areas of the country, there is often very thorough verification of financial information provided by the defendant – many times by an independent pre-trial services unit and often at substantial cost.

Many other jurisdictions throughout the nation have no eligibility guidelines and conduct no inquiry, or simply appoint a lawyer for all defendants who claim they cannot afford retained counsel. The reasons for such systems (or non-systems, to be more accurate) vary: poverty rates among the defendant population may have been empirically found to be so high that the cost of eligibility screening would exceed the potential cost-savings; the need to keep court dockets moving may have been determined by the judiciary to be more important than taking the time and effort to conduct eligibility screening; or the reason may be simple inertia on the part of the responsible officials.

Some or all of these reasons certainly apply to some of the regions of Michigan we visited. For example, NLADA site team members were told that Ottawa County judges approve almost every request for an attorney. One judge in Ottawa County even stated that doing so wasted less time and cost less than undergoing an attempt to try to make defendants find an attorney only to have them come back at a later date usually still not having retained private counsel. The screening process we observed there consisted of little more than a brief discussion between the defendant and the court (i.e., “Are you working, can you afford an attorney”). Similarly, Grand Traverse County appears to do little to no screening at all. Though there is some attempt to get financial information in Oakland County district courts, we were told that almost every client who wants an attorney there gets one as well. And, Marquette County leaves the discretion up to the judge.

However, some other Michigan jurisdictions do employ more rigorous eligibility screening procedures – though there is no uniform measure for doing so. At one Wayne County district court, defendants requesting counsel fill out a form, which is sent to the assigned counsel services manager and from there to the rotation judge (i.e. the judge who is making the appointments for that two-week period). There is no investigation before appointment of counsel as to a defendant’s ability to pay – reportedly because of time constraints. Rather, a defendant’s claim that she cannot afford counsel is accepted. Not surprisingly, the vast majority of defendants in Wayne County are represented

### Flat-Fee Contracting in Downtown Detroit

The Misdemeanor Defender Professional Corporation maintains a contract with the City of Detroit for \$661,400 per year to handle the “state docket” (araignments, pre-trials, show cause, and reviews) in three courtrooms of the 36th District Court.<sup>a</sup> According to the head of Misdemeanor Defender PC, Philip A. Ragan, Jr., the office’s five part-time attorneys - with whom the office subcontracts assignments - and a handful of students from local law school clinics take between 12,000 and 14,000 cases each year. As Chief Judge Atkins put it, “[w]e operate by volume, but without stepping on anyone’s Constitutional Rights.” Divided evenly, the five part-time defenders carry between 2,400-2,800 cases each or 500-600 percent greater than the nationally-recognized misdemeanor caseload standard for a full time defender (400 cases per year). If one assumes that each of these attorneys work 75 percent of their time on public cases, then they are in breach of the standards by more than 700 percent-833 percent. To put this in perspective, their caseload averages out to 32 minutes of attorney time per case.

<sup>a</sup> MDPC was first awarded the contract for \$661,400 beginning in 2001 after being the successful applicant in request to an RFP.

by court-appointed counsel.

In Bay County, if a defendant indicates she cannot afford counsel, she is referred to the Office of Assigned Counsel (OAC) to fill out a form detailing personal information (including marital status, number of children, etc.), and information about employment, assets, income, and expenses. Defendants who are not in custody may be further interviewed by the OAC staff. Yet, even there, the OAC Director indicated that there is no numerical formula used to determine eligibility for appointed counsel and that virtually all defendants who apply are found eligible. For example, in calendar year 2006 (the Court's fiscal year ends in February), 1,024 felony defendants received appointed counsel, while only two felony defendants were denied appointed counsel.

Alpena and Chippewa Counties have similar forms for screening. Alpena leaves it to the discretion of judges, whereas Chippewa charges the public defender instead of the court with conducting the screening process. Defense attorneys in Chippewa pointed out to us that caseload and technology constraints prohibited them from verifying the information provided by the client.

For those defendants seeking counsel in Jackson County, a "petition & order for court appointed attorney" form is given to be filled out truthfully under a punishment of perjury. The eligibility form asks for basic personal, income, and expense information, including: marital status, number of dependents, employer, average net and gross income (either bi-weekly, weekly, or monthly), other income, rent/mortgage amounts, child support payments, and car payments. The eligibility application is screened by staff in the circuit or district court administrator office. Defendants are not asked to provide any verification for their responses. Though there are no hard and fast rules, generally all people are approved unless a defendant earns more than \$700 per week net (or \$800 per week gross) or has car payments in excess of \$600 per month or house payments in excess of \$800 per month. In these rare instances, eligibility for publicly-financed defense counsel is made on a case-by-case basis.<sup>42</sup>

Shiawassee County appears to be the one county we visited with a more stringent and formal eligibility process. Screening consists of a submission by each client of a financial declaration, setting forth their assets, income, expenses, and family situation. Unfortunately, it was clear from our conversation with the circuit court administrative staff that securing reimbursement for the cost to the county of court-appointed counsel was the primary objective of the financial review.

The wide ranging practices described above paint a clear picture showing that the ability of a poor person to have their constitutionally-mandated right to counsel met is entirely dependent on which side of a county line the crime is alleged to have been committed. Situations like Michigan, where individual courts and jurisdictions are free to define financial eligibility as they see fit, ranging from "absolutely destitute" to "inability to obtain adequate representation without substantial hardship," with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others, have long been decried. The National Study Commission on Defense Services found in 1976 that such practices constitute a violation of both due process and equal protection.<sup>43</sup> This becomes even more problematic when the lack of uniform standards allow courts to assess clients' fees for the cost of their public attorney.

### C. *The Use of Cost Recovery Measures to Chill the Right to Counsel*

Across the country, more and more policy-makers are asking whether legal counsel at public expense should be provided for only the completely indigent – those unable to contribute any money towards their own defense – or whether public defense services also should be made available to those accused of crime who might have limited resources and can pay for only a portion of necessary representation expenses.

National standards permit cost recovery from partially indigent defendants under limited circumstances, but a preemptive notification that all defendants will be responsible – before the determination of the indigency status and without regard to their ability to pay – causes a chilling effect in which defendants waive counsel rather than incur charges for services that they do not believe they can pay. The American Bar Association's *Criminal Justice Standards, Providing Defense Services*, Standard 5-7.1 directs that: "Counsel should not be denied because of a person's ability to pay part of the cost of representation."<sup>44</sup>

Even in instances where defendants are determined to be able to pay something for their representation, the practice of trying to recover defense costs after the representation has been provided is unconditionally prohibited under ABA Standard 5-7.2.<sup>45</sup> Although various states have tried it over the years, via statute, civil suit, lien, or court-ordered condition of probation, post-disposition recoupment has frequently been struck down by the courts and has been a practical failure. Courts have struck down recoupment statutes on equal protection, due process, and Sixth Amendment grounds.<sup>46</sup> Imposition of recoupment as a condition of probation can additionally lead to the incarceration of indigent people under circumstances to which a non-indigent person would not be exposed, in violation of equal protection.<sup>47</sup>

The practical difficulties are obvious. Imposition of a debt on a marginally indigent person, already convicted of a criminal offense, with the option of incarceration for failure to pay being constitutionally barred, yields a likelihood of recovery so low (less than 10 percent, according to a U.S. Department of Justice Study<sup>48</sup>) that the revenues produced are less than the administrative costs of processing recoupment orders.<sup>49</sup>

Cost recovery from partially indigent defendants was first authorized by the National Advisory Commission on Criminal Justice Standards and Goals, Defense Standard 13.2, with the caveat that the amount should be "no more than an amount that can be paid without causing substantial hardship to the individual or his family." The concept was subsequently fleshed out in the *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, 1976), Guideline 1.7:

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense...

The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided,

however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

Later standards further clarified the limitations of such plans. The American Bar Association's Criminal Justice Standards, Providing Defense Services, Standard 5-7.1 directs that "[c]ounsel should not be denied because of a person's ability to pay part of the cost of representation." Cost recovery after the representation has been provided (see below) is unconditionally prohibited (with one exception, where the client committed fraud in obtaining a determination of financial eligibility) under ABA Standard 5-7.2. However, pre-representation "contribution" is permitted if: 1) it does not impose a long-term financial debt; 2) there is a reasonable prospect that the defendant can make reasonably prompt payments; and 3) there are "satisfactory procedural safeguards," so as not to chill the exercise of the right to counsel. Such safeguards include: a) right to notice of the potential obligation; b) right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings; c) right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs; d) right to all civil judgment debtor protection; e) right to petition for remission of fees, in the event of future inability to pay; f) notice that failure to pay will not result in imprisonment, unless willful; g) notice of a limit, statutory or otherwise, on time for the recovery of fees; and h) adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs.

Suffice it to say that little if any of these national standards are met in the various cost recovery plans we encountered in Michigan. In many instances, district courts simply assessed a fee on anyone seeking public counsel. The district court in Bay County routinely assesses \$100 - \$150 in attorney fees to any indigent client. When a defendant fails to comply with a similar payment plan ordered at sentencing in Grand Traverse County, a civil contempt charge is brought which can result in jail time. Apparently only one defendant in 10 years has asked for counsel in a civil contempt proceeding. The administrator said it was rare that a client actually could not pay. The minimum payment is \$25 per month. She expressed the view that if a client "can afford cigarettes, or get her nails done," they can pay for an attorney especially if a victim is involved in the crime. She noted that if a person is mentally ill or going to prison, the judge usually will not assess the attorney fee. Reimbursement is sought in Grand Traverse even if there is an acquittal.<sup>50</sup>

In Ottawa County, defendants are typically ordered as a condition of probation or as part of a misdemeanor sentence to repay the entire cost of their indigent defense representation. In misdemeanors, where the sentence is often imposed on the same day that the attorney was appointed and the plea of guilty was entered, the judge will often ask the appointed attorney what their attorney fees are and order the assessment to meet that cost (typically between \$250-\$350). The vigor of Shiawassee County's efforts to secure repayment is particularly troublesome, in light of the fact that repayment of the cost of court-appointed counsel is treated as a *condition of probation* and failure to make repay-

## Overview of Wayne County: Representation in District Court

Wayne, home to Michigan's largest city, Detroit, is the state's most populated county (estimated in 2006 to have 1,971,853 residents).<sup>a</sup> It is by far the state's most densely populated county as well; with only 614 sq. miles of land, there are 3,356.1 persons per sq. mile. The county populace is Michigan's most diverse. According to the 2000 US Census, the county is 51.7 percent white and 42.2 percent African-American, with small Asian (4.6 percent) and Hispanic/Latino (2.3 percent) populations. Wayne County has one of Michigan's worst high school graduation rates (77.0 percent), but an above-average median household income (\$40,776). The county's poverty rate (16.4 percent) is fourth-highest in the state. The county seat is the city of Detroit (pop. 951,270). The past decade has seen a good amount of economic recovery. But with its continued reliance on the auto-industry, Detroit is ever vulnerable to the peaks and troughs of economic cycles.

Wayne County is home to the Third Circuit Court (formerly known as Recorder's Court) and 23 district courts, with 65 judges, spread throughout the county. Indigent defender services in each of the county's 24 courthouses are administered and funded entirely separately from one another. The 36th District Court is the court of first appearance for all felonies and misdemeanors in downtown Detroit — with an annual caseload of 600,000, it is Michigan's busiest courthouse. District courts elsewhere in Wayne County — "out-county" — have by-and-large a miniscule caseload compared to the 36th District.

### Representation in "Out-County" District Courts

The bulk of cases in out-county district courts are appointed to "house counsel," whereby an attorney will be assigned to a courtroom for a half-day or day and will represent every indigent defendant in that courtroom on that day.

In the 33rd District Court in Woodhaven (about 30 minutes south of Detroit) house counsel are paid each month by event. There is no contact between the attorney and client prior to the pre-trial; the court does not give out house counsel phone numbers until the day of court, which could be anywhere from 1-3 weeks after arraignment. Jury trials are rare, though motions are even rarer. The court administrator estimated that, in an average year, there would be one motion filed by house counsel and maybe two jury trials involving an indigent defendant. For comparison, she estimated that private attorneys might file 10 motions in that same year and hold nine jury trials.

The 18th District Court in Westland (about 30 minutes to the west of Detroit) has in place a plan for a competitive bidding process to secure counsel for indigents. This plan provides, in short, that the District will issue an RFP in even-numbered years and advertise it at least twice in two newspapers. The minimum qualifications for attorneys are that they: reside or practice law in Westland; be a member in good standing of the State Bar; be available a minimum of three days per week; have at least three years' experience in criminal defense; submit a plan to demonstrate coverage in the event of a schedule conflict; demonstrate community ties/involvement; and "submit lowest bid."<sup>b</sup> Once contracted, payment is made to the attorney(s) on a monthly billing basis for 1/12th of the annual contract amount. The attorneys are obliged to represent all indigent misdemeanor defendants in all criminal court proceedings in the District. The contract is issued for a two-year term. The plan provides for performance review "on an on-going basis by the judges and court administrators based on information received from clients, other attorneys, and personal observation." If performance is unsatisfactory, as "determined solely by the judges," the court may terminate the contract upon 30 days written notice. So, in short, the plan is for a low-bid contract where satisfaction of the judges is the primary goal.

Two attorneys have held the contract for indigent misdemeanor representation in the 18th District for approximately 10 years. These two attorneys are personable and appear extremely conscientious and capable. About 10 years ago, they joined with another attorney to bid for representation. At that time, the three attorneys split the contract fee 1/3 each. Over time the third attorney dropped out. When the current attorneys became responsible for bidding for the contract, the court told them to keep the bid at the same level, which they did. They advised they are not aware of any "rhyme or reason" for the amount of the contract.

### Representation in the 36th District Court

The 36th District Court, in Detroit, is the most active district court in the state with far and away the largest docket, processing approximately 600,000

cases each year.<sup>c</sup> It is estimated that 90 percent of defendants are indigent. There are 31 judges, eight of whom will be holding criminal court in some form on any given day. Attorneys are assigned to courtrooms, generally: one attorney in each courtroom, except 1 ½ attorneys in the three arraignment courtrooms, and four or five attorneys in the traffic courtroom(s). The Court has a hybrid system for appointment of counsel in misdemeanor cases. All State Court Misdemeanors (also referred to as "high misdemeanors") are handled by the Misdemeanor Defenders Professional Corporation, which has held the contract with the 36th District Court since 2001. All other misdemeanors are handled by "house counsel," who are paid a flat rate of \$150 for a half day or \$300 for a full day, according to a complex plan promulgated by the court. These two systems are addressed separately below where appropriate.

There is a detailed plan for provision of attorneys to indigent non-state misdemeanor defendants, known as the house counsel system. In order to be appointed, an attorney must be on the approved roster of house counsel. To get onto the list, an attorney must: (1) attend a three-day training observation program (actually three mornings from 9:00 a.m. to noon) which "will encompass the arraignment, environmental and trial dockets" (in short, teaching attorneys the mechanics of the docket); and (2) sign a verification saying they have reviewed the *House Counsel Conduct Policy* and are familiar with *Chapter 38* of the City of Detroit Ordinance and the *Michigan Rules of Evidence*.

Getting onto the approved list is the first step, but this will not ever get any attorney appointed to represent an indigent misdemeanor defendant. The attorney must then find a way to convince a judge to actually appoint them. One judge estimated that there are 400 or 500 attorneys on the approved House Counsel list at any given moment, but each judge has favorites whom they will appoint. Attorneys drop off their business cards, writing on them whether they are requesting full day or half day appointments. Attorneys go by and visit judges and their staff asking and hoping for appointments. Some suggest anecdotally that attorneys make financial contributions to the campaigns of judges. An attorney must do something to garner sufficient favor or grace with a judge to get an appointment. The Court's formal plan explicitly says: "Attorneys seeking assignments are encouraged to meet with the judge or clerk to submit their business card or letter indicating their intent."

Each of the district court judges have responsibility for assigning counsel in all courtrooms for two weeks at a time. Approximately one month in advance, the judge will receive the roster of approved counsel and can only appoint lawyers who are on this roster. But in reality, judges use a wide variety of methods to actually appoint the lucky lawyers who will receive appointments during that rotation. Some judges do this personally and some judges have their staff do it. Some judges work their way through the stack of business cards that would have been dropped at their office that week. Some judges theoretically work their way down the entire approved roster. Everyone agrees that judges have favorite attorneys whom they consider to be good and whom they would prefer to assign, especially to their own courts. However they do it, they choose the attorneys and assign them to each of the courts during that 2-week rotation.

House counsel are appointed to half-day or full-day assignments in specific courtrooms where they will represent each indigent defendant appearing in that courtroom who has requested an attorney. At the end of their assignment, house counsel turn in their "per diem" to be paid the rate of \$150 for a half day or \$300 for a full day. Though the per diem lists all defendants represented by that house counsel during that day, the 36th District Court does not track individual clients. The court administrator counts half-days and full-days as "assignments." Thus there is no attorney caseload data for the court.

<sup>a</sup> <http://quickfacts.census.gov/qfd/states/26/26163.html>

<sup>b</sup> See Local Administrative Order 2003-05, Appointment of Counsel for Indigent Parties, effective January 1, 2004.

<sup>c</sup> Just to get an idea of the scale, six magistrates handle 10 to 15,000 civil infractions (traffic tickets), that do not require a defense attorney. Felony arraignments occur 365 days a year, at 8:30 a.m., 1:00 p.m., and 7:00 p.m.

*For a description of representation in Wayne County's Third Circuit Court, see page 66.*

ment subjects the client to probation violation proceedings.

Wayne County recoupment practices vary among district courts and among judges within the same courts. One judge in the 36th District Court advised us that he could only speak to his own policy, but he typically assesses \$25 to \$50 for a defendant whose case resolves without a trial and \$100 for a defendant who has a trial. This judge has no idea what percentage of these assessments is actually collected. Each of the three judges in the 33rd District Court in Wayne County has their own system for ordering defendants to repay appointed attorney fees. One judge advised that he, at least, is “ridiculously low” in ordering defendants to repay for their appointed attorneys. If he places a defendant on probation, he said he will always order them to pay \$20 per month, typically setting the repayment for attorney fees at not more than \$125.<sup>51</sup> Often he will reduce this later. If

### Overview of Oakland County:

One of Michigan’s largest counties, Oakland has a broad economic base; some areas are fully urban while others are more suburban (or otherwise in transition). As of 2005, Oakland had an estimated population of 1,214,361, and is Michigan’s second-most populated county.<sup>3</sup> Oakland County has Michigan’s fifth-best high school graduation rate (89.3 percent), and by Michigan standards a very high median household income (\$61,907, second best in the state). The county’s poverty rate (5.5 percent) is fifth-lowest in the state as well. Oakland’s county seat is Pontiac (pop. 67,500), an old bastion of the auto industry. Largely a satellite city of Detroit, Pontiac is surrounded by affluent metro-Detroit suburbs. The city is still an auto-manufacturing center, but less so today than it was 20 years ago.

The 6th Circuit Court has jurisdiction over all felony matters in the county, and its 10 district courts<sup>5</sup> handle all misdemeanor cases and felony first appearances. The courts in Oakland County are entirely docket-driven. Indigent defense representation is 100 percent assigned counsel, with event-based fees (see fee schedule below) in circuit court. While it is generally true that district courts in Oakland County have limited jurisdiction over felonies—conducting or accepting a waiver of the preliminary hearing, binding the case over to the circuit court for trial or other disposition, and sentencing—a relatively new program (The Felony Plea Program) allows defendants to plea to a felony in district court and then be sentenced in the circuit court.

#### *Representation in Circuit Court*

The system for appointing individual lawyers in the 6th Circuit Court is a function of the judiciary and the court clerk’s office. In Category 1 cases (“capital” offenses with maximum life sentences) and Category 2 cases (felony offenses with sentences in excess of 5 years but less than life, and negligent homicide) the circuit court judge will appoint an attorney from the judge’s own list of qualified attorneys. In Category 3 cases (felony offenses with sentences greater than two years but not more than five years) and Category 4 cases (felony and high misdemeanor offenses with sentences up to and including two years, except negligent homicide) counsel shall be appointed in rotation according to the date of their last appointment. A person who is unavailable for an assignment shall not lose her place on the rotational list.

Funding of the defense function is a line item in the judicial budget. Since payment is “event based” and any increase to the amount paid would require an increase in the defense line item in the Court’s budget, payment of defense counsel is not independent of the judiciary. There has not been an increase to the defense function in eight years. During this same period, we were told, there

have been regular increases to the other two legs of the criminal justice stool (judges and prosecutors).

There is no defender office. In fact there is not a single office (or space within an office) provided to defense counsel at the circuit courthouse, even though the defense function is part of the court. On the other hand, the prosecutors occupy at least one floor (maybe more). Prosecutors have access to the judges’ private halls; defense does not, even though the defense function is part of the court. Prosecutors have “pass-cards” that allow them to enter the building without going through security; defense does not.

Again, there is not a single office (or space within an office) provided to defense counsel at the circuit courthouse, even though the defense function is part of the court. Defense attorneys were unanimous in stating that there is very little time to meet with their clients and absolutely nowhere that would be considered confidential according to ABA standards—a corner of the courtroom with a deputy standing close (even pushing the attorney back if she got too close to her client). Client visits (as paid events) are limited to two.

Defense counsel is notified only after the prosecutor finds out which judge is assigned and thus can assign the “right” assistant to that court. There is nothing about this system that is client-based and very little that is defense counsel-based. If appointment of defense counsel were done sooner, the system could save both time and money.

In C1 and C2 cases, defense counsel will take as many cases as the judge is willing to assign to her. In C3 and C4 cases it depends on the rotation. Quality of representation is left to the defense attorney to define, balance, and sometimes struggle with. Beyond that—and this cannot be overstated—nothing is done to ensure the rendering of quality representation.

On the positive side, while there are no CLE requirements in general, there are CLE requirements for defense counsel to be on the appointment list. In addition, there are strict requirements to move up the category ladder. Judges state that appointments at the C1 and C2 level are based on the judge’s knowledge of the skills and abilities of every attorney on his list. The defense attorneys we talked with—while a small sample—were all impressive. On the other hand, while prosecutors have well organized and abundant training paid for by the county, defense attorneys must find and pay for their own training.

#### *Representation in District Court*

Although the circuit court has jurisdiction over all felony cases, these cases originate in the district court for purposes of arraignment and preliminary examinations. In virtually all such cases, counsel is appointed while the case is still in the district court if pri-

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

the charge is being dismissed, then he will order them to pay \$15 per month. He advised that they may also participate in the court's work program to work off their fee in lieu of incarceration if they have not paid the assessment. During our observations, this judge only ordered one defendant to repay attorney fees and this was in the amount of \$65.00. And, each of the two judges in the 18th District Court has their own habits about ordering defendants to repay for their appointed counsel. One reportedly orders every defendant *whose charge is dismissed* to pay \$50, while making no assessment against convicted defendants. The other typically assesses \$100 in attorney fees to every defendant win or lose.

At a different Wayne County district court, a series of in-custody defendants in groups of five to eight based on gender, level of alleged offense, and whether or not they had re-

### (Oakland continued)

private counsel is not retained. If the accused is determined by the district court judge to be eligible for a court appointed attorney, the case is referred to the circuit court and an attorney from the circuit court roster is assigned prior to the date of the preliminary examination. This attorney then represents the individual in the district court and in the circuit court if the case is bound over.

The delivery system for misdemeanor representation in the **50th District Court** is under the direct and total control of the judges and there is no independence. In most instances judges personally select the lawyers who will be assigned to individual cases. Although some use a "blind draw" method to select the attorneys, the judges individually determine which lawyers will be included in the group from which they make assignments in the cases before them. Indigent defense services in Oakland County, including the 50th District Court, are provided exclusively by members of the private bar. There is no public defender office in the 50th District Court or elsewhere in the county. There is no full-time attorney administrator for this system and no state funding. The 50th District Court is funded by the City of Pontiac, which has significant budgetary problems, and the court's budget for 2007-08 was cut by \$600,000 (from \$4.1 million to \$3.5 million).

Individuals who wish to request court appointed counsel at arraignment either complete a Petition or are questioned orally by the judge as to their financial eligibility. If the court determines that counsel should be appointed, the actual assignment of an attorney is deferred and the matter referred to the individual judge to whom the case is assigned for the designation of an attorney.

Typically, an attorney is not assigned to a defendant until an attempt is made to dispose of the case without counsel at the first pretrial conference. The time delay between arraignment and the pretrial conference is typically three weeks, during which time an individual is usually unrepresented. If the case cannot be resolved and counsel is appointed, the case is adjourned to a later date if the attorney is not present. If counsel is assigned prior to the first scheduled pretrial conference, the attorney typically does not meet with the client until the time of that court appearance.

In misdemeanor cases the vast majority of accused are not represented by counsel. Requests for counsel are often denied on the basis that there will be no jail sentence. Other defendants do not request counsel because they know that they will be assessed an attorney fee at the conclusion of the case. One judge indicated that he will only appoint counsel if there is a strong likelihood of going to jail so that the defendant will not have to repay the costs.

Defendants are not represented at the time of their initial arraignment, except if they have private counsel. Defendants are not represented during video arraignments.

The **47th District Court** is located in Farmington Hills and serves the relatively affluent communities of Farmington and Farmington Hills. The Court has primarily an assigned counsel system of providing counsel to indigent defendants. They have a small house counsel system that operates only in their Sobriety Court,<sup>c</sup> which is held every Monday afternoon. Four attorneys take turns serving as house counsel (one on each Monday afternoon of the month). The house counsel is paid a flat \$250 to represent every sobriety court defendant set that day and, for no extra pay, to take all emergency appointments that occur while they are at the courthouse that afternoon.

For all other misdemeanors, assigned counsel are appointed at random by the court reporters of the court's two district court judges and are paid a flat fee of \$150 with no expense reimbursement whatsoever and without regard to the number of times they must come to court on a given case.

Defense attorneys and prosecutors are present for the first time in a proceeding at the pretrial, which is the first appearance for a defendant after arraignment. As one court employee put it, "the defense attorney only meets the defendant on the pretrial date." If a defendant is in custody, the pretrial will typically occur within three to ten days of the arraignment; if the defendant is not in custody, the pretrial may not occur until 35 days or so after the arraignment. The majority of cases, probably 90 percent, resolve at the pretrial. Thus the defense attorney will typically make only this one appearance in each cases, where she will meet the defendant for the first and last time.

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26125.html>.

<sup>b</sup> Oakland County is home to the 43rd, 44th, 45A, 45B, 46th, 47th, 48th, 50th, 51st and 52nd District Courts. The 43rd District Court has three branches, while the 52nd has four. The county also has a probate court. See, <http://courts.michigan.gov/scao/services/dirs/county/Oakland%20County.html>

<sup>c</sup> Sobriety Court cases are fast-tracked. If a person comes in for arraignment in district court on Monday morning on a DUI, for example, they will be screened for eligibility/appropriateness for sobriety court. Then they come back in the afternoon, plead, and are sentenced into sobriety court.

tained counsel were brought into the courtroom to be arraigned. To those groups without counsel, the judge addressed the defendants *en masse*, advising them of their right to counsel and that they could be charged a fee for exercising that right. The fee would be \$250. “Raise your hand if you want an attorney.”

At the conclusion of a case in Oakland County’s 47th District Court – whether by dismissal or conviction – the judge will review a defendant’s financial status and order the defendant to pay some amount of reimbursement for the public defender attorney based on the judge’s determination as to the defendant’s actual financial ability to pay. Anecdotally, the court administrator believes that probably 60 percent of defendants are ordered to pay some sort of reimbursement. One judge advised that the assessment is *always* \$150 (be-

### Q & A

**Q: Is there a uniform standard for determining indigency?**

**A: Yes.** For those jurisdictions wanting to assure tax-payers that no one is getting a free ride, national standards are clear on how best to conduct eligibility screening. The Guidelines for Legal Defense Systems in the United States issued by the National Study Commission on Defense Services state that “[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation.”<sup>a</sup> “Substantial hardship” is also the standard promulgated by the ABA.<sup>b</sup> While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel because of a person’s ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

In practice, the “substantial hardship” standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly ex-

penses, local private counsel rates) would result in a “substantial hardship” were they to seek to retain private counsel. Examples of such presumptive standards include: a) a defendant is presumed eligible if he or she receives public assistance, such as Food Stamps, Aid to Families of Dependent Children, Medicaid, Disability Insurance, or resides in public housing; and b) a defendant is presumed eligible if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

For those who do not meet the presumptive standard but who may still qualify under the “substantial hardship” standard, many jurisdictions have developed financial eligibility formulas that take into account a household’s net income, liquid assets, “reasonable” necessary expenses and other “exceptional” expenses. The National Study Commission on Defense Services Guidelines is more comprehensive than other national standards in guiding this second tier of eligibility determinations. The first step is to determine a defendant’s net income (usually verified through documented pay stubs) and liquid assets. Under Guideline 1.5, liquid assets include cash in hand, stocks and bonds, bank accounts, and any other property that can be readily converted to cash. Factors not to be considered include the person’s car,<sup>c</sup> house,<sup>d</sup> household furnishings, clothing, any property declared exempt from attachment or execution by law, the person’s release on bond, or the resources of a spouse, parent, or

### Best Practices: Eligibility Screening

Nevada and Louisiana have both set uniform eligibility screening procedures to eliminate any bias in the determination of who gets a publicly financed attorney. Louisiana did it statutorily, while the Nevada Supreme Court did it through an Administrative Court Order. The language of the Nevada Order mirrors the Louisiana statute:

*A person will be deemed “indigent” who is unable, without substantial fi-*

*ancial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. “Substantial financial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial*

*hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of the charges being faced, monthly expenses, and local private counsel rates, would result in a “substantial hardship” were they to seek to retain private counsel.*

cause that is what is paid to the appointed attorney) and the judge “generally presumes the defendant can afford to reimburse” the District. This was justified on the basis that the District is located in a “relatively affluent community.”<sup>52</sup> If a defendant is sentenced to jail with no probation, then the judge “may waive” the reimbursement fee. If a defendant is placed on probation, the court always orders that all fines and costs are due at time of sentencing, but the probation officer can work out a payment plan with the defendant.

If the defendant then fails to pay the reimbursement while on probation, they will be brought to court for a probation revocation proceeding. One method of collecting funds from a defendant who is on probation is wage garnishment. If the defendant is not on probation and fails to pay the reimbursement, they will be addressed by the “Show Cause

## Federal Poverty Guidelines

Family Size	Poverty Guideline	250%
1	\$10,400	\$26,000
2	\$14,000	\$35,000
3	\$17,600	\$44,000
4	\$22,200	\$55,500

other person.

Next, the screening agency assesses a defendant’s reasonable necessary expenses and other money owed for exceptional expenses, like medical care not covered by insurance or court-ordered

family support. Though jurisdictions vary as to what constitutes “necessary” expenses, most include rent, day-care, and utilities. Screeners then determine an individual’s available funds to contribute toward defense representation by adding the net income and liquid assets and subtracting from the total the sum of reasonable and exceptional expenses. [(Net Income + Liquid Assets) – (Reasonable + Exceptional Expenses) = Available Funds]. The resulting “available funds” can then be measured against a second tier presumptive eligibility standard. In many jurisdictions, this second presumptive level is tied to a percentage of the Federal Poverty guidelines. For instance, both Louisiana and Nevada recently adopted a “presumptive threshold” of 250 percent of the Federal Poverty Guideline. In some jurisdictions across the country, eligibility screening is terminated if a person’s net income and liquid assets exceed these income thresholds, and the person is deemed ineligible for public appointment of counsel. In others, persons can be deemed eligible if their net income and liquid assets exceed these thresholds, but reasonable and exceptional expenses bring them under the threshold.

In lieu of the Federal Poverty guidelines, other jurisdictions take into account the going rate for private counsel to represent a defendant on various case types. For instance, private attorneys may routinely ask for a \$7,500 retainer to represent

a person on a felony indictment, in which case a defendant may fall above the 250 percent Federal Poverty index (\$2,166 monthly available funds) but would still face a “substantial hardship” if he or she were to attempt to retain private counsel. Similarly, private attorneys may routinely charge \$800 to defend a person against misdemeanor charges. In such an instance, the defendant in the above example would not qualify for counsel if facing a misdemeanor charge while qualifying if facing felony charges.

<sup>a</sup> Guideline 1.5.

<sup>b</sup> ABA Standards for Criminal Justice: Providing Defense Services 5-7.1 states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”

<sup>c</sup> A defendant’s vehicle may be the only thing keeping him or her off of public assistance by allowing him or her the means to get to work, or comply with conditions of probation or pretrial release such as drug or mental health treatment, or family counseling. In a county that is geographically expansive, including a car in a person’s liquid assets may be ultimately more costly than appointing the person a public defender.

<sup>d</sup> It is assumed that the goals of the criminal justice system are not served by rendering homeless a charged-but-unadjudicated defendant or his or her family.

## Best Practices: Eligibility Screening

Nationally, many states have Pre-Trial Services agencies tasked with, among other things, public defender eligibility screening, determining whether or not an arrestee should be detained or released on his or her own recognizance prior to initial court appearances, and presenting judges with independent assessments on bail recommendations. Pre-Trial Services often provide greater efficiencies throughout the court system while eliminating much of the bias in bail determinations. Since much of

the same information is required to determine both eligibility for a public defender and flight risk, having the indigency determination done at the same time of the risk assessment could allow for earlier notification of appointment to the public defender offices. This in turn will allow defenders to be more informed when meeting the client, leading to more informed bail hearings. Having a third party presenting objective information does not reduce the role of judges. The bail

determination is still their decision. But presenting more information, including accurate criminal histories, will produce better bail decisions. Pre-Trial Services agencies also often perform an oversight function that allows for defendants to be released through a type of pre-trial probation - a cheaper alternative to pre-trial detention that allows defendants to maintain their jobs and family life.

Program.” The judge referred us to Stacy Parke, the deputy court administrator, as an expert in recoupment of costs from defendants, and frankly the judge had very little information about exactly how the program works. Generally, the judge described that: a defendant would receive notice by letter that they were in arrears on paying; the defendant would be given an opportunity to pay; eventually the defendant would be brought to court to “show cause” why they had not paid (without counsel). It was the sense of the court that the collection efforts were definitely cost-effective for the District; as the judge pointed out, a defendant incurs an additional \$100 contempt fee (on top of what they already owe) for failure to appear.

For defendants sentenced to serve time, the sheriff operates a work release program at the Oakland County Jail, and any defendant participating in this program pays a supervision fee to the Oakland County Sheriff’s Department. But perhaps of more interest, the 47th District operates a Community Work Program. Under this program, a defendant will be ordered as a condition of probation to perform some number of hours of community service to one of the public agencies, such as the library, department of public works, or the courthouse. The defendant will be required to pay approximately \$30 - 40 per day as a supervisory cost in order to participate in this program.

One defense attorney in Oakland County summed things up this way: “I represent people who can afford to come into our office and hire me. But instead the county pays me less than I would charge, and the client has to reimburse the county. It is all designed to keep the assembly line moving. There is not a lot of work for private defense attorneys outside of begging judges for appointments.”

### ***D. Putting it All Together: McJustice in Jackson County’s District Court***

Upon entering the court building a non-custody defendant in Jackson County is directed to a district court clerk’s window, around which are prominently posted schedules of fines for common offenses. Defendants are asked by a clerk at the window how they wish to plead. If the answer is “guilty,” the defendant is provided with a “rights form” to sign and is subsequently directed into the courtroom.<sup>53</sup> For cases considered minor (but which nevertheless carry a possible jail sentence), a defendant may be offered by the clerk at the window a “plea by mail” form in order to plead guilty by mail.<sup>54</sup> Obviously, all of this is done without the benefit of counsel and before a defendant is even screen to see if they are eligible to receive public counsel under *Argersinger* or *Shelton*.

Defendants stating that they wish to plead “not guilty” are informed that they may be required to pay the entire cost of assigned counsel in their case: \$240 for misdemeanors and \$482 for non-capital felonies.<sup>55</sup> If they still want to continue to seek counsel and plead “not guilty” they are then sent into a court room where the only attorney is a prosecuting attorney. Perhaps not coincidentally, we were informed by District Court Judge Charles J. Falahee, Jr. that “95 percent of indigent defendants charged with misdemeanors waive assigned counsel”<sup>56</sup> and that “50 percent plead guilty at arraignment.”

In our opinion, the single biggest factor in the extremely high waiver rate is the coercive effect of telling poor defendants that they will be responsible for the entire cost of their representation. When a defendant enters the courthouse and is faced with a coercive message that they will not be provided a lawyer at no cost, the undeniable message is that they

will be penalized for exercising the rights guaranteed to them by the Constitution. The extent to which this problem is in play in the district courts of Jackson County is, perhaps, most noticeable in the ratio of public defense misdemeanor to felony cases. Nationally, the average ratio of indigent defense misdemeanors to felonies tends to be 3:1. In Jackson County, the ratio is inverted with appointed felony cases (1,732) far outnumbering appointed misdemeanor cases (729) – a ratio of 0.4:1. This strongly suggests rampant violations of the right to counsel cases in misdemeanor proceedings.

Unfortunately, even for those determined defendants in Jackson County still seeking their constitutional right to counsel, the battles to make that right meaningful continue throughout the court process up to and including circuit court – as we will see in the next chapter.

Q & A

**Q: Is Juvenile Delinquency Representation an Appropriate Training Ground for Unseasoned Attorneys?**

**A: No.** The United States Supreme Court recognized in *In Re Gault*, 387 U.S. 1 (1967), that a child’s loss of liberty “is comparable in seriousness to a felony prosecution,” despite the civil nature of the delinquency proceeding. Accordingly, the right to assistance of counsel was made law in all instances in which the child or their parent could not afford private counsel in delinquency cases. Gault acknowledged that juvenile delinquency cases are very complex and a specialized and uniform force of advocates is needed. Over the past 40 years, the specialized nature of juvenile procedures has only grown in scope. Juvenile defenders need not only be aware of the procedural rules and constitutional criminal procedures of the adult court system, but also must be aware of the developmental and mental abilities of their young clients, collateral consequences of conviction (including immigration, access to housing and jobs, admission into armed services, among

others), and the enhanced protections for children under federal and state law.

Juvenile justice representation is considered in many ways as an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse. Juvenile justice attorneys generally earn less than their colleagues representing adults. This is unfortunate – juvenile justice attorneys handle serious felony acts that may result in several years’ incarceration. The impact of mandatory and

discretionary bindover litigation for juveniles whose acts and background meet the statutory requirements is as serious as the poten-

tial case outcome for any adult charged with a felony offense. The application of the federal Adam Walsh Child Protection Act, which contains severe retroactivity applications for juvenile sex offenders, for example, raises the consequence significance of juvenile delinquency practice, placing it on a par with adult felony litigation. Kids deserve attorneys specially trained in these matters.

*“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”*  
**In Re Gault, 387 U.S. 1 (1967)**

**Best Practices: The Youth Advocacy Project (Boston, MA)**

The Youth Advocacy Project (YAP) provides services under the theory that alleged delinquent behavior is usually closely linked to a host of related problems and risk factors in the child’s life, such as family problems, poor health, mental illness, community violence, and inadequate schooling. The Youth Development Approach to Zealous Advocacy (YDA), first developed and fostered at YAP, presumes that adults and institutions can help young people to navigate the risky influences and factors that may have contributed to alleged delinquency and to avoid further problematic behavior by promoting their development into

happy, healthy, and economically self-sufficient adults. For example, recognizing that an individual child’s delinquency may be due to having too much time on her hands because of high truancy from school, and that avoiding school is rooted in poor educational performance, and that poor performance may be tied to feelings of low self-esteem, and that low self-esteem could be tied to a whole range of issues - from inappropriate school placement, or a lack of safety in the home, or poor oral hygiene, or no appropriate adult role models, or, most likely, some combination of all of the above plus others, YAP attorneys

screen each child in five core competencies: Physical & Mental Health, Positive Adult and Peer Relationships, Community Engagement, Education, and Safety in the Home & Community. As underlying risk factors are identified, YAP’s team of criminal defense and education attorneys, social workers, and psychologists work to get clients the desired help, be it health insurance, appropriate school services, and/or involvement in a productive or enriching activity (including but not limited to after school programs, school clubs, volunteer work or community services, job or job training, or other hobbies/activities.)

## The Failure to Ensure Independence of the Defense Function: The Jackson County Story

The ABA *Ten Principles* are a set of standards that are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance in each of the ten criteria and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions does not make the delivery of indigent defense services any better from a client's perspective if the appointment of counsel comes so late in the process, or if the attorney has too many cases, or if the attorney lacks the training, as to render those conversations ineffective at serving a client's individualized needs.

To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of each *Principle* and to demonstrate how Michigan counties fail to uphold them. Jackson County was chosen for this in-depth analysis for a specific reason. NLADA site team members were invited to attend a meeting of county stakeholders regarding indigent defense services that included representatives of the judiciary, prosecution, court administration, and the defense bar, among others, in which the adequacy of services were discussed and debated along with the desire for more stringent cost containment efforts. NLADA applauds the inclusive, pro-active approach to problem-solving that the county employed, not in small part because the inclusion of the defense bar acknowledges the importance of public defense in the overall health of the criminal justice system. This inclusive approach to problem-solving makes Jackson County the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, *but because they fail to provide constitutionally adequate services despite their desire to do so.*

### ***The Overarching Standard: ABA Principle 1 (Independence)***

By statute, Michigan's elected judges are authorized to pass out assignments and have discretion to set fee schedules in their jurisdiction.<sup>57</sup> Having judges maintain a role in the supervision of indigent defense services can create the appearance of partiality – thereby undermining confidence in the bedrock principle that every judge be a scrupulously fair arbitrator. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are

## *The ABC's of Jackson County*

All indigent defense services in Jackson County are performed by a small number of local private lawyers pursuant to a single joint annual contract awarded by the local judges. In circuit court, eight law firms are approved for felony assignments on a predetermined percentage basis. Attorneys to whom the judges award portions of the contract receive a monthly draw of funds against their anticipated contract earnings. Attorneys submit a monthly bill for their work. When the approved billing shows that the attorney fees exceed the advances, the county pays the additional amount.

At the time of our site visit, the circuit court fee structure was one in which a flat fee is paid for each case-type: murder (\$1,890); non-murder capital case (\$1,536); non-capital felony (\$482); case arising out of the Department of Corrections (\$422); and, probation violation (\$220). The only payment derivations above these set fees are: a) cases that go to trial (additional \$325 per half day for murder cases; additional \$260 per half day for other capital and non-capital felonies); b) cases dismissed upon a successful defense motion (\$265); and c) cases requiring travel outside of Jackson County to interview witnesses or the defendant (\$158 per day). Attorneys can also bill for actual out-of-pocket costs for transcripts, witness fees, and service of process. Costs for experts as well as any unusual expenses above \$100 (such as medical records and investigators) must be pre-approved by the assigned judge. The per-case-fee can also be reduced if a defendant retains private counsel prior to the disposition of the case or if a conflict of interest is determined. In addition to monetary compensation, attorneys are contractually allotted parking spaces at the court.

The attorneys are obliged under their contract to maintain professional malpractice insurance and a fax machine for the receipt of communications from the court, an e-mail address, Internet access to check the court schedule, and, for those attorneys who do not have

full-time secretarial staffing, a cell phone. The attorney is responsible for all overhead expenses. Finally, unlike most Michigan county indigent defense systems, the indigent defense felony attorneys are contractually bound by the proposed minimum standards for court-appointed criminal trial counsel, as set forth in the August 1993 Michigan Bar Journal. The standards are a set of 45 performance standards detailing the obligation of counsel in regard to lawyer-client relationship, pre-trial proceedings, trial practice, and sentencing. Among the most critical performance standards are: a) the prohibition on accepting excessive caseloads; b) early client interview; c) the requirement of counsel at felony arraignments; d) timely investigations; e) keeping the client informed; f) seeking to obtain experts; and g) consideration of pre-trial motions.

In Jackson County's district court, four individual attorneys are approved for misdemeanor assignments on a predetermined percentage basis. Unlike circuit court, there is no upfront monthly draw of funds against a lawyer's anticipated contract earnings. Instead, defense attorneys are paid a single flat-fee per case. The current two-year contract stipulates that cases assigned in 2006 are paid at a rate of \$245 per case, with an increase to \$250 per case in 2007. Also differing from the circuit court, there are no additional payments for successful motions or for cases that proceed to trial. Contractually, misdemeanor defense attorneys may bill for out-of-pocket expenses, though any anticipated cost above \$25 must be pre-approved by the judge presiding on the case. Attorneys under contract to provide misdemeanor representation must have an office in the county and be in good standing with the bar. There are no standards of representation in the contract.

The representation of children in delinquency proceedings is even less formal than for district court misdemeanors. All juvenile delinquency cases are handled

by two defense attorneys who do not have a formal contract. There is an oral agreement to simply pay these two attorneys at the rate of \$60 per hour, with no other stipulations regarding performance or maintenance of local offices.

The process for obtaining a portion of the indigent defense contracts is to send a letter of application to the chief judge of the appropriate court, who discusses the application with the other judges. Likewise, judges hold the discretion to terminate a contract for just cause or to opt not to retain a lawyer in a subsequent contract period. It is rare for an attorney who is not currently under contract to be awarded a portion of the indigent defense work.

<sup>a</sup> Though the term “law firm” is used, six of the contractors are sole practitioners. The court assigns cases on the following percentage basis: Jacobs & Engle, P.C. (7/32); Brandt & Dehncke, P.L.L.C. (7/32); Michael Dungan (4/32); Paul R. Adams (4/32); Steven Haney (3/32); David Lady (3/32); George D. Lyons (2/32); and Robert Gaecke (2/32). In February 2006, Mr. Haney terminated his contract to go to work for the local prosecutor’s office. His share of the contract was assumed by the law firm of Wilson & Brown.

<sup>b</sup> The county advances the following monthly sums: Jacobs & Engle, P.C. (\$7,000); Brandt & Dehncke, P.L.L.C. (\$7,000); Michael Dungan (\$4,000); Paul R. Adams (\$4,000); Wilson & Brown (\$3,000); David Lady (\$3,000); George D. Lyons (\$2,000); and Robert Gaecke (\$2,000).

<sup>c</sup> Likewise, if the approved billings are less than the advances paid out to the firm at the end of the contract agreement, then the attorneys must reimburse the difference within 28 days.

<sup>d</sup> These flat fee rates have increased annually on par with the raises bargained for by city employees. Other flat fee payments include: Interlocutory Appeal filed by Prosecutor (\$742); Interlocutory Appeal filed by defendant (\$444); Oral Argument on Interlocutory Appeal (\$280); Juvenile Review Hearing (\$220).

<sup>e</sup> This last category is subject to the approval of the assigned judge in the case and is in addition to mileage paid at current county rates.

<sup>f</sup> If indigent defense counsel is replaced before the preliminary examination, the attorney receives \$152. He receives \$310 if replaced after the preliminary examination.

<sup>g</sup> The number of parking spaces allotted per firm is based on the percentage of workload handled: Jacobs & Engle, P.C. (2 spaces); Brandt & Dehncke, P.L.L.C. (2 spaces); Michael Dungan (2 spaces); Paul R. Adams (2 spaces); Steven Haney (1 space); David Lady (1 space); George D. Lyons (1 space); and Robert Gaecke (1 space).

<sup>h</sup> These minimum proposed standards were not adopted by the Representative Assembly of the State Bar and are non-binding on defense counsel throughout the state, except, as in Jackson County, where they govern through inclusion in a contract.

<sup>i</sup> The court assigns cases on the following percentage basis: Bruce Clark (1/3); Terry Gillette (1/3); Michael Baughman (1/6); and Anthony Raduazo (1/6).

<sup>j</sup> Judges cannot reduce fees, which are set by the funding authority.

<sup>k</sup> The district court administrator reported that in misdemeanor cases there is no expectation of payment for travel costs and pretrial motions to hire experts or investigators are very rare.

<sup>l</sup> Patricia Worth and Ivan Brown.

<sup>m</sup> Chief Judge Chad Schmucker informed NLADA site team members that removing attorneys from the panel is very rare and he uses the power to terminate only in the most egregious circumstances. For example, he twice took a big political hit when he terminated the contracts of two popular attorneys. The first one was especially difficult for him because he was the sole African American defense attorney in the county, but had a chemical dependency problem that was interfering with his work. He on two separate occasions left a trial during a recess and never returned. The judge tried getting him into a rehabilitation center, but finally had to terminate the attorney when he did return to a trial after a recess disheveled and intoxicated on drugs. The more recent termination of a panel attorney was strictly on quality concerns. The judge had received a growing number of complaints from clients that the attorney was not visiting them, keeping them informed on their case, or telling them where and when they needed to show up. Toward the end, it was obvious that the attorney did not know his clients and was not preparing for cases at all. It turned out that the attorney had health issues – but Judge Schmucker could not sacrifice the court’s integrity simply because the attorney needed his job. Again, he stressed that most people are still upset with him for this decision.

<sup>n</sup> For example, though this is an annual process, the same four attorneys have been chosen to handle district court cases for the past 17 years. There are often some new applicants in the yearly selection process, but they are not chosen. Last year there were two new applicants, but they were not chosen.

*“[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”*

*Powell v. Alabama, 287 U.S. 45 (1932)*

based solely on the factual merits of the case and *not* on a public defender’s desire to please the judge in order to maintain his job.

For these reasons and others, all national standards call for the removal of all undue judicial influence in a right to counsel delivery system. As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: “[t]he ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks.”<sup>58</sup> Courts should have no greater oversight role over lawyers representing indigent defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of indigent defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that “[t]he mediator between two adversaries cannot be permitted to make policy for one of the adversaries.”<sup>59</sup>

The first of the ABA’s *Ten Principles* addresses the importance of independence in in-

### ABA 1st Principle

**The public defense function, including the selection, funding, and payment of defense counsel, is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

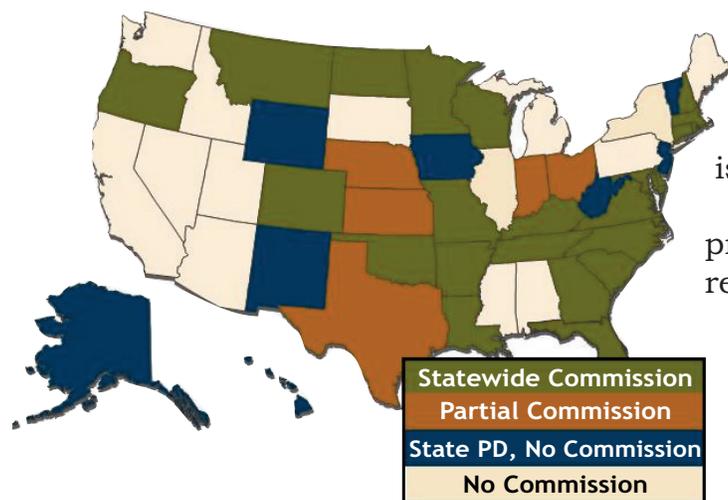
digent defense representation and acknowledges that political interference can be just as deleterious to a public defender system in calling for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.

Many states have met the ABA’s call for independence by placing the authority for oversight of the state’s indigent defense system with a statewide indigent defense commission.<sup>60</sup> NLADA guidelines recommend that the duties of the independent commission include selecting the chief administrator, monitoring of quality of services rendered, serving as a liaison between the legislature and the defender service, and ensuring the independence of the defender system.<sup>61</sup> Even in states without statewide oversight at the trial level – as here in Michigan – the same standards call for an independent commission on the local level to

insulate the office from the power of the bench.

None of the counties the NLADA site team studied had such a board insulating the public defense function. Accordingly the Jackson County judiciary maintains complete control over the indigent defense system. The judges control who receives an indigent defense

### Statewide Oversight in Trial-Level Services



contract and have complete discretion – fettered only by the financial outlook of the county and their own abilities to impact the normal political processes needed to persuade county commissioners to invest in public defender services – to give a contract to an attorney or to terminate an existing contract with an attorney.

Giving judges such wide discretion compromises the integrity of the attorney-client relationship and works to the detriment of indigent defendants by providing them with counsel whose professional judgment may be influenced by concerns that do not affect counsel for clients with financial means. Wielding such authority, it is not necessary for a judge to draft an administrative order

saying “do not file pre-trial motions.” Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to “keeping the judge happy.” In jurisdictions like Jackson County that place such a high emphasis on celerity of case processing, the defense attorneys simply understand not to do anything that will slow down the pace of disposing of cases or risk the reasonable compensation that the circuit court presiding judge has been able to secure for them.

### ***The First Impact of Undue Judicial Interference: The Failure to Adhere to ABA Principle 5 (Attorney Workload)***

An adequate indigent defense program must have binding caseload standards for the system to function, because public defenders do not generate their own work. Public defender workloads rise or fall due to a convergence of societal trends and decisions made by legislatures, police departments and prosecutors which are completely beyond the control of indigent defense providers. The legislature may approve new crimes or increase funding for new police positions that lead to increased arrests. As opposed to prosecutors, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients.

Restricting the number of cases an attorney is expected to handle has benefits beyond the impact on an individual client’s life. For example, the overwhelming percentage of criminal cases in this country requires public defenders.<sup>62</sup> The failure to adequately con-

trol workload will result in too few lawyers handling too many cases in almost every criminal court action – leading to a burgeoning backlog of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers’ expense.

### ABA 5th Principle

**Defense counsel’s workload is controlled to permit the rendering of quality representation.** Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

Conversely, forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time may lead to endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and puts public safety in jeopardy.

For all these reasons, ABA’s *Principle 5* states unequivocally that defense counsel’s workload must be “controlled to permit the rendering of quality representation” and that “counsel is obligated to decline appointments” when caseload limitations are

breached. In May 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441*. The ABA ethics opinion observes that “[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”<sup>63</sup> Both the trial advocate and the supervising attorney with managerial control over an advocate’s workload are equally bound by the ethical responsibility to refuse any new clients if the trial advocate’s ability to provide competent and diligent representation to each and every one of her clients would be compromised by the additional work. However, should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move “to withdraw as counsel *in existing cases* to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn” (emphasis added).<sup>64</sup>

The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.<sup>65</sup> NAC Standard 13.12 on Courts states: “The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.”<sup>66</sup> What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. The ABA’s *Ten Principles* support these national standards with their in-

## EVALUATION OF MICHIGAN’S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

struction that caseloads should “under no circumstances exceed” these numerical limits.<sup>66</sup>

Jackson County has no binding caseload standards for public defense attorneys and no workload prohibitions other than the circuit court defenders’ contractual obligation to follow the dictates of the *Proposed Minimum Standards for Court Appointed Criminal Trial Counsel*<sup>68</sup> which states that “counsel shall decline an appointment from the court to represent an indigent client if the nature or extent of the counsel’s existing caseload is likely to prevent effective representation of that client.” Table I (below) shows the number of felony assignments per attorney or firm for 2006.<sup>69</sup>

Assuming that the law firms with two associates divide the work evenly amongst the attorneys, then all but three of the defense attorneys are in breach of the nationally recommended caseload standards (See Chart A, next page). Seven attorneys are in excess of the national standards by significant percentages: Adams (+46 percent); Dungan (+45); Brandt (+27 percent); Dehncke (+26 percent); Engle (+26 percent); Jacobs (+26 percent); and, Lady (+12 percent).<sup>70</sup>

The national caseload breaches are more serious than even these numbers suggest. The national caseload standards were constructed assuming that an attorney works on indigent defense cases *and nothing else*. Each of the attorneys we interviewed estimated to varying degrees that their public cases were only part of a larger private caseload. For example, Al Brandt estimated that his public cases represented about 50 percent of his work. David Lady thought his indigent defense clients constituted 60 percent of his work. Adjusting the national caseload standard by these workload estimations suggests that Mr. Brandt should only be carrying 75 felony cases per year; and Mr. Lady 90 such cases. This means that Mr. Brandt is carrying a felony caseload that is 153 percent above standards promulgated under the United States Department of Justice and supported by the American Bar Association. Likewise, Mr. Lady is 87 percent above those same standards.

Even attorneys who appear in Chart A to be under national standards for workload are significantly over when accounting for the percentage of time they spend on indigent defense cases. Mr. Gaecke, for example, noted that he “is not dependent on the assignments to keep [his] practice going.” As he described it, “the bulk” of his work is private cases. Conservatively estimating that public cases compose only 40 percent of his workload, Mr. Gaecke has a workload that is 95 percent above national recommendations [40 percent of

**Table 1: Jackson County Felony Assignments**

Attorney	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	Total
Adams	20	26	17	14	19	16	18	25	18	15	15	16	219
Brandt & Dehncke	33	47	29	23	36	24	31	41	36	26	25	28	379
Dungan	18	29	18	14	20	10	19	20	19	19	14	18	218
Gaecke	13	17	5	12	10	8	9	12	9	8	7	7	117
Haney	15	4	-	-	-	-	-	-	-	-	-	-	19
Jacobs & Engle	35	45	30	21	36	25	30	44	34	25	27	26	378
Lady	15	21	12	14	15	11	15	15	14	11	12	13	168
Lyons	13	12	10	11	10	9	6	14	12	7	7	8	119
Wilson & Assc.	-	-	-	8	14	11	14	16	15	14	12	11	115
<b>Total</b>	<b>162</b>	<b>201</b>	<b>121</b>	<b>117</b>	<b>160</b>	<b>114</b>	<b>142</b>	<b>187</b>	<b>157</b>	<b>125</b>	<b>119</b>	<b>127</b>	<b>1,732</b>

## NATIONAL LEGAL AID & DEFENDER ASSOCIATION

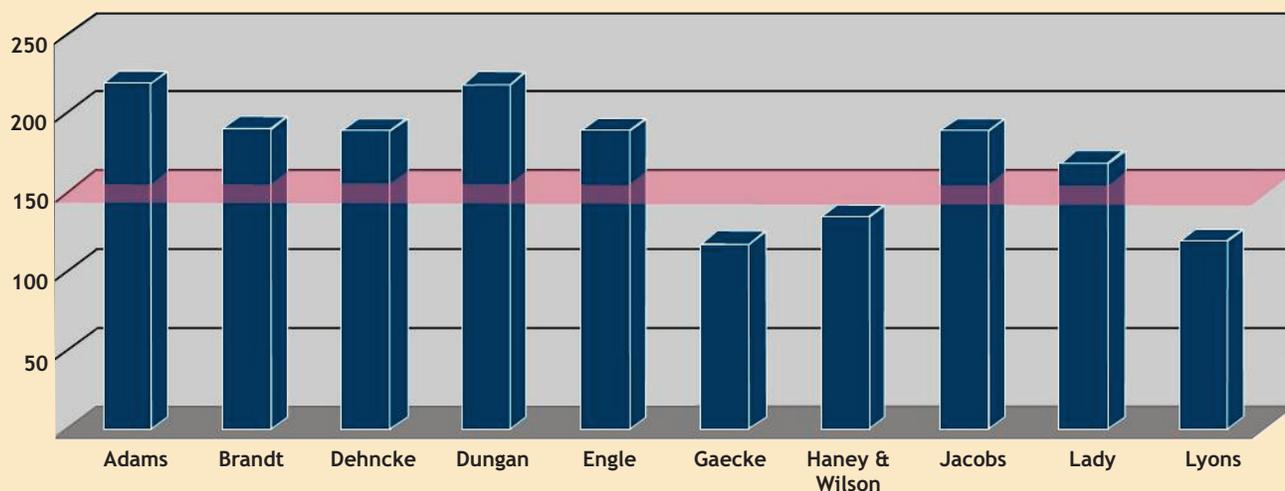
150 equals an annual caseload standard of 60 cases; Mr. Gaecke handled nearly twice that amount (117) in 2006].

Another factor to take into account when judging the workload of private attorneys handling publicly-financed criminal cases is the extent to which they have access to adequate support staff (investigators, social workers, paralegals, legal secretaries, and office managers). Investigators, for example, have specialized experience and training to make them more effective than attorneys at critical case-preparation tasks such as finding and interviewing witnesses, assessing crimes scenes, and gathering and evaluating evidence – tasks that would otherwise have to be conducted, at greater cost, by an attorney. Similarly, social workers have the training and experience to assist attorneys in fulfilling their ethical obligations with respect to sentencing, by assessing the client’s deficiencies and needs (e.g., mental illness, substance abuse, domestic problems, educational or job-skills deficits), relating them to available community-based services and resources, and preparing a dispositional plan meeting the requirements and expectations of the court, the prosecutor, and the law.<sup>71</sup>

Because of this, some states impose further restrictions on their indigent defense caseload standards. For example, public defenders in neighboring Indiana who do not maintain state-sponsored attorney to support staff ratios cannot carry more than 120 felony cases per year (down from the standard of 150 felonies per year for full-time public defenders with appropriate support staff). To the extent that any investigation or social work is being done on behalf of indigent clients in Jackson County, it is being handled by the attorneys. For example, Paul Adams stated that the overwhelming majority of his workload is his indigent defense assignments, yet he has no paralegal staff and conducts all his own investigations. Using the Indiana standard of 120 felony case per year, Mr. Adams is in breach of that standard by 83 percent.

Of note in this discussion is that the circuit court is on record of knowing the actual indigent defense felony caseload for the county for calendar year 2005 (1,794).<sup>72</sup> By entering into a contract with only eight firms at the prescribed percentages, the court was essentially asking all attorneys with at least 3/32 of the contract (or a projected 168 felony cases a year) to agree to break nationally recognized caseload limits – even before taking

**Chart A: Felony Indigent Defense Assignments (2006)**



## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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into account that most of the attorneys carried private cases in the circuit court as well. Moreover, by contractually acknowledging that some of the attorneys do not even have secretarial support (in the stipulation that these attorneys must have cell phones), the court was further compounding the caseload issues.

For those readers unfamiliar with criminal defense practice, below is a partial list of duties ethically required of an attorney to complete on the average case:

### On cases that are disposed by a plea bargain well in advance of trial:<sup>73</sup>

- Meeting and interviewing the client;
- Preparing and filing necessary initial motions (e.g. bail reduction motions; motion for preliminary examination; motion for discovery; motion for bill of particulars; motion for initial investigative report; etc.)
- Receiving and reviewing the state's response to initial motions;
- Conducting any necessary factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence, investigating possible defenses, among others;
- Performing any necessary legal research;
- Preparing and filing case-specific motions (e.g. motions to quash; motions to suppress; etc.);
- Conducting any necessary motion hearings;
- Engaging in plea negotiations with the state;
- Conducting any necessary status conferences with the judge and state;
- Preparing for trial (e.g., develop a theory of the case, prepare for examination of witnesses, including any expert witnesses, conduct jury screening, draft opening and closing statements, requested jury instructions, etc.);
- Meeting with client to prepare for trial;
- Preparing to examine and cross-examine witnesses

### Additional duties for cases that actually go to trial:

- Analyzing potential and final jury instructions;
- Conducting the trial

### Duties for sentencing after pleas and trials:

- Gathering favorable information;
- Preparing sentencing witnesses and documents for presentation to court;
- Reviewing the presentence report and interviewing probation officer;
- Drafting and submitting sentencing memorandum or letter;
- Advocating for the client's best interests at sentencing.

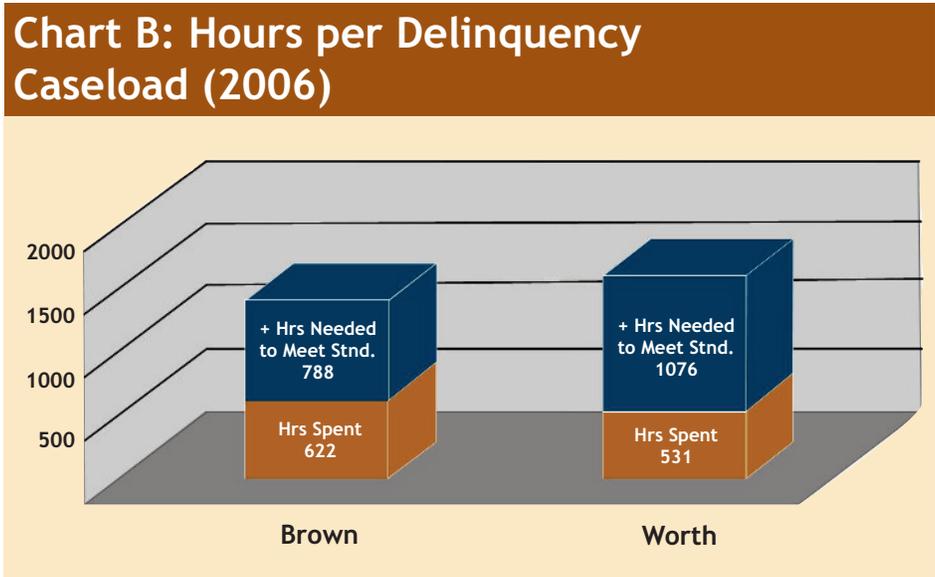
As this list makes evident, no attorney can even think about performing all of these tasks while struggling under the burden of the current workload.

The caseload situation for juvenile delinquency cases is just as troubling in Jackson County. Though a database of caseload assignments was not available for this type of case, NLADA was able to obtain enough information to make reasonable estimates. A staff member of the circuit court administrator stated that Patty Worth was appointed on 171 delinquency cases<sup>74</sup> and that Ivan Brown received 150 such cases in 2006. The court ad-

ministrative staff person also indicated that Ms. Worth received \$31,858 in that year and that Mr. Brown was paid \$37,354. Calculated at the agreed upon rate of \$60/hour, Ms. Worth worked 531 hours on behalf of indigent juveniles in 2006. Mr. Brown worked 622 hours. This means that Ms. Worth spent on average 3.1 hours per juvenile delinquency case. Comparatively, Mr. Brown spent 4.1 hours per case.

National workload standards state that an attorney handling juvenile delinquency cases should handle no more than 200 cases per year *and nothing else*.<sup>75</sup> To convert the national caseload standards to an hour-based workload standard it is necessary to establish some baseline for a “work year.” For non-exempt employees who are compensated for each hour worked, the establishment of a baseline work year is fairly simple. If an employee is paid to work a 35-hour workweek, the baseline work year is 1,820 hours (or 35 hours times 52 weeks). For exempt employees who are paid to fulfill the parameters of their job regardless of hours worked, the establishment of a work year is more problematic. An exempt employee may work 35 hours one week and 55 hours the next. NLADA uses a 40-hour workweek for exempt employees because a 40-hour work week has become the *maximum* workweek standard used by other national agencies for determining workload capacities of criminal justice exempt employees.<sup>76</sup>

Thus a comparative work year assumes a 40-hour work week for 47 weeks (adjusting for holidays and three weeks vacation), or 1,880 hours per year. If the maximum number of cases that a full-time juvenile delinquency attorney should handle in a year is 200 cases, then the average number of hours per case should be 9.4. At that rate, Ms. Worth and Mr. Brown should have worked 1,607 hours and 1,410 hours respectively.<sup>77</sup> Juvenile defense attorneys in Jackson County significantly deprive children of an effective representation by spending only a third of the time required on these cases under national caseload standards.



And, this calculation presumes that an attorney spends every single working hour on case-related task without any time for administrative duties, professional development, mentoring or supervision. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems increasing the risk that they will eventually be brought into the adult criminal justice system in later years. These are commonly children who have been neglected by parents and the range of other support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and valuelessness continues, and the risk of

not only recidivism, but of escalation of misconduct, increases.<sup>78</sup>

As related in the previous chapter, inappropriate misdemeanor convictions or sentences may not generally result in lengthy incarceration, but the life consequences of wrongful convictions can be severe, including job loss, family breakup, substance abuse, and deportation – all factors that tend to foster recidivism. By investing state money in defender services for clients, even when facing misdemeanor charges, jurisdictions may be able to retard the rate of more serious crimes, and the consequent costs for indigent defense and the rest of the system. With this in mind, the NLADA site team found that similar caseload issues arise in the district court of Jackson County as well. National caseload standards suggest that a full-time attorney handle no more than 400 misdemeanor cases per year *and nothing else*.<sup>79</sup> In Jackson County, the district court indigent defense attorneys estimated that they dedicate 25 percent of their time to their public cases. Accordingly, each attorney should handle no more than 100 cases per year. Based on data from 2006, each attorney is in serious breach of those standards: Clark (240, or 140 percent); Gillette (232, or 132 percent); Raduazo (134, or 34 percent); and Baughman (123, or 23 percent).

### ***The Second Impact of Undue Judicial Interference: Failure to Adhere to ABA Principles 3, 4 & 7 (Prompt Appointment of Counsel, Client Confidentiality & Continuous Representation)***

Requirements for prompt appointment of counsel are based on the constitutional imperative that the right to counsel attaches at “critical stages” occurring before trial, such as custodial interrogations,<sup>80</sup> lineups,<sup>81</sup> and preliminary hearings.<sup>82</sup> In 1991, the U.S. Supreme Court ruled that one critical stage – the probable cause determination, often conducted at arraignment – is constitutionally required to be conducted within 48 hours of arrest.<sup>83</sup> Such promptness is equally important elsewhere in Michigan's statutory scheme; valid legal challenges that could result in dismissal of a case should not be delayed for lack of counsel to identify and raise them at the first opportunity.

The third of the ABA's *Ten Principles* addresses the obligation of public defense systems to provide for prompt financial eligibility screening of defendants, toward the goal of early appointment of counsel. Most standards take requirements regarding early assignment of counsel beyond the constitutional minimum requirement, to be triggered by detention or request even where formal charges may not have been filed, in order to encourage early interviews, investigation, and resolution of cases, and to avoid discrimination between the outcomes of cases involving public defense clients and those clients who pay for their attorneys.<sup>84</sup>

Once a client has been deemed eligible for services and an attorney is appointed, *Principle 4* demands that the attorney be provided sufficient time and a confidential space to meet with the client.<sup>85</sup> As the *Principle* itself states, the purpose is “to ensure confidential

### ***ABA 3rd Principle***

**Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.**

communications” between attorney and client. This effectuates the individual attorney’s professional ethical obligation to preserve attorney-client confidences,<sup>86</sup> the breach of which is punishable by disciplinary action. It also fulfills the responsibility of the jurisdiction and the public defense system to provide a structure in which confidentiality may be preserved<sup>87</sup> – an ethical duty that is perhaps nowhere more important than in public defense of persons charged with crimes, where liberty and even life are at stake and client mistrust of public defenders as paid agents of the state is high.<sup>88</sup>

The trust that is fostered in those early stages would not mean much if the client never saw the same attorney again. For this reason, ABA *Principle 7* demands that the same attorney continue to represent the client – whenever possible – throughout the life of the case.<sup>89</sup> Though it may seem intuitive to have an attorney work a case from beginning to end, many jurisdictions employ an assembly-line approach to justice in which a different attorney handles each separate part of a client’s case (i.e., arraignment, pre-trial conferences, trial, etc.). Standards on this subject note that the reasons for public defender offices to employ the assembly line model are usually related to saving money and time. Lawyers need only sit in one place all day long, receiving a stream of clients and files and

then passing them on to another lawyer for the next stage, in the manner of an “assembly line.”<sup>90</sup> But standards uniformly and explicitly reject this approach to representation,<sup>91</sup> for very clear reasons: it inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective, and is demoralizing to clients as they are re-interviewed by a parade of staff starting from scratch.<sup>92</sup>

In Jackson County, Magistrate Fred Bishop signs the warrant and the person is arrested on the basis of that warrant. A Grand Jury is never required to institute

prosecution, but prosecutors may convene one for that purpose if they believe there is some need (apparently this occurs rarely in Jackson County). Once arrested, a person will have an initial appearance and a bond setting (generally within not more than 48 hours of arrest). As throughout Michigan, all criminal cases in Jackson County for persons 17 years or older begin in the district court. If the person is in jail, this initial appearance and bond setting will occur by video from the jail. One defense attorney advised the NLADA site team that no one is typically held on bond for a misdemeanor arrest unless they have some other problem like a probation violation. If the defendant has not been bailed, arraignment is done by video daily at 12:45 p.m. The district court explains to the defendant the charges, his or her rights, and the possible consequences if convicted of the charge. The court also determines the bail amount and collects bail. There is no defense counsel or assistant prosecutor present. Bail is set by a judge without argument or any

### ABA 4th Principle

**Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

hearing.

As we have seen in the previous chapter, Jackson County's district court eliminates a significant number of defendants from even seeking the right to counsel in violation of *ABA Principle 3*. Defendants are forced to appear in court without counsel at the initial arraignment and bail hearing. Interestingly, in asking many of the defense attorneys whether they would allow a privately-retained defendant to appear at such hearings without counsel, they uniformly answered that they would not. For those defendants who manage to hold strong in their determination to receive appointed counsel, the Jackson County criminal justice system still fails to promptly appoint counsel to them.

For those defendants who qualify for appointment of counsel, attorney assignments are made by staff in the court administrator's office in circuit court and in district court by a court officer. In both instances assignments are made on a rotational basis, though in circuit court there is a more complex matrix to account for the appropriate percentages of the caseload originally contracted with each law firm at the start of the contract period. Lawyers are notified by fax of their appointments as well as by hard copy delivered to their mailbox in the courthouse. The matter is then continued for a pre-examination hearing, if a felony, and a pretrial conference if a misdemeanor.

If the defendant is charged with a misdemeanor that is punishable by not more than one year in jail, the district court will conduct the trial and sentence the defendant if found guilty. In felony cases (generally, cases that are punishable by more than one year in prison) the district court will set the bail amount and hold a preliminary examination to determine if a crime was committed and if there is probable cause to believe the defendant committed the crime. If so, the case is transferred to the circuit court for trial. In both instances, it is unlikely that a defense attorney will do any work on a case or even meet the clients before the next court date (whether for a misdemeanor or felony)

On the Thursday afternoon following arrest, circuit court defense counsel will receive the police reports for the arrests of their appointed defendants. Every Friday, the circuit court holds a "preliminary examination conference" – an informal meeting between the prosecutor and the appointed defense attorney.<sup>93</sup> All of the indigent defense attorneys advised that they did not see much point in meeting with their clients before they received the police report. Because they get the report on Thursday and have the preliminary examination conference on Friday, this results in appointed counsel most often meeting with their client for the first time after the Friday session. At the preliminary examination conference, the attorneys review the police report and discuss whether: (1) a felony charge will be reduced to a misdemeanor for a plea; (2) whether an agreement will be worked out on a felony plea; and (3) if the charge will remain a felony and cannot be worked out, whether it is necessary to actually have a preliminary examination or whether it will be waived.

For those clients who are in jail on the date of the preliminary examination conference, the appointed attorneys will have the conference with the prosecutor and then go back to the two holding cells to talk with their clients. The defendants are brought from the jail to

### *ABA 7th Principle*

**The same attorney continuously represents the client until completion of the case.** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

the courthouse in groups. The attorneys meet with their clients all together in a single room. One defense attorney said this presents problems in having frank and privileged conversations with clients because often co-defendants or witnesses are present in the same room. His solution to this problem is often to adjourn the preliminary examination conference to the next week so that he can go see the client in the jail and have a private conversation.

If a charge is being reduced to a misdemeanor and the defendant wishes to plead, the defendant will go directly to district court on the same day and enter the misdemeanor plea, with sentencing set within a few weeks. An informal study conducted by Judge Schmucker of 200 sample felony court-appointed cases suggests that 50 percent of all felony indigent defense cases are resolved in the district court.<sup>94</sup>

If a plea agreement is worked out to a felony, the defendant will be set for arraignment and plea before the circuit court judge to whom they are already allotted. This normally occurs the following Tuesday, with sentencing set a few weeks hence after receipt of a presentence report. Until the past year or so, if a plea was worked out to a felony the defendant would go the same day and enter the plea before the district court judge with sentencing set in a few weeks in front of a circuit court judge.<sup>95</sup>

If the charge remains a felony and there is no plea agreement, then a preliminary examination will either be held the following week in district court or it can be waived. The defense attorneys all indicated that most of the time the preliminary examination is waived and the client is set for arraignment in circuit court. They did say, however, that the district court preliminary examination is sometimes useful for convincing the client to plead, because once the defendant realizes that the witnesses are actually going to show up and testify then the defendant becomes “more reasonable.” If probable cause is found at the preliminary examination or if the preliminary examination is waived, then the defendant will be set for another arraignment in circuit court, which will commence the actual felony prosecution. There will not be a defense attorney (or a prosecutor) present at the circuit court arraignment.

Jackson County tries to adhere to *Principle 7*'s demand for continuity of defense representation in most circumstances once a case reaches circuit court. However, given that no attorney is appointed in the critical stages at the start of the case in district court, Jackson County does not meet the basic parameters of the *Principle*. Moreover, there is a serious problem with continuous representation for juveniles tried as adults. When first detained, the child will be represented by one of the juvenile contract attorneys. If the child is designated by either the prosecutor or the court to be tried as an adult, the juvenile defender just closes the file; the child then receives a circuit court contract attorney in the new court. And the two attorneys do not talk nor does the juvenile defender transfer her file to the circuit court defender.

Because of the civil nature of juvenile delinquency proceedings, the process in cases involving children not tried as adults follows a different course than adult criminal procedures. For instance, petitions are formally filed in the probate section of circuit court and presided over by a juvenile court “referee.” When children are detained, they are taken to the Youth Center. By statute, a preliminary hearing must be held within 24 hours. This hearing can be held by anyone and is typically held at the Youth Center and presided over by some Youth Center employee, without any attorney present. If the charge against the child is going to be “lodged,” then the hearing is adjourned until the following Monday, be-

cause “lodging” can only occur before the referee or an actual judge. Children are represented at the Monday hearings by one of two lawyers under contract with the court regardless of whether the juvenile is indigent (as long as they have not waived their right to counsel or retained private counsel).<sup>96</sup> The referee and one of the juvenile indigent attorneys agreed that approximately 80 percent of juveniles request and receive appointment of counsel.

All juveniles are always entitled to a jury trial, but virtually no juvenile jury trials ever occur. The referee (who has held that position for 17 years) could not recall a single juvenile jury trial during her tenure. Importantly, juvenile proceedings and records in Michigan are not sealed, and juvenile convictions are considered in imposing sentence in adult courts. Finally, prompt appointment of counsel and the demand for a preliminary hearing in juvenile delinquency cases is skirted as well. The 24-hour hearing is waived in any instance in which charges will be lodged since such actions can only occur in front of a referee – who is not in attendance at the hearing. The 24-hour requirement for the preliminary hearing is literally circumvented by having the hearing commence within 24 hours but not conclude until the child is brought before the referee on the following Monday.

Jackson County should be commended for adhering to the first part of ABA *Principle 4* requiring that defense counsel is provided a “confidential work space” in which to meet clients. The courthouse has a number of attorney-client meeting rooms at attorneys’ ready disposal. Unfortunately, the rooms are not frequently used. This is especially true in misdemeanor cases where most lawyers meet their clients for the first time in the courtroom or when they are having plea negotiation discussions with them in the en masse holding cells or in the hallways. For many defendants this is the only time or place they ever meet with their attorneys. The fact that some attorneys choose not to interview clients in these areas reflects more on the pace at which the court house is expected to function than to the physical lay-out of the court space.

### ***The Third Impact of Undue Judicial Interference: A Failure to Adhere to ABA Principles 6, 9 & 10 (Attorney Qualification, Training, & Performance Supervision)***

All national standards, including ABA *Principle 6*, require attorneys representing indigent clients in criminal proceedings to have the appropriate experience to handle a case competently.<sup>97</sup> That is, policy-makers should not assume that an attorney who is newly admitted to the bar is skilled to handle any type of case or that even an experienced real estate lawyer would have the requisite skill to adequately defend a person accused of a serious sexual assault. ABA *Principle 6* acknowledges that attorneys with basic skills can effectively handle less complicated cases and those with less serious potential consequences. However, significant training, mentoring, and supervision are needed to foster the budding skills of even the most promising young attorney before allowing her to handle more complex cases.<sup>98</sup>

The systemic need to foster attorneys is the thrust of the call for on-going training encapsulated in ABA *Principle 9*. For example, new-attorney training is essential to cover

## ABA 6th Principle

**Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

exercises and videotapes to record student work on required skills such as direct and cross-examination and interviews (or mock interviews) of clients, which are then played back and critiqued by a more experienced attorney or supervisor.

As *Principle 9* indicates, training should be an on-going facet of a public defender agency. Skills need to be refined and expanded, and knowledge needs to be updated as laws change and practices in related fields evolve. As the practice of law grows more complex each day, even the most skilled attorney practicing criminal law must undergo training to stay abreast of such continually changing fields as forensic sciences and police eye witness identification procedures, while also learning to recognize signs of mental illness or substance abuse in a client.<sup>99</sup>

Such training should not be limited to theoretical knowledge. Defense practitioners also must gain practical trial experience by serving as co-counsel in a mentoring situation on a number of serious crimes, and/or having competently completed a number of trials on less serious cases, before accepting appointments on serious felonies. Moreover, the authority to decide whether or not an attorney has garnered the requisite experience and training to begin handling serious cases as first chair should be given to an experienced criminal defense lawyer who can review past case files and continue to supervise, or serve as co-counsel, as the newly qualified attorney begins defending her initial serious felony cases – as demanded by ABA *Principle 10*.

Without supervision, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed – one that is much more than an evaluation form or process for monitoring compliance with standards – and should include: a) clear plan objectives;<sup>100</sup> b) specific performance guidelines;<sup>101</sup> c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations;<sup>102</sup> and d) specific processes for providing training, supervision, and other resources that are necessary to support performance success.

To be fair, the circuit court defense contract in Jackson County does contain some performance standards. But for performance standards to be effective there must be some

matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training includes a thorough introduction to the workings of the indigent defense system, the prosecutor's office, the court system, and the probation and sheriff's departments, as well as any other corrections components. It makes use of role playing and other mock

## ABA 9th Principle

**Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

mechanism to monitor, evaluate, and enforce these standards on the defense practitioners – as encapsulated in the tenth of the ABA's *Ten Principles*' demand to ensure that attorneys are monitored for compliance with such standards. Circuit Court Presiding Judge Schmucker acknowledged that there is no formal supervision of the contract attorneys to ensure that they meet the performance guidelines of the contract. And, as has already been detailed, at least three major contract performance measures – those regarding case-load, appearance at arraignments, and early client contact – regularly remain unmet.

Moreover, the NLADA site team found issues with attorney performance against other of the existing circuit court contract performance standards. For example, local performance standard #23 requires counsel to consider the merits of filing pre-trial motions for each defendant. All indications from our research suggest that almost no motions are ever filed in Jackson County. One defense attorney said that motions were usually unnecessary because the prosecutors “will give us everything they have; sometimes they will even show us their file.” Judge Grant estimated that only about 10 percent of all felony cases ever have any motion hearing litigation, such as a motion to quash or a motion to suppress. Either the defense or the prosecutor can take interlocutory appeals from adverse rulings, but this is very rarely done, and Judge Grant indicated that in his 14 years on the bench he could not think of a single time that he had been reversed on interlocutory appeal.

The defense attorneys seem to believe that written motions are just unnecessary almost anytime. With regard to motions to reduce bail, one defense attorney said “sure they could file a motion if they needed to, but if a person could not make the bail that was set it probably wasn't going to help them any.” With regard to local performance standard #18 requiring defense attorneys to obtain investigators or experts in appropriate cases, defense attorneys and the judges uniformly stated that defense attorneys could file a motion asking for funds if they needed to, but were more likely to just show up in court and ask for a hearing to explain to the judge why they needed funds. Yet, we were told, even this more informal practice rarely ever occurs. When asked whether the prosecutor would participate in a hearing on a defense request for funding (should one take place), defense counsel said they would talk to the prosecutor about it ahead of time and tell them what they needed and therefore the prosecutor would not object. There was no indication that any defense attorney ever considered filing an ex parte or under seal motion for funding. With regard to discovery, the defense attorneys repeatedly assured NLADA site team members that the prosecutors would share with them pretty much everything in the prosecutor's file. One defense attorney even went so far as to sum it up by saying, “we just won't stand for” filing all those motions in Jackson County. Judge Grant assured an NLADA site team member that indigent defendants receive a free copy of the transcript of the preliminary examination, if one was held, which serves to provide extensive discovery in his opinion.

The NLADA site team was able to conduct court observations of some indigent defense hearings and one trial. The performance of counsel, for the most part, was very good. For

### ABA 10th Principle

**Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff ), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

example, NLADA site team members observed a case of a 40-something adult male charged with intent to distribute. The case posed an interesting question about the legality of the search of the defendant and the car in which he was riding as a passenger, after it had been stopped for speeding. The indigent defense attorney led the arresting officer through the entire stop and search procedure, questioning at every turn the apparent absence of adequate suspicion to legally warrant his actions. It was clearly zealous advocacy at work. Similarly, a NLADA site team member observed the final stages and closing arguments of a felony trial of a young man who had been charged with conspiracy and armed robbery. The indigent defense attorney appeared to be consulting with his client throughout the trial, making sensible objections, and presenting a closing argument that led the jury to conclude a reasonable doubt and acquit the young man of all charges.

However, we also observed a case of a woman who was charged with physical abuse of her 11-year old son (he had been placed in foster care). The defendant, who was serving 120 days in the county jail on a circuit court violation of probation, was handcuffed and manacled and wore an orange jumpsuit with “COUNTY JAIL” prominently displayed. The prosecutor was requesting a continuance of the preliminary examination, on the ground that no summons had gone out to procure the boy’s appearance. The defendant’s lawyer told the court he would normally object and move for dismissal, but since his client was serving her sentence, he would not object to a brief continuance “under the normal stipulation that the case will be dismissed if the prosecutor cannot proceed on the next court date.”

A few minutes later, an NLADA representative saw the prosecutor going back into the courtroom. She told us that they had found another case pending against the defendant, a misdemeanor charge of driving under the influence with a minor passenger in the car, which had occurred in December 2006. Reentering the courtroom, we observed the defendant already in the middle of pleading guilty to the charge, without counsel present. When the judge asked her if she had any comment upon the facts contained in the police report, she explained that she and her 11-year old son had argued, at which point he had run out into the cold winter night without proper clothing. Feeling that she had to find him, she took her five-year old child with her, got into her car, and drove through the projects looking for him. The judge asked if she had driven on a public street, and she said no, she had never left the project grounds. Then the judge asked her a leading question about the location at which she was arrested (a dirt road) and whether someone could drive onto that road from a nearby public road. Thus the necessary “public way” element of the crime was verified, at least for purposes of the plea.

Had her indigent defense attorney continued to be present at that point in time, the lawyer might well have raised a reasonable doubt on the point. The judge, having confirmed that her release date on the probation violation sentence was May 21, imposed a sentence of 90 days in the county jail “starting today” (i.e., concurrent), which should give her a release date on or about May 23. She seemed satisfied, once she understood that her sentence would run concurrently; but whether she truly drove on a way to which the public has a right of access was never tested, as it surely would have been by competent counsel.

Despite this one observation, NLADA believes that the defense attorneys handling indigent defense cases in Jackson County are – for the most part - qualified to be doing the work that they are doing as required under the sixth of the ABA’s *Ten Principles*. This re-

quirement derives from all attorneys' ethical obligations to accept only those cases for which they know they have the knowledge and experience to offer zealous and quality representation.<sup>103</sup> This *Principle* integrates this duty together with various systemic interests – such as efficiency and the avoidance of attorney errors, reversals and retrials, findings of ineffective assistance of counsel, wrongful convictions and/or executions, and attendant malpractice liability – and restates it as an obligation of the indigent defense system within which the attorney is engaged to provide legal representation services.

However, there is simply no required attorney training in Jackson County. This is particularly problematic because there seems to be a consensus concern regarding where the next generation of indigent defense attorneys will come from after the current attorneys retire. Both the judges and the lawyers said Jackson County is just not a place that young lawyers want to live and practice. Many interviewees indicated that with attractive cities like Detroit and Ann Arbor being so nearby, attorneys would much rather live and work in those cities than in Jackson. Yet it is not hard to imagine that part of the desire of young criminal defense attorneys to leave Jackson County is because they see a system that does not allow for them to get appointed to lesser criminal cases and develop the skills needed under the tutelage of older, wiser attorneys to become great felony trial attorneys.

If it so desired, Jackson County could expand the pool of attorneys and offer training that covers matters such as how to interview a client, the level of investigation, legal research and other preparation necessary for a competent defense, trial tactics, relevant case law, and ethical obligations. Effective training could include a thorough introduction to the workings of the indigent defense system, the prosecutor's office, the court system, and the probation and sheriff's departments, as well as any other corrections components. And it could tap the expertise of the current defense bar through mentoring younger less experienced attorneys. At least one bar member who is not on the indigent defense panel expressed an interest in acquiring such experience, before noting that it was all but impossible to crack the insular "old boys network" that is currently the indigent defense bar in Jackson County.

### ***The On-Going Devolution of Jackson County's Right to Counsel System***

During our site visit, members of NLADA's site team were permitted to attend the meeting of county stakeholders referenced at the start of this chapter. In preparation for that meeting, Judge Schmucker detailed a number of areas of cost containment that merit review, including: 1) more rigorous eligibility standards and screening procedures; 2) prosecution charging practices; 3) feasibility of creating a staffed public defender agency; and 4) putting the indigent defense contracts out for competitive bid. In our opinion, Judge Schmucker correctly identified that stricter screening of defendants will necessarily require increased staffing in the court system – an investment that would probably cost more than the savings that would be produced. Similarly, though we do not take a position on the charging practices of the county prosecutor, we note that Judge Schmucker conducted an informal study that found that 50 percent of all felony cases are resolved in district court. Judge Schmucker argued that if those cases had been originally charged as misdemeanors, there would have been a cost savings of \$222 per case for an overall indigent defense savings of \$150,000.

Such a potential cost savings was the onus for debating the merits of simply reducing

the flat fee paid to circuit court defense attorneys for any cases that are resolved at district court. However, there was a prevailing view amongst defense practitioners that, should the county government implement a plan to reduce fees for felonies bargained down to misdemeanors in district court, it would result in many fewer district court dispositions and many more cases clogging the circuit court. This is troublesome, to say the least, since the defense bar was essentially saying they would elevate their own personal need for a full fee over their client's opportunity to downgrade a felony to a misdemeanor or to dispose of their case with expediency. That is to say, the one respect in which indigent clients currently gain some relative advantage – the chance to downgrade their felony charge and minimize their punishment – was subject to fall victim to the cost-cutting proposal and the defense attorneys' financial interests. The whole conversation in Jackson County regarding cost containment seemed to the NLADA representatives to reflect the strains that the county is feeling for the state's abdication of their responsibility to provide right to counsel services.

A number of things have occurred that has resulted in a reduction in indigent defense funding from the high experienced during our site visit. In April 2007, Judge Schmucker issued a request for proposals to move to a flat fee contracting system. This caused some resistance from the defense bar, who, at first, submitted a joint single bid that was rejected by the judge and county because it did not comply with their hopes of a competitive bid process. When the bid was re-let a second time, the court received a number of proposals from attorneys who had not previously been appointed to public counsel cases – though most of the attorneys that signed on to the previous joint proposal submitted individual bids albeit with the same cost per case bid. Judge Schmucker assured an NLADA representative that low bid was not the only condition for selecting the winning bids but also acknowledged that there has been a reduction in quality of services related to the reliance – in some cases – on less experienced attorneys. Jackson County is about to re-bid the flat fee contracts again, this time for a two and a half year period – again in an attempt to hold costs steady over a longer period of time. It should be noted that the current Jackson County juvenile delinquency contract has devolved beyond the flat fee per case format to one that offers a single flat fee to take 50 percent of the cases that come through the court no matter how many that might be.

### ***Final Thoughts on Jackson County***

In closing this section, NLADA notes our site team members were impressed with Presiding Court Judge Chad Schmucker, both with his courtroom demeanor toward indigent defendants and his openness to discuss options to improve both the cost-efficiencies and the effectiveness of the indigent defense system under his purview. NLADA's critique of the indigent defense system in Jackson County – and the subsequent and myriad effects on poor people facing the potential loss of liberty in criminal procedures – is not a complaint about Judge Schmucker himself. Rather, it is a cautionary tale of what can – and does – go wrong when a state cedes its constitutional obligations to its counties, and in particular the county judiciary, in even the best of circumstances. If Jackson County cannot provide adequate constitutional representation to people of insufficient means and meet the ABA *Ten Principles* under the stewardship of Judge Schmucker, the impact on clients' lives can only be worse in other jurisdictions, as we will see.

## Q & A

### Q: Can Assigned Counsel Systems or Contract Programs Function Independently from the Judiciary?

**A: Yes.** Several states have statewide assigned counsel systems, contract programs, or hybrids from which policy-makers can learn positive lessons. For example, Massachusetts provides indigent defense services through the Committee on Public Counsel Services (CPCS). CPCS has statutory oversight of the delivery of services in each of Massachusetts's counties and is required to monitor and enforce standards. Private attorneys, compensated at prevailing hourly rates, provide the majority of defender services.

At the local level, attorneys accepting cases must first be certified by CPCS to take cases. To accept district court cases (misdemeanors and concurrent felonies), attorneys must apply, be deemed qualified, and attend a five-day state-administered continuing legal education seminar offered several times throughout the year. Attorneys seeking assignment to felony cases must be individually approved by the Chief Counsel of CPCS, whose decision is informed by the recommendation of a Certified Advisory Board composed of eminent private attorneys from each geographical region. To be certified for these more serious cases, attorneys must have tried at least six criminal jury trials within the last five years or have other comparable experience. Proof of qualification, including names of cases, indictment numbers and charges, names of judges and prosecutors, dates, and a description of the services provided must be included in the application. Recommendations from three criminal defense practitioners familiar with the applicant's work are also required. Certification is only valid for a term of four to five years, after which all attorneys must be reevaluated.

All newly certified attorneys in Massachusetts must participate in a mandatory program of mentoring and supervision overseen by regional advocacy centers. For attorneys seeking appointments to children and family law matters, for example, counsel must meet with their mentor prior to any new assignments and bring writing samples to help the mentor develop a skills profile. The mentor and mentee are required to meet at least four times per year. The mentor is instructed to follow CPCS' performance guidelines in assessing the attorney's ability. Participation in the program is mandatory for an attorney's first 18 months, and may continue longer at the discretion of the mentor.

By being certified, an attorney agrees to abide by the set of rigorous performance guidelines that set out attorney responsibilities at every stage of the case, for each specific type of case the attorney is qualified to handle. Assigned counsel attorneys are also bound by numerical caseload limits: an attorney may handle no more than 200 Superior Court criminal cases per year, 400 district court criminal cases, 300 delinquency cases, 200 Children and family law cases, or 200 mental health cases. An attorney may bill no more than 10 billable hours in a day (unless this limit is specifically waived by CPCS) nor more than 1,800 hours annually. CPCS assesses "quality" through a formal evaluation program based on the written performance guidelines and overseen on a regional level by compliance officers. These supervisors are given training in how to evaluate staff, and their ability to assess performance fairly is a subject of their own performance review by CPCS.

The Oregon Public Defender Services Commission has total authority to establish and maintain a public defense system that ensures the quality, effectiveness, efficiency, and accountability of defense services consistent with national standards, including adopting rules regulating: professional qualification standards for appointed counsel and procedures for the contracting of public defense services. All indigent defense services at the trial level are decentralized, with 100 percent of the funding provided by the state through a series of contracts with private attorneys, consortia of private attorneys, or private non-profit defender agencies.

The Commission oversees the Office of Public Defense Service, which contracts with ten non-profit organizations to provide primary indigent defense services in 11 of the state's 36 counties. Twenty-four counties are served through either consortium contractors or individual law firm/private attorney contracts.

In one county, indigent defense services are provided through an assigned counsel plan. In this county, and for conflict representation in other counties, the Office pays attorneys an hourly rate. All individual private attorneys must apply to the Office and receive certification in order to receive appointments.

The contracts are the enforcement mechanism to ensure that state standards are met. For instance, a non-profit public defender agency is required by contract to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contract obligations. If a defender agency cannot meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

Oregon also enforces strict workload standards in their contracts. For instance, a typical contract with a 501c3 non-profit public defender sets a precise total number of cases to be handled by the contractor during the contract term, with specific numbers of cases allocated among numerous categories of cases, each of which generally require different amounts of work. Thus, instead of the common per-attorney-per-year formulation of numerical caseload limits, the Oregon system reflects overall numerical caseload limits for all staff in the office combined. And, instead of pure caseload limits, the allocation of case numbers among different categories of cases according to the number of hours commonly required for each type of case essentially constitutes a case "weighting" system, i.e., measuring "workload" rather than caseload and allowing more sophisticated planning for the office's actual work and staffing needs.

Every six months, there is a budget review process with state funding officials, in which extra funding may be negotiated for extra work performed – for example, for cases which required more than the usual amount of time of type of services (e.g. "three-strikes" cases). In effect, the contract public defender office monitors its intake and can project the degree of compliance with its estimated workload on a week-by-week basis. It notifies the court promptly if workloads are being exceeded and additional appointments must be declined. If, for example, the office meets its workload level on Wednesday, the balance of all new assignments for that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows the office to consistently maintain a uniform quality of service and manageable workloads even during periods of lower-than-normal staff levels due to turnover, sickness, or other authorized leave.

### Breaking News!

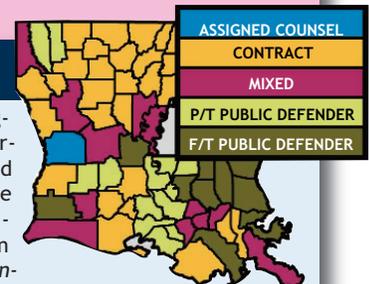
CARSON CITY, NV, January 2008 — The Nevada Supreme Court removes the judiciary from the administration of local indigent defense systems by Administrative Order. Model assigned counsel plans are being developed while state and local policy-makers weigh creating a statewide system. The Administrative order also sets attorney performance standards and creates uniform indigency standards.

## Success in Louisiana

Louisiana — a state with a struggling economy like Michigan — had endeavored to reform its broken system of justice for years. Pre-Katrina, the public defense system in Louisiana was not obligated to adhere to any standards, resulting in public defenders handling too many cases with practically no training or supervision and while experiencing undue interference from the judiciary. And all of this was before hurricanes Katrina and Rita made landfall in August 2005.

Yet, in the midst of having to contend with extreme financial and emotional devastation, Louisiana has reformed its entire system for providing counsel to the poor — today funding 100 percent of its statewide defender system. In June 2007, Governor Blanco signed into law the Louisiana Public Defender Act, thereby creating a comprehensive statewide public defender system that abolished the local judiciary controlled public defender boards in favor of a statewide independent

board with regulatory authority to set and enforce a wide array of standards based on the ABA 10 Principles. Services are still delivered locally through a hybrid of contract and assigned counsel, but oversight is administered at the state level.





## The Failure to Michigan's Counties to Adhere to the ABA Ten Principles

The United States Department of Justice *Report of the National Symposium on Indigent Defense* recommends that statewide standards be adopted to prevent disparate services between neighboring jurisdictions. There is simply no uniformity in how services are provided throughout the state of Michigan. This chapter explores how the seven other counties we studied in the Lower Peninsula fail the majority of the ABA *Ten Principles*.

### *The United States Department of Justice on "Uniformity" & "Quality"*

"Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced and supervised, while the other gets a neophyte."

*U.S. Department of Justice, Report of the National Symposium on Indigent Defense*

### **A. The Failure to Adhere to ABA Principles 1, 5, & 6: the Lack of Independence, Workload Controls, & Attorney Qualification**

#### Bay County:

Many defense attorneys in Bay County insisted that the existence of a public defender office in their county helps to maintain independence from inappropriate actions by the courts. As an example, they cited an instance in which the public defender office went to the appeals court and won an order requiring the judge to stop removing attorneys from cases if he did not like what they were doing (that is, if the attorneys would not go along with what the judge wanted).

Despite this one instance, the independence of the public defender offices in Bay County is continually compromised. The county pressures the public defenders to accept too many new defendants for representation each month, in order to keep down the cost per defendant represented. The di-

rector of the Department of Criminal Defense reported that the average cost per defendant represented by the defender offices has remained at \$300 for the last 15-20 years (with felony cases averaging more than \$300, but misdemeanor cases about \$100). This makes the defender offices cheaper for the county than outside counsel, whose fees average about \$300 for a misdemeanor case and more for felonies.

To understand the workload concerns in Bay County requires a brief discussion of how best to “count” cases. The Conference of State Court Administrators and the National Center for State Courts publication *State Court Model Statistical Dictionary, 1989*, instructs administrators to “[c]ount each defendant and all charges involved in a single incident as a single case (page 19).” Throughout our study in Michigan we have been plagued in our attempts to quantify caseload because some counties count cases by “defendant,” some by prosecution charging document, and some by charges. In Bay County, the prosecutor counts each incident or event as a case, while the Office of Assigned Counsel (which assigns cases to the two public defender offices and appointed counsel) counts each defendant as only one case no matter how many incidents or events are involved.<sup>104</sup> Cases are assigned to the five attorneys of the two public defense offices based on a formula that limits each of the attorneys to receiving no more than 38 new defendants per month, of whom no more than 13 can be charged with felonies. If all five attorneys in the two public defender offices have been assigned 38 defendants in a given month, assignments of additional defendants are made to appointed counsel.

Because of the definition of a “case” employed in Bay County, attorneys in both defender offices estimated that their “caseload” is probably 1.2 to 1.5 times higher when using the national “case” definition that would require factoring in the number defendants

### Overview of Bay County

**A** mid-sized county, Bay County sits in the center-east of the Lower Peninsula. As of 2005, the county had an estimated population of 109,029, ranking it 19th among Michigan’s counties.<sup>a</sup> Bay County has an 82.4 percent high school graduation rate and a median household income of \$38,646. Its poverty rate of 9.7 percent ranks slightly better than average among Michigan’s counties. The county seat, Bay City (pop. 36,817), was once a major port of Michigan’s famed lumber industry. Most of its sawmills have now closed, and the Defoe Shipbuilding Company (manufacturer of war vessels for the U.S. Navy) ceased operations on December 31, 1975. Today Bay County continues to play a role in the state’s manufacturing industry (auto parts, machinery, cement, steel, and agriculture), though to a lesser extent than in earlier decades, and is a recreational center for boating, fishing, etc.

Bay County is home to the 18th Circuit Court and the 74th District Court, which jointly administer the county’s public defense delivery system. The county’s Office of Assigned Counsel (which is part of the court administration) assigns cases to the two public defender offices and appointed counsel. The Department of the Public Defender (three attorneys) and Department of Criminal Defense (two attorneys) are both county agencies under direct control of the county administration. Indeed, the heads of both offices are direct appointees of the county legislature.

Cases are assigned to the public defender offices through a formula that limits each of the five defender attorneys to 38 new defendants per month, of whom no more than 13 defendants can be charged with felonies. The five attorneys in the two defender programs all have extensive criminal case experience (some both as

prosecutors and defense counsel). The heads of the offices attempt to divide up the most serious cases among the staff, in order to keep the workload among the five roughly even. Because of the small size of the two defender offices and the experience levels of the attorneys in those offices, the heads of the offices are considered first among equals, so there is no supervision/file review in the sense contemplated by national standards. The additional responsibilities of the directors of the two defender offices are administrative, rather than supervisory. There are no written performance guidelines for either office.

Assigned counsel (known in Bay County as “outside counsel”) are appointed by the Office of Assigned Counsel (OAC), a division of the court administration for Bay County, from a list that office maintains. The OAC administrator assigns cases to outside counsel when the two defender offices are conflicted out or have reached their monthly case cap. Outside counsel also receive appointments in cases involving juvenile delinquency, abuse and neglect, FOC contempt, and paternity/PPO. Attorneys on the OAC list are ranked according to their experience, so that to a certain extent cases are assigned based on the severity of the charge, with the exception of delinquency cases where an effort is made to assign the case to the attorney who represented the juvenile before (if the juvenile has prior arrests). New attorneys are assigned to misdemeanor cases for at least 6 months, at which time the OAC administrator seeks permission from the chief judge to move the attorneys to the felony appointment list.

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26017.html>.

charged with multiple events. In calendar year 2006, the five attorneys in the two offices were assigned the following number of defendants: 806 felony defendants (or 161.2 per attorney); 694 misdemeanor defendants (or 138.8 per attorney); 453 traffic defendants (90.6 per attorney); and 212 circuit court violations of probation (42.4 per attorney). In other words, even without multiplying the above numbers by a factor of 1.2 or 1.5 to get the number of “cases,” each attorney in the two public defender offices exceeded the national caseload standard for felony representation by 12 percent *before* factoring in all of the other work.<sup>105</sup>

Whereas some right to counsel systems would respond to such workload issues by using other types of public defender staff (social workers, investigators, or paraprofessionals) to support the attorneys, that is not the case in Bay County. The office has no social workers or staff investigators. Public counsel attorneys in Bay County have to apply to the courts for funds to hire investigators.

Similarly, the attorneys must seek judicial approval for expert witnesses. During the site visit, a public defender told an NLADA site team member that one of the judges was refusing to authorize more than \$60 an hour for a forensic psychiatrist (which is far less than they charge), and the attorney was considering taking an interlocutory appeal if the judge could not be persuaded to approve a higher rate. The judge in question told an NLADA representative that he “had trouble” paying the forensic experts more than the outside counsel receive (that is, \$60 an hour), but to his credit also said he would like to see a line item in the budgets of the two defender offices for expert witness fees.

The combination of high defender workloads and lack of investigators results in a system where very limited investigation and motions work is done on public defender cases and where the trial rate is less than 1 percent in the two public defender offices. Attorneys in the two defender offices attribute the low trial rate, in part, to the fact that Michigan’s sentencing guidelines and the volume of cases generally produce good plea offers from the prosecutor.<sup>106</sup> Still, a trial rate of less than 1 percent is exceptionally low—the national average criminal justice trial rate is 3.1 percent.<sup>107</sup> Indeed, one defender said there is no time to try cases.

Public defender attorneys informed NLADA site team members that they had recently attempted - unsuccessfully - to stop accepting new defendants before they reached the 38 defendants per month cut-off. Some of the felony defendants whom the public defender had been assigned to represent had serious and/or capital cases, which dramatically affected the attorneys’ workloads. The defenders first went to the OAC director, who said she did not have the authority to approve assignment of fewer than 38 new defendants per attorney per month. The defenders then asked the chief judge of the circuit court to order the OAC to stop assigning new defendants to the defender attorneys, but the judge told them to talk to their boss, the county executive (who is not an attorney).

The NLADA site team interviewed judges about public defender workload issues. One was very critical of both the defenders and assigned counsel, suggesting that the attorneys were not working very hard.<sup>108</sup> He said the defenders have a quota of cases and they have to accept them, just as he has to accept the cases assigned to his courtroom. The judge said cases are not adequately investigated because, he believes, the defenders often assume the case will result in a guilty plea. He said both prosecutors and defenders are unwilling to take cases to trial, and he believes the defendants would receive better plea offers from the prosecutor if the cases were “worked up” for trial and defenders indicated

they were ready to try cases.

If high workloads, judicial interference, and lack of support staff were not enough, attorneys in both defender offices in Bay County also said that, in the last few years, the county board of commissioners has been “micromanaging” the office. As examples, they cited: a county commissioner who came into the public defender office to look at the case numbers (although it did not appear that the commissioner looked at client files) before the county would approve filling a vacant public defender attorney slot;<sup>109</sup> and increased scrutiny of reimbursement requests for public defender attendance at meetings of the Michigan Public Defense Task Force and State Bar Criminal Law Section meetings.

But the story of Bay County does not stop there. After the NLADA site visit, the move to place cost concerns above constitutional due process continued. The county decided that the answer to high caseloads was not to add additional public defender staff, but rather to privatize pieces of existing work through the use of flat fee contracts. Not surprisingly when emphasizing cost control over the constitution, the county had to engage in two request for proposal processes in soliciting bids for misdemeanor representation. The first go round, bids came in too high for the county commissioners’ liking. Suspecting that limiting bids to Bay County attorneys only was artificially inflating the cost, the county commissioners voted to redo the process and also allow attorneys from outside of the county to bid. This process worked as the county received lower bids, and the staff public defenders no longer handle misdemeanor cases. Misdemeanors are handled by private counsel on a flat-fee contract. This on-going devolution of independence in favor of cost containment is a common theme throughout Michigan.

### Alpena County:

For example, felony representation services in Alpena County were provided for years by the Office of the Public Advocate (OPA). OPA was initially funded in 1981 by a special \$80K federal grant obtained by a then sitting circuit court judge from the Department of Justice as part of a special rural legal services grant program. OPA was a 501(c)3 organization with its own board of directors and was charged with providing felony defense services for the four counties that made up the 26th Circuit Court at that time. OPA contracted for legal services with the Joint Judicial Commission, made up of representatives from those four counties.

In 2003, the 26th Circuit Court was reorganized into just two counties: Alpena and Montmorency. Judge Kowalski was the circuit court judge, and he conducted a regional survey of indigent defense costs, finding that OPA was costing the county around \$420K per year for felonies only, while similarly situated county like Otsego County was reportedly only spending \$330,000 per year on all indigent defense services. He determined that Alpena County was spending too much on indigent defense services. The end result was that OPA – with its own independent Board of Directors – was closed.

In its place, Alpena County entered into a flat fee contract with three former OPA staff attorneys – the law firm of Lamble, Pfeifer & Bayot (LPB). There is no longer any semblance of independence. While OPA had a staff investigator, LPB does not. If needed, LPB goes to the court with a request for services – but this is not an *ex parte* procedure; the prosecutor will know about the request. If experts are needed, LPB must also apply to the court.

Measuring caseload in Alpena is difficult because the three contract attorneys all do both public defense work outside of their Alpena County contract and private cases. For

example, though Lamble and Pfeifer handle the felony cases in Alpena and Montmorency, Pfeifer also handles the firm's contract cases in Presque Isle County to the north of Alpena, and he has a private practice with separate offices from his LPB office. He is also a part-time Alpena city attorney, but he affirmed that he does no city work that would place him in conflict with representation under the criminal defense contract. Bayot primarily does probate, family, and some district court work. Bayot says he does not do private work; but Lamble does – primarily divorce and child custody.

Moreover, some criminal justice stakeholders raised questions during our interviews regarding the LPB firm's definition of "conflict." Their allegation was that the firm inappropriately keeps conflict cases, due to financial concerns. They claimed that LPB will represent both the perpetrator in a child abuse case and represent the parent/guardian/custodian in the related dependency court proceeding. They also alleged that the lawyers do not meet with their clients until the court date, in part because they are juggling too many cases in too many courtrooms.

### Grand Traverse County:

On their face the caseloads being handled by assigned counsel in Grand Traverse are well within nationally accepted caseload standards. Under the district court contract, an individual attorney is assigned approximately 60 misdemeanor cases per year. In the circuit court, it was reported that a roster attorney is assigned an average of 55 felony cases per year. In 2005, six felony attorneys received 63 cases each and one 62. But all of the assigned counsel attorneys are engaged in full-time private practice. Consequently, no conclusion can be reached about the reasonableness of their appointed caseloads without more information as to the percentage of their total time that is spent on court appointed cases and the extent and nature of their private practices. One attorney estimated that he did about 150 total cases in 2006, including felony and misdemeanor appointments and retained cases. He does some estate planning and divorce and about 10 abuse and neglect appointments each year. This attorney said there is not enough time to do the work he would like to do on his cases.

The lack of independence is a significant defect in Grand Traverse County as well. The delivery systems in both the circuit court and the district court are administered by the judges. The district court reserves the right to terminate contract attorneys without cause. While the judges exercise considerable control over the attorneys, they have not been willing to advocate on behalf of the attorneys with the county to obtain increases in compensation and improved access to resources. The terms and conditions of the contract and the amount of the compensation are supposed to be based upon competitive bidding, but there is no competition and the judges essentially dictate the flat rate compensation per case. Although competitive bids for the contract are solicited, the attorneys have joined together as a single group and only one bid is submitted. For 2007-08, the attorneys' request for an increase in the compensation rate from \$350 to \$400 per case was rejected by the judges, and the group was told that the judges would find other attorneys to do the work if they would not accept the existing rate.

Perhaps most seriously, the district court group of attorneys in Grand Traverse County is required by the judges to provide certain services under the contract for which they are not compensated, including: providing an arraignment attorney daily to consult with unrepresented individuals; staffing the drug ("Sobriety") court; and appearing at lineups. At-

torneys are generally willing to accept whatever terms the judges dictate, apparently so as to not jeopardize their contract.

### Oakland County:

Funding of the defense function in Oakland County is a line item in the judicial budget. Since payment is event-based and any increase to the amount paid would require an increase in the defense line item in the court's budget, payment of defense counsel is not independent of the judiciary. Consequently, there has not been an increase to defense function funding in eight years. During this same period, we were told, there have been regular increases to the budgets of the other two legs of the stool (judges and prosecutors). In most instances district court judges personally select the lawyers who will be assigned to individual cases. Although some use a "blind draw" method to select the attorneys, the judges individually determine which lawyers will be included in the group from which they make assignments in the cases that are before them.

The system for appointing individual lawyers in the 6th Circuit Court in Oakland County is also a function of the judiciary and the court clerk's office. In Category 1 cases (capital offenses with maximum life sentences) and Category 2 cases (felony offenses with sentences in excess of five years but less than life, and negligent homicide), the circuit court judge appoints an attorney from the judge's own list of qualified attorneys. In Category 3 cases (felony offenses with sentences greater than two years but not more than five years) and Category 4 cases (felony and high misdemeanor offenses with sentences up to and including two years, except negligent homicide), counsel are appointed in rotation according to the date of their last appointment. An attorney who is unavailable for an assignment does not lose her place on the rotational list. Defense attorneys made clear that staying on a judge's category 1 or 2 list requires a clear understanding of what that judge wants and delivery of that performance. The general rule is that you have to keep things moving. A common refrain from the defense bar was that attorneys who know how to please a judge receive most of the big (C1 & C2) cases from that judge.

The experience level of the attorneys who are eligible to receive appointments in the district court is varied; however, there are no minimum standards or qualifications required in order to be included on the approved list. An individual is eligible if s/he is a member of the bar in good standing and requests to be included on the list. On the positive side, while there are no continuing legal education (CLE) requirements in general, there are CLE requirements for defense counsel to be on the appointment list. Judges state that appointments at the C1 and C2 level are based on the judge's knowledge of the skills and abilities of every attorney on his list.

All of the assigned counsel attorneys in Oakland County are engaged in the private practice of law and are not restricted from accepting assignments in other circuit court and/or district courts within the county or in other counties. One judge indicated that the circuit court attorneys who are assigned to felonies in the district court are overworked, spread too thin, and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance, and sometimes struggle with. Beyond that – and we cannot overstate this – nothing is done to ensure the rendering of quality representation. In two separate courtrooms we witnessed clear evidence of defense attorneys being more concerned about pleasing the judge than supporting their clients. In addition, there is strong sentiment among county and court officials

that lowering prosecutor pay would decrease the quality of the prosecutors in Oakland County; yet there are no parallel views supporting an increase for the defense function, even though all agree defense pay is too low. In Oakland County, the view is that the “defender quality is good enough.”

### *Shiawassee:*

A lack of independence also defines Shiawassee County. Lawyers there are appointed by name directly by the judge before whom they will appear on each assigned case. Their bills are scrutinized, approved, modified, or disapproved in whole or in part by each judge personally. The judges themselves decide who is added to or removed from the list of assigned counsel. The judges to whom we spoke indicated that they are aware of how many cases they have assigned to each lawyer before they appoint that lawyer to additional cases. What is clear, however, is that there is no mechanism in place for taking into account the “workload” of the lawyers, all of whom maintain private practices in a variety of legal disciplines. Absent too, it appears, is any way of determining how many (if any) cases from other jurisdictions are assigned to the lawyers on the list. While a review of the cases assigned to each of these lawyers by the Shiawassee County courts indicated that the num-

## Overview of Shiawassee County

**S**maller in population than many neighboring counties, Shiawassee has an estimated population of 73,125, ranking 26th among Michigan’s counties.<sup>a</sup> The county has an above-average high school graduation rate (84.4 percent) and a median household income of \$42,553. The county’s poverty rate is 7.8 percent. The county seat is Corunna, a city of 3,381.

Two judges handle the business of the 66th District Court, which has limited jurisdiction in criminal cases. It has jurisdiction over all misdemeanor cases from beginning to end. Felony cases are filed in the district court, but its jurisdiction over these cases is limited to conducting or accepting a waiver of the preliminary hearing and then binding the case over to the 35th Circuit Court for trial or other disposition and sentencing. The delivery method is entirely assigned counsel.

Appointment of counsel in both district court and circuit court is entirely by the individual judges. Lawyers are appointed by name directly by the judges before whom they will necessarily appear on each assigned case. Their bills are scrutinized, approved, modified, or disapproved in whole or in part by each judge personally. The judges themselves decide who is to be added to or removed from the list of assigned counsel.

There are 16 lawyers on the “list” of counsel available to accept appointments in both district court and circuit court. The circuit court judge makes appointments for all felony cases, assigning a lawyer to a felony case in district court when notified that a defendant has been determined to be indigent and thus eligible for the services of counsel at public expense. The circuit court judge assigns lawyers on felony cases based on the nature and seriousness of the charge and the availability of counsel with the requisite skill and experience. Occasionally, the circuit court judge asks a lawyer who is not on the list to accept appointment on a particular case where that lawyer had previously represented the client and/or when there is a particularly difficult and complex case or client.

The administrative staff of both courts keep track of the number of cases assigned and the amount of money paid to each

lawyer. Tracking of types of cases assigned to each lawyer is limited to designation as circuit court cases and district court cases.

There is no breakdown of the type of felony cases assigned to each lawyer, such as cases in which the maximum sentence was life imprisonment or those in which sentences could be enhanced by habitual criminal statutes.

All cases, misdemeanor and felony, are compensated in the same manner and at the same rate. Whether a petty theft or first degree murder, lawyers are paid at the rate of \$50.00 per hour for both in-court and out-of court work. Itemized bills are submitted periodically by each lawyer and are reviewed by the judge who made the appointment.

All of the judges felt that appointed lawyers were clearly underpaid for their work. All indicated that a raise in the hourly rate was overdue. Most of the lawyers to whom we spoke described the \$50 hourly rate as small but “fair.” One lawyer, who had been on the court-appointed list for five years but who no longer accepted appointments, cited the low pay as a reason for “moving on” from court-appointed work to concentrate on his vastly more lucrative private practice. He indicated that the \$50 per hour rate was so far beneath his \$200 per hour private rate that he could simply no longer afford to accept appointments.

There is no mechanism in place for taking into account the “workload” of the lawyers, all of whom maintain private practices in a variety of legal disciplines. Absent too, it appears, is any way of determining how many (if any) cases from other jurisdictions are assigned to the lawyers on the list. While a review of the cases assigned to each of these lawyers by the Shiawassee County courts indicated that the number of cases assigned was actually very small, no clear picture emerged about how much time was available to these lawyers for the proper representation of their court-appointed clients.

<sup>a</sup> U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26155.html>.

ber of cases assigned was actually very small, no clear picture emerged about how much time was available to these lawyers for the proper representation of their court-appointed clients.

In all fairness, the NLADA site team asked all of the judges and lawyers about the perception inherent in the structure of this system that vigorous advocacy on behalf of the clients could be compromised to avoid inconveniencing the court, upon which the lawyers must depend to make a living. Each of the three judges spoke convincingly, not only of their respect for vigorous advocacy by appointed counsel, but of how they would not want any lawyer on their “list” who did not defend his or her clients’ interests appropriately. One lawyer, in fact, pointed with pride to a case where the Michigan Supreme Court reversed on an important issue he had unsuccessfully argued in the trial court. He said he was congratulated by the judge who was found to have erred and had experienced no negative feedback with respect to the nature or number of assignments he continued to receive from that judge. Another lawyer, on the other hand, indicated that he had received no cases from the district court for a period of a year and a half and only began receiving cases again after an internal audit by the administrative staff shined light on the fact that he had not received cases for an extended period of time. He was not, however, able to point to any particular reason for this and guessed that it had something to do with a member of the administrative staff rather than with either of the district court judges.

### Wayne County:

Independence of the indigent defense function in Wayne County district courts and Third Circuit Court is also problematic. On the one hand, the current appointment system is subject to patronage and the potential for undue judicial influence (but some of the judges appear to make a sincere attempt to appoint qualified attorneys and match attorney skills and experience to the cases). On the other hand, the alternative being contemplated by then-Third Circuit Chief Judge Mary Beth Kelly is a contract system that could result in low-bid contracts. No one is talking about a system with an independent board of directors and an independent assigned counsel office that would comply with ABA *Principle 1*.

While visiting Wayne County, we witnessed a political struggle between the chief judge and the other judges of the circuit court. Partly in order to contain costs, partly (according to the chief judge) to improve quality of representation, and partly (according to judges who disagreed with the chief judge) to consolidate her power, the chief judge replaced the appointed counsel system in juvenile cases with several contracts, some of which are reportedly low-bid contracts. The chief judge reported that she was interested in seeing more contracts for representation of adult indigent defendants in circuit court.

Under Administrative Order 2006-08, each judge has one 2-week rotation per year to make appointments in criminal cases. During that time, the judge can assign no more than eight felonies to a given attorney. In addition, no attorney can receive more than 200 violation-of-probation appointments in a calendar year. However, there is no limit on how many cases overall an attorney may be appointed to in a given year, nor is there any examination of the attorney’s entire workload/caseload (for example, cases the attorney is appointed to by other Third Circuit judges, by judges in other counties, and/or the attorney’s private retained criminal and/or civil work). For example, in the Third Circuit alone, in addition to an unlimited number of felony appointments and up to 200 violation of pro-

bation appointments each year, attorneys can receive appointment as arraignment-on-information (AOI) house counsel and appointment in any of the twenty-three district courts of the county (not to mention all other state and federal courts). Judges, appointed attorneys, and the prosecutor all reported that defense workloads are very high. Most of those interviewed attributed the workload to the fact that many attorneys try to be appointed to as many cases as possible because the fees on each case are so low.<sup>110</sup> Some lawyers reported that other attorneys are accepting too many murder assignments to be able to represent each defendant properly. The heavy workload means that attorneys frequently have scheduling conflicts, resulting in continuances, use of stand-in attorneys, and – in some instances – removal of the attorney and replacement with another appointed attorney.

The Third Circuit system for matching an appointed attorney's ability, training, and experience to the complexity of the case is very limited and has no enforcement mechanism. Attorneys who are interested in receiving appointments to represent indigent defendants in felony cases must join the Wayne County Criminal Defense Bar Association (WC-CDBA).<sup>111</sup> Attorneys usually submit their resumes to the judges (after applying to the Assigned Counsel Services Office to be placed on the appointments list) and may also ask to meet with the judges regarding their interest in receiving appointments. Judges report they try to assign attorneys to cases based on the attorneys' experience and competence, but there are no rules or guidelines requiring a minimum level of experience for handling certain types of cases. In practice, judges say they try to give newer attorneys violation of probation and other less serious cases, but in many instances "less serious" translates to any type of non-capital case. Judges say they generally require that an attorney have at least three years of experience before s/he is assigned to a capital case.

### Ottawa County:

The attorneys interviewed in Ottawa County all stated that the judges are fair in the assignment of cases and payment of claims. All stated they have never had a claim reduced. All attorneys stated they can aggressively represent clients and this is not a problem for the judges. However, Ottawa County's assigned counsel program is still controlled completely by the judiciary. Judges decides which attorneys will be admitted to the panel, whether they will be allowed to stay on the panel, what level they are rated at, what cases they are assigned, and the hourly rates they are paid. The circuit court (through a staff person who is not an attorney) reviews and approves the claims submitted by attorneys. The judges formally evaluates the attorneys on the panel on a yearly basis. The judiciary resolves issues arising from client complaints. In short, this is a court-run assigned/appointed counsel system.

For example, Ottawa County does not have written standards for attorney classification. Attorneys are classified as either level 1, 2, or 3. While the level 1 attorneys are paid the highest hourly rates, the classification appears to be based on how long they have been on the panel and not necessarily how experienced they are. That is, a very experienced criminal defense attorney who applies to and is accepted on the panel will be made a level 3 attorney, regardless of whether he has years of experience doing serious and complex cases in another county. What does seem pretty clear is that when you apply to be on the panel, no matter how much experience you have, you start out getting misdemeanors until the judges decide you are competent enough and have been on the panel long enough to get felonies. This implies that, to move up, one must have proven themselves to a judge.

## Overview of Wayne County: Representation in Circuit Court

Wayne County is the home to Detroit and the Third Circuit Court. There are 28 circuit court judge seats, but not all of these judges hear criminal cases. The Third Circuit has a mixed system for providing representation to the poor. The court assigns 25 percent of its felony cases to the Legal Aid and Defender Association (see side bar) and the rest to an appointed counsel system administered by the court's Assigned Counsel Services Office with appointments made by the circuit court judges.<sup>a</sup> Each of the judges has a single two-week period annually in which she makes appointments. Attorneys let the judges know that they are available for, and interested in, receiving appointments. Attorneys who have not previously received appointments from a given judge will usually submit a resume and request an interview. In addition to filing a written application with the Assigned Counsel Services Office, attorneys must be members of the Wayne County Criminal Defense Bar Association, and attend a minimum number of hours of training presented by the Detroit-Wayne County Criminal Advocacy Program (CAP) before they can receive appointments in criminal cases.<sup>b</sup>

### Early Appointment of Counsel

The vast majority of defendants (in excess of 95 percent according to the chief judge) in the Third Circuit are represented by court-appointed counsel (either from LADA or assigned counsel).<sup>c</sup> At arraignment in district court (arraignment on warrant), defendants requesting counsel fill out a form, which is sent to the Assigned Counsel Services Manager and from there to the rotation judge (i.e. the judge who is making the appointments for that two-week period). If a defendant has an open case, the new case is assigned to the attorney on the open case. The assigned counsel administrator tries to give LADA "clean" cases (i.e. cases that don't involve violations of probation, etc.). The request for an appointed attorney is usually received by the assigned counsel administrator within 4-5 hours of the district court arraignment, and forwarded to the rotation judge - who usually appoints an attorney within 24 hours.

Initial interviews are relatively timely - but the physical conditions in which they usually occur, and the lack of time to conduct a thorough interview. Initial interviews with defendants (particularly those in

custody) are frequently conducted in court (or in the "bullpen" - a cell behind the courtroom), just prior to a hearing held within days of the district court arraignment.

Indigent defendants are usually assessed attorneys' fees at the conclusion of the case (the vast majority of cases are resolved through guilty pleas).<sup>d</sup> It is common for attorneys' fees to be assessed as a condition of probation (which means failure to pay can constitute a violation of probation). It is also common for attorneys' fees to be assessed in cases where the defendant is in custody, or has indicated that s/he is unemployed. In some cases, judges will substitute community service in lieu of fees.<sup>e</sup> In none of the cases we observed was there any colloquy by the judge into a defendant's ability to pay attorneys' fees - nor was there any objection by counsel, or even a request from counsel that attorneys' fees be waived.<sup>f</sup>

### Judicial Interference

Since the assignment responsibility stays in one court for only two weeks out of each year, and since the cases themselves do not stay in the courtroom from which the assignments were made, that the lawyer appointed on a particular case by a judge would appear before that judge on that case would be relatively unusual. On its face, therefore, the independence of the defense bar would seem to be rather well protected from interference of the judges. Unfortunately, that simply is not the case.

But unlike the judges of many other jurisdictions we visited, many judges of the Third Circuit Court recognize the impact that the system in-place - the system they control - has on the level of quality in the representation of the poor. Some judges pointed to the event-based fee structure as a critical systemic flaw, and that its deficiencies play a role in the quality of representation some clients received. Because the fees are so low, some attorneys seek to generate a high volume of appointments to increase their income. Payment is event-based (as opposed to hourly), with the payment based on the seriousness of the case (potential sentence of five years/10 years/20 years/life in prison). As an example:

## Legal Aid & Defender Association, Inc.

Founded in 1909, the Legal Aid and Defender Association (LADA) Michigan's largest provider of legal services to those of insufficient means. Overseen by an 18-member Board of Directors (12 are attorneys), the non-profit's approximately 180 employees are divided among Administration (including finance and human resources) and LADA's four law groups. Each law group is funded independently of one-another. The Civil Law Group is LADA's largest program and is funded through the Legal Services Corporation, the Michigan State Bar Foundation, and other local entities. The Federal Defender Office is funded by the Administrative Office of U.S. Courts. The Juvenile Law Group holds a contract with the Family Division-Juvenile of the Third Circuit Court. The State Defender Office holds a contract with the Third Circuit Criminal Division to provide representation in 25 percent of indigent felony cases each year. Though the contract, originally negotiated in 2001, expired in October 2002, the terms of the agreement continue to be honored. LADA receives a flat \$1.98 million each year for its services.<sup>a</sup>

The 17 attorneys in LADA's State Defender Office (all full-time employees) are divided into three teams with five trial attorneys each.<sup>b</sup> Two of the teams are lead by supervising attorneys (27 and 29 years experience) who maintain full trial loads. The third team is lead by Donald Johnson (29 years experience) who described his caseload as consisting of a "half-day plea docket each week" on top of his administrative duties as Chief Counsel of the State Defender Office. LADA attorneys are provided an office, secretar-

ial services, health insurance, vacation/sick pay, and malpractice insurance. Attorneys are compensated by level of experience and length of tenure with the organization - first-year attorneys are paid \$35,000 and the current maximum is \$96,000. The flat-fee nature of the contract with the Third Circuit has left LADA unable to provide raises to any of its State Defender attorneys. LADA contracts Iverson Investigative Agency to do their investigation.

Each attorney has approximately 50 open felony files at any given moment, collectively handling about 5,000 cases each year. LADA's annual caseload per attorney is thus 96.07 percent above the national standard (or 294 felony cases each year). The heavy caseload forces the State Defender Office into a horizontal system of representation, whereby LADA attorneys substitute for each other in court on various matters (anywhere from preliminary examinations to sentencings). When we asked about the practice, Mr. Johnson agreed that it was in direct violation of national standards, but felt the circumstances of the arrangement between LADA and the Third Circuit left no alternative.

<sup>a</sup> At the time of our visit, LADA had recently submitted a proposal to the court for a new contract for representation of felony defendants. Nothing came of that. The court similarly requested LADA submit a proposal the year before, in Feb. 2006, but did not act.

<sup>b</sup> LADA originally employed 19 attorneys during the first year of the contract.

- \* the fee for preparation and investigation of a case carrying a potential maximum sentence of up to 20 years is \$170;
- \* for preparation and investigation of a Life Maximum sentence is \$210; and
- \* for preparation and investigation of a Murder One case is \$270.

Attorneys receive payment for one jail visit to custody clients (a flat \$50) facing a potential sentence less than life, and two jail visits for clients charged with capital offenses. The prosecutor said it has been calculated that assigned counsel make an effective hourly rate of \$10 when the fees they receive are divided by the hours spent on cases.<sup>g</sup> Fees for investigators and expert witnesses for indigent defense cases are very low, and even then require a judge's approval.<sup>h</sup> For example, the fee schedule for a psychiatric expert in a case where the potential sentence is life in prison is a flat \$500 for the interview and written evaluation, and \$300 for attendance in court. Attorneys report that the low fees make it extremely difficult to establish a pool of expert witnesses who will work on their cases.

Regarding the jail visits portion of the fee schedule, one judge stated flatly that it was the cause of "cursory" visits to clients, and sometimes for the fact that there were no visits. That indigent clients are not receiving the appropriate assistance of investigators and experts for the preparation and presentation of their cases is indisputable fact. The amount of fees that are paid for experts and investigators makes it nearly impossible for a lawyer to retain them. The court schedule for expert witnesses was a flat \$250 total in most instances, and that only \$25 per hour, with a cap set by some judges of only a handful of hours, made hiring such crucial people nearly impossible. The lawyers believe that it is futile to ask the court for experts and investigators because they perceive that such requests will be routinely denied. Thus, they don't bother to make such requests. The low fees for investigators and experts, the requirement that requests have to be made to the judges, the difficulties that some attorneys have getting their requests approved, and the pressure to dispose of cases quickly have combined to create a culture where it is taken for granted that such requests are the exception rather than the rule.<sup>i</sup> Appointed attorneys reported that some lawyers have stopped accepting appointments in murder cases because there is not enough money to "do the job right".

Indeed, several judges and lawyers said that the miserable pay had cost the court-appointed attorney ranks the services of many talented lawyers. They could simply not afford to continue accepting appointed cases at the rates of pay provided by the fee schedule. As one circuit court judge candidly put it: "the plead-'em-out mentality is all pervasive here." While other judges were not as blunt, it became clear that this judge's opinion was shared by at least a few others. Meanwhile, Wayne County lawyers pointed out that they were compelled to hurry cases toward disposition because of the "90 day rule" promulgated by the Michigan Supreme Court. This rule compels the trial courts to dispose of criminal cases with 90 days. Put another way, the absence of resources and the pressure to resolve cases quickly, has created a culture in the defense community of despair and resignation. That culture is materially affecting the quality of the representation that is being provided to indigent clients in Wayne County.

### Attorney Qualification & Supervision

The Third Circuit system for matching an appointed attorney's ability, training and experience to the complexity of the case is very limited and has no enforcement mechanism. Attorneys who are interested in receiving appointments to represent indigent defendants in felony cases must join the Wayne County Criminal Defense Bar Association (WCCDBA).<sup>j</sup> Attorneys usually submit their resumes to the judges (after applying to the Assigned Counsel Services Office to be placed on the appointments list), and may also ask to meet with the judges regard-

ing their interest in receiving appointments.

Judges report they try to assign attorneys to cases based on the attorneys' experience and competence - but there are no rules or guidelines requiring a minimum level of experience for handling certain types of cases. In practice, judges say they try to give newer attorneys Violations of Probation and less serious cases - but in many instances "less serious" translates to any type of non-capital case. Judges say they generally require that an attorney have at least three years of experience before s/he is assigned to a capital case.<sup>k</sup>

Supervision and review of assigned counsel in Wayne County's Third Circuit Court are virtually non-existent, so Wayne County's indigent defense system does not comply with this *Principle*. This failure, along with constitutionally inadequate resources and excessive workloads, and the rule requiring cases be adjudicated in 91 days, mean that in many cases indigent defendants are not receiving competent representation.

Judges and appointed attorneys say attorneys handling assigned cases are, for the most part, very competent and do a thorough job. The chief judge said sometimes the newer lawyers are more zealous than those who have been practicing for a while. She also said that, while jail logs show attorneys representing adult defendants are interviewing their clients, attorneys don't request funds for investigators and expert witnesses as often as they probably should. Another judge, when asked about attorney competence, described good lawyers as those who are efficient and have good "client control", meaning (I assume) that the attorneys can persuade their clients to accept guilty pleas.

<sup>a</sup> Administrative Order 2006-08 "Plan for Assignment of Counsel in the Third Judicial Circuit", issued by the chief judge on September 22, 2006.

<sup>b</sup> Attorneys with more than 10 years of experience are required to attend a minimum of four of the 10 sessions offered each year; less experienced attorneys are required to attend a minimum of six sessions annually.

<sup>c</sup> There is no investigation before appointment of counsel as to a defendant's ability to pay - reportedly because of time constraints. Rather, a defendant's claim that s/he cannot afford counsel is accepted.

<sup>d</sup> The court administrator reported that his office tabulates the dollar amount of attorneys' fees collected, but does not calculate the collection rate (i.e. the amount received versus the amount assessed).

<sup>e</sup> This might happen when a judge learns that a defendant is unemployed - but there is no discussion of whether the defendant has an ability to pay - and also represents a system where those who cannot afford to pay are required to "work out" the fees.

<sup>f</sup> There was also no judicial colloquy or defense objection/request concerning the imposition of other court costs and fees.

<sup>g</sup> The court administrator said the Michigan Supreme Court continues to monitor fees paid to individual assigned counsel - in particular when attorneys gross more per year than the justices make in salary. Obviously, the justices are not considering (or choosing to ignore) the fact that they don't pay for office space, staff, access to online legal research, law library, malpractice insurance, medical and retirement benefits, etc.

<sup>h</sup> A court order has to accompany a voucher sent to court administration requesting funds for investigators, expert witnesses or extraordinary fees. If the voucher amount is over \$500, it is sent to the chief court administrator.

<sup>i</sup> Criminal Division Presiding Judge Ed Ewell, who is a former federal prosecutor, said defense preparation was a lot better in federal court, where there is more money, and assigned attorneys don't have to get an order from a judge before they can hire investigators and experts.

<sup>j</sup> Dues for the WCCDBA cover the required Criminal Advocacy Program training, and also pay for computers and furniture for WCCDBA offices housed in the Hall of Justice.

<sup>k</sup> The Third Circuit Court administrator said he believes a random case assignment system (where judges would not be involved) would be better than the current system. However, his deputy disagreed with respect to capital cases, saying the judges are in a position to know which attorneys have the experience and competence to handle capital cases.

The Ottawa County court culture leads to a lack of meaningful advocacy. In noting that there is a great rapport between defense attorneys, judges, and prosecutors, one defense attorney stated: “Everyone knows how it works . . . what can and can’t be done . . . no wheel spinning . . . no time wasting . . . we know what a judge will do. It is an expeditious way of handling cases.” He said he tells his clients, “the more time I put into a case the more money I make, but then you [client] will have to pay the court back . . . and the result will be worse than the offer you have right now.” Such comments lead us to conclude that in Ottawa County you need to play by the judges’ rules in order to stay in the game. For example, in asking a judge about defense attorneys’ use of investigators, we were told that in all his years as a former prosecuting attorney and as a judge he had only seen two cases where a private investigator was requested. The judge volunteered that at one time a lawyer from Grand Rapids handled some cases, but she frequently asked for an investigator in routine cases, and the judge suggested that the attorney knew an investigator and was simply trying to generate revenue for him. Perhaps the most shocking revelation, acknowledged by both defense attorneys and the Prosecuting Attorney, was that when additional investigation is needed, the common practice is for the defense attorneys *to call the prosecuting attorney and ask him to have law enforcement do it or in some cases they will call the sheriff directly.*

The judge said the real reason for lack of investigations is the outstanding credibility of everyone involved in the Ottawa County criminal justice system. He stated: “Trust and respect is what our system is about. If you don’t like that or buy into it, you leave.” What the judge misses in his views is that our American system of justice presumes law enforcement officials are human and thus fallible. Despite the overall dedication and professionalism of the hundreds of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime in every single instance. If errorless law enforcement existed, there would be no need for a jury of one’s peers to weigh the evidence in a case before an impartial judge. But because American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers’ tactics, the police investigation, the lawfulness of any searches and seizures, the credibility of the evidence, and the prosecutor’s theory of the case to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process that the United States is in the forefront of cutting edge public safety technologies – like DNA evidence – that help to exonerate the innocent while convicting the guilty.

### Marquette & Chippewa Counties:

The assigned counsel program in Marquette County is not independent. There are three lists: two for felony cases of differing severity and one for misdemeanors. Standards for, admission to, and removal from these lists are completely within the control of the circuit court criminal session (for the felony lists) and district court (for the misdemeanor list) judges. Judicial responsibility and control is set forth explicitly in the circuit court’s Local Administrative Order 2004-06 and in the January 1, 2004 circuit court notice regarding Appointment of Counsel in Circuit Court Criminal Cases.

Though Circuit Court Judge Weber has on several occasions persuaded the county board to increase hourly compensation to indigent defense attorneys in two stages (from

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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\$40 to \$45 and then \$50, where it stands today), the judges can and, especially in the district court, do reduce bills submitted by counsel. An attorney's admission to or removal from the panel is entirely within the judge's discretion.

The Public Defender Office in Chippewa suffers a lack of independence of a different variety. The chief public defender is a county employee, directly hired and supervised by the Chippewa County Board of Commissioners. From all members of the justice community in Chippewa County it was noted that most commissioners consider the criminal justice system a low priority – and the public defender office the lowest of the low. It is well understood that some commissioners wish to dissolve the office entirely. This has produced what NLADA calls a “bunker mentality” on the part of the chief public defender. Though the chief public defender feels her rapport with the county board is somewhat better than others in the criminal justice community, this has been achieved based on years of “keeping my head down and not picking any fights.” She does not ask for any budget increases or fees for investigators and would not think of declaring caseload overload. In return she is rewarded by being able to keep her job.

Though there are no workload standards in place, NLADA site team members saw no indication in Marquette County that excessive assignments caused lawyers to cut back on their case preparation. One defense lawyer even said that, on occasion, when his private practice is busy or he has recently accepted several new court appointed cases, he will ask the district court assignment coordinator to delay new assignments for a period of time; he said she has always complied with such requests.

Chippewa County likewise has no workload standards. However, unlike Marquette County, attorney overload is an issue at the public defender office. Data is collected office-wide and not delineated by attorney. Prior to July 2006, cases were distributed equally between the two attorneys. Since that time, the chief public defender takes 80 percent of all misdemeanors and 33 percent of all felonies, and the assistant public defender handles the difference. From caseload data collected since 2002, NLADA finds an average caseload of 335.6 misdemeanors and 94.5 felonies per attorney per year. Weighting the mixed caseload to a misdemeanor caseload,<sup>112</sup> we find the office handles 591 cases per attorney per year, which is 191 cases or 48 percent above the national standard for misdemeanor representation alone.

The lone conflict attorney takes an average of 91.8 “transfers” each year. Assuming that all of these cases were assigned to the same attorney and that all were charged as felonies, this caseload is still reasonable for one attorney to handle. But the office has no ability to monitor the attorney's private workload to safeguard against overload and has no idea if the assignments can be handled adequately.

Because of pervasive lack of private counsel willing and available to take assignments in Chippewa County, there is no adequate safety valve for excessive cases or conflicts of interest. It is not a surprise therefore to find that workload becomes a major issue for the office with each case involving co-defendants. For example, Chippewa County is home to five state prisons. Crimes involving inmates in these facilities are automatically charged as felonies and usually involve multiple co-defendants. While NLADA was on-site in Sault Sainte Marie, the county was in the midst of one case involving 30 co-defendants. And, even though the Michigan Department of Corrections reimburses attorneys fees at a rate of \$70 per hour,<sup>113</sup> the public defender has been unable to assign out all of the co-defendants cases to conflict counsel. Instead, the public defender has resolved to handle these

## Overview of Marquette County

Marquette is the most expansive of Michigan's 83 counties (1,821 sq. miles of land) but ranks 28th in population with 64,874 people.<sup>a</sup> The county has an 88.5 percent high school graduation rate and a median household income of \$35,548. Its poverty rate of 10.9 percent ranks in the middle among Michigan's counties. The City of Marquette serves as the county seat. There are two other cities in the county: Ishpeming and Negaunee. Marquette, a city of about 20,000, is a major port on Lake Superior, dealing primarily with iron ore.

Marquette County utilizes an assigned counsel program. There is neither a public defender office nor, apart from court personnel, an assigned counsel administrator. The assigned counsel program is not independent. There are three attorney lists: two for felony cases of differing severity and one for misdemeanors. Standards for, admission to, and removal from these lists are completely within the control of the circuit court criminal session (for the felony lists) and district court (for the misdemeanor list) judges.

The caseload in Marquette County may not be "sufficiently high" to require both "a defender office and the active participation of the private bar." There are only about 380 felony arrests per year in the county and close to half of those charges are reduced to misdemeanors and resolved in the district court. While

the lists of available counsel seem small (17 for misdemeanors, 12 for level 2 felonies, 10 for level 1 felonies), everyone seemed satisfied that the numbers are adequate, and no attorney is overloaded with cases. For example, in the busier district court, no lawyer received more than 59 assignments in 2006. Indeed, there was no indication in this very quiet county system that excessive assignments cause lawyers to cut back on their case preparation. One lawyer said that on occasion, when his private practice is busy or he has recently accepted several new court appointed cases, he will ask the district court assignment coordinator to delay new assignments for a period of time; the coordinator always complied with such requests.

Marquette and perhaps other rural Michigan counties as well do not need a county public defender office so much as they need an independent body to administer the defender system. There is currently no independent oversight board or agency to provide certification, training, supervision, trial and appellate litigation support, evaluation, and where necessary discipline - all with the interest of the clients first and foremost.

<sup>a</sup> To complete the picture, Marquette County ranks 63rd in density, with 35.5 persons per square mile. See <http://quickfacts.census.gov/qfd/states/26/26103.html>

cases one-at-a-time through disposition before taking the next case, as if that would resolve any actual conflicts of interest.

Chippewa County has no eligibility criteria for attorneys willing to take indigent defense cases. With only three attorneys to choose from, it is difficult for the court to exclude anyone. In Marquette County there is some baseline requirement for attorneys seeking appointment in felony cases. That requirement is imperfect, however, because on its face it honors bench trial experience equally with jury trials and prior prosecution practice equally with defense. One lawyer complained that a lawyer leaving the prosecutor's office after several completed trials would gain admission to the felony lists, while a more experienced defense attorney, whose first loyalty to his client may have limited the number of cases tried "to verdict" as the standard requires, might not. There is no standard for misdemeanor representation. One district court judge candidly stated that, if an applicant is a member of the bar and does not have a negative reputation in the local legal community, his application will be approved.

Each lawyer is an independent actor, subject to oversight by the judge and the judge only in both Chippewa and Marquette counties. Although a public defender office is the ideal model to provide independent supervision and evaluation of lawyers, workload and lack of funding prevents the office in Chippewa from doing so.

### ***B. Failure to Adhere to ABA Principles 4 & 7: The Lack of Continuous Representation & Client Confidentiality***

If there is a set of standards that is more frequently met throughout the state of Michigan, it is the standards related to building an attorney-client relationship. Most counties we visited try to maintain the same attorney from assignment to disposition and provide

## Overview of Chippewa County

Chippewa County is the eastern-most county in Michigan's Upper Peninsula. It is also the population center of the eastern half. The county has an estimated population of 38,780, ranking it 42nd among Michigan's counties.<sup>a</sup> But Chippewa is the state's second largest county (1,561 sq. miles of land), yielding only 24.7 persons per sq. mile. According to the 2000 US Census, the county is 75.9 percent white, with a large American-Indian population (13.3 percent) from which the county takes its name.<sup>b</sup> The county has an 82.4 percent high school graduation rate, an average rate among the state's 83 counties, and a median household income of \$34,464. Its poverty rate (12.8 percent) ranks Chippewa County among Michigan's 20 poorest counties.

Rich in history, the county's main city and seat, Sault Ste. Marie, is Michigan's oldest city. Indeed it is the third oldest city in the United States west of the Appalachians. Despite its strategic location on the St. Mary's River, between Lakes Superior and Huron, the county was somewhat isolated until the 1850's when work began on the Soo Locks.<sup>c</sup> Sault Ste. Marie is home to Lake Superior State University, and, as a border town with the Sault Ste. Marie International Bridge to Ontario, Canada, the city sees a good deal of tourism. Importantly, from the U.S. Border Control to the Police of the Sault Ste. Marie Tribe of Chippewa Indians, there are eleven police agencies with jurisdiction spread throughout Chippewa County.

The county formerly used assigned counsel to handle all indigent defense cases through direct appointments by the chief judge of the 91st District Court. As a cost-saving measure, in 1996, the county commission created the Office of the Public Defender as a county agency. The chief public defender is a county employee, directly hired and supervised by the Chippewa County Board of Commissioners. Since the agency's creation, the participation of the private bar in the public defense system has decreased dramatically.

The public defender office, with offices in the Courthouse Annex building in downtown Sault Sainte Marie, has a staff of only two attorneys and an administrative assistant. All clients who request counsel at arraignment in the 91st District Court are referred to the public defender for a determination of indigency and assignment of counsel. For any conflicts the public defender may assign cases to private counsel. Unfortunately, there is only one private attorney accepting "transfers" (conflict cases) from the public defender office. Thus, workload becomes a major issue for the office with each case involving co-defendants.

For example, Chippewa County is home to five state prisons. Crimes involving inmates in these facilities are automatically charged as felonies and usually involve multiple co-defendants. While NLADA was on-site in Sault Sainte Marie, the county was in the midst of one case involving 30 co-defendants. Even though the Michigan Department of Corrections reimburses attorneys fees at a rate of \$70 per hour,<sup>e</sup> the public defender is unable to assign out all co-defendants to conflict counsel. The only recourse available to the public defender is to handle cases one-at-a-time through disposition before taking the next case, in an attempt to lessen the conflict of interest.

Meanwhile, there are no caseload controls in place. Data is collected office-wide and not delineated by attorney. Prior to July 2006, however, cases were distributed equally between the two attorneys. Since that time, the chief public defender takes 80 percent of all misdemeanors and 33 percent of all felonies, and the assistant public defender handles the difference. From caseload data collected since 2002, we find an average caseload of 335.6 misdemeanors and 94.5 felonies per attorney per year. Weighting the mixed caseload to a misdemeanor caseload,<sup>f</sup> we find the office handles 591 cases per attorney per year, which is 191 cases or 48 percent above the national standard for misdemeanors.

Further complicating attorney workload, the 50th Circuit and 91st District Courts do not coordinate their docketing. Therefore, though the courts are no more than 30 yards apart (and the public defender office is just across the street), it is sometimes difficult for a defender to juggle both schedules. To cope, the two staff attorneys will occasionally sit in for one another on a sentencing or to waive a preliminary exam, for example.

From all members of the justice community in Chippewa County it was noted that the county commissioners consider the criminal justice system a low priority.<sup>g</sup> As all other stakeholders - judges, sheriff, prosecutor - are elected, while the public defender is a direct hire of the county board, the office of the public defender is subject to political interference of a particularly severe nature. It is well understood that some county commissioners wish to dissolve the office. The chief public defender knows not to ask for any budget increases or fees for investigators and would not think of declaring caseload overload. In return she is rewarded by being able to keep her job and the agency survives.

<sup>a</sup> U.S. Census Bureau, at:

<http://quickfacts.census.gov/qfd/states/26/26033.html>.

<sup>b</sup> The Sault Tribe of Chippewa Indians maintains an office in the city of Sault Ste. Marie. See: <http://www.saulttribe.com/>.

<sup>c</sup> Lake Superior is 21 feet higher in elevation than Lake Huron and the other Great Lakes. Locks were needed as the rapids of the St. Mary's River prevented ships from passing from one lake to the other. Major shipping on the Great Lakes was made possible with the completion of the first lock in 1855. See: <http://www.infomi.com/county/chippewa/>.

<sup>d</sup> Camp Koehler, Chippewa Correctional Facility, Hiawatha Correctional Facility, Kinross Correctional Facility, and Straits Correctional Facility. See: [http://www.michigan.gov/corrections/1,1607,7-119-1381\\_1387\\_1701---,00.html](http://www.michigan.gov/corrections/1,1607,7-119-1381_1387_1701---,00.html).

<sup>e</sup> Reimbursements are sent directly to the county and not to the Public Defender Office.

<sup>f</sup> As national caseload standards call for a maximum of 400 misdemeanors or 150 felonies per attorney per year, we can multiply a felony case by 2.5 to weight it equally to a misdemeanor.

<sup>g</sup> There has been a long-standing battle between the county commission and the criminal justice system as the commission expects the courts to act as a money-making venture; a point the judges vehemently contest. The prosecutor recently sued the commissioners over their attempts at micro-managing his office, and in retaliation the board declined to give him a raise while all other county employees received one.

the defendants sufficient space to meet with attorneys. However, that statement must be understood with the knowledge that undue interference, high workloads, and the fast pace of dispositions combine to leave little time for informed discussions to take place.

### Wayne County:

For example, the Third Circuit in Wayne County has a mixed approach when it comes to continuous representation and, as a result, only partially complies with ABA *Principle* 7. In felony cases, the same attorney ostensibly represents the defendant from appointment after arraignment on the warrant through sentencing. However, there are two significant exceptions - and it is rare for judges to conduct a colloquy with defendants to obtain their waiver of original counsel and agreement to be represented by stand-in or replacement counsel. The first exception is the widespread practice of both appointed and retained attorneys having a “stand-in” attorney represent the defendant if the appointed or retained attorney is unavailable. This is usually done at arraignment on the information, sometimes for guilty pleas, and sometimes for setting of a preliminary hearing date or trial date (called “blind draw” for a jury trial, because the case is randomly assigned to a trial judge). Some judges will not permit stand-ins for setting of trial dates because the stand-ins are frequently uninformed as to the original attorney’s schedule, status of the case, etc.

One judge said he sees some weakness with how stand-in attorneys treat defendants, particularly those in custody, although this judge apparently permits the practice of stand-ins. The chief judge and the prosecuting attorney said the archaic fee schedule for defense attorneys is a major cause of the use of stand-ins (because attorneys accept a large number of appointments in order to compensate for the low fees on each case), and they believe the problem would be reduced if fees were raised.

One prosecuting attorney said stand-ins can actually cause delays in the disposition of cases. For example, she said stand-in attorneys at the pre-exam (see Sidebar) will not have the client waive a preliminary hearing, but when the case gets to the actual preliminary hearing day the defendant waives because the original attorney is present. According to the prosecuting attorney, more than 80 percent of the preliminary hearings are ultimately waived.

The other exception to vertical representation is when judges *sua sponte* appoint attorneys in the courtroom as stand-ins or remove the appointed attorney from the case and appoint an attorney in the courtroom. This can happen both for scheduled hearings and in cases where a defendant appears after the issuance of a *capias*. To the members of NLADA’s site team, this appears to be an obvious docket moving measure. Some appointed attorneys say that attorneys who do a lot of criminal defense work can competently represent clients as stand-ins.

Because of the procedures described above, initial interviews with defendants in Wayne County (particularly those in custody) are frequently conducted in court (or in the “bullpen” – a cell behind the courtroom). Some of the courtrooms have interview rooms the attorneys can use to meet with clients who are not in custody – although frequently several attorneys are using the same room simultaneously, either to meet with their own clients or to make phone calls. During the AOI (arraignment on information) hearings that NLADA site team members observed, most attorneys spoke to their non-custody clients (whom most of them were meeting for the first time) in the hallway outside the courtroom or in the back of the courtroom. These conversations could be overheard by anyone within 10 feet or so. Similarly, most of the in-custody clients were interviewed while they were sitting in the jury box (next to other defendants, bailiffs, and court personnel).

## Wayne County: Early Case Resolution

In response to jail overcrowding and the Michigan Supreme Court's 91 day adjudication rule, the Third Circuit conducts what are called "pre-exams." Pre-exams are held sometime between the district court arraignment (arraignment on the warrant, held within 48 hours of arrest) and the preliminary examination (i.e. preliminary hearing, which must be held within 14 days of the district court arraignment). Pre-exams are designed to dispose of as many cases as early as possible, but mean that defendants and their attorneys (whom they are usually meeting for the first time) are pressured to settle cases without benefit of a thorough interview, investigation, meaningful discovery, etc.

States have adopted standards to balance the desire for speedy dispositions with a client's constitutional right to counsel. Such standards can: prohibit certain classifications of cases from ever going through an early case resolution program; demand that full discovery be turned over to the defense, including a cover letter or simple pleading that will be filed with the trial court wherein the prosecutor states that all discovery pursuant to the rules of court and that all exculpatory information in the possession of the state has been turned over to the defense; and, demand that the attorneys have confidential space and time to advise clients so that they can make a knowing and voluntary decision to resolve the case through an ECR program.

For example, the Oregon Public Defender Services Commission (OPDSC) was legislatively created to provide independent oversight of all indigent defense services in the state. OPDSC has adopted a series of guidelines for public defenders participating in early disposition programs (EDP). These guidelines include, among others:

1. An EDP should insure that the programs operation and rules permit the establishment and maintenance of attorney/client relationships.
2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions.
3. An EDP should provide for adequate physical space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.
4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.
5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.
6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict of interest for the client's original attorney.
7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

One of the more controversial aspects of the Oregon standards is found in Guideline 2, which states: "Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial."

Such an acknowledgement shows just how precariously close any early case resolution program comes to breaching clients' constitutional right to counsel. Indeed, the United States District Court, Eastern District for Michigan has held that early case resolution programs that dispose of cases prior to preliminary examination hearings violate clients' right to counsel. *United States v. Morris*, 470 F. 3d 596 (6th Cir. 2006), *aff'd*, 377 F. Supp. 2d 630 (E.D. Mich. 2005). NLADA asked judges and prosecuting attorneys in Wayne County whether they thought the *Morris* decision would result in systemic changes in the Third Circuit. Without exception, the judges and the prosecuting attorney were not familiar with the case (some recognized it after we described the facts and the holding) or tried to describe it as an isolated case that was not representative of how the indigent defense system works in the Third Circuit.

### Grand Traverse County:

It is the practice in both the district court and the circuit court in Grand Traverse County for a single attorney to be appointed to represent an accused and to continuously represent that client until the case is concluded. The district court contract (Sec. 12E) expressly provides that “the signatory attorney to whom a particular case has been assigned shall perform and appear as record counsel to a full disposition of the matter.” Although all felony cases originate in the district court for purposes of arraignment and preliminary hearing, an attorney on the circuit court roster is appointed to commence representation while the case is still in district court. That same attorney continues to represent the defendant in circuit court after the case is transferred.

Grand Traverse County’s “sobriety court” practice, however, does not fully comply with the principle of continuous representation. No defense attorney assists the defendant at review hearings and, despite arguable defenses, the reviews often conclude with the defendant being sent to jail. In one case an NLADA representative observed, the defendant was accused of missing three drug tests. The judge ordered her to Transition House, to “stabilize things.” She asked, “May I respond at all?” And the court responded: “We’ve discussed this and I’ve made my decision.” The defendant said she had ridden her bike to the appointment and been two minutes late and that she was not drinking. The judge said two years of being sober still could result in failure if she did “not pay attention to details.” While we cannot know whether an attorney actively advocating for her would have made a difference, we do know that a pro se defendant in that situation needs counsel. Also, we believe that for the judge to make the decision in advance and not permit mitigation advocacy by the defendant is a violation of due process. The entire proceeding took 12 minutes.

One attorney described the role of the defense attorney in the sobriety court. Three of the attorneys rotate participation. They stand with the client only when there is a probation violation and a threat to be removed from the program. The “sanction hearing” that we saw is not considered to be in that category. The defense attorney participates in a team meeting with the court, in which the lawyer agrees with the sanction that the judge will impose. The attorney we spoke to does not see himself as representing the client, but rather the defense bar, in those meetings. He told us that about half of the defendants who go into sobriety court do so without an attorney representing them when they make the decision. This practice violates the requirement of zealous and independent advocacy of NLADA’s *Ten Tenets of Fair and Effective Problem Solving Courts*, which states: “Nothing in the problem solving court policies or procedures should compromise counsel’s ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.”<sup>114</sup>

Outside of this obstruction of due process, Grand Traverse County appears to do a good job of securing confidentiality for defense attorneys and their clients. Attorneys are able to meet with out-of-custody defendants in their private offices or in several private meeting rooms on the perimeter of the main lobby of the district court or in conference rooms in proximity to the courtroom in the circuit court. There does not appear to be confidential meeting space to meet with incarcerated clients in the courthouses. Incarcerated defendants were seated in the courtroom in the jury box in the circuit court. The district

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court, a new facility, has holding cells off the courtrooms, but they were not being used because of issues with the security cameras and the lack of privacy from the public. Thus it would appear to be necessary to meet with in-custody clients in the county jail adjacent to the courthouses. The jail supervisor indicated that attorneys do meet with their clients regularly, although the meeting rooms are used by numerous professionals so there can be a wait for use of the rooms.

### Oakland County:

For clients who are released on bail in Oakland County, attorney-client conferences take place in the courtroom, in the hallways, or outside the courthouse. Defense attorneys were unanimous in stating that there is very little time to meet with their clients and absolutely nowhere that would be considered confidential according to ABA standards – a corner of the courtroom with a deputy standing close (even pushing the attorney back if she got too close to her client). Client visits (as paid events) are limited to two.

For clients who are incarcerated, the lack of confidential space for attorney-client discussions is a serious and significant problem. Attorneys are not permitted to meet with clients in the courthouse lock-up and conversations with incarcerated clients take place in the courtroom. The clients are seated in the jury box with other defendants and the conversations can be overheard by the other prisoners, sheriffs, and to a lesser extent by anyone else present in the courtroom. It appeared that to have confidential meetings with incarcerated clients, it would be necessary to meet with them in the county jail. One judge indicated that some of the lawyers meet with their clients at the jail, but that there are others who probably do not do so; another said that most do not.

In felony cases, the circuit court in Oakland County appoints the attorney after being notified by the district court of the request for counsel. However, one district court judge indicated that the delay in the assignment of an attorney by the circuit court frequently results in late notice to the attorney and inadequate time to prepare for the preliminary examination in district court. There is excessive use of “stand-ins” and “substitutes.”

### Shiawassee County:

Each of the lawyers interviewed in Shiawassee County has an office adequate to meet with his or her out-of-custody clients. And, since the circuit court judge makes all appointments on felony cases from the time of arraignment in the district court, the same lawyer represents the client throughout the pendency of the proceedings in all cases. The problem in Shiawassee County is for those clients who remain in custody during the pendency of their cases. An NLADA representative was told by both the sheriff and the under-sheriff that there are only about six appointed lawyers who regularly meet with their clients in the county jail. Both pointed to this as a sign of the indifference of the majority of court-appointed lawyers toward their clients. The under-sheriff (who had been a court administrator and court-appointed lawyer himself for a number of years) noted that many lawyers first meet with their in-custody felony clients at the preliminary hearing in court. He expressed the opinion that this is a pervasive problem. He also assigned part of the reason for this to the fact that the county jail is anything but a “user-friendly” environment for lawyers to meet with their clients.

However, one lawyer (who told us that he always visits his in-custody clients promptly after appointment) said that the lack of jail visits had been a big problem in felony cases

and had been addressed by the chief judge of the district court. The chief judge issued an order to all court-appointed counsel compelling them to visit their clients *before* the day of the preliminary hearing. The lawyer thought this order was made because the lack of client visits before the day of the preliminary hearing slowed the process to a crawl while the lawyers conferred with their clients at the courthouse before proceeding with the hearings.

### Alpena & Ottawa Counties:

The right to counsel systems in two counties (Alpena and Ottawa) merit recognition for securing space for client-attorney confidential talks and ensuring continuous representation. For example, the appointed defense lawyers and prosecuting attorney's office in Ottawa County both practice strict vertical representation. Prosecuting Attorney Ron Franz stated that, while vertical representation is not as efficient, it means a lot to the victims to have one prosecutor and to defendants to have one attorney. All the courts in Ottawa County have some private space that defense counsel can use to meet clients. The newer court in Hudsonville has several private meeting rooms that the attorneys can use.

Likewise, all of the attorneys interviewed in Alpena County have professional office space. The law firm of Lamble, Pfeifer & Bayot (LPB) owns its office building; the offices include a waiting area in which a secretary/receptionist is located. There is a reasonably-sized conference room/law library directly to the left of the waiting area. Mr. Lamble indicated that they maintain vertical representation whenever possible, especially for serious felony cases, but they do cover for one another when necessary due to trial or court assignments.

### Marquette & Chippewa:

There are private rooms in the courthouse for attorney-client consultation, and respect for the role of counsel permeated all conversations during our visit to Marquette County. Thus the physical aspects for promotion of attorney-client confidentiality are honored. It is not clear, however, that it is the practice of lawyers to rush to the jail and see their detained clients as early as possible. Indeed, in some cases the notice of assignment is mailed to the defense attorney's office, ensuring additional delay beyond the arraignment date. Thus, compliance with the much more important, albeit implicit, promptness aspect of this principle is doubtful. Failure to provide counsel at arraignment almost guarantees unacceptable delay in counsel conferring with her client "as soon as practicable," as the commentary to this principle urges.

In Chippewa County, the chief judge of the 50th Circuit Court noted that, despite having two to three weeks between preliminary exam in district court (at which time the case is "bound over" to circuit court) and the arraignment in circuit court, defense attorneys routinely meet with their clients for the first time inside the courthouse on the day of their arraignment. The assistant public defender was able to show that, in fact, there is a lag of four to six weeks in the average case between bind-over and arraignment in circuit court. The implication is that public defenders' workload is too great to allow them to meet with their clients. They are forced then to make do with the time and space provided within the courthouse.

The public defender office in Chippewa County has adequate space for confidential meetings with clients. There is a dedicated room for client interviews. In circuit court, a

building on the national register of historic places,<sup>115</sup> there are two rooms available as “confidential” spaces within which to meet with the client. In-custody clients are brought as a group into an auxiliary meeting room attached to the hallway outside the courtroom. Attached to the meeting room is another smaller room (about the size of a walk-in closet) where the defense attorney can call in individuals one-by-one – she must talk softly however as it is possible to hear through the door and a sheriff’s deputy will usually stand guard outside the door. For out-of-custody clients, attorneys make use of the jury room adjacent to the courtroom or the hallway outside.

The district court in Chippewa provides no confidential space within which an attorney may meet with clients. The morning of arraignment in district court, the corridor outside the courtroom is bustling with attorneys meeting clients for the first time. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the uni-sex restroom across from judge’s chambers to discuss the charges, while others will talk softly in the corridor. For in-custody clients, the attorney is allowed to bring her clients out to the corridor, but only so far as the other side of the courtroom door, behind which the sheriff’s deputy stands guard over the rest of the detained accused, very much within earshot of the conversation on the other side of the door.

Client interview rooms at the county jail in Chippewa County are laughable. The attorney enters the room from the corridor outside the 91st District Courtroom, the client from within the jail, and the two can converse by a telephone handset on either side of a Plexiglas barrier. To the attorney’s right, a second Plexiglas barrier separates the client interview room from the general inmate visiting room, which has three or four chairs and phones on both sides of the divider. To the attorney’s left, a sheriff’s deputy sits in a security control room behind black Plexiglas for observation of both the client interview room and the general visiting room. At the base of the black glass dividing the attorney from the sheriff’s deputy, one can see an opening through which the attorney can pass a document so that the deputy would pass the document along to the client on the other side through an identical opening. There is no way to close the opening, and eavesdropping by sheriff’s deputies was reported to be a problem.

Confidentiality in the jail’s client meeting room is further compromised when one considers that the door securing the room from the corridor outside is far from soundproof – when speaking at a normal volume we were able to maintain a conversation through the door with a public defender on the other side. This corridor is the same used by all attorneys as the primary space for meeting clients prior to appearances in district court, as the chief judge’s route of access to his chambers, and as the means of access to the general visiting room through which family members of other inmates will necessarily pass.

Finally, as there is no funding available for accepting collect calls from the jail to the public defender office, the agency has made it a policy not to accept such calls. In-custody clients who wish to communicate with counsel between in-person meetings will write notes addressed to the public defender’s office.<sup>116</sup> The note cannot be sealed, per jail security regulations, and is therefore tri-folded and handed to the deputy on duty who then places the note in a drop box at the jail designated for inmate-to-public defender correspondence (the public defender office’s administrative assistant checks the box every weekday). Should the public defender have a need to send information back to the defendant, she will send it in an envelope clearly marked as confidential attorney-client correspondence. Some inmates began using such envelopes as means for hiding contraband, how-

ever, so they became subject to search by the sheriff's department. It was noted that under both circumstances, client-to-attorney mail and attorney-to-client mail, sensitive information relating to a case had from time to time been read by a sheriff's deputy.

If there is a benefit to clients of having a small pool of available attorneys willing to take right to counsel cases, it is that the same attorney oftentimes will handle the case continuously from assignment through disposition and sentencing. Certainly this is the case in Marquette County. Felony assignments are made by the district court judge from the appropriate felony list, subject to the approval of the circuit court judge if and when the case gets to the higher court.

Though the Chippewa County public defenders maintain vertical representation in most instances, the lack of coordination between the 50th Circuit and 91st District Courts forces the office to occasionally substitute attorneys. While the courts are no more than 30 yards apart (and the defender office is just across the street), it is sometimes difficult for a defender to juggle both schedules. To cope, the two staff attorneys will occasionally sit in for one another on a sentencing or to waive a preliminary exam, for example.

### ***C. The Failure to Adhere to ABA Principle 9: The Lack of Adequate Training for the Defense Function***

It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually every county-based indigent defense system outside of the largest urban centers. And, even those are inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against, and present scientific evidence and testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more “life-in-prison” sentences, and complex sentencing practices that require significant legal and factual research time to prepare and present sentencing recommendations.

To give the reader a sense of how other jurisdictions respond to this ever-evolving complexity, all newly hired lawyers at the Public Defender Services of the District of Columbia (PDS) experience a full 15 months of dedicated training resources. For the first eight-weeks of employment, recent hires undergo all day training, agency and justice system orientation, and an advocacy skills building program, during which time the new attorneys have no client or caseload responsibilities. Current and former PDS attorneys and staff actively participate in this training process, which communicates PDS' client centered culture and expectation of excellence. The new attorney class also receives extensive written materials to support their advocacy and practice needs, as well as their ethical and professional responsibilities.

The closest thing to adequate training in Michigan comes from the State Appellate Defender Office (SADO), Criminal Defense Resource Center (CDRC), through a combination of grants, the SADO budget,<sup>117</sup> and user fees.<sup>118</sup> The CDRC maintains a deep-content web site and help desk and publishes a monthly newsletter and four defense manuals.<sup>119</sup> The CDRC also conducts 18 technology training events each year, at approximately a dozen locations statewide, training trial and appellate attorneys on how to present and challenge

demonstrative evidence, prepare electronic pleadings, and conduct Web-based legal research. And, the CDRC coordinates two three-day-long statewide training conferences and a week-long trial skills college (partnering with the Criminal Defense Attorneys of Michigan), a 10-seminar program on hot legal topics (partnering with the Wayne County Circuit Court), and scholarships for Michigan attorneys to attend national skills training events (the Trial Practice Institute of the National Criminal Defense College and the Appellate Training Conference of the National Legal Aid & Defender Association). A limited amount of other criminal defense training is provided by larger local bar associations, typically through "brown bag lunch" seminars and by the Institute for Continuing Legal Education (ICLE).<sup>120</sup>

Most of the funding for criminal defense training comes from grants awarded by the Michigan Commission on Law Enforcement Standards and from fees paid by trainees. A small percentage of SADO's state general fund budget is devoted to training, and it is inadequate to reach the large number of potential trainees. In contrast to the very limited state-funded training for the criminal defense bar, Michigan's prosecutors are served by the Prosecuting Attorneys Coordinating Council (PACC).<sup>121</sup> There are a total of approximately 650 state court prosecutors statewide. The PAAC was funded at \$1,860,900 during the 2006 budget year, with a staff of 15 full time employees.<sup>122</sup> The MCOLES award for prosecutor training that year was approximately \$330,000.

So, while the district court contract in Grand Traverse County requires each attorney participant to attend at least one two-day ICLE seminar or its equivalent during each calendar year, there is no provision in the contract for the court to make such training available or to pay for the training. Consequently, any training is at the individual attorney's own expense. The free training provided by SADO can be expensive to get to and it is time consuming for the attorneys to attend. We heard similar complaints about the SADO training from attorneys in Ottawa County. Bay County pays for defender attorneys to attend the two conferences conducted each year by the Criminal Defense Attorneys of Michigan (CDAM). However, the county will not pay for attendance at SADO training or any national training conferences. One attorney in Shiawassee said that, while the CDAM and the State Appellate Public Defender offer a wide variety of excellent education and training, "I can't really afford the courses offered, since they can cost \$200 to \$300, and are offered out of our area."

The only area of the state<sup>123</sup> that partially complies with the training principle is Wayne County. Wayne County has a Criminal Advocacy Program (CAP) run by the Wayne County Criminal Defense Bar Association ("WCCDBA"). CAP was established in 1983 "for the purpose of developing, expanding, and maintaining high professional standards of representation in felony cases."<sup>124</sup> CAP has a board of directors, composed of judges, private attorneys, the deputy director of the State Appellate Defender Office, the head of LADA, and the county prosecutor.

In order to be placed on the court administration list of attorneys eligible to receive appointments in the Wayne County Circuit Court, attorneys with fewer than 10 years of experience must attend at least six of the 10 CAP sessions offered each year, and those with more than 10 years of experience must attend at least four of the annual sessions. No more than two of the required sessions may be made up by viewing videotapes according to a specified "makeup" procedure.<sup>125</sup> For the Fall 2006 series, the sessions included: A View from the Bench; Civil Consequences of Pleas/Trials; Sentencing Guidelines; How to Get

Your Client Medical and Psychological Services While In the Wayne County Jail; Power Up Your Trial Presentation (Use of Technology in the Courtroom); Drug Court and Treatment Facilities; Preliminary Exams; Demonstrative Evidence; Criminal Law Update; and US Supreme Court Update.

### ***D. Failure to Adhere to Principle 10: The Lack of Supervision over Attorney Performance***

An assessment of attorney supervision against national standards serves as an appropriate conclusion to this chapter since, for the most part, what little supervision is occurring is being conducted by judges in violation (again) of ABA *Principle 1*. For example, there are no national or local performance standards adopted by Grand Traverse County under which assigned counsel are evaluated. Supervision of assigned counsel is limited to the court's exercise of its supervisory authority over these attorneys as members of the bar or to monitoring compliance with the provisions of the district court contract or in the handling of individual cases. Systematic review for quality and efficiency does not take place. Review of attorney performance is done on an ad hoc basis by the judges to ensure that the attorneys are meeting the judges' expectations.

One circuit court judge indicated that one attorney was removed from the roster in recent years because "he wasn't getting the job done" and was filing too many "frivolous motions" and another attorney was removed for an ethical breach. No attorney has been removed from the district court contract in at least four years. Judges indicated that there is currently one contract attorney regarding whom they have some concerns about his performance. The district court administrator said that, while some attorneys "give it their all," others "give the bare minimum." She said they could get rid of the attorneys who do the bare minimum, but they do not. She said she has never received a client complaint about the defense attorneys. Judges indicated that they like to control the assigned counsel system to ensure that only competent lawyers are appointed. Attorneys complained that the system in the circuit court is "too efficient" and that the judges put them under a lot of pressure to dispose of cases quickly under a very short timetable. Efficiency is an issue in the outlying counties also (Antrim; Leelanau). Because of the infrequency of court sessions (e.g., one per week), cases are scheduled quickly with little time to prepare.

The judges believe that they exercise oversight in that they see the lawyers every day in their courts and "know if they are doing a good job." They said if they have a problem with a lawyer, they could call him in and talk with him and if things didn't change he might be removed from the list; if a complaint is made about a lawyer they follow-up on it. The judges stated that once a year every attorney on the list is evaluated. An evaluation form for each attorney is sent to every judge before whom the attorney has appeared. Each judge prepares an independent evaluation and then, as a group, the judges meet to discuss each attorney evaluated. At this evaluation attorneys can be removed from the list, have their level changed – up or down, and new attorneys may be added to the list.

Defense attorneys in Oakland County are not "supervised" in any formal sense. Some of the circuit court judges who make appointments informally assess the ability and experience of the lawyers they appoint, but there is no formal mechanism for such evaluation. A similar informal judicial assessment is done in Shiawassee County.

The Third Circuit Administrative Order in Wayne County governing the appointment and removal of assigned counsel establishes an Attorney Review Committee, including the presiding judge of the Criminal Division, the executive court administrator and two Criminal Division judges.<sup>126</sup> This committee reviews referrals made by judges regarding attorneys whom they believe should be considered for removal from the appointment list.<sup>127</sup> The chief judge said it is unusual for an attorney to be removed from the appointment list, unless it is something of a “grievable nature.” The Administrative Order also states that individual judges may remove appointed attorneys from particular cases: if a defendant demands that appointed counsel be replaced; if a defendant appears after the issuance of a *capias*; if an attorney fails to appear at a scheduled hearing; or “for other good cause,” which is not defined.<sup>128</sup>

While some appointed attorneys attempt to and do provide quality representation to their clients in Wayne County, there is a disturbing lack of competence and diligence in too many cases – not all of which can be attributed to lack of resources, excessive caseloads, and the 91-day rule. In the space of two days of court observations, NLADA site team members observed the following:

- Attorneys representing co-defendants at arraignment with no on-the-record waiver of the conflict of interest;<sup>129</sup>
- An attorney prepared to have the defendant plead as charged, because he had not read, or re-read, the prosecuting attorney’s offer. The judge asked the attorney if he really wanted to do that, since the prosecuting attorney’s written offer (a copy of which was in the court file) was for a plea to reduced charges.<sup>130</sup> The defendant then pled to the reduced charges.
- Another attorney (before the same judge) wanted to set for trial a DUI case where the defendant had a .22 blood alcohol reading, without asking the judge for a Cobbs hearing.<sup>131</sup> The judge said in open court that it was “almost malpractice” for the attorney not to request a Cobbs hearing, and, after some back and forth, the attorney finally requested a Cobbs hearing;
- An attorney at a sentencing hearing did not object, or request a reduction, when the judge included various fees plus \$300 in court fees and \$400 in attorneys’ fees on each of two cases for which the defendant was being sentenced;
- An attorney at an arraignment hearing did not know that the offense of serving liquor without a license is a one-year felony, not a one-year misdemeanor – even though it was in both the information and complaint. The judge read it as a misdemeanor, and the prosecuting attorney had to point out the error.

Q & A

**Q: Does a Public Defender Model Provide More Efficient & Effective Services?**

**A: Maybe.** ABA *Principle 2* states that jurisdictions with a sufficiently high caseload should deliver services through a public defender office, while leaving enough conflict and overflow cases to allow for the continued active participation of the private bar. Several reports support this recommendation,<sup>3</sup> concluding that full-time staffed public defender offices do provide the most efficient and cost-effective representation, due to a number of factors (familiarity with criminal law; specialization for certain types of cases; and centralization of administrative costs). Given this, it is important to note that Wayne and Oakland Counties are two of only six of the United States' 50 most populous counties not to have a full-time public defender office as its primary trial-level service provider. And, the four other largest counties without a staffed public defender office are all in Texas, where indigent defense services have been universally decried as not meeting constitutional muster. Even there, Travis County (Austin) has a public defender office for juvenile and mental health cases.

However, a public defender office does not guarantee efficient & effective services. That phenomenon only holds true if the public defender office is appropriately funded and meets nationally-recognized standards – such as the ABA *Ten Principles*. The efficiencies and effectiveness inherent in the public defender model are premised on being able to bring together a team of attorneys, investigators, and social workers with a variety of complementary skills that no individual alone can possess, allowing greater flexibility and a more rapid response than individuals can achieve alone. Public defender offices that are under-funded and fail to meet standards are just as problematic as poorly funded assigned counsel systems with no institutionalized standards – perhaps worse, since an under-funded public defender office tends to have to contend with crushing caseloads as well.

<sup>3</sup> See for example: West Virginia Office of Legislative Auditor, *Preliminary Performance Review of Public Defender Services* (1998) - available at [www.wvpds.org](http://www.wvpds.org); West Virginia Public Defender Services, *Report of the Indigent Defense Task Force*, January 2000 – also available at [www.wvpds.org](http://www.wvpds.org); The Spangenberg Group, *Final Report to the West Virginia Indigent Defense Task Force*, January 2000; North Carolina Indigent Defense Services, *FY02 North Carolina Public Defender & Private Assigned Counsel Cost Benefit Analysis*, 2003 – available at [www.ncids.org](http://www.ncids.org).

Most Populous U.S. Counties

1	Los Angeles County	CA	Los Angeles	9,945,081	County Public Defender Office
2	Cook County	IL	Chicago	5,288,655	County Public Defender Office
3	Harris County	TX	Houston	3,866,207	Assigned Counsel System
4	Maricopa County	AZ	Phoenix	3,768,123	County Public Defender Office
5	Orange County	CA	Santa Ana	3,002,048	County Public Defender Office
6	San Diego County	CA	San Diego	2,941,454	County Public Defender Office
7	Kings County	NY	Brooklyn	2,508,820	County Public Defender Office
8	Miami-Dade County	FL	Miami	2,402,208	County Public Defender Office
9	Dallas County	TX	Dallas	2,345,815	County Public Defender Office
10	Queens County	NY	Jamaica	2,255,175	County Public Defender Office
11	Riverside County	CA	Riverside	2,026,803	County Public Defender Office
12	San Bernardino County	CA	San Bernardino	9,948,081	County Public Defender Office
13	Wayne County	MI	Detroit	1,971,853	Assigned Counsel System
14	King County	WA	Seattle	1,826,732	4 - 501c3 Independent PD Offices
15	Broward County	FL	Fort Lauderdale	1,787,636	County Public Defender Office
16	Clark County	NV	Las Vegas	1,777,539	County Public Defender Office
17	Santa Clara County	CA	San Jose	1,731,281	County Public Defender Office
18	Tarrant County	TX	Fort Worth	1,671,295	Assigned Counsel System
19	New York County	NY	Manhattan	1,611,581	County Public Defender Office
20	Bexar County	TX	San Antonio	1,555,592	Limited Public Defender Office
21	Suffolk County	CA	Riverhead	1,469,715	County Public Defender Office
22	Middlesex County	MA	Cambridge	1,467,016	Statewide Oversight/Felony PD Office
23	Alameda County	CA	Oakland	1,457,426	County Public Defender Office
24	Philadelphia County	PA	Philadelphia	1,448,394	County Public Defender Office
25	Sacramento County	CA	Sacramento	1,374,724	County Public Defender Office
26	Bronx County	NY	The Bronx	1,361,473	County Public Defender Office
27	Nassau County	NY	Mineola	1,325,662	County Public Defender Office
28	Cuyahoga County	OH	Cleveland	1,314,241	County Public Defender Office
29	Palm Beach County	FL	West Palm Beach	1,274,013	County Public Defender Office
30	Allegheny County	PA	Pittsburgh	1,223,411	County Public Defender Office
31	Oakland County	MI	Pontiac	1,214,255	Assigned Counsel System
32	Hillsborough County	FL	Tampa	1,157,738	County Public Defender Office
33	Hennepin County	MN	Minneapolis	1,122,093	Statewide Public Defender
34	Franklin County	OH	Columbus	1,095,662	County Public Defender Office
35	Orange County	FL	Orlando	1,043,500	County Public Defender Office
36	Contra Costa County	CA	Martinez	1,024,319	County Public Defender Office
37	Fairfax County	VA	Fairfax	1,010,443	County Public Defender Office
38	Saint Louis County	MO	Clayton	1,000,510	Statewide Public Defender
39	Salt Lake County	UT	Salt Lake City	978,701	County Public Defender Office
40	Fulton County	GA	Atlanta	960,009	County Public Defender Office

Breaking News!

HOUSTON, TX, April 2008 — Under the leadership of State Senator Rodney Ellis and at the request of local community groups, the Harris County Commissioners have voted to undergo a feasibility study to create the county's first staffed public defender office.

## Creating a Level Playing Field: The Failure to Ensure Prosecutor & Defender Parity

**A**BA *Principle 8* requires parity between the resources of the public defender and those of the prosecutor, including “parity of workload, salaries and other resources.”<sup>132</sup> One of the reasons why *Gideon* determined that defense lawyers were “necessities” rather than “luxuries” was the simple acknowledgement that states “quite properly spend vast sums of money” to establish a “machinery” to prosecute offenders. This “machinery” – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without such resources, the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching.

In 1972, Chief Justice Warren Burger in his concurring opinion in *Argersinger* even went so far as to state that “society’s goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution.”<sup>133</sup> Michigan counties are ill-equipped to make up for the imbalance in resources created by state and federal contributions to local law enforcement.

At its most basic, the concept of parity requires salary parity between public defenders and prosecutors. The Justice Department’s 1999 report, *Improving Criminal Justice*, concludes that “[s]alary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads – the innately linked notions of ‘equal pay’ for ‘equal work.’ The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.”

Jackson County is one of the few counties we have studied anywhere in the country in which the budget of the indigent defense program is essentially the same as the prosecution (at least it was before the recent advent of flat-fee contracts).<sup>134</sup> In 2006, Jackson County spent approximately \$1,241,212 on right to counsel services (or a per capita expenditure of \$7.58)<sup>135</sup> – approximately \$200,000 more than the Prosecuting Attorney’s budget. Though Jackson County should be commended for meeting the standard of parity, there is one caveat. *ABA Principle 8* presumes that the

prosecution is adequately funded. An NLADA representative had the pleasure and privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in March 2008 in Traverse City. Though NLADA is not an expert on the prosecution function, we were not surprised that our presentation on right to counsel systemic deficiencies and under funding was met by similar complaints on the prosecution side of the aisle. It is our general observation that prosecuting attorneys in Michigan are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. We noted with interest as the PAAM representatives discussed strategies to reform the prosecution function that have been similarly employed by defense advocates: assessments against nationally-recognized standards of justice; litigation; and public education.

Though NLADA sympathizes with the plight of Michigan prosecutors, it must be said that there is no constitutional mandate to effective prosecution (perhaps there should be). Rather, the deficiencies of the prosecution function serve to highlight the fact that dollar for dollar parity in Jackson County does not mean much when the prosecution is under funded as well. The situation is therefore exponentially worse in those Michigan counties that do even approximate Jackson County's parity level.

### Grand Traverse County:

There is no parity between the prosecution and the defense in Grand Traverse County with regard to resources or compensation, and the structure does not provide the defense an equal role in the justice system. Whereas prosecutors are full-time county employees with salaries, benefits, office space, and support staffs, assigned counsel attorneys are paid either a flat fee per case in the district court (\$350) or are paid in accordance with an event-based fee schedule in the circuit court. The felony attorneys in 2005 were paid between \$21,580 and \$38,356 for their 62 or 63 cases. This amounts to an average of \$608.83 per case. Given the national experience in law practice in which approximately half of attorneys' gross income is available for compensation, after deducting overhead costs, the real salary for these lawyers is less than \$46,000 per year.

## **ABA 8th Principle**

**There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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The 2006 starting salary for the prosecutors was \$36,400, and with five years experience the prosecutors earn \$67,500. The chief assistant prosecutor can earn up to \$86,000. One of the defense attorneys with 25 years of experience said that, of the eight attorneys on the felony panel, only four or five are financially secure. He said the \$60 per hour fee paid for capital cases barely covers overhead and that it would be hard to live on that pay. Another attorney said he used to take felony appointments but they are no longer cost effective. One of the circuit court judges, when asked why the defenders should not make \$67,500 per year as do the prosecutors, responded: that is “a fair question, but it is more than the market [requires].” This judge said a lot of full-time lawyers in the county earn only about \$40,000 a year. He said he is willing to discuss increasing the rate schedule. The circuit court administrator said there has been no complaint about the fee schedule, and “we're under our budget.”

One attorney with both prosecution and defense experience said the current circuit court fee schedule is poor. The fee schedule is event-based and pays \$600 in any guilty plea case (preliminary hearing waived). In the past, when public defenders were under contract in circuit court, they were paid \$750 for the same disposition. Privately this attorney said she would charge \$3000 for a circuit court plea case; and for a trial case, she would charge an additional \$150 per hour and obtain an advance deposit. Her court appointed work is 20-30 percent of her practice, and she does a heavy concentration of divorce mediation. She wishes the judges in both courts would understand that attorneys have more than court-appointed cases, because the attorneys are put under time pressures. One misdemeanor attorney said “the fear factor prevents us from having real negotiations,” implying the attorneys fear losing appointments if they complain about how little they are paid. The misdemeanor attorneys are paid \$350 per case, but out of that they have to pay for overhead and all case-related out-of-pocket expenses.

If there is a conflict with all of the contract attorneys, the attorneys must provide for other counsel at the expense of the contract attorneys. One of the attorneys told us that the way to “make it economical” is to have four or five hearings set for the same day and that the panel coordinator's legal assistant tries to arrange the assignments that way. The panel coordinator said that \$350 is inadequate and that a number of the attorneys “use it to pay overhead.” One younger lawyer said he is happy to get the experience at this point in his career, but that the payment is not adequate. Although he wants to make his career in criminal defense, he is considering not continuing depending on “what happens at the end of this contract.” One lawyer told us that district court “is more of a cattle call .... You get in, do your job, and get out of there.”

Prosecutors have access to law enforcement personnel for investigation of every case. Assigned counsel attorneys in Grand Traverse County have virtually no access to investigative services in the representation of their clients. One veteran attorney said that he has never been granted funds for an expert toxicologist or an investigator. Another attorney said that, while under *Ake v. Oklahoma* he should be able to get investigation and experts, “I need to work with my judges,” implying that the judges don't appreciate such motions. “It is up to me to investigate.” He added, “I need to have rapport with the judges.” Although judges indicated that funding is available for investigation if necessary and appropriate, very few requests are made in either court – only a de minimis amount is expended on defense investigation annually. The circuit court administrator said that generally the lawyers do their own investigation.<sup>136</sup> One told us that he had only needed

an investigator once or twice years ago and he has never needed an expert witness. The prosecutor said that defense investigation is done on “those cases where it should be.” Noting that there are a lot of property crimes, he asked, “Where do you go with those?” The prosecution has access to experts from the Center for Psychiatry, paid for by the state. Defense attorneys have extremely limited access to independent defense experts. Any expenditure must be approved by the court and Michigan law requires a threshold showing that the expert’s testimony will be helpful to the defense before it can be approved.<sup>137</sup>

### Oakland County:

There is no parity between the prosecution and the defense in the 50th District Court in Oakland County with regard to resources, compensation, or anything else. Most misdemeanor cases in the district court are prosecuted by the city attorney or an assistant city attorney for the City of Pontiac as violations of a city ordinance. State law violations are prosecuted by a county prosecutor. In either case, the prosecuting attorney is a government employee who receives a salary, benefits, and payment of all overhead expenses. Oakland County is yet another example of an indigent defense system in which judges or court personnel could not recall a single instance where funding was provided to a court appointed defense attorney for investigative services in a misdemeanor case. Similarly, assigned counsel in 50th District Court do not request funding to engage the services of expert witnesses in the representation of their clients in misdemeanor cases. Defense attorneys stated that it is futile to ask the court for experts and investigators because such requests will be routinely denied. Thus, they don’t bother to make such requests. The county prosecutor’s office has a very extensive training program for prosecutors, which is funded by the county in the budget. There is no funding for training for assigned counsel.

Defense attorneys in Oakland County pointed out that not only was there a lack of parity in pay, but also in resources, and, as one defense attorney put it, “[t]here is also a psychological lack of parity.” She stated: “When your client sees the deputy put his hands on you and push you away from your client while you’re trying to talk with him – in the courtroom, in front of the judge – it tells that client you’re not respected by the system. And when that same client sees that same deputy paying deference to the prosecutor, it tells that client the system is stacked against him.” Similar stories were conveyed by the other defense attorneys. Prosecutors have “pass-cards” to the judges’ private hallways, while defense attorneys do not. Prosecutors do not have to go through security, while defense attorneys do. Prosecutors have impressive offices, complete libraries, video and computer equipment, automated research capabilities, power-point equipment, meeting and training rooms, and abundant support staff. Defense counsel are not provided with a single office (or space within an office) at the circuit courthouse, even though the defense function is part of the court.

This disparity of respect extends to the view of local county officials. The county executive and his deputy took pride in pointing out that they were former Oakland County prosecutors and talked extensively (as did judges and other court personal) about what a fine office it is – the excellent training, mentoring, and support it provides to its prosecutors; and the importance of the high pay and status to attract and retain the very best talent. When it came to the defense function, we were told “they do a good job .... they probably should get more pay, but they make do.” By no stretch of the imagination is de-

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fense counsel an equal partner in the justice system; no one thinks she is; and no one – except defense counsel – thinks she should be.

### Shiawassee County:

Such a lack of respect was not evident in Shiawassee County. However, all of the judges felt that appointed lawyers are clearly underpaid for their work in comparison with the prosecutors. All indicated that a raise in the hourly rate is overdue. Most of the lawyers to whom we spoke described the \$50 hourly rate as small but “fair.” One lawyer, who had been on the court-appointed list for five years but who no longer accepts appointments, cited the low pay as a reason for “moving on” from court-appointed work to concentrate on his vastly more lucrative private practice. He indicated that the \$50 per hour rate was so far beneath his \$200 per hour private rate that he could simply no longer afford to accept appointments. He said he had very much enjoyed his five years of representing indigent clients, noting that he was delighted to have been appointed to represent a client in a murder case. He felt that the current hourly rate is the principal reason that some very talented lawyers no longer accept court appointments.

The lack of anything approaching parity of investigatory services seen in other counties is also true of Shiawassee County. One lawyer, who had been accepting court-appointed cases in Shiawassee County for eight years, told us that not only had he never asked the court for funds for an investigator or an expert, he did not even know of another lawyer who had been granted such funds. He, and other lawyers to whom NLADA site team members spoke, indicated that when they want to interview a defense witness or to investigate details about an alleged crime, they either: a) call the witnesses on the phone to interview them themselves, or – like in Ottawa County – b) ask the prosecutor’s office to send the police out to interview the witnesses again.

When NLADA representatives asked why defense attorneys would proceed to defend their cases in this fashion, we were told that the judge would never grant them money for such a request and “this is the way we’ve always done it.” When an NLADA representative asked one lawyer in Shiawassee what he would do if a witness “went sideways” on the stand during trial from what he had told the lawyer before trial, he said he would probably have to become a witness himself, taking the stand and asking another lawyer to step in to elicit the impeachment material from him at the trial.

When we asked the circuit court judge about the availability of funds for investigators and/or experts, he indicated he would grant (and had in the past) such requests on occasion, but would do so only where the lawyer clearly demonstrates a need for such ancillary services and after he makes certain the defense lawyer has secured the best possible price from the investigator or expert (as he feels compelled to do by statute, which requires him to pay only a reasonable amount for such services at public expense). It is clear that there is to some degree a disconnect between the circuit court judge and appointed counsel on this subject. The court-appointed lawyers feel that asking for funds for investigation or expert assistance is a futile act. They also appear to be disturbingly comfortable with the idea that the arresting police agencies will gather information that will assist the defense.

### Wayne County:

Significantly, the Third Circuit in Wayne County does not come close to complying with

the parity principle. According to the chief judge, the Wayne County indigent defense budget is \$18 million, compared to \$39 million for the Prosecuting Attorney. Furthermore, this parity comparison must recognize that the Prosecuting Attorney claims the entire prosecution system is under-resourced and salaries in her office are too low. Assigned counsel fees have not been increased in 20 years, and the salaries paid to attorneys in LADA are significantly lower than what attorneys in the Prosecuting Attorney's office are paid.

Virtually everyone interviewed by the NLADA site team characterized the assigned counsel fee structure in Wayne County as archaic. Because the fees are so low, some attorneys seek to generate a high volume of appointments to increase their income. Payment is event-based (as opposed to hourly), with the payment based on the seriousness of the case (potential sentence of five years/10 years/20 years/life in prison). As an example, the fee for preparation and investigation of a case carrying a potential maximum sentence of up to 20 years is \$170; for preparation and investigation of a life maximum sentence is \$210; and for preparation and investigation of a murder one case is \$270. Attorneys receive payment for one jail visit to in-custody clients (a flat \$50) facing a potential sentence less than life and two jail visits for clients charged with capital offenses. Attorneys report that many of them make more visits, even though they are not paid for them. The prosecutor said it has been calculated that assigned counsel earn an effective hourly rate of \$10 when the fees they receive are divided by the hours spent on cases.<sup>138</sup>

Fees for investigators and expert witnesses for indigent defense cases are very low and even then require a judge's approval.<sup>139</sup> For example, the fee schedule for a psychiatric expert in a case where the potential sentence is life in prison is a flat \$500 for the interview and written evaluation and \$300 for attendance in court. Attorneys report that the low fees make it extremely difficult to establish a pool of expert witnesses who will work on their cases. Moreover, the lack of adequate funding for expert witnesses, combined with the 91-day case adjudication rule, has resulted in cases where defense counsel say they have been forced to trial without an independent DNA analysis. In more than one case, attorneys reported they were told to use the Michigan State Police to conduct an analysis of DNA evidence. In comparison, the Prosecuting Attorney reported that her office has 11 staff investigators (down from a high of 19) and four or five paralegals. As with prosecutorial offices around the country, the Wayne County DA's office receives grant money, including federal funds for victim projects and state funds for juvenile projects, in addition to its county funding. Attorneys in the DA's office receive medical benefits and participate in the county retirement plan; attorneys in LADA (which is not a county agency) have neither.

### Chippewa & Marquette

In Marquette County, the prosecutor has a staff of approximately eight attorneys, which seems almost luxurious for the business at hand in a rural and peaceful county. Assistant prosecutors receive ample free continuing training, which assigned defense counsel attorneys do not. In addition, as a long-term (since 1973) elected county official, longest-serving state prosecutor, and head of the state prosecutor's training committee, the prosecution in Marquette County has a strong policy voice, which the leaderless defense bar lacks completely. As to the availability of investigators and experts, reports were anecdotal and mixed: Judge Weber said he routinely allows such motions, despite their drain on the

limited county coffers; but the lawyers said they would file such motions only in serious cases with demonstrated need. For example, most lawyers routinely do their own investigations, despite the ever present danger that doing so may make them witnesses, which would require them to withdraw and thereby deprive their client of their services. Marquette County offers no training to defense lawyers and very few, if any, attorneys subscribe to the Michigan SADO on-line case updates. Lawyers and judges alike pointed to the absence of trial practice and legal developments training as a significant flaw in the current assigned counsel system.

The county prosecutor in Chippewa has seven staff attorneys – one assigned to family court, one to juvenile court, and the other five to adult criminal court – and three support staff. The public defender has two attorneys and one support staffer. The difference in budget is approximately 2:1 in favor of the prosecutor. Each year, the county prosecutor has funds to send one attorney to the Michigan Association of Prosecutors' trial skills training, whereas the defenders have no such funds in their budget. While there are 11 police agencies with jurisdiction within Chippewa County,<sup>140</sup> each charged with investigating crimes on behalf of the county prosecutor including in some circumstances access to federal crime labs, the public defender has no funds for investigators or special expertise of any kind.



## Conclusion: Michigan's *Eleventh Principle*

Though NLADA assessed the state of the right to counsel in Michigan against the ABA *Ten Principles*, we note that the Michigan Task Force has promulgated an *11th Principle*: “One function of an indigent defense system is to explore and advocate for programs that improve the effectiveness and efficiency of the criminal justice system and that reduce recidivism.” NLADA supports this platform.

However, current opportunities to act in such a responsible manner are being missed in Michigan. For example, in the district court of Grand Traverse County, approximately 10 percent of all cases are for driving with a suspended license (DWLS). The jail manager told us that two percent of the people in jail are there for DWLS charges. Diverting these cases out of the regular prosecution system and establishing a program to help people regain their licenses could free funds for other far more serious defense purposes, avoid the need to appoint counsel, and help defendants maintain their jobs and avoid court costs and jail costs. The court administrator in Grand Traverse County indicated an interest in such a program. The prosecutor also noted that DWLS needs to be addressed, that “it’s an economic issue,” and that most of the defendants have no other criminal record. One of the judges told us the state “driver responsibility” fees are so high that most people cannot pay them and many are caught driving again with a suspended license.

Another area worth exploring in Grand Traverse County is the extensive use of probation for long periods of time, resulting in a number of probation revocations and jail sentences. We heard more than once the local motto for this resort community: “Come on vacation, leave on probation.” It is not our place to say Michigan must deemphasize incarceration, only to note that without a uniform statewide structure, Michigan will always lack the ability to implement its *11th Principle*. The ability of defense advocates to currently speak with a single, unified voice on justice matters and effectively advocate in such a manner is seriously diluted in Michigan by the Balkanization of service providers.<sup>141</sup>

Our Constitutional rights extend to all of our citizens, not merely those of sufficient means. Though we understand that policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed to the poor due to insufficient funds. The issues raised in this report serve to underscore the failure on the part of the state of Michigan to live up to the mandate of the U.S. Supreme Court *Gideon* decision. Though some may argue that it is within the law for state government to pass along its constitutional obligations to its counties, it is also the case that the failure of the counties to meet constitutional muster

regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision. Unfortunately, the state's abdication of its responsibilities exposes counties like Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne to potentially costly litigation around these issues.

# Endnotes

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<sup>1</sup> *Powell* established the right to counsel in capital cases. Thirty-one years later, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court extended the right to felony trials. The right to counsel has been consistently extended over the ensuing four and a half decades to include: direct appeals – *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation – *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement – *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings – *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment – *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002). Most recently, the Roberts Court found that indigent defendants who plead guilty at the trial-level do not give up their right to counsel on appeal to challenge their sentencing – *Halbert v. Michigan*, 545 U.S. 602 (2005).

<sup>2</sup> The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems*, infra n.12) (<http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf>); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). Other related national standards: American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Defense Function* (3rd ed., 1993); Report on Courts, Chapter 13: *The Defense* (National Advisory Commission on Criminal Justice Standards and Goals, 1973).

With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise. In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor. NLADA's Justice Standards, Evaluation & Research Initiative (JSERI) is a research project with a discrete national capacity for public defense data collection, research, standards-based evaluation, and technical assistance. NLADA standards-based assessments utilize a modified version of the Pieczenik *Evaluation Design for Public Defender Offices*, which has been used since 1976 by NLADA and other organizations, such as the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The design incorporates reviewing budgetary, caseload, and organizational information from a jurisdiction, in addition to site visits to perform court observations. JSERI has become the standard bearer in helping assure local compliance with national indigent defense norms of quality in areas where government policy-makers themselves may lack expertise.

<sup>3</sup> MCL § 775.16. "This section, as originally enacted, reenacted, except proviso, section 1 of Pub Acts 1857, No. 109, being CL 1857, § 5675." See generally, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. Chicago: American Bar Association Standing Committee on Legal Aid and Indigent Defen-

dants (December, 2004).

<sup>4</sup> The statewide study of public defender services was conducted under the auspices of a joint resolution of the Michigan Legislature (SCR 39) through a generous grant of the Atlantic Philanthropies. The resolution states whereas the people of Michigan “expect the government to administer a system of justice that is just, swift, accountable and frugal,” and “whereas there is no accounting of total indigent defense cases nor complete accounting of expenditures dedicated to public defense services, the Michigan Legislature requests the NLADA, in cooperation with the State Bar of Michigan, to issue a report respecting the fairness, cost and accountability of the various indigent defense systems throughout the state.”

<sup>5</sup> Emphasis added.

<sup>6</sup> The onus on state government to fund 100 percent of indigent defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 2: “*Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide*”. See also: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976), Guideline 2.4.

<sup>7</sup> The Constitution of Michigan of 1963 echoes the right to counsel as provided in the U.S. Constitution, that “[i]n every criminal prosecution, the accused shall have the right .... to have the assistance of counsel for his or her defense.” Constitution of Michigan of 1963, Article I § 20. The Michigan Code of Criminal Procedure, Chapter XV § 775.16, states: “When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived examination on the charge upon which the person appears, the person shall be advised of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder's court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.”

<sup>8</sup> Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

<sup>9</sup> Kansas (state funds 77.3 percent of total \$23.4 million expenditure); Oklahoma (state funds 61.6 percent of total \$28.4 million expenditure); and South Carolina (state created statewide circuit public defender system in the 2007 legislative session. State now funds 63.8 percent of total \$32.5 million expenditure). State expenditures and percentages are based recent NLADA research and 2005 data collected by The Spangenberg Group under the auspices of the American Bar Association. See: *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005*. (November 2006).

<sup>10</sup> The seven states that provide no state money for trial-level representation are: Arizona, California, Idaho, Michigan, Pennsylvania, Utah, and Washington.

<sup>11</sup> See, for example: The National Legal Aid & Defender Association. *Indigent Defense Assessment of Venango County, Pennsylvania*. June, 2002, at pp. 54-55. “In conclusion, NLADA believes that Venango County has the personnel to make the tough criminal justice decisions that lay ahead to ensure adequate representation to its indigent citizens. Unfortunately, the economic realities of the county are such that should all of the recommendations detailed in this report be enacted, we still believe that it is only a matter

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of time until the adequacy of indigent defense services is again put in jeopardy. The number of cases entering the Venango County criminal court system is growing and becoming more serious in nature with each passing year, despite a declining population. Thus, the burden of paying to protect the rights of defendants will continue to increase as the county tax-base further declines.”

<sup>12</sup> All county population and poverty rates obtained from the United States Census Bureau. See: <http://quickfacts.census.gov/qfd/states/26000.html>; County crime statistics obtained from the Michigan State Police, Uniform Crime Reports. See: [http://www.michigan.gov/msp/0,1607,7-123-1645\\_3501\\_4621-25744--,00.html](http://www.michigan.gov/msp/0,1607,7-123-1645_3501_4621-25744--,00.html).

<sup>13</sup> NLADA received a spreadsheet from the Administrative Office of Courts entitled *Totals by Court, 2004-2006* showing amounts paid to all attorneys by court (circuit, district, probate, and municipal). The spreadsheet did not breakout criminal case from civil proceedings such as neglect and abuse, termination of parental rights, etc. NLADA included the total costs for all circuit and district courts and estimated 2/3 of probate costs to cover representation in juvenile delinquency proceedings. We believe the approximate \$74 million dollar figure for indigent defense errs on the side of being overly cautious – we think the actual total being spent on right to counsel cases in criminal and delinquency cases is actually somewhat less.

<sup>14</sup> See for example: Bright, Stephen B., *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake* (1997); The American Bar Association., *Gideon's Broken Promise*, 2004: “Problems resulting from funding and resource inadequacies were exacerbated in Alabama during 2003 due to the state’s fiscal crisis; ... A recent survey of 1,867 felony case files from contract defenders in four of the state’s judicial circuits revealed that no motions were filed for funds for experts or investigators in 99.4 percent of the cases; ... Despite national standards recommending that counsel be provided as soon as feasible after custody begins, many poor persons accused of crime in Alabama are arrested and detained in local jails for several months before finally entering a guilty plea, during which time they no nothing about their cases, not even the identity of their contract defenders.”

<sup>15</sup> NLADA undertook a 50 state survey to collect indigent defense expenditure data. In instances in which counties are the main source of funding and a survey was impractical, NLADA relied on the most recent expenditure data collect by The Spangenberg Group under the auspices of the American Bar Association, Standing Committee on Legal Aid & Indigent Defense, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2005*, (December 2006).

<sup>16</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System*, (Principle 2): Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

<sup>17</sup> The term “staffed public defender office” is meant to describe a public agency or private not-for-profit corporation with salaried staff attorneys whose sole function is to represent indigent clients upon appointment by a judge or court administrator. There are five such offices in Michigan in Bay, Chippewa, Kent, Washtenaw and Wayne Counties.

<sup>18</sup> The Legal Aid and Defender Association of Detroit operates under Supreme Court Administrative Order 1972-2, which states:

“It appearing to the Court that the Defender's Office of the Legal Aid and Defender Association of Detroit is a nonprofit organization providing counsel to indigent defendants in the Wayne Circuit Court and the Recorder's Court of the City of Detroit, and that such method of providing counsel to indigent defendants should be encouraged for the efficient administration of criminal justice; and

“It further appearing that assignments from Recorder's Court have been irregular, sometimes involving

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too many such assignments and sometimes too few;

“Now, therefore, it is ordered that, from the date of this order until the further order of this Court, the Presiding Judge of Recorder’s Court of the City of Detroit shall assign as counsel, on a weekly basis, the Defender’s Office of the Legal Aid and Defender Association of Detroit in twenty-five percent of all cases wherein counsel are appointed for indigent defendants.”

Administrative Orders can be found at <http://courtofappeals.mijud.net/rules/public/default.asp>

<sup>19</sup> NLADA reviewed a wide array of documents related to the delivery of indigent defense services throughout the state of Michigan, including county reports submitted to the state court administrator pursuant to Michigan Supreme Court Administrative Rules of Court (MCR 8.123, effective January 1, 2004) regarding the appointment of counsel, the method and manner of compensation, and the negotiation and awarding of contracts, among others. Though Leelanau County was not a subject of our site work, NLADA will use factual data from other counties throughout the report to demonstrate the statewide nature of the public defense systemic deficiencies.

<sup>20</sup> Levine, Barbara R., “Funding Indigent Criminal Defense in Michigan,” Michigan Bar Journal, February 1992, Vol. 71, No. 2., pg. 144.

<sup>21</sup> See generally, Lemos, Margaret H. “Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense.” New York University Law Review Vol. 75:1808 (December 2000), available at: <http://www.law.nyu.edu/journals/lawreview/issues/vol75/no6/nyu606.pdf>. See also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984), in which the Supreme Court of Arizona found that the lowest bid system for obtaining indigent defense counsel in Mohave County violated the defendant’s right to due process and right to counsel under Arizona and U.S. Constitutions. Citing NLADA’s “Guidelines for Negotiating and Awarding Indigent Defense Contracts,” and other national standards, the court found a systemic failure in low-bid contracting as:

1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants.
2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.
3. The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned....
4. The system does not take into account the complexity of each case.

<sup>22</sup> The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or “to waive a client’s rights for reasons not related to the client’s best interests.” For these reasons, all national standards, as summarized in the eighth of the ABA’s *Ten Principles*, direct that: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

<sup>23</sup> National Legal Aid & Defender Association. *Review of First Year Operations of the Juvenile Defender Services: Wayne County, Michigan*. August 1974. p. 2.

<sup>24</sup> National Legal Aid & Defender Association, National Center for Defense Management. *Evaluation of the Detroit-Wayne County Juvenile Defender Office*. 1978. (Preface, p. iii).

<sup>25</sup> Michigan State Bar Journal, at 242 (March 1978).

<sup>26</sup> Michigan Bar Journal, “Indigent Criminal Defense,” February 1992, Vol. 71, No. 2.

<sup>27</sup> Id.at 135.

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<sup>28</sup> Testimony recorded in 2003, was published in 2005 as part of "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." Michigan testimony can be found at: <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/mi.pdf>

<sup>29</sup> *In re Wayne County Criminal Defense Attorneys Association and Criminal Defense Attorneys Association of Michigan*, Complaint for Superintending Control against Chief Judges of Wayne Circuit Court, seeking enforcement of statutory right to "reasonable fees." Filed November 8, 2002; denied by Michigan Supreme Court on June 27, 2003. All materials available at: <http://www.sado.org/publicdefense/#II>.

<sup>30</sup> *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 503 N.W.2d 885 (1993). Complaint for superintending control against the chief judges of Wayne circuit court, asking that the "flat fee" schedule for assigned counsel compensation be set aside in favor of more reasonable fees. The Supreme Court issued an order appointing a special master, who then recommended that the flat fee schedule be removed in favor of a new schedule – either payment of \$75 per hour or enactment of the 1982 event-based fee schedule adjusted for inflation. The fee schedule in place in 2002 was established by Administrative Order 1998-03 (an order that mirrored the court's decision in *In the Matter of the Recorder's Court Bar Association*, with some minor adjustments), minus 10 percent resulting from an administrative action of the chief judges of Wayne circuit court, on June 25, 2001. See: <http://www.sado.org/publicdefense/complaint.pdf>, page 6.

<sup>31</sup> <http://www.mipublicdefense.org/>

<sup>32</sup> The 11th Michigan *Principle* states: "When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism. The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society."

<sup>33</sup> [http://www.mipublicdefense.org/2005\\_bill.pdf](http://www.mipublicdefense.org/2005_bill.pdf)

<sup>34</sup> As of this writing, the defendants in *Duncan* have appealed the trial court's denial of the defense of governmental immunity. Additionally, the defendants sought leave to appeal the trial court's denial of their motion to dismiss on grounds unrelated to governmental immunity. On February 22, 2008, the Court of Appeals granted this application for leave to appeal. The appeal covers numerous issues, including: whether the plaintiffs have standing; whether the plaintiffs' claims are ripe for adjudication; whether the plaintiffs have alleged facts sufficient to state a claim for equitable relief; whether the plaintiffs have adequately pleaded violations of their constitutional rights; whether the trial court has subject matter jurisdiction over this matter; and whether the plaintiffs are the proper parties to bring this suit and whether the state and the governor are the proper defendants. In evaluating this appeal, the Court of Appeals will review the trial court's order de novo. Finally, the defendants sought leave to appeal the trial court's class certification decision. The Court of Appeals also granted this application for leave to appeal on February 22, 2008. The Court of Appeals will reverse the trial court's decision to certify the class only if finds that the trial court's decision was clearly erroneous. The Court of Appeals has consolidated all three pending appeals.

<sup>35</sup> *Faretta v. California*, 422 U.S. 806 (1975).

<sup>36</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>37</sup> *Tovar*, 541 U.S. at 88. While not purporting to prescribe a proper colloquy for waiver prior to entry of an uncounseled plea, *Tovar* acknowledges that the colloquy required may be less than that required for a waiver of counsel prior to representing oneself at trial, but is likely more than that required for preliminary matters such as a waiver of *Miranda* rights. *Tovar*, 541 U.S. at 90-92.

<sup>38</sup> *U.S. v. McDowell*, 814 F.2d 245, 249-50 (6th Cir. 1987). When a defendant states that he wishes to represent himself, you [the judge] should ... ask questions similar to the following: (a) Have you ever studied law?;

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(b) Have you ever represented yourself or any other defendant in a criminal action?; (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.); (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least \$50 (\$25 if a misdemeanor) and could sentence you to as much as \_\_ years in prison and fine you as much as \$\_\_? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.); (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?; (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case; (g) Are you familiar with the *Federal Rules of Evidence*?; (h) You realize, do you not, that the *Federal Rules of Evidence* govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?; (i) Are you familiar with the *Federal Rules of Criminal Procedure*?; (j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?; (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony; (l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself; (m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?; (n) Is your decision entirely voluntary on your part?; (o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself;" (p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself. *Guideline For District Judges from 1 Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986).

<sup>39</sup> *U.S. v. Akins*, 276 F.3d 1141, 1144 (9th Cir. 2002). *Tovar* suggests that the overall recommendations of *Akins* may be at the far end of the spectrum of what is required.

<sup>40</sup> As Justice Engel observed in his concurrence in *McDowell*, a detailed colloquy is "consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided .... [I]t would probably be useful for a judge to inquire as to the extent of any defendant's education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to represent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense." *McDowell*, 814 F.2d at 252.

<sup>41</sup> We would note that the judge's unswerving confidence in the reliability of drug tests may be misplaced. *The Journal of Clinical Chemistry* Vol.33 No.6, 1987, reports: "the quantities of poppy seed ingested in this study (25 and 40 g) may be expected to be contained in one or two servings of poppy seed cake. Therefore, poppy seeds represent a potentially serious source of falsely positive results in testing opiate abuse." The article continues, "[n]ot only is it difficult to distinguish heroin or morphine abuse from codeine, but dietary poppy seeds can give a strong positive result for urinary opiate of several days duration that is confirmed by GC/MS analysis." See also, *National Guideline Clearinghouse*, "Medication-assisted treatment for opioid addiction in opioid treatment programs: Drug testing as a tool": "certain prescribed and over-the-counter medications and foods might generate false positive and false negative results for different substances." [http://www.guideline.gov/summary/summary.aspx?ss=15&doc\\_id=8353&nbr=4676](http://www.guideline.gov/summary/summary.aspx?ss=15&doc_id=8353&nbr=4676).

<sup>42</sup> NLADA's site visit coincided with a meeting of criminal justice stake holders on the issue of indigent de-

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fense expenditures. In preparation for the meeting, Chief Circuit Judge Schmucker prepared and shared with us a memorandum on court-appointed attorney fees that covered a range of issues, including eligibility procedures and cost-recoupment. In that memorandum (“*Schmucker Memo 2/7/07*”) he states: “A defendant who earns \$800 per week can probably afford an attorney if the defendant is charged with a 2 year felony, such as resisting and obstructing an officer, or writing a check on a closed account. However, a defendant who earns \$800 per week will be unable to retain an attorney if the defendant is charged with a criminal sexual conduct, armed robbery, or murder. Almost all defense attorneys require a substantial retainer, if not pre-payment of the entire attorney fee. As such, even defendants who have good jobs are often unable to raise \$2500 to \$5000 for an initial retainer.” *Schmucker Memo 2/7/07*, p. 3.

<sup>43</sup> NSC commentary at 72-74.

<sup>44</sup> Cost recovery from partially indigent defendants was first authorized by the *National Advisory Commission on Criminal Justice Standards and Goals*, Defense Standard 13.2 (promulgated in 1973 pursuant to directions of the 1967 President’s Crime Commission), with the caveat that the amount should be “no more than an amount that can be paid without causing substantial hardship to the individual or his family.” The concept was subsequently fleshed out in the *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, 1976), Guideline 1.7:

“If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense . . .

“1(b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.”

<sup>45</sup> The lone exception is in instances where the client committed fraud in obtaining a determination of financial eligibility.

<sup>46</sup> *James v. Strange*, 407 U.S. 128 (1972) (Kansas recoupment statute; equal protection); *Rinaldi v. Yeager*, 384 U.S. 306 (New Jersey statute requiring repayment of the cost of a transcript on appeal; equal protection); *Giacco v. Pennsylvania*, 382 U.S. 399 (1966) (recoupment statute; due process/vagueness); *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) (Oregon recoupment statute; due process); *Fitch v. Belshaw*, 581 F. Supp. 273 (D. Or. 1984) (recoupment statute; due process and Sixth Amendment).

<sup>47</sup> *Bearden v. Georgia*, 461 U.S. 660 (1985) (imprisoning an indigent defendant who tried and failed to pay restitution violates equal protection and the fundamental fairness guaranteed by the Fourteenth Amendment).

<sup>48</sup> *Containing the Cost of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (National Institute of Justice, 1986), at 34-35.

<sup>49</sup> However, pre-representation “contribution” is permitted if: 1) it does not impose a long-term financial debt; 2) there is a reasonable prospect that the defendant can make reasonably prompt payments; and 3) there are “satisfactory procedural safeguards,” so as not to chill the exercise of the right to counsel. The most effective cost recovery programs ask defendants to contribute a modest fee to help offset the costs of representation, generally between \$10 and \$50, at the time they are being screened.

<sup>50</sup> The U.S. Supreme Court, in upholding the concept that a convicted person could be required to pay recoupment of attorney fees, approved the idea that an acquitted person need not pay, as an effort to achieve elemental fairness. The court wrote:

A defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. . . . Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the state for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.

*Fuller v. Oregon* 417 U.S. 40, 51(1974) (footnote omitted).

Other states have limited repayment to convicted defendants. See, e.g., *State v. Barklind*, 87 Wn.2d 814 (1976): “repayment is only to be imposed upon convicted defendants.”

<sup>51</sup> It seems unlikely that any misdemeanor defendant could have incurred \$125 worth of appointed attorney fees. Based on a house counsel being paid \$300 per house counsel day, if they receive on average five appointments per day, then each appointment would only cost the court \$60.

<sup>52</sup> The judge estimated that far more defendants retain attorneys for felony cases than request appointed counsel.

<sup>53</sup> The rights form enumerates the following rights: 1) The right to plead guilty, not guilty, or to stand mute; 2) the right to trial by judge or jury; 3) the right to assistance of counsel; 4) the right to an attorney at public expense, if indigent, and the charge requires a minimum jail sentence or the court determines it could impose a jail sentence (this right is couched with the information that the defendant may have to repay the cost of appointed counsel); 5) the right to be presumed innocent and, if the case proceeds to trial, to call witnesses, question witnesses, testify or stand mute; and 6) the right to be released on bond. The rights form is also informational in that defendants are told that, by pleading guilty, they are waiving rights two through five above. The form also informs those defendants on probation that a guilty plea may adversely affect the terms of their probation.

<sup>54</sup> Most of the same rights and information enumerated on the “rights form” are also on the “plea by mail” form.

<sup>55</sup> NLADA site team members were informed that the judges have discussed increasing this fee by \$100 to cover the cost of collecting the fees.

<sup>56</sup> NLADA retained statistics that verify that Judge Falahee’s estimation within an acceptable margin of error. In 2006, district court handled 8,910 misdemeanors. Appointed counsel were assigned in only 726 cases. This means that defendants waived counsel 92 percent of the time. Misdemeanor cases taken from the *12th District Court of Jackson County Summary 2006 Court Caseload Report*. Misdemeanor indigent defense cases obtained from District Court Administrator Michael J. Dillon.

<sup>57</sup> Court-appointed counsel in Michigan “shall be entitled to receive from the county treasurer .... the amount which the chief judge considers to be reasonable compensation for the services performed.” Michigan Code of Criminal Procedure, Chapter XV § 775.16.

<sup>58</sup> NCJ 181344, February 1999, at 10.

<sup>59</sup> NSC Report, at 220, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

<sup>60</sup> Of the 30 states that currently have statewide indigent defense systems, 15 (or 50 percent) have a single state agency vested with the responsibility of overseeing all trial-level and appellate defender services – both primary and conflicts – including the payment of assigned counsel (CT, KY, IA, MD, MA, MT, NC, ND, NH, NM, OR, WI, WV, VA, and VT). Except for New Mexico, Vermont, and West Virginia, each of these state

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agencies is overseen by an autonomous commission. These commissions are housed in either the executive or judicial branch for budget purposes. Yet, even in those states which place their commissions in the judicial branch of government, the indigent defense system operates outside of the state court system and the judiciary takes no part in the day-to-day administration of the system. Funding in these states is a separate line item from the rest of the judiciary budget. Kentucky, Iowa, Maryland, Montana, North Dakota, and Wisconsin house their commissions in the executive branch of government. Connecticut, Massachusetts, North Carolina, New Hampshire, Oregon, and Virginia house the commission in the judicial branch. The public defender agencies in New Mexico, Vermont, and West Virginia are not overseen by independent commissions. In all three states, the indigent defense system is a department of the executive branch of government.

<sup>61</sup> NLADA *Guidelines for Legal Defense Services*, Standard 2.10, *supra* n. 14.

<sup>62</sup> Throughout our country, more than 80 percent of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, *Defense in Criminal Cases* at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, *Indigent Defense* at 1 (1996). See generally: Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997). The actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See A.P., *U.S. Poverty Rate Rises to 12.7 Percent*, N.Y. Times, August 30, 2005, [http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58.\(8/30/2005\)](http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58.(8/30/2005)).

<sup>63</sup> American Bar Association, Standing Committee on Ethics and Professional Responsibility. *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. May 13, 2006. Opinion can be found online at: [www.abanet.org/cpr/pubs/ethicopinions.html](http://www.abanet.org/cpr/pubs/ethicopinions.html).

<sup>64</sup> *Id.*

<sup>65</sup> See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

<sup>66</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12. The National Advisory Commission accepted the numerical standards arrived at by the NLADA Defender Committee "with the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction." *Id.* at 277. Because many factors affect when a caseload becomes excessive, other standards do not set numerical standards. ABA *Principle 5* notes in commentary that national numerical standards should in no event be exceeded and that "workload" – caseload adjusted by factors including case complexity, availability of support services, and defense counsel's other duties – is a better measurement.

<sup>67</sup> The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. See *Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) ([www.ncjrs.org/pdffiles1/bja/185632.pdf](http://www.ncjrs.org/pdffiles1/bja/185632.pdf)).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded public defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. See, e.g., *Missouri ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982); *New Hampshire v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983); *Corenevsky v. California Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *Arizona v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *Arizona v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *California v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *Kansas ex rel.*

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*Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den.* 495 U.S. 957 (1989); *Hatten v. Florida*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *Oklahoma v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *Louisiana v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

<sup>68</sup> *Michigan Bar Journal*. August 1993. p. 818.

<sup>69</sup> NLADA secured a copy of the circuit court administrator's database showing the number of cases assigned to the eight firms in calendar year 2006.

<sup>70</sup> This does not take into account those cases handled in 2006 that were assigned in prior years. So the caseload is in fact much greater.

<sup>71</sup> Such services have multiple advantages. As with investigators, social workers are not only better trained to perform these tasks than attorneys, but more cost-effective; preparation of an effective community-based sentencing plan reduces reliance on jail and its attendant costs; defense-based social workers are, by virtue of the relationship of trust engendered by the attorney-client relationship, more likely to obtain candid information upon which to predicate an effective dispositional plan than an attorney; and the completion of an appropriate community-based sentencing plan can restore the client to a productive life, reduce the risk of future crime, and increase public safety.

<sup>72</sup> *Schmucker Memo 2/7/07*, p.1.

<sup>73</sup> The following is just a partial list of ethical duties required under national performance guidelines. The black letter Performance Guidelines for Criminal Defense Representation (NLADA, 1995) is available on-line at: [www.nlada.org/Defender/Defender\\_standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_standards/Performance_Guidelines).

<sup>74</sup> These official figures vary greatly from Ms. Worth's own estimations. She told an NLADA site team member that she receives 34 appointments per month (or 408 case per year). If correct, this would put her in breach of national caseload figures by 100 percent. When NLADA is confronted with differing information regarding caseloads, we err on the side of caution and take the more conservative figure.

<sup>75</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12.

<sup>76</sup> See: National Center for State Courts, *Updated Judicial Weighted Caseload Model*, November 1999; The American Prosecutors Research Institute, *Tennessee District Attorneys General Weighted Caseload Study*, April 1999; U.S Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Workload Measurement for Juvenile Justice System Personnel: Practice and Needs*, November 1999; The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*; April 1999. Moreover, discussions with the U.S. Department of Labor, Bureau of Labor Statistics, suggest that using a 40-hour work week for measuring workload of other local and state government exempt employees is the best method of approximating staffing needs.

<sup>77</sup> Significantly, this is a conservative estimate of the workload of the juvenile delinquency attorneys because the billable hours also include any abuse and neglect conflict cases these attorneys may have handled in 2006. The circuit court administrator staff person overseeing the assignments could not account for the number of such cases handled by the two defenders reflected in the hourly compensation.

<sup>78</sup> Recognizing this, other public defender systems have elevated the priority of juvenile representation and established special divisions, not only to promote assessment and placement of juveniles in appropriate community-based service programs, but also to train and collaborate with others in the system to support the same goals, such as jail officials, judges, prosecutors, and policy makers. See *Juvenile Sentencing Ad-*

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vocacy Project, Miami/Dade County, Florida (proposal for this and other successful federal Byrne grants on-line at [www.nlada.org/Defender/Defender\\_Funding/Successful](http://www.nlada.org/Defender/Defender_Funding/Successful)). See also Youth Advocacy Project, Roxbury, MA ([www.nlada.org/News/NLADA\\_News/1005694565.43](http://www.nlada.org/News/NLADA_News/1005694565.43)).

<sup>79</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12.

<sup>80</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>81</sup> *Kirby v. Illinois*, 406 U.S. 682 (1972).

<sup>82</sup> *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>83</sup> *County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991).

<sup>84</sup> *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.

<sup>85</sup> *ABA Principle 4*: Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

<sup>86</sup> *ABA Model Rules of Professional Conduct*, Rule 1.6; *Model Code of Professional Responsibility*, DR 4-101; *ABA Defense Function*, Standard 4-3.1; *NLADA Performance Guidelines*, 2.2. State Performance Standards; New York's "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State" (NYSBA 2004); "New York State Bar Association Standards for Providing Mandated Representation" (NYSBA 2005); and "Client-Centered Representation Standards" (NYSBA Client Advisory Board 2005).

<sup>87</sup> *NSC*, Guideline 5.10

<sup>88</sup> *Id.*, and commentary at p. 460.

<sup>89</sup> *ABA Principle 7*: The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

<sup>90</sup> *NSC* at 470.

<sup>91</sup> *ABA Defense Services*, commentary to Standard 5-6.2, at 83.

<sup>92</sup> *NSC* at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; reported at 392 F. Supp. 834, rev'd on other grounds, 481 F.2d 621; *Moore v. U.S.*, 432 F.2d 730, 736 (3rd Cir. 1970); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

<sup>93</sup> If a person is arrested on Wednesday or Thursday, it might be the following week before they will be set for the preliminary examination conference.

<sup>94</sup> *Schmucker Memo 2/7/07*, p. 4. The judge acknowledges that he is unsure whether these cases resolved in the district court were "fully dismissed or simply reduced to misdemeanors."

<sup>95</sup> The change was the result of the elections of Judges Grant and McBain. Both Grant and McBain refuse to honor sentencing agreements entered into between the prosecutor and the defense and refuse to partici-

pate in plea bargain discussions (i.e., they will not give any indication of the sentence they will impose on a plea); only Judge Schmucker will do so. This means that the prosecutor and defense attorney can only charge bargain, but cannot bargain on sentence. During the transition period, defendants often accepted a plea offer with an agreed sentence, entered the plea in district court, and then were allotted to a circuit court only to find out that the circuit court judge would not be bound by the sentencing agreement. Judge Grant said those defendants were allowed to withdraw their guilty pleas and go forward in circuit court. As a partial fix to this dilemma, felony cases are now allotted to a circuit court before the preliminary examination conference, so that all of the parties know whether they are before Judge Grant, Judge McBain, or Judge Schmucker, and can bargain accordingly.

<sup>96</sup> It is mandatory that a child be provided with counsel if: 1) the juvenile requests counsel; 2) a parent requests counsel for the juvenile; or 3) a family member is the victim. Mich. Comp. Laws § 6.937(2).

<sup>97</sup> *Principle 6* of the ABA *Ten Principles* demands that “[d]efense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” *Ten Principles of a Public Defense Delivery System* (ABA 2002) at p. 3. See also *Performance Guidelines for Criminal Defense Representation* (NLADA 1995), Guidelines 1.2, 1.3(a); *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA 1989), Guideline 5.1.

<sup>98</sup> For most public defender offices across the country, the training and practical experience gained by attorneys working on less serious criminal cases permits them, over time, to acquire the skills necessary to handle more serious cases. Consequently, public defender offices across the country generally assign misdemeanor charges, traffic offenses, and preliminary stages of a prosecution to newer attorneys. Over time—often measured in years—attorneys in these offices acquire the skills that support handling more challenging cases.

<sup>99</sup> Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a “cost-saving device” because of the “cost of retrials based on trial errors by defense counsel or on counsel’s ineffectiveness.” The preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members “more productive, efficient and effective.” [www.nlada.org/Defender/Defender-Standards/Defender-Training-Standards](http://www.nlada.org/Defender/Defender-Standards/Defender-Training-Standards).

<sup>100</sup> These can vary greatly both in kind and number but they commonly include such things as: fostering and supporting professional development; giving people clear guidance about what is expected of them; and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency’s mission and vision. Critically, effective plans emphasize a goal of promoting employees’ performance success.

<sup>101</sup> People need to know what is expected of them in order to work to fulfill those expectations. Performance expectations should include, for example, attitudinal expectations and administrative responsibilities as well as substantive knowledge and skills.

<sup>102</sup> People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan, so that evaluations are done fairly and consistently.

<sup>103</sup> See, e.g., ABA *Model Rules of Professional Conduct*, Rule 1.1; ABA *Defense Function*, Standard 4-1.6(a); NLADA *Performance Guidelines*, 1.3(a).

<sup>104</sup> For example, if a defendant is charged with two separate burglaries of two unrelated houses on two different dates, the prosecutor counts two cases – as recommended – but the defender offices and appointed counsel are required to count that as one unit (that is, one client).

<sup>105</sup> One defender attorney reported that the Michigan Supreme Court recently removed the ethical provision forbidding attorneys from accepting more cases than they can handle. The Court’s reasoning was report-

edly that the prohibition is self-evident.

<sup>106</sup> However, the public defender reported that the prosecutor has a policy of withdrawing plea offers if defense counsel pursues pretrial motions. On the other hand, defenders reported that, as an office (really two offices), they have the “clout” to pressure the DA in some respects regarding handling of cases.

<sup>107</sup> See: “Manner of Disposition for Criminal Cases Filed in 28 Unified and General Jurisdiction Courts, 1999,” *Examining the Work of State Courts, 1999 - 2000*, National Center for State Courts. When a jurisdiction has a significant deviation from the figure, it begs the question: “Why?” A jurisdiction’s trial rate may be impacted by a number of factors. For instance, a jurisdiction where a prosecutor overcharges may have a very high trial rate (if the public defender is doing his or her job adequately). Similarly, a public defender trying to have her staff gain trial experience may cause an increase in trial rates in a jurisdiction. Conversely, a system in which the prosecutor has generous plea offers may have a significantly lower trial rate. So trial rates are just one indicator of a functioning criminal justice system, but one that must be gauged in conjunction with other criteria. In this instance, NLADA believes the low trial rate is an indicator of a system in trouble.

<sup>108</sup> The judge was also critical of the attorneys in the prosecuting attorney’s office, saying that both defenders and prosecutors do not have an incentive to work hard because they are salaried.

<sup>109</sup> The prosecutor reportedly tried to persuade the commissioners not to approve filling the public defender attorney vacancy, but rather to authorize him to hire another assistant prosecutor.

<sup>110</sup> The chief judge, while stating that the assigned attorney fee schedule is “archaic” and needs to be changed, also said – disapprovingly – that there are members of the bar who believe indigent defense should be their entire practice and believe that the system should be paying them at a level they could live on.

<sup>111</sup> Dues for the WCCDBA cover the required Criminal Advocacy Program training, and also pay for computers and furniture for WCCDBA offices housed in the Hall of Justice.

<sup>112</sup> As national caseload standards call for a maximum of 400 misdemeanors or 150 felonies per attorney per year, we can multiply a felony case by 2.5 to weight it equal to a misdemeanor.

<sup>113</sup> Reimbursements are sent directly to the county and not to the Public Defender Office.

<sup>114</sup> [http://www.nlada.org/Defender/Defender\\_ACCD/ACCD\\_TenTenets](http://www.nlada.org/Defender/Defender_ACCD/ACCD_TenTenets)

<sup>115</sup> Making alterations to the building is nearly an impossible task. For example, the building also holds most county offices and a handful are just now getting individual air conditioning units.

<sup>116</sup> The obvious issue here is a client’s literacy skills. Frequently, a client will rely upon a friend – often a co-defendant – to write notes on his behalf to his attorney.

<sup>117</sup> SADO is statutorily authorized to provide education to its own attorneys and private attorneys accepting appellate assignments and to maintain and share a brief bank. MCL 780.712 and 780.716.

<sup>118</sup> Training offered by SADO's CDRC or its training partners is either free of charge to trainees or offered for a modest fee, due to grant support from the Michigan Commission on Law Enforcement Standards. SADO administers MCOLES training grants totalling about \$300,000 each year.

<sup>119</sup> *The Defender Motions Book; Defender Trial Book; Defender Plea, Sentencing and Post-Conviction Book; and Defender Habeas Book* are published by the CDRC on an annual basis.

<sup>120</sup> ICLE's criminal law training generally focuses on drunk driving defense and sentencing.

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<sup>121</sup> MCL 49.103.

<sup>122</sup> 2006 PA 345.

<sup>123</sup> Michigan does not have Mandatory Continuing Legal Education (MCLE).

<sup>124</sup> [www.capwayne.org](http://www.capwayne.org). Other goals of the program include: educating the bench, bar and public about the need for quality and integrity in prosecution and defense representation; promoting alternatives to the present criminal justice system; guarding against erosion of the rights established by constitutional, statutory, case and other law governing the administration of the criminal system; and publishing, recording, and distributing written, video-taped and audio-taped materials pertinent to the administration of the criminal justice system. The CAP web site and grant are a project of the Criminal Defense Resource Center of the State Appellate Defender Office, [www.sado.org](http://www.sado.org), which offers training and support services to assigned criminal defense attorneys. The CDRC partners with C.A.P., Wayne County Circuit Court, and the Wayne County Criminal Defense Attorneys Association on this defense training project.

<sup>125</sup> Videotapes of the sessions can be viewed at any time after they become available on the CAP web site, but not all viewing of the videotapes qualifies for credit under the special makeup procedures. Handouts from the sessions can also be downloaded from the web site. And a CD containing all the written materials for the entire series is provided to attendees at the last session of the series.

<sup>126</sup> Administrative Order 2006-08, IV. L

<sup>127</sup> Administrative Order 2006-08, IV.I.2.c.

<sup>128</sup> Administrative Order 2006-08, IV.I.2.a-c

<sup>129</sup> The county prosecutor said sometimes prosecutors have to point out conflicts where defense lawyers inappropriately attempt to represent co-defendants. One judge told us he has no problem with attorneys representing co-defendants at arraignment or diversion hearings.

<sup>130</sup> The prosecuting attorney in the courtroom was either unaware of the written plea offer in the file or chose not to point out the defense lawyer's error.

<sup>131</sup> *People v. Cobbs*, 505 NW 2d 208 (Mich. 1993). Under this case, a defendant (through his attorney) can ask the judge to review the file and indicate what his likely sentence will be if the defendant pleads guilty. This procedure results in many cases being disposed of through pleas, where there is no offer from the DA or the defendant is reluctant to accept the DA's offer.

<sup>132</sup> *Principle 8* of the American Bar Association's *Ten Principles* states: "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." See also: National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.6, 3.4, 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office); American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-2.4, 5-3.1, 5-3.2, 5-3.3, 5-4.1, and 5-4.3; National Legal Aid & Defender Association *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines III-6, III-8, III-9, III-10, and III-12; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989), Standard 4.7.1 and 4.7.3; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) (Performance); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(B)(iv); and American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993), Standard 4-1.2(d). Cf. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

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<sup>133</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

<sup>134</sup> Judge Schmucker invited NLADA representatives to observe a meeting at which the costs of the indigent defense program were discussed with a number of County stakeholders. During that meeting it was revealed that indigent defense outspent the prosecution by approximately \$200,000 in 2006. The indigent defense expenditure figure, however, included a number of non-criminal, non-juvenile delinquency costs, such as representation of poor people in abuse and neglect cases, termination of parental rights, etc. To account for these cases, NLADA used the actual costs paid to the juvenile delinquency attorneys instead of the higher family court expenditures detailed in the *Schmucker Memo 2/7/2007*.

<sup>135</sup> Felony (\$901,000); juvenile delinquency (\$69,212); district court (\$179,000); and appeals (\$92,000). Per capita cost is based on the United States Census projected population estimates for Jackson County of 163,629.

<sup>136</sup> This has the potential to raise issues about the rule that lawyers should not be witnesses and advocates in the same case. Should the lawyer take a statement or observe something about which the lawyer would want to testify, it could raise a question under Michigan Rule of Professional Conduct Rule 3.7, Lawyer as Witness, which provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

<sup>137</sup> See *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

<sup>138</sup> The court administrator said the Michigan Supreme Court continues to monitor fees paid to individual assigned counsel – in particular when attorneys gross more per year than the justices make in salary. Obviously, the justices are not considering the fact that they do not pay for their own office space, staff, access to online legal research, law library, malpractice insurance, medical and retirement benefits, etc., as assigned counsel must.

<sup>139</sup> A court order has to accompany a voucher sent to court administration requesting funds for investigators, expert witnesses or extraordinary fees. If the voucher amount is more than \$500, it is sent to the chief court administrator.

<sup>140</sup> From U.S. Border Control to the Police of the Sault Ste. Marie Tribe of Chippewa Indians, there are 11 police agencies having jurisdiction spread throughout Chippewa County.

<sup>141</sup> If Michigan were to create a statewide indigent defense system it could simultaneously commission an “adjudicative partnership” to study a whole host of criminal justice policies. An adjudication partnership is a formal collaborative effort in which representatives from key justice system agencies join together to identify problems, develop goals and strategies for addressing the problems, and oversee the implementation plans to manage or solve problems. In the best jurisdictions, adjudication partnerships produce joint criminal justice fiscal impact statements, such that the Legislature can make informed decisions on all pending criminal justice bills. For instance, increasing the funding to hire additional law enforcement officers will result in an increased workload on the courts, prosecutors, and defense attorneys. Jointly, the adjudication partnership can inform policy-makers that increasing law enforcement will require “X” number of new judges, “Y” prosecutors and “Z” public defenders.



## NLADA Site Team Biographies

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**Nancy Bennett** is deputy chief counsel for the Private Counsel Division of the Committee for Public Counsel Services (CPCS), Boston, MA. Beginning as a public defender handling felony trials from 1981-89, for the past 18 years Bennett has been engaged in developing systems for statewide oversight of the more than 2000 private attorneys who provide over 90 percent of the criminal defense representation to the indigent in Massachusetts. These systems include certification requirements, performance standards, mentoring, performance evaluations of private counsel, affirmative action to increase the ethnic and linguistic diversity of assigned counsel, required continuing legal education and client complaint investigation. Bennett is a contributing author to E. Blumenson, ed., *Massachusetts Criminal Defense*, Butterworth Legal Publishers, 1990, has been guest faculty annually at Harvard Law School's Trial Advocacy Workshop 1993-2005. A member of the American Council of Chief Defenders, Bennett was a presenter at the 2006 Annual Conference of NLADA. Bennett earned her B.A. at Yale University and her J.D. degree at Northeastern University School of Law.

**Mary Broderick** served as team leader for the NLADA evaluations of the Cook County (IL) Public Defender and the San Bernardino County (CA) Public Defender and developed a Projected Indigent Defense System Budget for San Diego (CA). She was also a team member for the NLADA evaluations of the Public Defender Service of the District of Columbia, Montana indigent defense system and the Riverside County (CA) Public Defender. As executive director of California Attorneys for Criminal Justice (CACJ), the largest statewide association of criminal defense lawyers and allied professionals, Broderick was responsible for policy development; supervision of the legislative, professional education and publications programs; public education and media relations; liaison with other organizations; technical assistance; and administration. She led the CACJ legislative effort that preserved unanimous jury verdicts in California. Broderick was also director of NLADA's Defender Division, where she conceived and edited NLADA's *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* and its *Standards for the Administration of Assigned Counsel Systems* and supervised development of NLADA's *Performance Guidelines for Criminal Defense Representation; Indigent Defense Caseloads and Common Sense: An Update; The Lay of the Land: Statewide Defender Programs; FINAL REPORT: Indigent Defense and the FY 91 BJA Formula Grant Program; and the National Directory of Death Penalty Mitigation Specialists*. She designed and launched NLADA's *Life in the Balance* death penalty defense training, and NLADA's *Defender Management Training*, and supervised its *Appellate Defender Training*. She also led NLADA's effort in Congress to preserve *habeas corpus*.

**Robert Boruchowitz** graduated from Northwestern University School of Law in 1973. He is visiting clinical professor and director of The Defender Initiative at Seattle University School of Law, teaching in the Youth Advocacy Clinic and a seminar on *Law and the Holocaust*. He was director of The Defender Association in Seattle from 1978 through 2006. He

was president of the Washington Defender Association for 20 years. He is a member of the Washington State Bar Association Committee on Public Defense and served as the chair of the American Council of Chief Defenders (ACCD) Committee on Emerging Systems, of which he now is a member. He led an ACCD committee that drafted a statement on case-loads and workloads. He is qualified to be counsel in capital appeals and post-conviction proceedings. He co-counseled the first King County "sexual predator" commitment jury trial and the subsequent appeals and retrial and led the eventual argument in the U.S. Supreme Court. He established The Defender Association's Racial Disparity Project with a federal grant, and the Death Penalty Assistance Center funded by the state Office of Public Defense. He has participated in state and national efforts to develop public defender standards and a model defender services contract and helped to draft state law requiring local governments to develop standards for public defense. He has been an expert witness on effective assistance of counsel in death penalty cases and in a habeas corpus proceeding challenging a persistent offender conviction, and in the recent Grant County systemic ineffectiveness litigation.

Boruchowitz has served on site visit and evaluation teams for the National Legal Aid & Defender Association in Louisiana; Las Vegas; Washington, D.C.; Ada County, Idaho; and Michigan. He has served on the boards of NLADA and the ACLU of Washington. He has written several articles on the sexual predator law and on public defense issues. He was a *Soros Senior Fellow* addressing the denial of counsel in misdemeanor and juvenile cases. He has received the WDA *Gideon Award*, the Washington Association of Criminal Defense Lawyers *Douglas Award*, the ACLU *Civil Libertarian Award*, the NLADA *Reginald Heber Smith Award*, the King County Bar *Friend of the Profession Award*, the WSBA *Professionalism Award*, and the Mothers for Police Accountability *Paul Robeson Peace and Justice Award*. He also is the player-manager for the Defender Softball Team.

**David Carroll** is the director of research for the National Legal Aid & Defender Association (NLADA). Carroll has conducted assessments of the right to counsel in Montana, Idaho, New York, the District of Columbia, Clark County (Las Vegas) Nevada, Santa Clara County (San Jose) California, and Venango County Pennsylvania. Carroll has consulted with numerous public defender organizations and state supreme courts, and he co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards.

In 2004, NLADA released *In Defense of Public Access to Justice*, a comprehensive report detailing the impact Louisiana's systemic deficiencies had on one judicial district – Avoyelles Parish. A legislative Task Force on Indigent Defense subsequently retained Mr. Carroll to advise them on different models for delivering indigent defense services. The Louisiana State Bar retained NLADA to document issues in post-Katrina New Orleans and to create a road map for a legislative fix to the state's systemic deficiencies. The report, primarily authored by Mr. Carroll and released in September 2006, was the starting point for a legislative advisory group put together by the Chair of the House Criminal Justice Committee that eventually led to the passage of the Louisiana Public Defender Act of 2007.

For five and a half years, Carroll worked as a senior research associate & business manager for the Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues. Mr. Carroll di-

rected numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties (Louisville and Lexington), Kentucky; a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court, and prosecutor case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Carroll also was chosen to provide on-site technical assistance to statewide Task Forces in Illinois, Nevada, Alabama, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

**Nicholas L. Chiarkas** is the director of Wisconsin's State Public Defender Agency. Under his leadership, the agency received three consecutive awards for excellence. In addition, he is the founder of Justice Without Borders, is an adjunct professor of law at the University of Wisconsin Law School and was a visiting lecturer in law at Justus-Liebig-Universität, Gießen, Germany. Previously Chiarkas served as the deputy chief counsel and research director to the President's Commission on Organized Crime; deputy chief counsel to the United States Senate Permanent Subcommittee on Investigations; professor of law; professor of criminology; and a New York City police officer. In 1996, he became the nation's first public defender to receive the *Law Enforcement Commendation Medal* awarded by The Sons of the American Revolution. In 2006, Chiarkas served as part of an assessment team for the Department of Justice along with American University that examined New Orleans justice system. He previously participated in evaluations of public defender systems in Israel, Gaza and Japan.

**John Digiacinto** is the chief defender of the Private Defender Program (PDP), a controlled assigned counsel program in San Mateo County, California. He graduated from Lincoln University School of Law in 1977 and was admitted to the bar that same year. In private practice he represented indigent clients as a PDP lawyer for 12 years. He handled the complete range of criminal and juvenile cases, beginning his career with misdemeanors and advancing to the defense of the most serious of felonies, including capital murder cases. He has taught trial advocacy to public defenders and assigned counsel from around the country by invitation of the Institute of Criminal Defense Advocacy in San Diego. He became the assistant chief defender of the PDP in October 1989 and the chief defender in July 2000.

In addition to leading the innovative and well-respected PDP, Digiacinto was appointed by the State Bar Board of Governors to the 10-member commission tasked with revising the 1990 *Indigent Defense Guidelines* for California. This working group presented its proposed revised *Guidelines* to the State Bar Board of Governors, which approved and promulgated them in January 2006. He is also a member of the National Legal Aid & Defender Association's American Council of Chief Defenders, the California Public Defenders Association, California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers.

**Richard Goemann** is the director of Defender Legal Services for the National Legal Aid & Defender Association. Previously, he was an assistant federal public defender for the Eastern District of Virginia and served as the executive director for Virginia's Indigent Defense

Commission, and as the executive and deputy director for the IDC's predecessor agency, the Public Defender Commission. Goemann also served as the public defender for Fairfax, Virginia, and was an assistant and senior assistant public defender in Alexandria, Virginia. Prior to coming to Virginia, he was a staff attorney in the criminal division of the D.C. Law Students in Court Program, where he was an adjunct professor and clinical supervisor for law students from George Washington University and Catholic University law schools.

Goemann received his J.D. degree from New York University School of Law and was selected as an *E. Barrett Prettyman Graduate Fellow* at Georgetown University Law Center where he earned an LL.M. degree in advocacy.

**Theodore Gottfried** is the director of the Office of the Illinois State Appellate Defender, a statewide appellate public defender office representing over 40,000 criminal cases in the Appellate and Supreme courts of Illinois. He has participated in numerous committees and task forces, including Illinois Capital Punishment Reform Study Committee (2004), the Criminal Law Edit, Alignment and Reform Initiative (to rewrite the Illinois Criminal Code – 2004), the Governor's Commission to Study the Death Penalty (2000), the Task Force on Professional Practice in the Justice System (1999-2000), and the Speaker of the House's Task Force on the Death Penalty (1999). Since 1969, Gottfried has worked with NLADA to evaluate 16 defender systems across the United States. Some of these evaluations include: the Office of the Riverside County California Public Defender (1999), the Appellate Defender Program of Arkansas (1981), the State Appellate Defender Program of Iowa (1981), the State of Arkansas, Feasibility Study for a possible State Appellate Defender Office (1979), the Wisconsin State Appellate Defender (1975) and the State Public Defender of California (1979), also an appellate office. A member of the American Council of Chief Defenders and a former member of the NLADA board of directors, Gottfried has received NLADA's prestigious *Reginald Heber Smith Award* for outstanding achievements of an attorney employed by an organization supporting defender services (1992). He received an honorary doctor of laws degree from the John Marshall Law School in 2001 and was presented with the Gideon Award by the Illinois Public Defender Association in May 2000. Additionally, the Illinois Office of the State Appellate Defender was awarded NLADA's *Clara Shortridge Foltz Award* (1986), in recognition of outstanding achievements in the provision of criminal defense representation services.

**Fern Laethem** began her legal career as a deputy district attorney in Sacramento, California and was later appointed as an assistant U.S. attorney for the Eastern District of California. In 1981, she opened a solo criminal defense practice that she maintained until 1989 when California Gov. George Deukmejian appointed her as the state public defender of California to oversee direct appeals in capital cases statewide. Gov. Pete Wilson reappointed her for two more terms. Laethem retired as state public defender in 1999 and accepted a position with Sacramento County as the executive director of Sacramento County Conflict Criminal Defenders.

Laethem has served as a member of the California Committee of Bar Examiners, the California Judicial Council Appellate Standing Advisory Committee, the California Council on Criminal Justice and a California Senate appointee to the California Advisory Commission on Special Education. Laethem has participated as a trainer for NLADA's National

Defender Leadership Institute for many years and is a consultant to contract public defender programs in other jurisdictions.

**William J. (Bill) Leahy** grew up in Boston, graduated from the University of Notre Dame in 1968 and Harvard Law School in 1974. Between college and law school, he taught elementary school students at P.S. 20 in Hunts Point, the Bronx. His legal career has been dedicated to the representation of indigent persons, first as a trial and appellate defender with the Massachusetts Defenders Committee for 10 years, then as the first leader of the Public Defender Division of the Committee for Public Counsel Services (CPCS) from 1984 to 1991, and since 1991 in his current position as CPCS chief counsel.

Leahy was a member from 1991 to 2005 of the Massachusetts Supreme Judicial Court Standing Advisory Committee on the Rules of Criminal Procedure and was a member of the Boston Bar Association Executive Council from 2003 to 2006. He has been an Adviser to the American Law Institute's Model Penal Code sentencing project since 2001. He has served on the Boston Bar Association/Crime and Justice Foundation Task Force on Justice, the Superior Court Criminal Justice Study Committee, the Criminal History Systems Board, and the executive board of the Massachusetts Association of Criminal Defense Lawyers. He is an active member of the National Legal Aid and Defender Association and is currently a member of the Executive Committee of the American Council of Chief Defenders. In April 2007, Leahy was appointed to serve on Gov. Deval Patrick's Anti-Crime Council.

In September 2005, he received the *Award for Legal Excellence* from the New England Bar Association, and the *Outstanding Professional Achievement Award* in June 2005, from the Boston Inn of Court. In June, 2004, he received the *Clarence Earl Gideon Award* from the Massachusetts Association of Criminal Defense Lawyers, and in October 2004, he received the Juvenile Bar Association's *Judge Leo Lydon Award*. Leahy was lead counsel in the landmark right-to-counsel case of *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

**Phyllis Mann** is the director of the National Defender Leadership Institute, within the National Legal Aid & Defender Association. Prior to joining NLADA, she was a consultant in criminal defense, providing expert testimony in both state and federal courts in capital defense, research and writing in systemic areas of criminal defense, and serving as the curriculum coordinator for NLADA's *Life in the Balance* capital defense training. Before returning to her home state of Texas, where she still resides, Phyllis practiced exclusively criminal defense – trial and appeal, state and federal – in Louisiana. At various times in her career she served as a public defender for Rapides Parish, as an appellate public defender for the Louisiana Appellate Project, as a court appointed capital defender certified by the Louisiana Indigent Defender Assistance Board, and as a court appointed CJA attorney for the Western and Middle Districts of Louisiana. In 2005, Phyllis secured the unanimous opinion from the Louisiana Supreme Court in *State v. Citizen & Tonguis*, establishing the authority for trial court judges to halt capital prosecutions in Louisiana where there is no funding for the defense of the accused. Following Hurricane Katrina, she established and led an *ad hoc* group of criminal defense attorneys in their *pro bono* efforts to interview, counsel, and document the approximately 8,500 prisoners and detainees evacuated from south-eastern Louisiana jails and to represent them where appropriate in

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*habeas corpus* and bond proceedings. She received the 2006 *Arthur von Briesen Award* from NLADA for her contributions as a private attorney to indigent defense in Louisiana. Phyllis is a past president of the Louisiana Association of Criminal Defense Lawyers and was the recipient of LACDL's 2005 *Justice Albert Tate Jr. Award* for lifetime achievement in criminal defense.

**Jon Mosher** is research associate for the Research & Evaluations division of the National Legal Aid & Defender Association. He assists in the direction of NLADA's numerous standards-based assessments of indigent defense systems, including: an evaluation of public defender services in Hamilton County (Cincinnati) Ohio; a study of public defense in Orleans Parish (New Orleans) Louisiana; a statewide study of the right to counsel in Idaho's trial-level adult criminal and juvenile delinquency systems; an evaluation of the Idaho State Appellate Defender's Office; and a study of public defender services in the State of New York. He joined NLADA in 2003 as resource coordinator with Defender Legal Services, serving as primary staff liaison to the American Council of Chief Defenders. He is a graduate of George Washington University.

**Gerard A. Smyth** is the former chief public defender for the State of Connecticut and served as co-chair of the American Council of Chief Defenders (ACCD) from 2004-06. He had a 30-year career as a public defender in Connecticut, including misdemeanor representation, felony trials and supervision of the Capital Defense & Trial Services Unit of the CT Division of Public Defender Services. He served as chief public defender from 1994 until 2006. He is also the founder of the CT Innocence Project and has served on numerous criminal justice advisory boards and commissions. He currently is affiliated with the Institute for the Study of Crime & Justice at Central Connecticut State University and is an adjunct professor in the Department of Criminology & Criminal Justice. He has served as a consultant to the National Legal Aid & Defender Association and has been involved in indigent defense evaluations in several jurisdictions throughout the United States.

**Phyllis Subin** completed two gubernatorial appointment terms as the chief public defender for the state of New Mexico in 2003. In that capacity, she was the leader of New Mexico's largest statewide law firm, the New Mexico Public Defender Department, which had a budget of more than \$30 million and employed 320 staff members (160 attorneys) with more than 100 contract attorneys. At the time of her first appointment, Subin was an assistant professor at the University of New Mexico School of Law and the director of the Criminal Defense Clinic. She has a long history in the teaching and training of law students and public defender attorneys. Following years as a trial and appellate public defender, Subin was the first director of training and recruitment at the Defender Association of Philadelphia (PA), a large county public defender system, where she developed and taught a nationally recognized training program for lawyers and law interns.

Subin served as chair of NLADA's Defender Trainer's Section, was instrumental in writing and developing NLADA's national training and development standards and assisted in the creation of NLADA's *Defender Advocacy Institute*. Subin has consulted privately for a number of indigent defense programs, including the Kentucky Department of Advocacy.

**Jo-Ann Wallace** is president and CEO of the National Legal Aid & Defender Association

(NLADA). Before coming to NLADA, she was director of the Public Defender Services of the District of Columbia. There, she previously served as the deputy chief of the appellate division, coordinator of the juvenile services program and as a trial and appellate attorney. Wallace was a founder of the American Council of Chief Defenders (ACCD). She has extensive experience as a lecturer on criminal justice topics, including public defense management and leadership issues.

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The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

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