



Indigent Criminal Defense Systems in the State of Michigan—A Time for Evaluation and Action

In the landmark case of *Gideon v. Wainwright*, the United States Supreme Court held that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to indigent defendants in felony cases. In so doing, it unanimously concluded that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” To the Court, the fact that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime” makes it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries.” Accordingly, the right to counsel has consistently been extended to any case that may result in a potential loss of liberty.

Twenty-five years ago, a Defense Services Committee was appointed to review Michigan’s system for providing legal representation of indigent defendants in criminal proceedings. The committee’s report made several recommendations. Unfortunately, little has changed since then.

Currently, Michigan has no statewide standards or funding structure to assure adequate representation. In recent national reviews of indigent defense systems, Michigan has ranked among the lowest in terms of providing adequate support and structure to its defense system. Before assessing Michigan’s system for providing legal representation for indigent criminal defendants and before making recommendations for improvements,

it is important to determine what the optimal system should include.

With support from the Gideon Initiative of the American Bar Association several years ago, Michigan developed a statewide citizen’s group (the Michigan Public Defense Task Force) to review Michigan’s current system

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and develop a model for change. On January 2, 2002, the Task Force unanimously adopted the following principles to guide its efforts:

- I. The selection, funding, and payment of public defense counsel is independent from the judicial process.
- II. 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.
- III. 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.
- IV. Defense counsel is provided sufficient time and a confidential space to meet with the client.
- V. Defense counsel’s workload is controlled to permit the rendering of quality representation.

- VI. Defense counsel’s ability, training, and experience match the complexity of the case.
- VII. The same attorney continuously represents the client until completion of the case.
- VIII. 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.
- IX. Defense counsel is provided with and required to attend continuing legal education.
- X. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

On February 5, 2002, the American Bar Association adopted “The Ten Principles of a Public Defense Delivery System,” calling them “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.” The ABA further resolved that, “the American Bar Association recommends that each jurisdiction use [the principles] to assess promptly the needs of its public defense delivery system and clearly communicate those needs to policy makers.” The principles adopted by the ABA are substantially the same as those adopted by the Michigan Public Defense Task Force. On April 27, 2002, the State Bar of

Michigan's Representative Assembly adopted the criminal defense assigned counsel guidelines for improving public defense services as proposed by the Task Force. In April of 2005, the Board of Commissioners reaffirmed the Representative Assembly's adoption of the criminal defense assigned counsel guidelines for improving public defense services and voted to support the Bar's participation in the formulation of legislation that actualizes these principles.

The time has come to carefully and thoroughly study how efficiently and effectively Michigan counties are delivering the constitutional right to counsel. Fortunately, help appears to be on its way. The National Legal Aid and Defender Association (NLADA), a national non-profit association dedicated to qualify representation for people of insufficient means, has recently submitted a proposal to the State Bar to conduct an evaluation of trial-level indigent defense systems in the state of Michigan. Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems.

At the center of the proposal is a well-balanced, thoughtful argument for objective statistical data. The proposal states:

One of the lessons learned by the national indigent defense community over the years is the importance of quantitative, statistical data to inform policy-makers about the quality and cost-effectiveness of the services provided at taxpayers' expense. Without independently verifiable data, policy-makers (many of whom are not necessarily versed in the constitutional, ethical and practical requirements of indigent defense representation) are left to make critical funding decisions based on speculation, unverifiable assertions, "gut feel," or the competing budget demands of other agencies within their jurisdiction.

Though all policy-makers owe the electorate a higher standard of accountability than that, the need for uniform data grows exponentially when, as in Michigan, local government is burdened with a significant portion of the state's constitutional duty to provide counsel to those facing a potential loss of liberty in criminal proceedings. Because local funding is primarily derived from

property taxes, the amount available for defender services tends to constrict in inverse proportion to the demand for such services (i.e., a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime). As a result, the quality of public defender representation in a state that relies upon local funding generally fluctuates widely from locality to locality. A system that metes out justice in proportion to the availability of limited local resources cannot assure victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

Though NLADA has not formally studied the quality of representation afforded the poor in Michigan's trial-level courts, and therefore cannot comment specifically on the extent to which or even if this national phenomena holds true in Michigan's counties, we can report that Michigan is the *only* state in the entire country that cannot accurately account for the total amount of state and local funding dedicated to ensuring people's constitutional right to counsel. In 2003, the American Bar Association (ABA) published *State & County Expenditures for Indigent Defense Services in Fiscal Year 2002*. The report is the most comprehensive national study detailing the amount of money state and local governments spend on defender services in each of the 50 states. Though the lack of reliable data in seven states led the ABA to estimate total expenditures in those jurisdictions (Illinois, Kansas, Pennsylvania, Mississippi, Montana, Nevada, and Utah), the dearth and unreliability of data in Michigan prevented even an educated guess, let alone a fair and accurate estimation.

The failure of Michigan and its counties to keep accurate information on such basic indigent defense funding data suggests, at best, that the constitutional right of defendants to adequate counsel is simply a low priority to local policy-makers. At worst, the failure to account for spending decisions may be resulting in an enormous waste of money that is borne by taxpayers and community businesses (i.e., the failure to invest in adequate defense counsel may in fact raise the ultimate cost of criminal justice because of unnecessarily detaining people pretrial, endless appeals, re-trials, settlements with innocent people who have been unfairly convicted and incarcerated, and defending the

state against systemic litigation). Moreover, when a young person comes to court and is given a public defender that has no access to the needed resources to present a fair defense, a message is sent to our youth—and especially our young men of color—that they do not matter. When states institutionalize this hopelessness and neglect they are asking for an escalation in bad behavior and ultimately more expenditures of resources down the line.

NLADA understands that the Michigan Public Defense Task Force has taken the position that Michigan's provision of the right to counsel is systemically deficient. Though this may be true, NLADA would prefer to conduct this evaluation under the auspices of a respected state institution, or branch of government, that has taken no formal position on the effectiveness and efficiency of Michigan's trial-level indigent defense services so that there is no perception of bias in our findings and recommendations.

It is anticipated that Senator Alan Crosey will also introduce legislation to support the collection of statewide data to help evaluate the effectiveness of Michigan's indigent criminal defense system. But beyond just study and evaluation, action is needed. We must finally recognize and value the critical role of indigent services in the criminal justice system. We must strive to implement helpful standards for indigent defense—standards that cover, among other things, skills, experience, and appropriate workloads. We must insist that the indigent defense bar, in acquiring essential training and technical assistance, be provided what is necessary to do the job of adequately representing its clients. And last, but perhaps most importantly, we must ensure that indigent criminal defense attorneys are adequately paid.

Those of us who are closest to the criminal justice system see daily reminders of the remarkable lawyers who represent indigent defendants. Our system of justice will only work if we provide every defendant with competent, fully trained, and adequately paid defense counsel. Hopefully, the NLADA study, along with the appropriate legislation, will help bring the 10 principles of a public defense delivery system one step closer to reality. ◆