STATE OF MICHIGAN

IN THE SUPREME COURT

Complaint for Writ of Superintending Control

In re:
THE RECORDER'S COURT BAR ASSOCIATION, THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, WOMEN LAWYERS ASSOCIATION OF MICHIGAN AND THE SUBURBAN BAR ASSOCIATION,

Plaintiffs,

v

CHIEF JUDGES OF WAYNE COUNTY CIRCUIT COURT AND RECORDER'S COURT,

Defendants.
_____/

Supreme Court No. 86099

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF AMICUS CURIAE MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM

RESPONSE OF AMICUS CURIAE MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM TO SPECIAL MASTER'S REPORT

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IN RE:

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Petitioners,

v

CHIEF JUDGES OF WAYNE COUNTY CIRCUIT COURT and RECORDER'S COURT,

Respondents,

and

COUNTY OF WAYNE,

Intervening Respondent.

_____/

Supreme Court No. 86099
Hon. Tyrone Gillespie
Special Master

AMICUS CURIAE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

The proposed findings of fact, conclusions of law and recommendations of amicus curiae, Michigan Appellate Assigned Counsel System, are attached. Transcript citations are indicated by the name of the witness, the transcript volume number and the page(s) at which the testimony appears. A complete table of contents for all 12 volumes of transcript is appended as Attachment A.

TABLE OF CONTENTS

TABLE OF CONTENTS - Cont'd

INDEX OF AUTHORITIES CITED

INDEX OF AUTHORITIES - Cont'd

Cases — Page

Constitutions

Rules

INDEX OF AUTHORITIES - Cont'd

Statutes — Page

Other

PROPOSED FINDINGS OF FACT

A. Nature of Wayne County Fee Payments

1. From 1985 to July 1, 1988, counsel assigned to represent indigent felony defendants in Wayne County were paid according to an event-based fee schedule which paid such rates as:

Jail Visit	$ 50
Office Visit	25
Preliminary Examination (held or Waived)	125
Investigation & Preparation	150
Motion with Brief and Argument	75
Calendar Conference, Trial Conference, Arraignment on Information (each appearance)	50
Evidentiary Hearing (each 1/2 day)	75
Plea	150
Each Trial Day	150
Sentence	75

Additional rates were specified for events on appeal, such as transcript review, brief preparation and prison visits. The schedule also set rates for expert witnesses, "show-up" attorneys and other miscellaneous items.

Pl. Ex. 2; 1/52

2. Payment rates in the 1985 schedule differed significantly for certain events from those recommended by a committee chaired by Judge Clarice Jobes and approved by the Recorder's Court and 3rd Circuit benches in 1982. The 1982 schedule, which was never implemented, would have paid $150 for conducting a preliminary examination, $450 per trial day in a capital case, and $300 per trial day in a non-capital case. Notably, the fees for waiving preliminary examination and for guilty plea proceedings would each have been reduced to $100. The 1982 schedule would also have paid for one more jail visit than the 1985 schedule allows.

Pl. Ex. 3; 1/113; Jobes 1/112-15; Lorence 1/229-30

3. In July, 1988, Chief Judges Roberson and Kaufman informed the defense bar that the fees for trial work were being changed to flat rates that would depend on the statutory maximum prison sentence for the defendant's highest charge, with separate rates for murder cases. The flat rates are:

Offense Category	Fixed Fee
24 month max	$ 475
36 month max	500
48 month max	525
60 month max	550
84 month max	575
120 month max	600
168 month max	625
180 month max	650
240 month max	675
Life	750
Murder II	1,000
Murder I	1,400

The 1988 schedule specifies that each additional case for a single defendant will be paid at 50% of the fixed fee for that case. Reduced rates are also specified for dismissals at the preliminary examination because the complainant has not appeared, cases in which a capias warrant must be issued for the defendant, and cases in which assigned counsel are replaced by retained counsel. Per event fees for appeals, witness fees and selected other items were not changed. Under the flat fee schedule, the prosecutor's charging policy determines the fee.

Pl. Ex. 1; 1/35; Gish 11/4-5

4. The flat rate schedule makes no provision for trial per diems. The average jury trial in Recorder's Court takes 3.1 days. Since the schedule was adopted, the practice has arisen of paying $300 per day for each trial day beyond 3. In Recorder's Court the trial per diem is added to the flat fee automatically when clerks process the voucher. In Wayne Circuit, counsel must request the per diem in a petition for extraordinary fees.

Gish 10/195-97, 198-99; Slomski 1/205; Sowell 8/85-90; Kaufman 11/105, 153-54; Roberson 12/156-57

5. When extraordinary fees other than the trial per diem are granted, they are paid at the rate of $35 per hour. That rate has been in effect since the 1970's. In Recorder's Court cases, the petition for extraordinary fees is submitted to the trial judge. If the trial judge recommends approval, the petition is passed on to the Chief Judge, who ultimately decides whether to grant the request in whole or in part. In Wayne Circuit cases, petitions are submitted directly to the Chief Judge, who reviews them in batches of 10-15 every few months.

Lorence 1/237-38; Kerwin 6/100-01; Kaufman 11/98-100, 108-09; Roberson 12/155-56

6. Under the flat fee schedule, the amount paid bears an inverse relationship to the amount of effort expended. The effective hourly rate always goes up as the hours worked go down.

A lawyer who put only 3-5 hours work into a case before having it dismissed at the preliminary examination or entering a guilty plea may earn effective hourly rates of $100-200 per hour. Even with the trial per diem, a lawyer who puts numerous hours into preparing for and conducting a jury trial may earn $30 per hour or less.

Ravitz 1/106; Jobes 1/117; Morgan 1/160-61, 162-63, 165-66, 199; Slomski 1/207-212; Mogill 2/168; Spangenberg 3/42-43; Daniel 3/141; Evelyn 4/38-40; Thomas 4/149; Jacobs 5/21, 46, 60-61; Levine 6/41-44; Kerwin 6/97-99; Sowell 8/85-89; Edison 8/138-41; Gish 11/61; Kaufman 11/150-51, 154, 157-58

7. Under the flat fee schedule, petitions for extraordinary fees must include an analysis of all the lawyer's assigned cases for the preceding year. The purpose of this requirement is to prevent attorneys from receiving windfalls when their total assignments are averaged. That is, if a lawyer earned relatively high hourly rates by receiving the flat fee for a number of cases that required minimal work, those payments would be set off against the extraordinary fees to be paid in a case requiring substantial work. In Wayne Circuit, failure to provide the analysis will result in at least partial denial of the petition, even if the only amount being requested is the trial per diem.

Gish 10/160, 11/60-61; Kaufman 11/102-104, 148, 151-53; Thomas 4/136-37, 141

8. Extraordinary fees are paid infrequently. They are reserved for the truly exceptional cases, such as lengthy murder trials with multiple co-defendants or high public visibility and appeals to the United States Supreme Court. Attorneys are reluctant to request extraordinary fees "too often" because they feel it will negatively affect how judges perceive them. Petitions are commonly granted only in part. When they do file petitions, some attorneys try to anticipate the extent to which their requests will be granted and do not itemize all their hours. Denials of extraordinary fees are almost never appealed because of the additional effort required and because of a desire not to antagonize judges.

Lorence 1/238-40, 4/164, 222-23; Evelyn 3/220-26, 4/27; Thomas 4/121, 122-23, 132-33; Levine 6/39; Kerwin 6/100-01; Gish 10/159-60; Kaufman 11/101, 144-46

9. The public defender office (Legal Aid and Defender Association) is not funded by an annual governmental appropriation or an annual budget from the board of a non-profit corporation, as is typical nationally. Instead, the public defender submits vouchers on a case-by-case basis, like private assigned counsel. The public defender also submits petitions for

extraordinary fees in selected cases, although the requirement that it analyze its total caseload has been waived.

Churikian 4/42; Blake 5/76, 93, 95-97; Spangenberg 3/21

10. The scheduled rate for psychiatric experts in capital cases is $300 for an interview and written evaluation. All other experts receive $200 for an interview and evaluation. All experts receive an additional $150 for a court appearance. The maximum amount routinely allowed for an investigator is $150. Defense attorneys have a difficult time finding experts who will work at these rates. It is not uncommon for defense attorneys to pay for investigation out-of-pocket that is not reimbursed. The appellate schedule also fails to reimburse adequately for routinely incurred out-of-pocket expenses, including travel, postage and photocopying. Thus the scheduled fees for these services put the defense at a disadvantage relative to the resources available to the prosecution through local, state and national law enforcement agencies.

Pl. Ex. 1; Loeb 2/102-03; Churikian 4/47-49, 50-56, 66; Evelyn 4/6-10; Blake 5/103-05; Kerwin 6/173; Morgan 1/157, 160, 167; Tarnow 5/172

B. Comparison to Other Jurisdictions

11. Wayne County's fee schedule is unique in Michigan. While nine of the 42 counties that rely primarily on assigned counsel, including six of the nine largest counties in the state, use fee schedules for predictability and administrative convenience, all of these are event-based. Only Wayne pays a flat fee based on the potential maximum sentence. In addition, all the other fee schedule counties pay a trial per diem beginning with the first day of trial except Tuscola, which pays a per diem only after the second trial day.

Pl. Ex. 34; Levine 6/18, 27-28

12. Wayne County's public defender office is also unique. The four other defender offices in Michigan (Kent, Washtenaw, Bay, 26th Circuit) are typical of defender offices nationally in that they are either governmental agencies or private non-profit corporations with annual budgets that handle the majority of assigned cases in their jurisdictions. The defender office in Wayne County is unique both because it receives only 25% of the assignments and because it vouchers for fees on a case-by-case basis just like individual assigned counsel do.

Levine 6/25-26; Spangenberg 3/21

13. Thirty-three counties that rely primarily on private assigned counsel pay hourly rates ranging from $25-65 per hour. Most pay in the $40-50 range and reimburse expenses.

Pl. Ex. 33 & 34; Levine 6/28-29

14. Thirty-four Michigan counties use the contract system for indigent defense. A study by the Defender Systems and Services Committee of the State Bar indicates that these contracts share many of the problems associated with low-bid contracts nationally. These include payment of fixed annual rates regardless of changes in case volume, payment of low fixed fees per case, the lack of any trial per diem and gradually rising costs.

Pl. Ex. 37; Levine 6/33, 47-49, 7/66-67; Loeb 2/160-61; Spangenberg 3/44-49

15. When the fee schedules of Wayne, Oakland and Macomb Counties are compared by applying them to hypothetical cases, it is evident that they all pay lawyers relatively better for pleas than for trials. However, the disparity is greatest in Wayne County. For a guilty plea requiring ten hours of work, the lawyer would be paid effective hourly rates of $52.50 in Wayne, $35 in Oakland, and $60 in Macomb. For a three-day jury trial in a capital case, the lawyer would be paid effective hourly rates of $15 in Wayne, $22.40 in Oakland and $39 in Macomb.

Pl. Ex. 34; Levine 6/41-44

16. In Oakland County an additional disincentive to conducting jury trials is the fact that the prosecutor, who controls the docket, routinely schedules 6-10 trials for a single day. Defense attorneys must return to court repeatedly, prepared for trial each time, until their cases are actually heard. Guilty pleas can be disposed of in a single appearance.

Loeb 2/159-60; Roberson 12/86-87

17. There is a crisis in the delivery of indigent defense services nationally due to underfunding. Litigation over assigned counsel fees is pending or has been recently resolved in 21 states. In the majority of states, indigent defense is fully or partially state funded. With a few exceptions, including California, state funded jurisdictions provide greater resources for indigent defense than county funded ones.

Spangenberg 3/16, 62, 83; Neuhard 7/76-78

18. Most jurisdictions compensate private assigned counsel on an hourly basis. Although maximum fees may be set according to case type, e.g., felony, misdemeanor, juvenile, mental health,

flat fees based on the potential maximum sentence are "very, very unusual."

Spangenberg 3/22-23, 30

19. Rates in non-capital cases, i.e., those where the maximum penalty is less than death or life imprisonment, are moving towards $50 per hour and above. Twenty-three states now have that rate somewhere in their payment formula. The average hourly rate nationwide is $45-47. Capital offenses are generally paid for at much higher rates. In addition, 21 states have no maximum payment amounts for non-capital felonies. In 18 other states, the maximum exceeds $1,000. To the extent that maximums exist, they are almost all higher than the Wayne County flat rates.

Pl. Ex. 23; Spangenberg 3/18, 24-25, 28-29, 30, 97-98

20. Having a relationship between the time required to handle a case and the fee that is ultimately paid is very important. Studies show that as a general rule, the more serious the case, the more time is required. Where payment maximums exist, it is critical to determine whether and how often they are waived. Some states, such as Virginia and South Carolina, have unwaivable maximums. In some states maximums are waived routinely. And in some states they are waived only in extraordinary circumstances, such as very long trials or complex cases.

Spangenberg 3/96, 100, 25-28, 30-31

21. Although it is often discussed, bill padding by lawyers is not a common problem nationally. Apart from the effect of maximum rates, where they exist, judicial review of vouchers acts as a check on the hours being billed. In addition, some jurisdictions establish presumptive payment guidelines for various types of cases that are similar to sentencing guidelines or the repair cost estimates used by automobile mechanics. Standards for each case type, e.g., B&E bench trial, CCW plea, murder 1 jury trial, are developed either by a quantitative analysis of a sample of itemized billings or by the consensus judgment of experienced lawyers and judges about the work typically involved. Vouchers that fall within the guideline range are automatically paid. Those above the guidelines must be individually justified. Such a payment system can be operated administratively without consuming a great deal of judicial time. Periodic computer checks of an attorney's total vouchers, as are done in Massachusetts, also can be used both to detect double-billing and to deter it.

Spangenberg 3/31-37, 92-93; Levine 6/50-51, 7/66

22. At the time of the hearings in the instant case, the U.S. District Court for the Eastern District of Michigan, like

most federal courts, paid $40 per hour for out-of-court time and $60 per hour for in-court time to a maximum of $3,500 per trial. However, by statute, federal rates are reviewed every three years and cost of living adjustments may be made. The Court can take judicial notice of the fact that the Eastern District subsequently raised its hourly rate to $75 and eliminated the distinction between in-court and out-of-court time, as many other federal districts have recently done. The federal maximum is frequently waived and expenses are routinely reimbursed.

Morgan 1/158-59; Spangenberg 3/61; Amicus Attachment B: Fact Sheet - CJA Attorney Compensation

C. Wayne County Fees Relative to Retained Rates, Overhead, and Criminal Justice System Salaries

23. Rates paid under the flat fee schedule range from roughly one-third to one-tenth the prevailing rates for retained criminal defense counsel. The disparity is particularly great in capital cases, which are the most likely to result in jury trials, are the most legally and factually complex, and carry the most serious consequences for defendants. Retained criminal defense lawyers bill at both flat and hourly rates, often in combination in the same case. The 1988 State Bar Survey on Legal Economics reported the median hourly rate of Michigan criminal lawyers to be $75. The statistician who conducted the survey testified that median would rise to $82 per hour for 1990 based on 5% inflation each year. A survey by the Defender Systems and Services Committee of the State Bar reported the median hourly rate of criminal defense attorneys to be $90 per hour in 1989.

Witnesses who do substantial retained criminal work testified that, to the extent they bill on an hourly basis, their rates range from $100 to $200 an hour. Lump sum retainers for murder cases were typically quoted in the $10,000-15,000 range, with $1,000-1,500 additional per day of trial. This is corroborated by the Criminal Defense Survey done by the Defender Systems and Services Committee of the State Bar. Retainers in other capital cases range from $3,500 to $7,500 and beyond. In non-capital cases retainers range from $2,500 to $5,000.

The only witness who would accept a fee substantially below $10,000 for a murder case was Elizabeth Jacobs, who candidly ascribed her willingness to accept below average retainers to the fact that women lawyers have more difficulty attracting murder cases and she likes handling them. Several witnesses, including Ms. Jacobs, noted that the $1,400 fee schedule rate for first degree murder cases is at or below their retained rates for such simple matters as drunk driving charges. Rates on the event-based schedule for assigned appeals also yield payments that are 25% or less of what would be paid for retained appeals.

By comparison, attorneys representing the prisoner class in federal 1983 litigation were recently awarded fees by Judge Enslen from $125-180 per hour. The State Bar survey found that large law firms bill from $30-60 per hour for work done by paralegals.

Ravitz 1/71, 86; Morgan 1/168, 195; Stiffman 2/12, 19, 20-21, 62; Loeb 2/90-91, 100-01, 145; Mogill 2/167; Daniel 3/114-20; Howarth 3/174-75, 185; Jacobs 5/20, 22, 23, 32-33; Tarnow 5/156-71, 173; Levine 6/36-38; Kerwin 6/95-99; Lusby 8/52; Sowell 8/106; Tippman 8/191; Gish 10/209-11; Roberson 12/209-11

24. Overhead consists of fixed costs a lawyer must pay that are not attributable to any particular case. These include non-lawyer salaries, rent, phone, utilities, library, taxes and insurance. The testimony regarding defense attorneys' overhead cannot be reconciled perfectly. Some witnesses stated overhead as a percentage of gross income (e.g., 25%, 50%), some gave annual dollar amounts (e.g., $24,000, $35,000), and some offered amounts per hour (e.g., $39.30, $31.00, $43.00, $25-35, $45.00, $30.00). It is also not clear that hourly overhead rates were calculated on a strictly consistent basis, such as actual hours worked, actual hours billed or 40 hours per week, with or without weeks off. Nonetheless, the typical overhead for Wayne County criminal defense attorneys appears to be in the $30-40 per hour range. At $35 an hour for each hour actually worked, assigned counsel would generally just break even, without having drawn any salary for themselves. Low assigned counsel fees require those lawyers doing primarily assigned work to keep overhead costs low.

Slomski 1/219-21; Stiffman 2/14, 15, 20, 21, 74-75, 81-82; Loeb 2/97-99, 154; Mogill 2/168-69; Lorence 2/190, 4/186-93; Daniel 3/113; Howarth 3/213; Evelyn 3/219; Levine 6/38

25. It is undisputed that the flat fee schedule effectively freezes assigned counsel rates at 1985 levels (which were in turn twice the rates paid in 1967) while the salaries of all other criminal justice personnel, including judges, prosecutors, probation officers, courtroom clerks, police and corrections officers are routinely adjusted for inflation. Judicial salaries, in particular, rose from $57,000 to $98,000 since 1981 and have nearly tripled since the early 1970's.

Attorneys employed by the state to do criminal defense and prosecution are paid on a salary schedule that provides $30-40,000 per year for entry level lawyers and $35-49,000 for those with several years of experience. The state provides cost of living adjustments annually. In 1989, staff attorneys in the Wayne County Prosecutor's Office were paid salaries that ranged up to $81,250. Investigators in that office were paid from $29,665 to $55,845. By contrast, the public defender in Wayne County could only offer to hire attorneys with some experience at $25,000 and was forced to give his staff Christmas bonuses in lieu of raises for 1990.

Publicly salaried attorneys do not, of course, pay overhead, which is built into their offices' budgets. The salaries of criminal justice personnel other than defense attorneys do not vary according to the penalties defendants face or the defendant's income or the extent of jail overcrowding.

Pl. Ex. 35 & 46; Ravitz 1/38-39, 78; Blake 5/79, 80-83; Tarnow 5/178; Levine 6/51-53, 67; Sowell 8/101-02, 103-04; Neuhard 7/104-06, 126-27; Gish 11/37-38; Kaufman 11/170

D. Conclusions Regarding Adequacy of Fees

26. It is undisputed that fees paid under the schedule are low. Witnesses for both plaintiffs and defendants, including judges as well as lawyers, variously characterized the rates paid under the flat fee schedule as "shockingly low", "inadequate", "woefully inadequate", "ridiculously low", "very, very low" and "much too low". One defense witness, the former head of the public defender office, said that as applied in Wayne Circuit Court the current schedule amounts to "pure unadulterated slavery". Witnesses further noted that fees under the prior event-based schedules were also low and that even the 1982 schedule devised by Judge Jobes' committee but never implemented would be inadequate today unless adjusted for inflation. Judge Edward Thomas said he thought no one on the bench would say defense attorneys should not get paid more. Chief Judge Dalton Roberson said, ". . . I will never sit here and tell you that the amount of money that the lawyers make in Recorder's Court on assigned cases is enough." Thus the question to be decided is not whether the current fees are objectively low, but whether they nonetheless satisfy the statutory requirement of reasonable compensation.

Ravitz 1/50, 53-55; Jobes 1/118, 143; Howarth 3/170; Evelyn 4/35; Thomas 4/138; Kerwin 6/99-100; Lusby 8/53, 55; Sowell 8/104-05; Edison 8/137; Roberson 12/152

E. Attorney Appointment Process

27. Recorder's Court maintains a list of attorneys eligible to receive assignments. To join the list at entry level, a lawyer must complete an application form and be "CAP" certified. CAP is the Criminal Advocacy Program, a training program funded by a 1% assessment on all assigned counsel vouchers. CAP is essentially a lecture series which is open to anyone working in the criminal justice system in Wayne County. To be certified, lawyers must attend a certain number of the lectures each year.

Attorneys who are qualified to handle capital cases are identified on the assignment list by the designation "cc". Attorneys who want to handle capital cases must submit a written request to a judicial screening committee chaired by Judge

Clarice Jobes. The committee assesses the lawyer's experience, ability, demeanor, knowledge of the rules of evidence and other factors contained in a list of criteria.

Currently the assignment list contains about 650 names. However there is a significant amount of "deadwood" as lawyers often stop taking assignments without formally withdrawing from the list. Of the total, there are about 400 lawyers who actively seek assignments, and about 100 who are very active.

Jobes 1/124-25; Lorence 2/193; Churikian 4/46; Thomas 4/141; C. Harper 8/10-12, 18, 22-23, 25-26, 26-27, 35, 36; Sowell 8/75-76; Roberson 12/69-70; Eaman & A. Harper 7/27-33

28. Responsibility for making assignments is rotated among the judges, including those Wayne Circuit judges sitting temporarily in Recorder's Court under the merged docket. In January, 1990, the rotation period was shortened from two weeks to one week. Attorneys who want appointments leave their business cards with the judge who is sitting on assignments. The judge typically receives a large stack of cards, many from young lawyers who virtually beg for the work.

When an indigent defendant requests counsel, the clerk's office determines whether the defendant is already being represented by assigned counsel on another case. If so, as happens in 5% of all cases, the appointment is given to the lawyer previously assigned. Otherwise, the petition and basic information about the case are given to the assignment judge. The judge picks the lawyer to be appointed and notifies the clerk's office, which in turn notifies the lawyer. The assignment judge is given a daily computer printout of the assignments he or she has made so far. The judge does not know the extent to which a lawyer has received assignments from other judges.

The assignment judge has full discretion to select counsel. The only controls on the assignment process are informal social controls. While the judges have agreed to limit themselves to picking attorneys who are on the eligibility list, some occasionally pick ineligible lawyers and their decisions are not overruled. If a judge selects an unqualified attorney for a capital case, Judge Roberson may encourage reassignment to another lawyer and, if necessary, discourage the lawyer by advising that he or she will not be paid for handling the case. Some judges tend to give more assignments to particular attorneys, and some eligible attorneys receive no assignments during the course of a year. Some judges delegate the task of selecting counsel to their clerks.

Judges share information a about extreme instances of attorney incompetence and individual judges can choose not to appoint lawyers they feel are incompetent. Pressure may be exercised if a judge engages in blatant cronyism, as when one

judge gave 24 assignments to a woman he was dating. On the other hand, judges freely exchange places in the rotation order so that those who are running for re-election are in a position to make assignments shortly before their fundraisers.

By Supreme Court order, 25% of all the assignments must be made to the defender office. The order was entered in 1972, when grant funding ended and the office had to become economically self-sufficient to survive. The order was needed because judges who felt the public defender impinged on their assignment prerogative were not giving it enough cases. Today, the 25% share of Wayne Circuit cases is allotted administratively by the Chief Judge. For Recorder's Court cases, each assignment judge is expected to make 25% of his or her appointments to the defender, and most do.

Ravitz 1/99-100; Jobes 1/129-30; Howarth 3/206; Blake 5/67; Kerwin 6/121, 140-42; 158-62; Roberson 12/71-72, 77-78; Eaman & A. Harper 7/27-33

29. Assigned counsel are notified of their appointments by telephone and have 24 hours to appear at the clerk's office to pick up paperwork. If they do not appear in time and have not made other arrangements, the case is reassigned. In addition to the order of appointment, the lawyer is given an early discovery packet that includes the police investigator's report (warrant request), the defendant's prior record, and a standard signed discovery order. In January, 1990, a sentencing guidelines calculation was added to the discovery packet.

Preliminary examinations are scheduled for 7-10 days after arraignment on the warrant. Since early discovery packets are available on the third day after the arraignment, counsel has 4-7 days to confer with the defendant and review the case. If no lawyer appears for the preliminary examination, the case is assigned to "house counsel", a standby lawyer who is assigned to be available in District Court to cover such situations. On occasion, the defender office has been removed from a capital case by a district judge for refusing to conduct a preliminary examination without additional discovery and other counsel was appointed. If the case is bound over, arraignment on the information (AOI) occurs in 7 days if the defendant is in jail and 14 days if the defendant is free on bond. Thus the total time elapsed from the appointment of counsel to AOI is 17 days in jail cases and 24 days in bail cases. If the defendant pleads guilty at AOI, sentencing is set for 10 days later.

C. Harper 8/15-16, 24-25, 28-30; Lorence 2/201-02; Churikian 4/105-06; Gish 10/137, 140-41, 145, 200-209; Roberson 12/66, 68, 75-79, 130-31

F. Effect of Fees on County Budget

30. Wayne County is statutorily required to pay the cost of indigent defense. Unlike several other county services (e.g., airport, roads, public works) that are paid from specially earmarked revenue sources, indigent defense is paid from the general fund. In 1990, the general fund budget was $273 million and $15.8 million, or 5.8%, was paid for indigent defense. Of that total, Recorder's and Circuit Courts were responsible for $9.2 million and Probate Court was responsible for $6.6 million. By comparison, $14.5 million was county-paid for prosecution costs, not including county-owned office space which is covered elsewhere in the county budget.

Although fees have not been raised, the cost of indigent defense has increased substantially over the last several years because of increased case volume stemming from the war on drugs. From the county budget perspective, the problem with recent cost increases is not so much the total dollar amount per se, but the county's lack of predictability and control. Indigent defense is an expense the county essentially absorbs without question. The courts approve the vouchers for payment and the county pays them. The courts attempt to provide accurate cost projections during the budgeting process, but if there are overruns the county must shift money from other budget categories, as it did in both 1988 and 1989. Overruns are a matter of great concern to budget officials because the county must stay within very tight budget parameters to avoid paying interest on state loans.

The determination of assigned counsel payment rates is left exclusively to the judges. If the judges were to raise the rates, the county would simply pay them unless, in an extreme case, the county executive felt compelled to intervene somehow. Increased rates would raise the total budget for indigent defense but would not fundamentally affect the problems of predictability and control one way or the other.

The county has only explored superficially the potential cost effectiveness of a county-wide public defender office, with a budget and staffing essentially comparable to the prosecutor's, that would handle the majority of non-conflict cases. Attempts to establish such an office would be politically sensitive.

Lannoye 9/16-17, 22,-24, 28-30, 35-36, 56, 63-64, 74-75, 79, 88, 10/6-8, 12-13, 19-23; Amann 9/99-100, 100-01, 104-06, 114-15, 115-17, 10/24-26, 31, 42, 62-64; Dodge 12/29-31, 39; Blake 5/146-47; Sowell 8/93-96; Roberson 12/95-97

G. Effect of Low Fees on Indigent Defense Representation

31. If fees are sufficiently low, attorneys are not merely faced with the choice of making a lower rather than a higher personal income. They are in the position of earning less per hour than they are spending on overhead. At that point, the attorney has four choices:

a) Continue to provide indigent defendants with high quality representation at a financial loss;

b) Increase the volume of cases handled to compensate for low payments per case;

c) Minimize the work done in each case to increase the effective hourly rate; or

d) Stop taking assignments.

The testimony indicates that all four options are exercised.

Mogill 2/172; Evelyn 4/35; Levine 6/7-9

32. Some competent, experienced lawyers continue to accept some assignments despite low fees. Once they agree to handle a case, they give the best representation they can, although they may not give as much personal attention to the client and the client's family as they would in a retained case. Those attorneys are generally acting from a sense of personal commitment to indigent defense. Sometimes they agree to take particular appointments only because urged to do so by a judge. To the extent these lawyers are being paid at effective rates below overhead, they are subsidizing the criminal justice system from their own pockets. The provision of effective representation to indigent defendants, particularly in capital cases, has depended largely on the integrity of these lawyers.

Ravitz 1/72-73, 96-97; Jobes 1/135; Slomski 1/225-26; Loeb 2/139; Mogill 2/174; Spangenberg 3/77-78; Daniel 3/144; Churikian 4/103; Thomas 4/153; Lorence 4/186, 221; Kerwin 6/106; Lusby 8/48, 50, 53; Sowell 8/82-84, 107; Edison 8/130-31, 133

33. Some lawyers seek a very large volume of assigned cases to compensate for the low payments per case. While high volume is not necessarily synonymous with poor quality representation, it makes it very difficult for an attorney to give each case the attention it deserves. Two witnesses described lawyers who were constantly rushing from courtroom to courtroom obviously "hustling a living" from numerous assignments.

Mogill 2/177; Howarth 3/169-70, 211-12; Churikian 4/111; Lorence 4/175-76; Levine 6/6; Kerwin 6/131

34. Some lawyers provide ineffective representation because they are unwilling to expend effort for which they will not be adequately compensated. Most ineffective representation consists of acts of omission rather than commission. Such omissions include failing to make suppression motions or other motions necessary to protect the defendant's right to a fair trial, failing to conduct preliminary examinations or evidentiary hearings, failing to investigate and assert viable defenses, failing to discover or challenge prosecution evidence and failing to advocate in the defendant's behalf at sentencing. These failures are frequently not visible to the trial judge and are often masked by guilty pleas.

Omissions may be most evident to co-defendant's counsel in multi-defendant cases. For instance, witness Joan Morgan described a situation in which the co-defendant's counsel wanted to waive the preliminary examination. The prosecutor would not agree because Ms. Morgan refused to waive it for her client. As a result of the exam, the charges against Ms. Morgan's client were dismissed and the prosecution was left with an extremely weak case against the co-defendant. Ms. Morgan's sense was that, left to his own devices, the co-defendant's lawyer would have waived the exam and advised his client to plead guilty at AOI in order to maximize his own fee.

Witness Gerald Evelyn described a case in which four co-defendants were faced with multiple charges, including murder. Counsel for three of the co-defendants conducted extensive evidentiary hearings on pretrial motions. Despite the urging of the co-defendants' lawyers, the lawyer whose client had the strongest defense refused to participate because, he said, it was not worth filing extensive motions and being tied up in hearings for several days for $75. Ultimately that lawyer's client was convicted of murder while the co-defendants all obtained dismissals, acquittals or, in one instance, conviction as an accessory after the fact.

Lawyers also overhear other lawyers talking to clients in the lock-up, coercing pleas and suggesting a factual basis that is contrary to the facts given by the defendant. Lawyers see defendants in court "blowing" pleas because they have not been adequately prepared for the plea proceeding. Lawyers also engage in shop talk and hear their peers state the intention not to perform certain tasks because the fees are too low.

Apart from specific acts or omissions that so clearly affected the outcome that an appellate court might be persuaded to reverse, testimony indicated that a great deal of generally shoddy practice occurs. Many witnesses described the "waivers and pleaders" who constitute as many as 25% of the attorneys actively receiving assignments. The waivers and pleaders do not maintain offices, do not have secretaries and do not use law libraries. They work from the trunks of their cars. Their files consist of envelopes with case names scribbled on the back. They

survive by keeping their overhead low and their volume high. They can regularly be seen calling out their clients' names in courtrooms and advising defendants they have never met before to waive preliminary examinations or enter guilty pleas. Some of these lawyers have practiced in Recorder's Court for many years and never conducted a trial.

In most cases the causal connection between low fees and poor performance is implicit. However the existence of that connection is widely recognized. In studies done in Virginia, Oregon, Oklahoma and Massachusetts, lawyers admitted that inadequate fees affect the quality of the representation they provide indigent defendants. Similarly, of 185 Michigan lawyers responding to the Defender Systems and Services Committee survey, 82% said they believe current assigned counsel fees affect the quality of representation indigent defendants receive. Asked how fees affect quality, the respondents said that low fees create pressure to spend less time on cases overall, to omit particular tasks, to take on an excessive volume of appointments, and to avoid trials and encourage guilty pleas.

Ravitz 1/89, 93; Jobes 1/138-39; Morgan 1/168-69, 197-98; Stiffman 2/24; Mogill 2/166-67, 174-75, 178-80; Lorence 2/196-97, 217, 4/200-03, 208-09; Spangenberg 3/38, 101-03; Daniel 3/127-29; Howarth 3/169-70, 182, 193-94, 211; Churikian 4/104, 108-09; Levine 5/10-11, 6/40; Pl. Ex. 36; Kerwin 6/107-12, 122-23, 127-28, 143-44; Neuhard 7/81, 134-35; Sowell 8/100-01; Edison 8/141-43; Kaufman 12/7-8

35. Some lawyers who are unwilling to compromise their performance standards simply stop accepting assignments when they can no longer tolerate the fees. The evidence indicates that the majority of assigned work is handled by lawyers with less than five years' experience. The longer lawyers are in practice, the less time they devote to assigned cases. However, this phenomenon appears to be related strictly to economics. Defense attorneys who had stopped taking assignments testified they would begin accepting them again if the rates were increased to a point somewhere beyond overhead. Over 71% of all respondents to the Defender Systems and Services Committee survey, including two-thirds of those with over ten years in practice, said they would take more assignments if the fees were raised.

Respondents to that survey also pointed to the loss of "good" lawyers from assignments lists as a way in which fees affect the quality of representation. As good lawyers drop out, an increased share of the assignments must be made to lawyers who are inexperienced or willing to cut corners. Eighty-seven percent of all felony defendants in Wayne County are indigent. With caseloads increasing, the need for qualified lawyers will also continue to increase. While the absolute number of lawyers willing to accept assignments is still adequate to meet the demand, a significant percentage of them are waivers and pleaders, or young and inexperienced. It is becoming

increasingly difficult for judges to find qualified lawyers willing to accept capital cases.

The connection between low fees and the willingness of lawyers to accept assignments has been seen nationally and on the appellate level in Michigan. Numerous attorneys have removed their names from the statewide appellate assigned counsel roster or from the local appellate lists of particular circuits because of county payment rates. Although 50 to 70 lawyers join the statewide roster each year, the total membership has remained about the same, in the face of rising caseloads, because an equal number of lawyers drop off. Since the new members are generally inexperienced and the resignations include some attorneys eligible to take the most complex cases, there is a net loss of the best qualified appellate lawyers.

Ravitz 1/62-63, 92, 94; Jobes 1/138, 142-43, 144; Morgan 1/156; Mogill 2/164-65, 189; Spangenberg 3/38, 40, 80; Daniel 3/112-13, 121; Howarth 3/187, 205; Thomas 4/142-44; Levine 5/14-17, 6/4-5, 17, 36, 38, 40; Jacobs 5/22, 51-52; Tarnow 5/154; Kerwin 6/113, 127, 166; Sowell 8/108; Edison 8/148; Gish 11/66

H. Purpose of Flat Fee Schedule

36. The current flat fee schedule was constructed by averaging the fees paid in 1987 in each of 12 categories of cases. The categories represent the various statutory maximum sentences defendants may face plus separate categories for first and second degree murder. Roughly 45% of Wayne County cases carry 4 or 5 year maximums; roughly 14.5% carry 20 year maximums; over 17% are capital cases.

The 1987 figures are the fees paid on an event basis for dismissals, guilty pleas, bench trials and jury trials, including extraordinary fees. Since there are many more pleas than trials, an average including all cases is somewhat higher than the average for pleas alone but lower than the average for just trials would be. A suggestion by the court's statistician for building into the new schedule a means of accounting for the attorney time spent was not acted upon. While the amount paid for any particular case in 1989 might be very different than it would have been in 1987, the per case average is virtually identical. The average paid per case was $628.99 in 1987 and $627.34 in 1989. Changes in the total amount of fees paid to assigned counsel are attributable solely to changes in volume, not to the difference in payment rates.

The schedule was unilaterally adopted by Chief Judges Kaufman and Roberson. No input was obtained from any judicial committee or from the defense bar.

Pl. Ex. 9; Tippman 8/162-63, 182-83, 186-88, 189-93, 198, 208-11; Gish 10/92-93, 104, 116, 174-76, 197-98, 11/27, 35-37; Roberson 12/110-11, 161-62; Jobes 1/116; Lorence 1/236-37

37. The testimony regarding how the flat fee schedule came to be adopted is inconsistent. Recorder's Court Administrator George Gish testified that he was asked to come up with a schedule that would reduce unnecessary delay after a lawyer upset Recorder's Court Chief Judge Roberson by stating that he had been chided by other attorneys for getting a case dismissed at the preliminary examination when he could have made $200 more for delaying the case and getting it dismissed at a later stage.

Judge Roberson testified that he never thought there was a serious problem with lawyers milking the assigned counsel system for fees. However the County Executive and his staff thought so and that presumption was raised repeatedly at budget hearings. Judge Roberson felt compelled to rebut the presumption because it did an injustice to the whole Wayne County criminal justice system. Therefore he asked Mr. Gish to develop a fee schedule that would not permit lawyers to profit from simply delaying a case.

Wayne Circuit Chief Judge Richard Kaufman testified that the fee schedule evolved from discussions about how to reduce jail overcrowding. A study had shown that the longer cases took to be resolved, the more jail beds were needed. Therefore, if guilty pleas were obtained earlier in the process, the pressure on jail space would be reduced. Mr. Gish was assigned to develop a flat fee schedule as an incentive to attorneys to resolve earlier those cases that would result in guilty pleas anyway.

There is no question that the ultimate goal is efficient case resolution in order to effectuate defendants' speedy trial rights, avoid the sort of docket congestion that plagued Recorder's Court in the mid-1970's, and reduce jail overcrowding. The intended means for achieving that goal is obtaining more guilty pleas at AOI. Saving money on the total cost of indigent defense is neither a goal nor a consequence of the new schedule.

Tippman 8/184-85, 188; Gish 10/87-88, 93-94, 96-97, 105, 11/23-4; Kaufman 11/91-94, 127-29, 168; Roberson 12/53, 59-60, 94-95, 114-15; Lorence 2/216-17

38. Several factors which retard case resolution were identified.

a) One is the substantial increase in volume resulting in large part from the war on drugs.

Gish 10/116

b) A major factor is changes in the policies and organization of the prosecutor's office. The current prosecutor has adopted a policy of not plea bargaining in entire categories of capital cases, including murder and armed robbery. This

forces defendants to go to time-consuming trials in cases that might have resulted in guilty pleas at an early stage. This no-reduced-plea policy is exacerbated by the fact that many cases are overcharged to begin with, e.g., by charging a higher level of intent than the facts necessarily support.

The situation is even further complicated by a high degree of bureaucratization in the prosecutor's office. Formerly, pleas were negotiated by face-to-face discussion between a prosecutor and defense attorney about each individual case. Now, supervisory level prosecutors review files and indicate on them what reduced plea, if any, will be acceptable. Courtroom prosecutors have no discretion to change that decision through negotiation.

The inflexibility of prosecution charging and bargaining policies results in an enormous number of bench trials which are recognized to be "slow pleas". It is understood in these cases that the judge will find the defendant guilty of a reduced charge to compensate for the lack of a plea bargain. Consequently, among cases that go to trial, 63.5% of all murder charges and 76.7% of all assault with intent to murder charges result in convictions of lesser offenses. These bench trials take an hour or more. A judge cannot typically conduct more than three a day. Although Wayne County's jury trial rate is similar to the rest of the state, its bench trial rate is 15 times higher and its plea rate is 32% lower. Judge Kerwin characterized slow pleas as being "what lubricates the court".

Jobes 1/150; Loeb 2/135-37; Howarth 3/175-76; Kerwin 6/118, 166; Edison 8/144, 148-49; Gish 10/224-28, 11/5-8, 14, 69-72; Pl. Ex. 48; Kaufman 11/139, 142; Roberson 12/108-09, 127, 137-40

c) Another factor that contributes to docket congestion is the increased bindover rate since the responsibility for conducting preliminary examinations shifted from Recorder's Court to the 36th District Court. Despite prosecution overcharging, it is more difficult for defense attorneys to get charges reduced or quashed. When Recorder's Court judges acted as magistrates, they were sensitive to the fact that they were screening cases into or out of their own dockets. In addition, strong public sentiment about crime has made some judges more reluctant not to bind over.

Jacobs 5/59; A. Harper 11/9-10

d) A final factor that contributes to delay is the slowness of individual judges' dockets. While some judges have a reputation for hard work and efficiency, others routinely process cases at a much slower pace. Their dockets regularly become backlogged with cases that have been awaiting trial for 90 days or more.

Jobes 1/123; Lorence 2/210-11; Roberson 12/105-06

e) There is no evidence of conduct by defense attorneys, including dragging out cases unnecessarily to obtain fees, that was or is contributing to docket delay.

Lorence 2/214-15; Tippman 8/185; Gish 10/215-16; Kaufman 11/93, 106; Roberson 12/113-14

39. Various means other than adjusting assigned counsel fees are used to reduce docket congestion and jail overcrowding.

a) Under the capable guidance of Court Administrator George Gish, former Chief Judge Samuel Gardner and current Chief Judge Dalton Roberson, Recorder's Court has developed a highly sophisticated centralized docket management system. Information about the status of all cases, the dockets of all judges and the caseloads of all attorneys is constantly available. Consequently, problems can be identified quickly and resolved. Schedules can be established and maintained. Workload trends can be seen and priorities can be set. Recorder's Court has gained national recognition for its docket management techniques.

Gish 10/97-98, 148-49, 11/14-20; Roberson 12/53-57

b) A significant means of resolving cases quickly is the executive floor judge system. The entire bench is divided into work groups that may or may not have their courtrooms physically located on the same floor. One judge in each group is designated as the executive floor judge and is responsible for conducting arraignments on the information. The other judges in the group primarily conduct trials.

Cases are assigned through a two-stage blind draw. The first draw is to an executive floor judge. These judges are selected for their relative leniency in sentencing. Their function is to accept as many guilty pleas as possible at the AOI stage so that cases are cleared off the docket quickly. A single executive floor judge disposes of 600 to 700 cases a year. Defendants who do not plead have their cases blind drawn to other judges in the work group, some of whom have reputations for being substantially harsher at sentencing. It is widely agreed that certain judges could not ever be made executive floor judges because defendants would never plead guilty before them.

Lorence 2/209-10; Kerwin 6/120-21; A. Harper 7/17-19; Eaman 7/22; Gish 11/78-79; Roberson 12/85, 135-37

c) Backlogs in individual judges' caseloads are resolved by having the Chief Judge "crash" the trial judge's docket. Cases which have been awaiting trial for several months are scheduled for a re-pretrial before Judge Roberson. An attempt is made to resolve the case by a plea. If that fails, the case is removed from the original judge's docket and reassigned to a different judge, who may be Judge Roberson himself, for trial. Since all judges are elected by the public,

crashing their dockets and disapproving vacation and travel requests are the only means the Chief Judge feels he has to control the behavior of judges whose work habits retard case resolution.

Lorence 2/211-14; Eaman 7/21; Gish 11/39-40; Roberson 12/107-08

d) Two diversion programs, one for first offenders generally and one for welfare fraud cases, are employed to keep selected less serious cases from placement on the docket at all. A special fast track for first offender drug cases has also been developed which permits addicts charged with simple possession to enter a counseled guilty plea and begin drug treatment within as little as 24 hours from arrest. While it had been hoped this program would move 9-10 defendants a day out of jail and into treatment, in fact only 130 defendants a year have been eligible for it because of the prosecution policy of charging possession with intent to deliver instead of simple possession.

Gish 10/117-18, 177-81, 182-88, 190-91, 11/12-14, 75

e) Informal discussions with the prosecutor regarding his charging and bargaining policies have been undertaken by Chief Judges Kaufman and Roberson. These discussions have not succeeded in changing those polices and the judges believe they cannot attempt to affect the prosecutor's exercise of discretion by any other means.

Gish 11/10-12; Kaufman 11/131-32, 139-40; Roberson 12/127-28

f) Jail overcrowding has been directly controlled by releasing inmates awaiting trial, by developing alternative sentences for misdemeanants, and by sending all convicted felons who would have received jail sentences to state prisons.

Gish 11/43-44; Kaufman 11/88, 89

I. Impact of Flat Fee Schedule

40. The effect of the flat fee schedule on docket congestion and jail overcrowding is inconclusive at best. The Recorder's Court statistician, Dr. Donald Tippman, testified that his data analysis revealed "very little measurable impact of the flat fee schedule on anything. None of the changes that occurred were statistically significant . . ."

There were some trends apparent that did not reach significant levels. These included a decline in the motion rate, a decline in the jury trial rate, an increase in the rate of one-day trials, a decrease in the rate of multi-day trials, a decrease in the rate of pleas after trial dates were set and a 2-1/2% increase in the rate of pleas at AOI. This last trend, which was the stated goal of the flat fee schedule, amounted to

an additional 170 pleas per year. Of these, 20%, or 34 pleas are estimated to have been from jailed defendants. It was further estimated that 20 jail days are saved if a jailed defendant pleads at AOI rather than after a trial date has been set. Thus 34 defendants at 20 days each equals a savings of 680 jail days. At $61 cost per jail day, the increase in pleas at AOI saved the county $41,480.

The largest change was in the dismissal rate, which increased by 14.9%. Dr. Tippman did not recall whether he had tested that for statistical significance. While the overall guilty plea rate stayed constant, there was no attempt to measure whether any change occurred in the extent to which pleas were to the original charges rather than reduced charges.

Because so many factors affect plea and trial rates, even if statistically significant changes had been identified, it would have been difficult to make causal connections. For instance, changes in prosecution charging and bargaining policies could affect both dismissals and pleas at AOI.

Stiffman 2/33, 35, 44-45; Tippman 8/163-64, 167, 170, 172, 174, 177, 180, 181, 194-96, 199-200, 200-04; Gish 107-10, 218, 11/21-23, 82-83; Kaufman 11/36-39; Amann 9/122

41. The flat fee schedule has further reduced the effective rates paid to assigned counsel in the most serious, complex and time-consuming cases. The clearest example is the $1,400 fee for first degree murder cases. These almost always go to trial, since plea offers are rare and it would be malpractice to plead a client guilty as charged.

Several witnesses described the compensation they received in particular capital cases under the new schedule. Patricia Slomski represented one of multiple co-defendants charged with multiple counts including murder. The case involved 8-9 days of trial, 3 days of preliminary examination, pretrial hearings and an interlocutory appeal. For a total of 198 hours she was paid $3,500, roughly $17.65 per hour.

Joan Morgan was asked to represent a battered spouse charged with first degree murder. With the help of an investigator, who she paid $259.50, she spent nearly 42 hours preparing the case for trial. Based on Ms. Morgan's preparation, the prosecutor offered her client a plea to manslaughter several weeks before trial. Her client received a one-year sentence; accounting for unreimbursed costs, Ms. Morgan anticipated receiving $31.05 per hour.

William Daniel described getting his client acquitted of murder after an eight-day trial. Although he plans to voucher for extraordinary fees, he will not automatically receive $300 per day for the last five days of trial because it was a Wayne County case. If he does receive the full trial per diem in

addition to the $1,400 flat fee, his effective hourly rate will be $41.14.

Gerald Evelyn described being paid $1,740 for the 113.7 hours he invested in a complex murder case. He was denied extraordinary fees because he substituted into the case after the calendar conference and that meant he received some "windfall" under the fee schedule. He was thus effectively paid $15.30 per hour. Myzell Sowell received $1,900 for an 11-day murder trial he conducted in Wayne Circuit Court.

The most dramatic example was the Alberta Easter case which involved a mother and three sons who shot three police officers. The prosecution marshalled enormous resources, the discovery materials were massive, and the publicity was intense. Gerald Evelyn invested 597.5 hours for one defendant and was paid $25,848 or $43.26 per hour. Samuel Churikian invested 745 hours and the defender office received $32,000 or $42.44 per hour.

The flat fee schedule has also negatively affected the defender office's budget overall. When the schedule took effect, it was calculated by costing out 2,180 recent vouchers under the old and new schedules that the office would lose $172,205 per year. The court anticipated that the shortfall would be made up by an increase in low level narcotics cases that require relatively little work. However this result did not occur for three reasons. A third of the narcotics defendants don't appear and the defender office never receives full payment for their cases. To maintain consistent caseload sizes, a caseload increase of any kind requires a staff increase which the office cannot afford because its budget has decreased. Consequently defender caseloads are rising from 35 active cases to 41. Finally, in the last six months of 1988, the office experienced an increase in time-consuming capital case assignments.

Jobes 1/50; Roberson 12/109; Slomski 1/207-10; Daniel 3/114-20, 137; Evelyn 3/220-26, 4/6-9, 27, 38-40; Churikian 4/150-56; Sowell 8/85-88; Blake 5/73-75, 77, 88-92, 145

42. The flat fee schedule has caused experienced lawyers who were willing to accept capital case assignments under the event-based schedule to stop taking assignments largely or altogether. Defense attorneys with 15 years and more in practice who command large fees in retained cases but who nonetheless believed they would always devote a percentage of their practice to indigent representation have decided they cannot afford the income loss the flat fees cause when the necessary effort is put into trying capital cases properly.

Jobes 1/118; Slomski 1/205, 212-13; Loeb 2/111, 137; Daniel 3/112-13, 121; Howarth 3/172; Evelyn 3/215-16; Thomas 4/124; Jacobs 5/20; Kerwin 6/95-96; Lusby 8/55; Sowell 8/111

43. The flat fee schedule exacerbates the impact of already low fees on the quality of representation. By paying the same amount whether the lawyer does more work or less, the flat fee schedule creates a financial disincentive to do all the work a case may require. Specifically, by failing to pay separately for pretrial preparation, motions or the first three days of trial, the schedule encourages quick guilty pleas and discourages jury trials.

While the intent of the courts was merely to create an incentive for cases that would inevitably result in pleas anyway to plead sooner, the schedule has no way of discriminating between inevitable pleas and cases that should go to trial. The financial incentive to have the defendant plead guilty is the same. While the system must depend on the integrity of lawyers to insure that appropriate cases result in trials rather than pleas, the schedule rewards lawyers who lack integrity and penalizes those who demonstrate it. In time-consuming cases, the schedule creates an inherent conflict of interest between the client's right to effective representation and the lawyer's financial self-interest. While a fee schedule cannot forestall all instances of deficient representation, it is the obligation of government not to construct a schedule that affirmatively induces inadequate representation and thereby increases the risk that individual defendants will be denied the effective assistance of counsel.

While the statistics about the impact of the flat fee schedule on the docket as a whole are inconclusive, there is much anecdotal information to suggest that instances of deficient performance have increased. In particular, defense attorneys who have substantial opportunities to observe the performance of assigned counsel in Recorder's Court believe that the fee schedule does induce pleas at AOI that are inappropriate because counsel has had inadequate time to investigate the facts, potentially dispositive pretrial motions have not been made, the prosecutor has offered no plea bargain or the defendant asserts innocence. The deputy director of the public defender office described seeing lawyers who had been appointed at the AOI advise clients they had just met to plead guilty as charged on the spot.

Ravitz 1/37, 83-84, 90-91, 96-97, 104; Slomski 1/211-13; Morgan 1/161-62, 168-69; Stiffman 2/28-29, 58; Loeb 2/99-100, 138; Mogill 2/180-81, 188; Lorence 2/208, 4/179-82, 183-84, 195, 196, 217; Howarth 3/171; Churikian 4/57-59, 106-07; Jacobs 5/21; Kerwin 6/102, 103-04, 105, 113-14, 136; Levine 6/9-10, 7/55-57; Neuhard 7/133-34; Sowell 8/84-85, 98-99; Gish 10/214, 11/75-76; Kaufman 11/129-31

J. Recommended Rates

44. Attorneys setting fees in retained cases take into account the client's ability to pay. Similarly, defense

attorneys recognize that government cannot and will not pay the market price for assigned cases. Attorneys and judges testified repeatedly that reasonable compensation would be an amount between the cost of overhead and the market rate if assigned counsel were paid for all the work actually done and reimbursed for actual and necessary expenses.

Most attorneys prefer an hourly rate. Some indicated that an event-based fee schedule, adjusted for inflation, would be sufficient to allow them to take assignments. They do not seek windfalls for cases requiring relatively little work, but do want to be able to invest all the hours a case requires secure in the knowledge they will be fully compensated. Recommended rates included $50 per hour, with trial per diems of $500 and $300 for capital and non-capital cases, respectively; $35 per hour; $75 per hour; an event-based schedule comparable to the one approved in 1982; $2,500 plus $300 per trial day for murder cases; an event-based schedule with rates 50% higher than the one last used. The testimony is corroborated by the survey done by the Defender Systems and Services Committee of the State Bar in which nearly 75% of respondents said assigned counsel should be paid on an hourly basis. The median rate recommended was $65 per hour.

Ravitz 1/56, 57-60, 88-89; Slomski 1/211-13; Loeb 2/137-38, 141-42; Mogill 2/168-69; Daniel 3/132, 139; Thomas 4/146-47; Jacobs 5/21, 35, 51-52; Blake 5/137-39; Tarnow 5/181; Levine 6/39, 88-89, 7/70-73; Kerwin 6/96-97; Lusby 8/57

PROPOSED CONCLUSIONS OF LAW

Plaintiffs have alleged that the Wayne County flat fee schedule violates the mandate of MCL 775.16; MSA 28.1253 that counsel assigned to represent indigent defendants receive reasonable compensation. They assert that the schedule is unreasonable per se because 1) the amounts paid are too low, 2) the fees bear no relationship to the amount of work performed, and 3) the fees provide an economic disincentive to try cases or provide other time-consuming services. Plaintiffs also claim the schedule is unreasonable because it impinges on the constitutional rights of indigent defendants to the effective assistance of counsel and to a jury trial, and causes an unconstitutional taking of assigned counsel's property.

Defendants respond that the flat fee schedule must be reasonable because there is an adequate supply of competent lawyers available to accept appointments. They deny that deficient defense representation is a significant problem and assert that, to the extent it exists, it is not engendered by the fee schedule. While acknowledging that the purpose of the flat fee structure is to induce guilty pleas at an earlier stage in the process, they say defendants' rights to a trial are not implicated because the schedule affects only those cases which would have resulted in pleas at a later point in any event.

In order to assess these positions it is useful to review the applicable law.

A. Review of Authority

1. Reasonable Compensation in Civil Cases

Reasonable compensation for lawyers in civil cases is the subject of a substantial body of law. Numerous Michigan statutes, ranging from the Freedom of Information Act[1], to the Hazardous Waste Management Act[2], to the Uniform Securities Act[3], authorize attorney fee awards. The most common statutory standard is that the fees be reasonable.

The Court of Appeals addressed the meaning of reasonable attorney fees in Crawley v Schick, 48 Mich App 728 (1973). The attorney had negotiated a $55,000 settlement in a wrongful death action. He received fees of $18,333.33 -- one

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[1] MCL 15.240(4); MSA 4.1801(10)(4)

[2] MCL 299.548; MSA 13.30(48)

[3] MCL 451.810(a)(3); MSA 19.776(410)(a)(3)

third of the gross award. Faced with a claim that the fees were excessive, the Court of Appeals held:

> ". . . the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." Crawley, supra, at 737.

Applying these criteria to the facts before it, the Crawley panel found the fees to be reasonable because the attorney was "an experienced and well-respected member of the bar" who had prepared the case for trial, attended numerous hearings, and incurred $1,854 in expenses. Id. at 737-738.

The Supreme Court adopted the Crawley factors as "guidelines for determining 'reasonableness'" in Wood v DAIIE, 413 Mich 573, 588 (1982). Writing for a unanimous bench, Justice Fitzgerald noted that a trial court is not limited to those guidelines and need not make specific findings as to each one. "The award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion."[4]

The Crawley/Wood guidelines have been applied repeatedly to uphold fee awards premised on hourly rates of $75-$100 in cases tried six or more years ago. See, e.g., Nelson v DAIIE, 137 Mich App 226 (1984) (where plaintiff in a no-fault insurance case received $381, payment to attorney of $75/hour for 99.5 hours approved for total of $7,462.50); Johnson v Detroit Hoist Co, 142 Mich App 597 (1985) (rates of $75/hour and $750 per

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[4] A related perspective is that of the Rules of Professional Conduct. Rule 1.5 lists the following factors as guides to be considered in determining the reasonableness of a fee: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent."

trial day upheld in products liability case even though winning attorney was insurance company's salaried in-house counsel); Burke v Angies, Inc, 143 Mich App 683 (1985) ($100/hour held to be reasonable fee for a complex dramshop action).

A marked contrast in trial court perspectives on fees is visible in two cases arising under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq; MSA 3.548(101) et seq. In Heath v Alma Plastics Co, 121 Mich App 137 (1982), the trial judge found, after a bench trial, that the plaintiff had been the victim of sex discrimination. He awarded her $16,659 in lost wages and $3,341 in damages, but attorney fees of only $750. The Court of Appeals found the fee award to be an abuse of discretion in light of the 116 attorney hours and 22 law clerk hours invested in the case.

At the other extreme was the trial judge's action in Department of Civil Rights v Horizon Tube Fabricating, Inc, 148 Mich App 633 (1986). The plaintiff's attorney had been awarded fees of $8,437, at the rate of $70 per hour by the Civil Rights Commission. When the defendant appealed, the circuit court raised the attorney's fees to $90 per hour. The Court of Appeals found that the trial judge had applied the Crawley/Wood guidelines appropriately and upheld the award.

Some statutes that provide for reasonable fees have definitional aids built in. The Uniform Condemnation Procedures Act, MCL 213.66(3); MSA 8.265(16)(3), provides for awarding reasonable attorney fees, "but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer." Fee awards of one-third of the excess amount are routinely upheld without application of the Crawley/Wood guidelines. See, e.g., Department of Transportation v DiMatteo, 136 Mich App 15 (1984) ($8,548.87 attorney fee where award exceeded offer by $25,646.62); City of Bay City v Surath, 170 Mich App 139 (1988) ($22,474 attorney fee where award exceeded offer by $67,422).

Another statute with built-in criteria for determining reasonable attorney fees lies within the Mental Health Code and concerns the appointment of guardians for the developmentally disabled. MCL 330.1615; MSA 14.800(615) was added to the Code when the chapter was amended in 1978. It provides for the appointment of counsel for an indigent respondent within 48 hours of the filing of a petition for guardianship. It directs that the respondent's preference for particular counsel be honored when possible. And it addresses the selection and payment of assigned counsel as follows:

> "(4) If the respondent is indigent, the court shall compensate appointed counsel from court funds in an amount which is reasonable and based upon time and expenses.

> "(5) The supreme court by court rule may establish the compensation to be paid for counsel of indigents and may require that counsel be appointed from a system or organization that serves developmentally disabled or indigent people." (emph. added.)

There are no published decisions construing these provisions.

A final Michigan statute of particular interest is the Open Meetings Act, MCL 15.261 et seq; MSA 4.1800(11) et seq, which grants actual attorney fees to successful plaintiffs. In Booth Newspapers, Inc. v Wyoming City Council, 168 Mich App 459 (1988), the trial court had reduced an actual attorney fee of $47,662.05 by 50% because, even though it found the fee to be reasonable and necessary, "rough justice and equity" required some relief be afforded the city's taxpayers. The Court of Appeals found no room in the statute for the exercise of discretion and modified the award.

Also instructive are decisions regarding the federal Civil Rights Attorney's Fees Awards Act, 42 USCA sec. 1988, which provides for the payment of reasonable attorney's fees to prevailing parties other than the United States. The Act specifies that counsel should be paid "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." Fee calculations under the Act begin by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Hensley v Eckerhart, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983). The goal is to make fee awards which are "adequate to attract competent counsel, but which do not produce windfalls to attorneys." Northcross v Board of Education of Memphis City Schools, 611 F2d 624, 633 (CA 6, 1979) (quoting S. Rep. No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News 5908).

The Act was applied in two decisions arising out of successful suits by prisoners against the Michigan Department of Corrections for various civil rights violations. The underlying litigation in Glover v Johnson, 531 F Supp 1036 (E.D. Mich 1982) occurred mostly in the late 1970's. The district court found that $75 per hour was a reasonable "market value" fee for the Detroit attorney who was the only private practitioner involved in the case.

In his recent decision in Knop v Johnson, ___ F Supp ___ (No G 84-651, W.D. Mich, Rel'd 4/5/89), District Judge Richard Enslen awarded $1,299,563.04 in attorney's fees to four principal attorneys, their associates, paralegals and law clerks. The law student interns were paid at the rate of $25 per hour. Clerks were paid $50 per hour. The principal attorneys, depending on their skill and experience, were paid at rates ranging from $75-$150 per hour for out-of-court time and $90-190

per hour for in-court time. The only Michigan attorney in the group was paid $110 per hour.

2. Payment to Assigned Counsel for Indigent Defendants

Ironically, the leading Michigan case on the adequacy of assigned counsel fees does not mention the reasonable compensation statute. In re Meizlish, 387 Mich 228 (1982) involved an assigned appellate attorney who, based on the Wayne County fee schedule, was paid $50 for 9.75 hours' work on a case in which he filed an Anders brief. Without ever invoking the reasonable compensation statutes (MCL 775.16; MSA 28.1253 et seq), the lawyer challenged the Wayne County schedule, which he characterized as irrational and conducive to assembly line justice, on the grounds that it violated his own rights to due process and equal protection and the rights of indigent defendants to due process, equal protection, the effective assistance of counsel and an effective appeal.

In rejecting these claims over a biting dissent by Justice Black, the majority quoted extensively from three opinions from other jurisdictions, all of which concluded that providing free representation to indigent defendants is a professional obligation lawyers assume upon joining the bar. The three decisions, United States v Dillon, 346 F2d 633 (CA 9, 1965), Jackson v State, 413 P2d 488 (Alas, 1966), and State v Rush, 46 NJ 399; 217 A2d 441; 21 ALR3d 804 (1966) are all badly outdated and of at least questionable authority in their own jurisdictions. Jackson v State has been expressly overruled. See DeLisio v Alaska Superior Court, infra. The State of New Jersey now has a state-funded statewide public defender system. And attorneys practicing in the Ninth Circuit are now paid $75 per hour.

Contemporary opinions from other states do recognize the constitutional violations created by low or nonexistent assigned counsel fees. The Florida Supreme Court faced the inadequacy of a legislatively established fee schedule in Makemson v Martin County, 491 So 2d 1109 (Fla, 1986). The defense attorney in a death penalty case sought compensation for 248.3 hours. Although expert testimony established the value of his services at $25,000.00, the attorney asked for only $9,500.00. The trial court placed $6,000.00 in escrow pending appeal, because the statute allowed only $3,500.00.

The Supreme Court found the fee schedule statute facially valid, since the appropriation of funds is within the legislature's province. However, it also found the inflexible application of statutory maximum fees interfered with the defendant's right to effective assistance of counsel. Because the courts are ultimately responsible for protecting that right, they have the inherent power to depart from the fee schedule in extraordinary cases "to ensure that an attorney who has served the public by defending the accused is not compensated in an

amount which is confiscatory of his or her time, energy and talents." Id. at 1115.

The Florida Supreme Court repeatedly emphasized the link between compensation and the quality of representation. It said the increasing complexity of criminal cases and the rising cost of doing business could not be ignored. While the attorney in question was seeking only "reasonable" compensation, not the market value of his services, the statute provided a token amount ($14.10/hour in this case) which in many instances would not even cover a lawyer's overhead.

The Florida Supreme Court took Makemson a step farther in deciding White v Board of County Commissioners of Pinellas County, 537 So2d 1376 (Fla. 1989). Application of the statutory maximum yielded a fee of $26.12/hour in that case. The Court declared itself "hard pressed to find any capital case in which the circumstances would not warrant an award of attorney's fees in excess of the current statutory fee cap." (Id. at 1378) Although it recognized the potential burden on county treasuries, the Court stressed that if the State wishes to enforce the death penalty, it is obliged to insure that indigent defendants receive competent representation first. It was the judicial responsibility for securing competent counsel, not the attorney's own right to reasonable compensation, which led the Florida Supreme Court to rely on the doctrine of inherent power as a basis for exceeding the statutory maximum fee in virtually every capital case. See also In re Claim of Rehm and Faesser, 226 Neb 107; 410 NW2d 92 (1987) (trial court abused its discretion by refusing to pay for pretrial preparation that constituted reasonable effort to provide competent representation under circumstances).

Some courts have gone beyond statutory interpretation to reach the constitutional claim that assigned counsel rates amount to the taking of private property for public purposes without just compensation. Both the federal and Michigan Constitutions forbid such takings. US Const., Am V; Const. 1963, art 10, sec. 2. "Just compensation" means fair market value -- what a willing buyer would pay a willing seller. United States v Miller, 317 US 369, 375; 87 L Ed 336, 343 (1943); Johnstone v Detroit G H & M R Co., 245 Mich 65 (1928).

In DeLisio v Alaska Superior Court, 740 P2d 437 (Alaska, 1987), the Alaska Supreme Court reversed earlier decisions on the subject, and concluded that

> "* * * requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of

> the attorney's labor is a 'taking' under the provisions of Alaska Constitution article I, section 18." Id. at 443.

The Court reasoned that an attorney's service is property, and the appropriation of that property is a taking. The taking is for a public use, since the appointment of counsel is designed to insure that all defendants receive equally fair trials. Just compensation, the Court then determined, is the fair market value of the property taken. In the case of attorney services, fair market value is "the compensation received by the average competent attorney operating on the open market." Id.

The Kansas Supreme Court relied heavily on DeLisio when it decided State ex rel Stephan v Smith, 242 Kans 336; 747 P2d 816 (1987). The Kansas Court was reviewing multiple challenges to the state system for providing indigent defense which, although regulated and funded at the state level, permitted wide variation from county to county. In some populous areas, public defender offices handled all but conflict cases, and the private bar was little involved. In other counties, members of the local bar were put on assigned counsel panels involuntarily and were required to accept assignments. The compensation rate of $30.00 per hour was set by regulation, and was subject not only to mandatory maximums, but to reduction when adequate funds for the entire system were not available.

The Kansas Supreme Court reviewed the changes that had occurred since the days when indigent criminal defense needs could be adequately served by having lawyers handle an occasional criminal case pro bono. The Court addressed the volume and complexity of criminal cases, and the increasing cost of overhead, which typically reaches or exceeds $30.00 per hour. It agreed that attorney services are property subject to Fifth Amendment protection, as is expense money advanced by attorneys out-of-pocket.

The Kansas Supreme Court concluded:

> "The State of Kansas has the obligation to furnish counsel for indigents charged with felonies, for indigents charged with misdemeanors when imprisonment upon conviction is a real possibility, and for other persons upon certain circumstances. The State also has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses. The basis of the amount to be paid for services must not vary with each judge, but there must be a statewide basis or scale. No one attorney must be saddled with

> appointments which unreasonably interfere with the attorney's right to make a living. Out-of-pocket expenses must be fully reimbursed.
>
> "Kansas attorneys have an ethical obligation to provide pro bono services for indigents, but the legal obligation rests on the state, not upon the bar as a whole or upon a select few members of the profession." Id. at 849-50.

Judicial review of an entire state's indigent defense system also occurred in West Virginia. Jewell v Maynard, 383 SE 2d 536 (W.Va. 1989). While declining to require payment at fair market rates, the West Virginia Supreme Court of Appeals found its state's current system of selecting and paying assigned counsel confiscatory and unconstitutional. It directed payment of $45 per hour for out-of-court work and $65 per hour for in-court work, effective July 1, 1990. It also prohibited the involuntary assignment of lawyers to criminal cases in amounts exceeding 10% of the lawyer's annual work load and required establishment of a mechanism for paying cash advances for out-of-pocket expenses.

There are few public defender offices in West Virginia, and most circuits rely on private assigned counsel for indigent defense. In those circuits where not enough lawyers volunteer, attorneys are appointed involuntarily and often. Rates set in 1977 paid these lawyers $20 per hour for out-of-court work, $25 per hour for in-court work, and a maximum of $1,000 on cases with maximum sentences below life imprisonment.

In response to a suit by a lawyer who had received so many court appointments that he had to refuse paying clients, the West Virginia Court appointed a special master to take evidence on the funding and operation of the indigent defense system, its impact on lawyers, and it ability to guarantee adequate representation. The master found that the hourly rates did not cover overhead, which averaged $35 per hour. In addition, lawyers frequently had to work without pay once the $1,000 maximum was reached. Legislative failure to appropriate enough money also meant that payments were frequently months in arrears. Lawyers often advanced defense-related expenses out-of-pocket.

The number of lawyers volunteering for criminal assignments was decreasing dramatically. In 21 counties, judges required all bar members to accept appointments, including "office lawyers" who were "neither comfortable in court nor knowledgeable about criminal law." (Id. at 541) In other counties, older and more experienced lawyers were exempted while young and inexperienced lawyers received the appointments.

Writing for a unanimous Court, Justice Neely made the following observations about the effect of inadequate fees:

> ". . . the random nature of appointments force indigent clients to rely on the luck of the draw to avoid prosecutorial overmatch. Criminal law is a demanding, rapidly changing and complex specialty. And the constitutional right to counsel is not satisfied by the compelled or random appointment of a specialist in real estate law." (Id. at 542)
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> * * *
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> "We have a high opinion of the dedication, generosity and selflessness of this States' lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted. See People v. Johnson, 417 N.E.2d 1062 (Ill. 1981); State v. Robinson, 465 A.2d 1214 (N.H. 1983)." (Id. at 544) (orig. emph.)
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> * * *
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> ". . . we emphasize that the most serious defect in the current system is that it strains to the breaking point the eleemosynary impulses of the private bar and creates an inherent conflict of interest that implicates the client's right to effective assistance of counsel." (Id. at 546) (orig. emph.)

The West Virginia Court also made its own role clear:

> "This Court must measure the current system against generally accepted constitutional standards to determine whether the system meets those standards. If we find the system deficient, our role ends at pointing that out to the legislature. It is, after all, the legislature which must engineer and fund an acceptable system." (Id. 545)

Most recently, the Oklahoma Supreme Court sustained constitutional challenges to that state's statutorily defined indigent defense system. State v Delbert Lynch, 796 P2d 1150 (Okla. 1990). Public defender officers exist in the more populous Oklahoma counties. In those counties, private practitioners handle only conflict cases. In 39 counties, private practitioners were required to accept court appointments without regard to their desire to serve or the effect on their income and practices. The statutorily set maximum fees are: $3,200 in capital cases, $500 in other criminal cases, and $700 in juvenile and guardianship cases.

The Oklahoma Supreme Court held that a lawyer cannot be forced to accept an appointment without being provided a post-appointment opportunity to show why he or she should not be required to take the case. The Court also found that although the statutory maximum fees are not facially unconstitutional, they are arbitrary and unreasonable, and there is a substantial probability they will result in an unconstitutional taking of private property in particular cases. Specifically, the Court said:

> "The State also has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses. The basis of the amount to be paid for services must not vary with each judge; rather there must be a statewide basis or scale for ascertaining a reasonable hourly rate in order to avoid the enactment of a proscribed special law.
>
> "Although we invite legislative attention to this problem, in the interim, we must establish guides which will apply uniformly without either violating due process rights or granting constitutional immunities. . . We find that the most even handed approach in setting fees is to tie the hourly rate of the counsel appointed for the indigent defendant to the hourly rate of the prosecutor/district attorney and the public defenders. . . (As a matter of course, when the district attorneys' and public defenders' salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.) The overhead and the litigation expense of the district attorney are furnished by the state. In order to place counsel for the defense on an equal footing with counsel for the prosecution, provision must be made for compensation of defense

> counsel's reasonable overhead and out of pocket expenses." Id., 1160-61 (fns. omitted.)

Low-bid contract defense systems, which have been critiqued frequently in the literature (see, e.g., Nelson, "Quality Control for Indigent Defense Contracts", 76 Calif. Law Rev. 1147 (1988); Mayer, "Low Bid, Low Service", Am. Law., Apr. 1984) have also received judicial attention. In State v Smith, 140 Ariz 355, 681 P2d 1374 (1984), the Arizona Supreme Court found that the low-bid system used in Mohave County presumptively affected the quality of defense representation adversely. The contracts specified no limits on caseloads or hours and provided no support for investigators or paralegals. The contracting attorneys, whose ability and experience were not evaluated, handled a stipulated percentage of all assignments regardless of the number of cases involved. Because caseloads were excessive, sufficient time could not be spent to provide adequate representation in every case.[5]

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[5] For discussion of a major contract defense system that was scrapped after re-examination by local policymakers see "To Provide Effective Assistance of Counsel": A Report of the Blue Ribbon Commission on Indigent Defense Services to the San Diego County Board of Supervisors (1986). Among the many observations that led the San Diego Commission to conclude that the contract system is an "ill-advised" method of providing defense services were the following:

> "(C) Conflicts - The "block grant" contracts, which require a contract group to provide its own investigation and provide no additional remuneration for trial, place groups with such contracts in a conflict between their responsibility to provide quality representation and their desire to operate economically. Similarly, as in the El Cajon situation, when the same contracting group was counselling at arraignment and handling individual cases for the same block of money, there is a conflict in that there is an incentive for an attorney to encourage a defendant to plead guilty so that the group will not have to later spend the time and money in representing the individual. Even if it could be argued that ethical considerations motivate attorneys to resist such conflicts and act only in the best interests of the client, there is still an appearance of conflict." Id. at 43-44.

For discussion of how the contract system is used to provide trial level felony defense in 34 Michigan counties, see Defender Systems and Services Committee, "Indigent Defense Contracts in Michigan" (State Bar of Michigan, 1990).

The inadequacy of assigned counsel fees, particularly in the most serious cases, continues to spawn litigation. Some of it was summarized in a recent National Law Journal article about indigent defense in death penalty states. (See Attachment C: Coyle, Lowell and Strasser, "Fatally Flawed", 13 Nat'l L. J. 11 (11/19/90) at 1, 28-29. However, litigation can be avoided. The Wisconsin Supreme Court has addressed the matter by court rule. Effective January 1, 1989, it amended SCR 81.02 to require compensation of all assigned counsel services at the minimum rate of $60 per hour. The Court also set itself the task of reviewing the compensation rate every two years.

This Court was well aware when it decided Meizlish that it was making a pragmatic, temporary decision that would not serve well for the long haul. Justice Swainson concluded the majority opinion by stating:

> "Appellant has demonstrated the difficult problems that courts face in insuring an efficient administration of criminal justice, combined with the concern for defendants' constitutional rights. Our Court will continue to work for improvement of our present system, agreeing with appellant that it must be improved.
>
> "To this end the State Bar as well as a number of local bar associations have recently petitioned the Court to adopt a rule requiring that court appointed counsel be compensated for their services in accordance with the State Bar Minimum Fee Schedule. Because of these increasingly insistent demands for such a uniform schedule of fees, and in view of the present dialog regarding improved methods of financing the entire judicial system, we shall doubtless review the question again in the future, but for the present we are reluctant to take such action as would plunge the counties into a position of responsibility for the payment of attorneys' fees more than double those presently paid. Such a burden we are not yet prepared to thrust upon them." Id. at 241 (fn. omitted).

3. Michigan Rules of Professional Conduct

Also relevant are the express dictates of Rules of Professional Conduct. Rule 1.7(b) forbids a lawyer to accept employment if the exercise of his professional judgment on behalf of his client will be affected by his own financial or personal interests. Rule 6.2 permits a lawyer to refuse appointments to avoid "an unreasonable financial burden on the lawyer". Rule

5.4(c) forbids a lawyer to permit a person who pays him to render legal services for another "to direct or regulate his professional judgment in rendering such legal services." Limitations on payment for tasks essential to competent defense representation, whether implicit or explicit, mean that lawyers' decisions about whether to perform these tasks will either be dictated by the judge who holds the purse strings, or conditioned on the lawyer's willingness to sustain a personal financial loss. Rule 1.1(b) is also implicated by the discouragement of client interviews, fact investigation, and time-consuming legal research, since it says a lawyer shall not "handle a legal matter without preparation adequate in the circumstances."

Finally, there is Rule 1.2(a), which states: "a lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules." If a lawyer foregoes investigating a potentially viable defense, or filing a pretrial suppression motion, or researching a complex issue on appeal because payment for the work will not be made, this fundamental tenet of professional conduct is violated.

4. The Right to Jury Trial

The right to a jury trial is guaranteed by the federal and state constitutions. US Const., Amend VI; Const. 1963, art. 1, sec. 20. The decision whether to plead guilty or go to trial is uniquely personal to the defendant. Brookhart v Janis, 384 US 1, 86 S Ct 1245, 16 L Ed 2d 314 (1966). It cannot be made by counsel as a matter of strategy or tactics. 1 ABA Standards for Criminal Justice, sec. 4-5.2 (2d ed. 1980); MRPC 1.2(a).

While recognizing charge and sentencing bargaining as practices that benefit both defendants and the state, the Michigan Supreme Court has taken pains to minimize the coercive effect on defendants of judicial participation. Recognizing that the judge's power to sentence could make the voluntariness of the defendant's plea questionable, the Court has forbidden trial judges to "initiate or participate in discussions aimed at reaching a plea agreement" or to "engage in the negotiation of the bargain itself." People v Killebrew, 416 Mich 189, 205 (1982).

B. The Reasonableness of the Wayne County Flat Fee Schedule

The Wayne County flat fee schedule has two discrete but highly related characteristics. One is that fixed rates are set according to the maximum penalty for the charged offense. The other is that the rates paid in many cases are extremely low. The reasonableness and consequences of low fees have been documented by state and national studies and discussed in judicial opinions from many jurisdictions. The fixed rate structure is unique to Wayne County. While it acts to compound the consequences of low fees generally, it works in different ways and for different reasons.

1. Nature of the Flat Fee Schedule

The stated purpose of the flat fee schedule is to induce pleas at AOI only in those cases which would ultimately plead out anyway. The notion is that lawyers will have no incentive to delay having their clients enter pleas because the lawyers will receive no additional pay for additional steps in the process, such as calendar conferences and final conferences. Logically, however, the schedule does not distinguish between cases that legitimately should plead out early and those that warrant pretrial motions, investigation, additional attempts at plea negotiation, or even trial. Since the lawyer will be paid a fixed rate regardless of the effort expended, the least amount of work will always generate the maximum amount of profit. Thus the schedule by design provides an economic incentive for quick guilty pleas in all cases and a disincentive to doing any additional work.

Defendants assert that the integrity of the defense bar insures that lawyers will take the steps necessary to provide effective representation in all cases. Thus it is assumed that despite the economic disincentive, lawyers will conduct preliminary examinations and jail visits and evidentiary hearings and trials whenever the facts warrant. However, it is inconsistent to adjust the fee schedule because one can't simply depend on the integrity of defense attorneys to resolve cases early, then to rely on the integrity of the same lawyers to take cases to trial against their own fiscal self-interest. If one adjusts the schedule in the belief that payment rates will impact on behavior, then one must acknowledge that the principle may operate to produce consequences other than the single one desired. It is also inconsistent in a system that depends on the integrity of defense counsel to preserve constitutional rights to structure a fee schedule that penalizes integrity and rewards those who take shortcuts.

A related problem with the flat fee schedule is that the amount paid is not related in any way to the work done. The existence of a statistical correlation between fees paid in 1987 and the maximum sentence for the offenses charged does not make it logical to set the payment rate according to the maximum sentence. While capital cases generally are more likely to go to trial and to require extensive pretrial preparation, some capital cases involve less work and some non-capital cases involve more. Except for seriousness of the consequences, all the other factors considered in determining reasonable compensation in civil cases are ignored. Since the ostensible basis for payment, maximum sentence, has no clear and predictable connection to the reason for payment i.e., services rendered, the structure of the schedule is inherently unreasonable.

Because the fees are really structured to induce pleas, not to reward effort, the schedule results in vastly overpaying lawyers in some cases while underpaying them in others. The

court has made the policy determination that it is worth paying literally $100 to $200 per hour in perhaps several thousand guilty plea cases annually in order to keep the docket moving. The existence of this overpayment is explicitly recognized by the requirement that attorneys analyze all their assignments for a year when petitioning for extraordinary fees. Thus in some cases compensation is excessively high while in others it is exceedingly low. Use of such a broad and indiscriminate inducement to quick guilty pleas creates an overall compensation scheme that is unreasonable as well as an undue risk that defendants' rights to trial will be subverted.

The flat fee schedule fits a mathematical model of average attorney fees paid that may have nothing to do with the amount real attorneys are paid in actual practice. While a statistician may assume the existence of an average attorney whose mixed caseload of dismissals, pleas and trials will balance out to economic perfection, in fact no attorney's caseload is likely to mirror this hypothetical average. The attorneys described as "waivers and pleaders" will make out very well. Attorneys who handle mostly capital cases and do many trials will be significantly shortchanged, since the fixed rates were calculated on the basis of a total case volume heavily weighted with pleas. The theoretical availability of extraordinary fees is inadequate to correct this disparity since extraordinary fees are very selectively requested and are typically granted only in part.

The failure of the flat fee schedule even to work out as intended on the average is evidenced by the decline in the public defender office's budget. Since one may view the public defender office as a single attorney with several thousand cases, one ought to be able to see that office's fees balancing out on the average. In fact, analysis of over 2,000 cases showed a loss of over $170,000 to the public defender office by going from the old event-based schedule to the flat fee schedule.

Even if the flat fee schedule could be considered reasonable if it achieved some overriding purpose, the fact is the schedule appears to have only a minuscule impact on the overall docket. Assuming, arguendo, that the fee schedule caused the increase in pleas at AOI from jailed defendants, that increase amounted to 34 cases. In sum, it appears that the flat fee schedule has no particular virtues. It does not save the public money or improve the quality of legal representation or treat lawyers fairly. It does not even accomplish its intended purpose. Most importantly, it is not designed to serve the statutory purpose of providing reasonable compensation in the sense of a fair return for services.

2. Use of Fee Schedule for Docket Control

Apart from the particular nature of the instant flat fee schedule is the broader question whether use of any fee

schedule as a docket control mechanism is appropriate. Enormous caseload pressures understandably make chief judges and court administrators very concerned about docket movement. Important as that goal is, however, a means of achieving it that impinges on defendants' rights to jury trial and counsel cannot be reasonable. Docket managers can manipulate aggregate numbers, but defendants and their lawyers must be wholly free to focus on their individual cases.

While defendants generally share the goal of docket movement because it is their speedy trial rights that are at stake, in some instances it is in the defendant's interest to slow the docket down by refusing to plead, filing pretrial motions and going to trial. Defense counsel's responsibility is to shield the defendant from institutional pressures that could induce an inappropriate plea. The use of the attorney's fees as an instrument of docket control is an attempt to enlist counsel as another source of institutional pressure.

The only things that should affect a defendant's decision to plead guilty are the accurate advice of well-prepared counsel and the terms of any plea bargain the prosecution offers. A fee schedule that attempts to inject indirect but deliberate pressure to plead for reasons that benefit not the defendant but the lawyer is unreasonable.

The use of the fee schedule to control the docket in the instant case is particularly troubling because there is no evidence that defendants and their lawyers are causing docket congestion. Rather, it is the policies and work habits of prosecutors and judges that contribute to delay. It is a fact that these elected officials are not easily controlled and have not been responsive to informal pressure from the Chief Judges. It is also a fact that, since judges control defense counsel's assignments and fees, and defendants' sentences, both lawyers and clients literally cannot afford not to cooperate with the bench. However, courts are not justified in pressuring defendants and their lawyers to solve problems caused by others just because they have the power to do so.

Manipulation of attorney fees as a docket control mechanism is unreasonable not only because it is unfair, but because it is relatively ineffectual. Recorder's Court has developed far more sophisticated and successful mechanisms, such as the executive floor judge system, for managing its docket. Moreover, those mechanisms apply equally to all defendants. Manipulation of assigned counsel fees by definition applies only to indigent defendants. The reasonable compensation statute which was intended to effectuate the right of indigent defendants to adequate representation is thus being used to undercut that right. Manipulation of the fee schedule for docket control purposes confirms the fears of indigent defendants that their lawyers are controlled by the judges who pay them.

3. The Inadequacy of Payment and Its Relationship to Quality of Representation

No one denies that Wayne County's assigned counsel fees are low by virtually any standard of comparison. Higher fees are paid by many Michigan counties and most other states. Indeed higher fees have been among those found to be constitutionally deficient by some state supreme courts. The rates do not only range from one-third to one-tenth of the fees charged in retained cases, after accounting for overhead they compensate private assigned counsel at levels substantially below the salaries of public defenders and prosecutors paid on the state wage schedule. Since the fee schedule is not routinely adjusted for inflation, private assigned counsel fall farther and farther behind other criminal justice professionals (judges, prosecutors, police, probation and corrections officers) who receive cost of living raises annually.

The problem is particularly acute in capital cases. While some lawyers may earn high hourly rates by putting the minimum amount of effort into quick guilty pleas, capital cases are typically more complex and time-consuming. Lawyers who take capital cases to trial are frequently paid less than their overhead costs.

The defendants do not claim that the fees are not low, just that they are reasonable nonetheless. The defendants do not claim that compensation is fair in every case, just that it works out on the average. Moreover, defendants insist, there has been no demonstration that the fee schedule has caused ineffective assistance of counsel in any particular case.

These responses do not suffice to prove that the schedule meets the statutory mandate for several reasons. First, payment at rates below a lawyer's reasonable overhead costs causes the lawyers to subsidize the criminal justice system out of his or her own pocket. The problem is compounded by low pay rates for experts and investigators and total non-reimbursement for some expenses, both of which cause lawyers to spend additional money from their own pockets. Such payment levels and failures to reimburse reasonable expenses are confiscatory and violate the state and federal constitutional prohibitions against governmental takings without just compensation.

Second, the fact that the county chooses to pay excessively high rates under some circumstances does not justify paying low rates in others. There is no guarantee that payments will average out for any particular lawyer. Moreover, the reasonableness of compensation must be judged relative to the work for which compensation is being paid, not to the lawyer's overall income from assigned cases.

Third, the relationship between low fees and deficient representation is widely recognized by researchers, appellate

courts, trial judges, and defense attorneys themselves. Low fees drive good experienced lawyers off assignment lists, encourage lawyers to work on volume, and induce lawyers to cut corners. Reasonable fees attract well-qualified lawyers, encourage lawyers to take all the steps that might benefit their clients and permit lawyers to accept only as many assignments as they can effectively handle. Reasonable fees also make it realistic to enforce performance standards which underpaid lawyers simply cannot meet.

The testimony established that low fees in general and the flat fee schedule in particular have in fact induced experienced lawyers, well-qualified to handle capital cases, to stop taking many or any assignments. Finding suitable lawyers to appoint in capital cases is growing more difficult.

The testimony further established that a significant amount of deficient representation occurs. Much of it consists of failures to act, not readily visible to the trial judge. Nonetheless, numerous witnesses, including Chief Judge Kaufman, described the "waivers and pleaders" whose offices are the trunks of their cars, whose files are the backs of envelopes and whose style of practice is to advise guilty pleas on the spot to clients they have never met before. Also described were lawyers in perpetual motion who are so busy hustling a living on volume that they run from courtroom to courtroom, never having enough time to concentrate on a single case.

Finally, the personal observation by defense attorneys of the conduct of other lawyers in particular cases reveals failings that are directly or indirectly connected to the fee schedule. Some lawyers have flatly refused to take steps that would have benefited their clients because the effort would not be compensated. Some lawyers pressure their clients into pleading guilty despite the client's assertion of a defense. Some lawyers waive preliminary examination and have their clients plead guilty as charged at AOI despite the lack of any benefit to the defendants.

Low fees may not be the conscious motivation for every instance of deficient performance, but they have a pervasive effect on the quality of practice by dictating what lawyers will be available and what standards of practice can realistically be enforced. Despite ethical standards and personal integrity and training programs and judicial oversight, there is only so much a lawyer who is consistently underpaid can do. As the West Virginia Supreme Court noted, compensation below a certain level strains the "eleemosynary impulses" of the private bar to the breaking point. On the other hand, the testimony of witnesses and the responses to the bar committee survey indicate that qualified lawyers with over 15 years in practice are willing to take assignments at rates substantially below those they charge retained clients so long as they earn some amount beyond overhead.

Defendants insist that the infrequent success of ineffective assistance of counsel claims on appeal proves the fee schedule is adequate. This argument misses the mark. Whether deficient performance requires reversal in a particular case and whether a system is flawed because it promotes deficient performance generally are questions that involve very different considerations. State supreme courts that have examined the matter, such as those of Florida and West Virginia, did not feel compelled to find ineffective assistance in particular cases in order to hold that the compensation schemes under review posed intolerable threats to the constitutional right to the effective assistance of counsel. They found the adverse effect low fees inevitably have on an immeasurable number of cases sufficient to require action. So, too, it is enough to say in the instant case that the Wayne County fee schedule is unreasonable because it inherently tends to create a conflict between the defendant's rights and the lawyer's fiscal self-interest and thereby poses a systematic threat to the rights of numerous defendants.

4. The Supply and Demand Theory

Defendants' contention that the flat fee schedule must be reasonable because there is an adequate supply of competent lawyers willing to accept appointments at the price being paid has two major flaws. The first is the assertion that an adequate supply of competent lawyers is available. Given the evidence just discussed regarding the decreased availability of qualified lawyers to handle capital cases (which constitute over 17% of the combined docket) and the frequency of deficient representation, this assertion is certainly questionable.

The second major flaw is the defendants' oversimplification of economic theory. The concept of market price assumes a competitive open market in which prices for goods and services of a certain quality will stay low as long as the supply stays high. When demand increases and supplies fall, prices begin to rise. A shortage occurs when supplies of the requisite quality are not available at the market price.

The problem is that the price for indigent defense services is not set on the open market. It is unilaterally set by the court, which controls 87% of the demand for criminal defense representation. Lawyers wishing to provide criminal defense services have two choices. They can compete for the relatively small group of retained clients who pay much higher fees that are set on the open market. Or they can accept the price the court is willing to pay.

Given the oversupply of lawyers and the difficulty of competing for clients, it is not surprising that 400 lawyers would actively seek felony assignments in Wayne County. However that supply proves nothing about the reasonableness of the compensation. For many years, millions of American workers "willingly" worked at minimum wage jobs for $3.35 per hour that

left their incomes below the poverty level. The availability of unskilled people desperate for work did not make the minimum wage "reasonable" -- just politically feasible. Similarly, the willingness of lawyers, many of them inexperienced and some of whom have spent years practicing off the backs of envelopes, to accept assignments does not prove the reasonableness of the fee schedule unless the statutory term "reasonable compensation" is defined to exclude quality of representation and fairness to lawyers.

The price the court is willing to pay says a great deal about the quality it is willing to accept. The extent to which lawyers can be expected to keep providing high quality representation at a loss has already been discussed. Where government controls 87% of the demand for a given service and sets prices unilaterally, neither price nor quality are being set by operation of the free market. Most providers wishing to supply that service must meet government specifications for price, and adjust quality accordingly.

Government typically sets prices adequate to induce acceptable quality either through labor negotiations with public employee unions or by negotiating contracts that specify minimum performance requirements. Thus wages for other criminal justice professionals are set to induce quality by paying fair salaries. The county might get an adequate supply of prosecutors or police or even judges if it paid them $15,000 per year. Certainly there are enough applicants for these positions. The county assumes, however, that such low pay rates would not insure adequate quality. It does not, for instance, pay prosecutors abysmally low salaries, then wait for their performance to become intolerable before negotiating raises. Oversimplified supply and demand notions are not a good enough basis for determining the compensation of other criminal justice professionals and they are likewise inadequate for defining assigned counsel fees.

5. The County's Obligation to Provide Reasonable Compensation

MCL 775.16 places squarely on the county the obligation to provide reasonable compensation to assigned counsel. The purpose of the statute is to insure that indigent defendants receive the effective assistance of counsel to which they are constitutionally entitled.

Government does not meet its obligation by depending on 6% of the bar to subsidize the cost, by paying rates inadequate to insure quality or by structuring fees to accomplish purposes that put the court's administrative interests above defendants' constitutional rights.

Government does not meet its obligation by paying compensation which in total is reasonable "on the average" since that provides no guarantee that compensation will be reasonable

in any particular case. Indeed, the very concept of averaging suggests that half the payments may be above what is reasonable and half may be below.

Above all, government does not meet its obligation by constructing a fee schedule that inherently promotes ineffective representation by creating an inverse relationship between the effort expended and the payment earned. While no kind of fee schedule can prevent all deficient performance, any schedule must at least satisfy the maxim "First, do no harm". The Wayne County flat fee schedule is not merely unreasonable, it is wholly counterproductive.

The fact that paying reasonable compensation may increase costs to the county does not change the nature of the statutory obligation. Reasonable does not mean whatever rate government is willing to pay, no matter how low. Indigent defense is not more burdensome than other county obligations -- it is just less popular. To the extent defense costs have been rising rapidly and unpredictably, they are not the result of increased fees for lawyers but an increased volume of prosecutions. As other courts have observed, if the adversary system is to be preserved, the cost of get-tough law enforcement policy decisions is more funding for indigent defense.

It is not clear from this record the extent to which providing reasonable compensation in all cases would actually raise the total cost to the counties. Currently, the serious underpayment for capital case trials is being balanced against relatively high payments for many quick guilty pleas. Since the current flat schedule was designed to yield the same overall cost as the immediately preceding event-based schedule, the problems associated with flat fees can be solved at no additional cost. The problem of low fees presumably would require an absolute increase in expenditures. However no study has been done to determine what cost-efficiencies, if any, could be achieved by changing the funding and expanding the role of the public defender office.

6. Defining Reasonable Compensation

Reasonable compensation need not equal the rates paid in retained cases. They must, however, exceed the cost of overhead and provide some profit to the attorney. Rates that provide after-overhead compensation comparable to the salaries of public defenders and prosecutors who are paid on the state civil service wage scale would be reasonable. Rates may be varied to account for the experience level of the attorney or the seriousness of the case. For instance, in Wayne County where only the most experienced attorneys receive capital assignments and overhead averages $30-40 per hour, it may be reasonable to pay effective rates of $55 an hour for non-capital cases and $65 an hour for capital cases.

Reasonable compensation must bear a rational relationship to the amount of work performed. Most jurisdictions pay on an hourly basis. That method most accurately compensates for the services actually provided. Billings can be monitored by employing presumptive payment guidelines without excessive administrative costs.

Although inherently imperfect, an event-based fee schedule is not necessarily unreasonable. It must, however, be based on accurate assumptions about the average hours required by each event and must use a fair hourly rate to calculate the amounts to be paid per event. The number and nature of the events for which compensation will be paid must realistically reflect the range of activities in which defense counsel engage.

PROPOSED RECOMMENDATIONS

It is recommended that the Supreme Court do the following:

1. Order the Respondents and Intervening Respondent to discontinue use of the flat fee schedule immediately.

2. Order the Respondents and Intervening Respondent to begin immediately paying assigned counsel according to the event-based schedule devised by Judge Jobes' committee in 1982, adjusted fully for inflation.

3. Establish a committee composed of representatives of the parties and such other individuals as the Supreme Court desires to examine the entire range of options for funding indigent defense services. The committee shall be responsible for submitting a proposal for permanent methods of providing reasonable compensation within one year.

4. Hold the complaint for superintending control in abeyance until the committee's proposal is approved.

Respectfully submitted,

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ATTACHMENT A

WAYNE COUNTY FEE HEARINGS - TRANSCRIPT NOTES

Volume 1
January 16, 1990

Justin Ravitz	32-111
Hon. Clarice Jobes	111-154
Joan Morgan	154-202
Patricia Slomski	202-226
Gerald Lorence	227-242

Volume 2
January 17, 1990

Dr. Lawrence Stiffman	4-86
Thomas Loeb	86-162
Kenneth Mogill	162-189
Gerald Lorence	190-218

Volume 3
January 18, 1990

Robert Spangenberg	4-108
William B. Daniel	109-155
James Howarth	155-214
Gerald Evelyn	215-228

Volume 4
January 19, 1990

Gerald Evelyn	6-40
Samuel Churikian	40-114
Hon. Edward Thomas	120-153
Gerald Lorence	155-230

Volume 5
January 31, 1990

Barbara Levine	4-18
Elizabeth Jacobs	18-65
Benjamin Blake	66-152
Arthur Tarnow	152-185

Volume 6
February 1, 1990

Barbara Levine	3-92
Hon. David Kerwin	92-174

Volume 7
February 2, 1990

Volume 8
February 12, 1990

Volume 9
February 13, 1990

Volume 10
February 14, 1990

Volume 11
February 15, 1990

Volume 12
February 16, 1990

ATTACHMENT B

FACT SHEET - CJA ATTORNEY COMPENSATION

Resolution on Mandatory Pro Bono Representation and Inadequate Compensation for Legal Services

At its June 1990 meeting, the Judicial Conference Committee on Defender Services adopted the following resolution with regard to the reliance upon mandatory pro bono representation and inadequately compensated legal services in connection with CJA cases:

> The Sixth Amendment to the Constitution places upon the government the obligation to provide, at its expense, effective assistance of counsel to persons financially unable to secure their own legal representation. Pro bono legal services have been an outstanding contribution of the legal profession to our society and have greatly assisted the government in providing these constitutionally mandated services. The complexities of modern criminal litigation and the economics of practice, however, make it fundamentally unfair to expect lawyers to perform increasingly burdensome work for which they are inadequately compensated. It is the sense of the Committee that equal access to justice is impaired when, for those with limited financial resources, that access depends upon mandatory pro bono legal services.

In furtherance of this resolution, the Judicial Conference and/or its Committee on Defender Services took the following actions to address the problem of inadequate compensation of attorneys providing CJA representation:

1. Cost of Living Increases in Maximum Hourly Attorney Compensation Rates.

The Judicial Conference amended the Guidelines for the Administration of the Criminal Justice Act (CJA Guidelines) to authorize automatic annual increases of maximum hourly attorney compensation rates (including alternative rates) provided that sufficient funding is available in the Defender Services appropriation.

The initial rate increase will become effective only after 1) the first federal pay comparability adjustment (FPCA) implemented on or after January 1, 1991 becomes effective, and 2) funds sufficient to implement the new rates have been identified within the Defender Services appropriation, or authorized by Congress. The amount of the initial increase will be the aggregate of the FPCAs authorized since March 14, 1987. The aggregate of the FPCAs since March 14, 1987 is estimated to be approximately 13.85 percent (including the FPCA projected for January 1991), which would result in new hourly rates of $45 for

out-of-court time, $68 for in-court time, and a maximum alternative rate of $85 per hour. Similarly, the effective date of the rate increases in subsequent years will be the first day that both the new FPCA is in effect and sufficient funds are available in the Defender Services appropriation for this purpose.

2. Elimination of Places of Holding Court

In response to administrative difficulties and real and perceived inequities associated with the CJA Guidelines provision authorizing establishment of an alternative rate for particular places of holding court, the Committee determined that alternative rates may be established for a circuit or for particular districts within a circuit, but they may not be established solely for specific court locations within a district.

In addition, the Judicial Conference agreed to extend, for every district in which an alternative rate has been approved for a court location, the highest hourly rate approved in the district to all places of holding court in the district. Implementation of this proposal also was made contingent upon the availability of adequate funds in the Defender Services appropriation. (See chart in section 7 below).

3. Alternative CJA Attorney Compensation Rates

The Defender Services Committee amended the CJA Guidelines to simplify procedures for establishing alternative rates. Under the amended guidelines, judicial districts no longer are required to apply for alternative rates or conduct surveys to support establishment of an alternative rate in their district. The Guidelines now provide that the Defender Services Division will consider the need for alternative attorney compensation rates in judicial districts, taking into account such factors as (1) the minimum range of the prevailing hourly rates for qualified attorneys in the district, (2) attorney overhead costs, (3) ability of the courts to recruit and retain qualified attorneys to serve on the CJA panel, (4) any recommendation of the judicial council of the circuit in which the district is located, and (5) any other relevant information. Chief judges of districts or judicial councils of circuits also may submit requests and justifications for alternative rates to the Defender Services Division. The Committee and the Judicial Conference will determine whether a higher rate is justified for a circuit or for particular districts within a circuit.

4. Study of CJA Attorney Compensation Rates

The amended CJA Guidelines provide that the Defender Services Division of the Administrative Office will conduct studies of the reasonableness of the Criminal Justice Act (CJA) rates in judicial districts. On the basis of these studies, the Defender Services Division will make recommendations to the Defender Services Committee regarding approval of alternative rates.

5. Request for Alternative Rates in the Seventh Circuit

The Judicial Conference approved the Committee's recommendation to establish an alternative attorney compensation rate of $75 per hour for in and out of court time for all of the districts in the Seventh Circuit, subject to the availability of funds (see list of authorized alternative rates in section 7 below).

6. Modification of CJA Compensation Maximums

The Defender Services Committee asked the Director of the Administrative Office of the U.S. Courts to once again communicate to the Congress the Judicial Conference's view that the Criminal Justice Act should be amended to authorize the Conference to establish and modify all dollar amounts for compensation for services provided under the CJA.

7. Districts with Alternative Rates

[Rates apply to both in-court and out-of-court time.]

Alternative rates are currently in effect in the following areas:

Districts/ Court Locations	Current Rates[1]
Alaska	$75
* Arizona (Phoenix and Tucson only)	$70
California (N)	$75

[1] Subject to the availability of funds in the Defender Services appropriation, these rates will be increased by the aggregate of the federal pay comparability adjustments (FPCAs) authorized since March 14, 1987. [See section 1 on pages 1-2.] The increase will become effective only after 1) the first federal pay comparability adjustment (FPCA) implemented on or after January 1, 1991 becomes effective, and 2) funds sufficient to implement the new rates have been identified within the Defender Services appropriation, or authorized by Congress.

Districts/ Court Locations	Current Rates
California (C)	$75
* California (E) (Sacramento and Fresno only)	$75
California (S)	$75
District of Columbia	$75
Hawaii	$70
* Michigan (E) (Detroit only)	$75
* Nevada (Las Vegas and Reno only)	$60
New Jersey	$75
* New Mexico (Las Cruces only)	$75
New York (E)	$75
New York (S)	$75
Oregon	$60
* Washington (W) (Seattle only)	$75

* Denotes districts in which alternative rate applicability will change from specific court locations to all places of holding court in the district, subject to the availability of funds.

Alternative rates for the following districts have received Judicial Conference approval but have not yet been implemented, due to a lack of available funding.

Districts	Authorized Rates[2]
Illinois (C)	$75
Illinois (N)	$75
Illinois (S)	$75
Indiana (N)	$75
Indiana (S)	$75
Wisconsin (E)	$75
Wisconsin (W)	$75

[2] Increases to these rates have been authorized pursuant to the terms and conditions stated in footnote 1.

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October 2, 1990

ATTACHMENT C

FATALLY FLAWED

Efforts in the Death Belt states to bolster indigent defense yield mixed results. But there are a few hopeful developments.

BY MARCIA COYLE
MARIANNE LAVELLE
AND FRED STRASSER
National Law Journal Staff Reporters

COURTS IN Southern states that lead the nation in executions recently have begun to confront the nearly universal lack of money, training and experience essential to the defense of capital murder trials, but with widely varying approaches and results.

In Mississippi and Oklahoma, judges have struck down statutes limiting — to as little as $1,000 in one case — what an appointed lawyer can receive for handling a death penalty trial. Calling such fee caps "grossly inadequate" and "unrealistic," they charge that the restrictions constitute confiscation of a lawyer's law practice and a violation of defendants' due process rights.

In Georgia, for only the second and third time since the U.S. Supreme Court set the standard for ineffective counsel in 1984, courts reversed death sentences because of bad lawyering.

And stung by their states' reputations as "dark holes" among criminal justice systems, state Supreme Court chief justices in Alabama and Louisiana, aided by small bands of worried criminal defense lawyers, recently laid the groundwork for investigations of indigent-defense problems, with special emphasis on capital cases.

But capital litigation experts, defense lawyers and others view with caution and sometimes rank pessimism each small step taken to correct what The National Law Journal, following a recent six-state investigation, described as a "failure in fairness." Too often in the nation's Death Belt, the NLJ reported, capital murder defendants are represented by ill-trained, unprepared and grossly underpaid appointed lawyers. (See "Fatal Defense," A Special Report, NLJ, June 11.)

This pessimism appears well-founded. While $1,000 was too little in Mississippi, it was all that a lawyer needed in Arkansas, that state's high court recently ruled. And state legislatures still show little interest in footing the bill for any death penalty reforms.

Although small and in some cases hesitant, there are, nevertheless, steps forward, says Robert Spangenberg of The Spangenberg Group, a nationally known consultant on indigent defense. One reason for the heightened attention, he says, was the recent, unsuccessful congressional attempt to limit court review of death sentences.

"The federal habeas battle in Congress surfaced a lot of these issues for the public," he says. "The bar and even some states are finally seeing this as an administration-of-justice issue and not just a question of whether you are for or against the death penalty."

A Taking?

On July 24, in a pathbreaking decision, the Oklahoma Supreme Court held that the state's $3,200 limit on fees paid in death penalty cases was so paltry as to rise to an unconstitutional "taking of private property," the property being the lawyers' practice. *Oklahoma v. Lynch*, 74,319.

Seminole County, Okla., attorney Jack Mattingly, who pressed the fee case with co-counsel Rob L. Pyron, says he abandoned his practice for two weeks to represent Delbert Lynch. "When I got back there were more court appointments waiting and paying clients wanting to know what was going on," he recalls.

Convinced that Messrs. Mattingly and Pyron had lost $48 and $33.39 per hour, respectively, in overhead costs alone, the Oklahoma court became the nation's first to develop a formula for paying appointed counsel in capital cases. Counties must reimburse reasonable overhead costs and pay fees equal to the hourly rate earned by prosecutors with similiar qualifications, the court ruled.

For non-capital cases, the court postponed implementation of its ruling until Aug. 24, 1992, to give the Legislature time to address "the myriad prob-

lems" involved with providing indigent defense.

"This could well be the impetus for a statewide public defender system," Al Schey, the chief state appellate public defender, says hopefully.

In Mississippi, where a challenge to the $1,000 cap is awaiting a state Supreme Court decision, a trial judge in Jackson on Sept. 26 awarded two local lawyers an additional $5,000 each for their work on a death penalty case, marking the first constitutional decision on the fee issue in the state.

Circuit Judge Breland Hilburn held that "[t]he grossly inadequate and unrealistic compensation...amounts to a denial of the defendant's right to due process of law" under both the U.S. and Mississippi constitutions. *Mississippi v. Taylor*, F-319.

Judge Hilburn says he acted partly because only a small number of lawyers in Hinds County are authorized to be appointed to capital cases. Eventually, he says, having to handle so many cases for so little "forces a compromise with quality of counsel and the right to counsel."

But a challenge to the $1,000 fee cap in Arkansas was defeated early this year in that state's highest court. *Pickens v. State*, 783 S.W.2d 341.

The court found that Jeffrey M. Rosenzweig, president of the state Association of Criminal Defense Lawyers, was effective with only $1,000 because he won a sentence reversal for his client. And, the court found, the lawyer neither needed nor was entitled to more money for "just a resentencing" trial that lasted 1½ weeks.

Effective Assistance

Within the past four months, Georgia state courts have struck down two death sentences based on ineffective assistance of defense counsel at trial.

Both defendants granted new trials had been represented by Decatur, Ga., attorney James R. Venable, 85. Now retired, he was an ex-imperial wizard of the Ku Klux Klan. *Harrison v. Zant*, 88-1640 (Super. Ct., Fulton Co.); *Ross v. Kemp*, 393 S.E.2d. 244. (Ga. Sup. Ct.).

In both cases, Mr. Venable was retained for a few hundred dollars by the families of the black defendants — but nervous trial judges appointed standby counsel to assist him. As the judge said in granting Aden Harrison Jr.'s state habeas petition on Oct. 2, the trial judge knew of Mr. Venable's "reputation, advanced age and numerous lapses of memory and judgment."

The two cases marked only the second and third times a Georgia court has granted relief to a death-sentenced prisoner based on poor lawyering since the current standard was set by the U.S. Supreme Court in 1984.

Bradley J. Butwin of New York's Davis Polk & Wardwell, who worked on Mr. Harrison's appeal, says Mr. Venable missed numerous meetings with the prosecution and appointed co-counsel, including one to discuss a plea offer. He failed to turn up eyewitness testimony that Mr. Harrison was not the trigger man in the slaying. Mr. Venable also fell asleep at the counsel table, according to court papers.

So lacking was the defense in the two cases that the rulings may not help other death row inmates who charge their trial lawyer was ineffective. "Short of Mr. Venable, you're never going to get an ineffective-assistance-of-counsel ruling in Georgia," says Patsy Morris, head of the Death Penalty Resource Center in Atlanta.

Meanwhile, Georgia's method of appointing counsel for the poor, under challenge in federal court as violating the Sixth Amendment, has produced such a crisis in Atlanta's Fulton County that experts have declared the system "on the verge of collapse."

Fulton County District Attorney Lewis R. Slaton told the Atlanta Journal in September that he has backed off seeking the death penalty because of the cost to the court system.

In the 4-year-old suit challenging the state's indigent defense system, the American Civil Liberties Union filed for immediate injunctive relief Oct. 30 before the 11th U.S. Circuit Court of Appeals to quell the Fulton County crisis. *Luckey v. Harris*, 86-297R.

In Louisiana, a small group of skilled capital litigators recently discovered a concerned ally in the state's new Supreme Court chief justice, Pascal F. Calogero Jr. Late last summer, he decided to form a task force to conduct the first study of indigent-defense problems in more than a decade.

"The primary beneficiaries of any reform will be capital defendants because they are grossly underrepresented," says Gregory Pechukas, an assistant to the chief justice.

The state Association of Criminal Defense Lawyers, says vice president Samuel S. Dalton of Jefferson, will raise $25,000 to help the task force pay an independent expert to assist.

A small but growing number of lawyers are starting to demand, in pretrial motions, that courts set adequate compensation and resource levels before trial instead of waiting — usually hopelessly — for fair reimbursement after trial, says Nicholas Trenticosta, director of New Orleans' Loyola Death Penalty Resource Center.

"The $1,000 fee cap is waivable, but it hardly ever gets waived," says Mr. Trenticosta. "Ultimately, we hope to get the Supreme Court to say that if a private lawyer is appointed and shows a need for more money, he will get it."

Mr. Dalton and many of his colleagues are not very optimistic about the state Legislature's reaction to any proposed reforms. But, Mr. Dalton says, "The situation in Louisiana couldn't be worse than it is."

While Louisiana is launching a new study, Alabama is revisiting an old one. Nearly two years ago, Alabama Supreme Court Chief Justice Sonny Hornsby established a special commission that recommended major changes in the state's grossly underfunded indigent-defense system. But those proposals fell stillborn at the chief justice's door, recall lawyers involved in the project.

Chief Justice Hornsby in late June, however, called together state bar representatives, capital litigators and members of the attorney general's office in an effort to get the reform movement back on track, with a particular emphasis on capital cases.

"The court has given us the legislative drafting capabilities of the administrative office," says Dennis Balske, chairman of the state bar's indigent-defense committee. "And we're looking around at systems in Ohio and other states."

Money continues to be the major obstacle to change, he says. The chief justice has ended his opposition to a doubling of the fair-trial tax fund — a $7-per-case filing surcharge — for indigent defense, he says. But even an increase in the fund, already $2 million in the red, will serve only as a stopgap measure, says Mr. Balske, who adds, "We're going to give it a whirl with our Legislature, probably in January 1992. But no one knows what they'll do."

More Studies

In Florida, which has a statewide public defender and where the high court has already overturned fee caps, the key concern is post-conviction counsel, handled primarily by the state-funded Office of the Collateral Capital Representative.

"The CCR is completely swamped," says Chief Justice Leander Shaw, who recently appointed a commission to study the issue. "The present governor is just cranking out death warrants, which places us in a terrible position. What are we going to do if they don't get a brief in? Execute the guy?"

A Florida Bar commission, meanwhile, is expected soon to recommend death penalty reforms, including adoption of American Bar Association experience standards for defense lawyers at all stages of capital litigation.

In Texas, the state bar has commissioned a study, due in December, by consultants The Spangenberg Group, on how the law can be amended to deal with the acute shortage of post-conviction counsel for prisoners on the nation's largest death row — 320 inmates.

States such as Florida and Texas could look to Ohio, where a special oversight committee recently declared a 3-year-old program for providing capital defense lawyers to indigent defendants a "great success."

The committee said the Ohio Supreme Court-imposed system had attracted four times the anticipated number of lawyers — 850 — for mandatory certification. Better representation, says committee member John J. Callahan of Toledo's Secor, Ide & Callahan, is evident in capital conviction statistics: from July 1987 to July 1990, the number of capital convictions dropped from 18 to eight.

Ohio's system currently is serving as a model for Tennessee and Indiana.

But Tennessee's proposal is flawed, says William Redick, head of that state's death penalty resource center, because it fails to address attorney fees. "Many of the lawyers you'd want on an appointment list won't get on because of the money."

The court, explains Mr. Redick, views compensation as the Legislature's problem and, he adds, "from what I hear, that's the last thing on the Legislature's mind."

Even Ohio's relatively generous fees are insufficient, says Mr. Callahan. The oversight committee's report urges the state to confront soon the need for more money and the consequences for local budgets.

Mr. Callahan says: "I'm hoping states like Tennessee will not have to come up with systems like Ohio's. If they want the death penalty, they must know it's going to be an expensive item in the law. Once taxpayers become aware of this, I hope they realize the penalty is not worth the cost."

Cop Plea, But Forfeit Your Fee

Officials in Georgia's Putnam County made Tony B. Amadeo fight for 13 years to obtain competent lawyers and avoid Georgia's electric chair. They finally extended a plea offer Oct. 18, but not before taking a slap at the attorneys who represented him and exposed their wrongdoing in the case.

As a condition of Mr. Amadeo's plea for a life sentence, Putnam County Prosecutor Joseph H. Briley insisted, lawyers Stephen B. Bright and William M. Warner of Atlanta would receive no compensation from the court for their work for the indigent client.

Mr. Bright of the Southern Prisoners' Defense Committee and sole practitioner Mr. Warner battled long to handle the retrial they had spent 11 years helping Mr. Amadeo to win. In 1988, they convinced the U.S. Supreme Court to order a new trial for Mr. Amadeo — based on proof that Mr. Briley and Putnam County court officials schemed to keep blacks and women underrepresented on the master jury list in his original 1977 trial. *Amadeo v. Zant, 486 U.S. 214.*

For the retrial, Ocmulgee Circuit Chief Judge Hugh P. Thompson attempted to replace Messrs. Bright and Warner with new local counsel inexperienced in capital trials. But the Georgia Supreme Court in 1989 said Mr. Amadeo had the right to keep his longtime lawyers. *Amadeo v. Georgia, 259 Ga. 469.*

The defense attorneys then worked to block Mr. Briley from prosecuting the retrial because of his jury-fixing work in the first. Just as a scheduled hearing on the defense motion to disqualify him was to begin, Mr. Briley offered the plea bargain.

While acknowledging that it set a "terrible precedent," Mr. Bright accepted the condition to the plea that he take no compensation from the court. "We weren't about to deny [Mr. Amadeo] a life sentence so we could get $2,500," he said.

The arrangement, however, appeared unethical because of the conflict of interest it established between the client and his lawyer, according to Prof. Monroe Freedman, a legal ethicist at Hofstra University School of Law.

"The appearance was that the condition [Mr. Briley] imposed was not for legitimate governmental purposes, but because of a personal grudge against the lawyers who successfully raised the issue of his misconduct earlier," Professor Freedman said. He said the prosecutor "clearly" should not have been handling the retrial in the Amadeo case.

Former Maryland Attorney General Stephen H. Sachs, of Washington, D.C.'s Wilmer, Cutler & Pickering, on hand as an expert witness for the defense, saw Mr. Briley turn to the victim's family as he read the plea's final condition. "He postured, as if looking for, and receiving, approval from them" before announcing that the defense lawyers would not be paid, Mr. Sachs said.

"I wanted to cry, 'Foul!' " he said, but said he did not know of any law against such a condition.

Professor Freedman said that depriving court-appointed counsel of even nominal pay sends a signal to other lawyers who might be called upon to invest years defending a death-row inmate. "Particularly when we know it's a serious problem that there are not enough people to handle cases of the importance and complexity of death-penalty cases, it seems inappropriate to impose this kind of discouragement," he said.

— *Marianne Lavelle*

S T A T E O F M I C H I G A N

IN THE SUPREME COURT

IN THE MATTER OF THE RECORDER'S COURT BAR ASSOCIATION, THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, WOMEN LAWYERS ASSOCIATION OF MICHIGAN, and THE SUBURBAN BAR ASSOCIATION,

Petitioners, Supreme Court No. 86099

v

WAYNE COUNTY CIRCUIT COURT and RECORDER'S COURT,

Respondents,

and

WAYNE COUNTY,

Intervening Respondent.

RESPONSE OF AMICUS CURIAE MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM TO SPECIAL MASTER'S REPORT

Amicus curiae is, on the whole, very gratified by the Special Master's report. It takes judicial consideration of assigned counsel fees to an entirely new level by its in-depth review of the facts and its recognition of fundamental problems. These include the need to assess the reasonableness of assigned attorneys' fees by the same standards that are applied in civil cases, the fact that there is widely disparate representation afforded indigent defendants in Michigan because the counties pay

at widely different rates, and the fact that low assigned counsel fees negatively affect the quality of representation indigent defendants receive.

Given the quantity of testimony (2400 pages) and the range of subjects considered, it would be easy for everyone involved in the hearings to find details in the findings or even in the summary of testimony with which they disagree. Amicus will address only a few matters of particular importance, but notes that the proposed findings submitted to the Special Master, taken together, provide a comprehensive analysis of the evidence from several perspectives.

In Subsection B of his Findings, the Special Master lists various characteristics of the flat fee schedule, which he divides into positive and negative. To the extent that the positive characteristics include an impact on docket movement, jail space and alternative dispositions, it should be noted that the statistical evidence regarding the effect of the schedule was inconclusive. Although there was much testimony about changes in the timing and nature of case dispositions, the statistician who analyzed the data, Dr. Donald Tippman, found no statistically significant correlations between these changes and adoption of the fee schedule. That is, it cannot be said with any certainty that the fee schedule has or has not had any particular impact.

It should also be noted that several of the characteristics identified as positive did not require changing the Wayne County schedule from being event-based to flat. For instance, there was no evidence that frivolous motions were a problem needing correction, that barriers to dismissing weak cases at an early stage existed, or that the event-based schedule

was administratively harder to operate. Some characteristics attributed to the flat fee schedule in particular are simply characteristics of fee schedules in general.

Amicus strongly supports the development of presumptive payment guidelines, based on a reasonable hourly rate of $60 to $70 per hour, as the Master proposed in Recommendation 1A. However, proper development of such guidelines would take quite some time. The flat fee schedule that the Master has now found to violate the reasonable compensation statute has already been in effect for nearly three years. Amicus urges the Court to adopt Recommendation 1B immediately and install the Jobes Committee event-based fee schedule, adjusted for inflation, as an interim measure. This would provide significant short-term relief for assigned counsel and their clients. Long-term solutions could then be carefully examined without concern that resolution of the instant litigation will be unduly delayed.

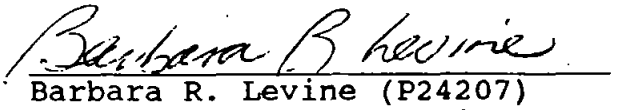
To whatever extent new payment methods are explored, there should be full participation by the plaintiffs and other representatives of the defense bar. The unilateral imposition of attorney compensation schemes by the bench, as occurred with the flat fee schedule, should not be condoned.

Amicus strongly supports Recommendation 3 regarding expansion of the study of assigned counsel fees with a view toward unifying "the hodgepodge of plans for indigent representation that now exist." As the Recommendation notes, such a study could build on much information that has already been gathered, particularly by State Bar committees and task forces. Amicus urges the Court to order legislative style hearings at several locations around the state. This would allow

lawyers, judges and other interested parties to present their views without the formal constraints imposed by litigation. Amicus also respectfully suggests that Judge Tyrone Gillespie be asked to conduct these hearings in a continuing role as Special Master. Not only does he now have enormous background on the subject matter, but the exceptional patience and civility with which he conducted the Wayne County hearings make him ideally suited to conduct hearings on this difficult subject matter at a wide range of locations.

Finally, while wholeheartedly concurring in the call for state funding of all indigent appellate defense services, Amicus objects to that portion of Recommendation 5 that suggests placing appellate defense under the direct supervision of the State Court Administrator. Such action would negate the statutorily defined role of the Appellate Defender Commission. It is critical, as ABA and NLADA standards have recognized, to have defense services supervised by non-judicial entities that can fully protect the professional independence and serve the unique professional needs of defense lawyers. The Appellate Defender Commission currently exists within SCAO for budget purposes only. With adequate state funding, the Commission itself could fully centralize the administration of appellate services.

Respectfully submitted,



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