State of Michigan
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.

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

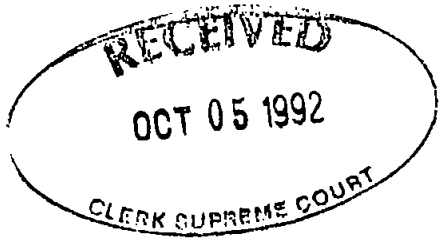
Respondents,

and

WAYNE COUNTY,

Intervening Respondent.

WAYNE COUNTY'S CALENDAR BRIEF



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STATE OF MICHIGAN

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,

No. SC 86099

v

Special Master
Hon. Tyrone Gillespie

WAYNE COUNTY CIRCUIT COURT and
RECORDER'S COURT,

Respondents,

and

WAYNE COUNTY,

Intervening Respondent
_____/

WAYNE COUNTY'S CALENDAR BRIEF

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Intervening Respondent Wayne County answers, "Yes."

Petitioners answer, "No."

The Special Master would answer, "No."

II.

SHOULD THIS COURT DISMISS THE COMPLAINT FOR SUPERINTENDING CONTROL WHERE THESE PETITIONERS HAVE ANOTHER ADEQUATE REMEDY AND WHERE THEY CANNOT SHOW THAT ANY RESPONDENT HAS VIOLATED A CLEAR LEGAL DUTY?

Intervening Respondent Wayne County answers, "Yes."

Petitioners answer, "No."

The Special Master would answer, "No."

III.

SHOULD THIS COURT REJECT THE SPECIAL MASTER'S FINDINGS OF FACT THAT THE GRADUATED FLAT FEE SCHEDULE (1) IS BASED ON "THE POTENTIAL MAXIMUM SENTENCE," (2) ENCOURAGES LAWYERS TO PERSUADE CLIENTS TO PLEAD GUILTY AND DISCOURAGES THEIR USE OF THE FULL PANOPLY OF CONSTITUTIONAL RIGHTS, (3) IS A DISINCENTIVE TO FILING SERIOUS MOTIONS AND (4) DISCOURAGES PLEA BARGAINING, WHERE SUCH FINDINGS ARE NOT SUPPORTED BY EVIDENCE?

Intervening Respondent Wayne County answers, "Yes."

Petitioners answer, "No."

The Special Master would answer, "No."

IV.

SHOULD THIS COURT REJECT THE SPECIAL MASTER'S RECOMMENDATIONS WHERE THE RECOMMENDATIONS EXCEED THE SCOPE OF THE SPECIAL MASTER'S ASSIGNMENT AND, IN ANY EVENT, ARE NOT SUPPORTED BY THE RECORD OR WARRANTED BY LAW?

Intervening Respondent Wayne County answers, "Yes."

Petitioners answer, "No."

The Special Master would answer, "No."

STATEMENT OF FACTS AND PROCEEDINGS

This is a superintending control proceeding in which the petitioners[1/] ask this Court to replace the system used by Detroit Recorder's Court and Wayne County Circuit Court to compensate lawyers who accept assignments to represent indigent criminal defendants.

The Parties And The Undisputed Facts

The petitioners are lawyer organizations some or all of whose members accept indigent criminal defense assignments in Wayne County. The originally named respondents are the Chief Judges of Detroit Recorder's Court and Wayne County Circuit Court; Wayne County was added as an intervening respondent. (11-6-89 Order, Addendum A, 54b.) There is no dispute that Wayne County pays for the legal services provided to indigent defendants in Wayne County Circuit and Detroit Recorder's Courts.

Many additional historical facts are not in dispute. As the Special Master's Report relates at pp 4-6, several systems and schedules for compensating assigned indigent defense counsel have been proposed and adopted in Wayne County since 1967 and several have been the subject of litigation.

1/ Wayne County adopts the designation of the parties as "petitioners," "respondents" and "intervening respondent" from the caption of this Court's November 6, 1989 and April 3, 1991 Orders, although the Complaint, Answers and Motions predating the November 6 Order referred to the parties as "plaintiffs," "defendants," and "intervening defendant."

(Special Master's Report (Excerpt), 232-234b.)[2/] The complaint for superintending control in this case attacks the latest such system, which operates pursuant to Joint Administrative Order 1988-2 ("AO 1988-2") and Schedule G, adopted by the respondent Chief Judges on June 27, 1988, effective July 1, 1988. (Addendum B.)

Schedule G provides for the payment of presumptive "fixed fees" for the representation of criminal defendants in the trial court, on a graduated scale from $475 to $1400, depending on the category of the offense defended.[3/] Offenses are grouped into categories according to the maximum sentence, under this Court's sentencing guidelines, which may be given for the offense. For example, all offenses, of whatever nature, which have a 36-month maximum sentence comprise one offense category; all offenses with a 48-month maximum sentence comprise another. Schedule G also sets out fees payable for psychiatric examinations and testimony, other expert testimony and interpreters. Pursuant to AO 1988-2, extraordinary fees may be paid upon the Chief Judge's approval of documented extraordinary fee petitions.

2/ The Special Master's Report is the 226-page document issued by the Hon. Tyrone Gillispie, whom this Court, by its 11-6-89 Order, appointed to serve as a special master to hear evidence and make proposed findings of fact, as described more fully at 6-7, infra. An excerpt of the Report, including the Findings of Fact, Comment and Recommendations, is included in the Appendix at 223b-263b.

3/ Schedule G also addresses compensation for representation on appeal; in spouse abuse, paternity and welfare fraud cases; and in other proceedings, including extradition and probation violation.

The graduated presumptive fixed fee schedule embodied in AO 1988-2 and Schedule G was developed by Recorder's Court Chief Clerk and Administrator, George Gish, based upon a two-year study of compensation and assigned defense activity under the fee-per-event compensation system in effect before Schedule G was adopted. According to Mr. Gish, he observed a direct correlation between the compensation paid, that is, the number of events performed, and the guideline maximum sentence involved. Thus, for example, more fees were paid -- because more events were performed -- for defending offenses with 36 month maximum sentences than for those with 24 month maximum sentences. (Gish, Tr 2-14-90, pp 80, 92-93; Exhibit I.)[4/] (138b, 140b-141b.)

In light of these data, Mr. Gish developed the flat fee schedule, i.e., "we didn't think to develop a flat fee schedule going in." (Id., p 92.) The fee payable under Schedule G in each sentence guideline category is the average fee that was paid under the preceding schedule, on a per-event basis, for the representation of defendants charged with offenses in each such category. (Id., pp 103, 104.) (146-147b.) See also Kaufman, Tr 2-15-90, p 103 ("[W]hen the Flat-Fee amount was set in the schedule, it was done based upon the historical average of what we had paid for those particular charges when we had a per event schedule"). (164b.)

[4/] Mr. Gish explained that he had "a tremendous data base to draw on in conducting the study. Because Recorder's Court has all the sentencing guidelines in effect since 1984 in the court's computer data base, we are able to do this sort of analysis." (Gish, Tr 2-14-90, p 104.) (147b.) Mr. Gish's testimony about the system was not contradicted.

This Litigation

Petitioners instituted this proceeding in May 1989. According to their Complaint, AO 1988-2 and Schedule G violate MCL 775.16, MSA 28.1253 (Addendum C), because the fees paid pursuant to them are not "reasonable." Petitioners alleged, among other things, that a flat fee schedule is unreasonable per se because it operates as an economic disincentive for vigorous advocacy which results in the under-representation of indigent defendants and in the denial of their and the assigned counsel's constitutional rights. (Complaint, ¶¶ 3, 22.) (4, 8-10b.) Additionally, petitioners asserted that if this Court permitted the parties to present evidence, petitioners could prove that application of the fee schedule denies indigent defenders effective assistance of counsel and violates the constitutional rights of the attorneys who represent them. (Id., ¶ 25.) (11-12b.) Petitioners requested, among other relief, that this Court substitute in place of AO 1988-2 and Schedule G the fee-per-event Schedule adopted by the respondents in 1982 but never implemented. (Id., ¶ V.A.) (13b.)

In its Order of November 6, 1989, "in order to facilitate resolution of the complaint for superintending control," this Court appointed the Hon. Tyrone Gillespie to serve as a special master, "to hear evidence and make proposed findings of fact to the Court." (Emphasis added, Addendum A.) (54b.) The specific topics on which Judge Gillespie was directed to make proposed findings were:

(1) the various rates of reimbursement for appointed counsel in Michigan.[5/]

(2) The amount of overhead and expenses typically incurred by attorneys who accept appointment to represent indigent criminal defendants;

(3) the amount of income which may typically be generated by acceptance of appointments;

(4) the amount of attorney and staff time spent to generate amounts of income from appointments;

(5) instances of pressures to under-represent indigent defendants; and

(6) any other topics which any party or the special master thinks will help this Court resolve the issues presented in this case.

Order, 11-6-89, Addendum A. (54b.)

For reasons not apparent on the record, the Special Master chose not to conduct a standard adversarial proceeding governed by the rules of evidence, but one "more in the form of a congressional hearing." (Hon. T. Gillespie, Tr. 1-16-90, p 4.) (57b.) He expressly authorized opinion testimony by all witnesses, "relevant" hearsay and only limited cross examination. (Id., pp 3-4.) (56-57b.) Wayne County objected to "the relaxed nature of [the] proceedings" and to the absence of an opportunity to conduct pre-hearing discovery. (Watkins, id., pp 19-20.) (58-59b.)

5/ This directive apparently was modified by the Court to include rates only in Wayne County. See Special Master's report, p iii. (227b.) Nonetheless, the amicus curiae submitted evidence of assigned counsel compensation systems and rates throughout Michigan. See Appendix A to Brief Amicus Curiae, dated July 11, 1989.

At the hearing conducted in January and February 1990, the Special Master heard testimony and admitted exhibits. Petitioners' witnesses stated their opinions about the inadequacy of compensation under AO 1988-2 and Schedule G and that other, unnamed, lawyers manipulated the system to maximize fees at their assigned clients' expense. Respondents' witnesses testified about the history and rationale of the system, and about features of the system other than compensation, such as the provision to the assigned counsel of the pertinent police report and pre-signed discovery orders at the time the assignment is made. (Gish, Tr 2-14-90. pp 137-138.) (148-149b.) Respondents' witnesses also testified about statistical data comparing attorney performance and case disposition under the current and former compensation systems.

After receiving proposed findings of fact, conclusions of law, recommendations and briefs submitted by the parties and the amicus curiae, the Special Master issued his Report, dated March 18, 1991 and filed in this Court on April 3, 1991. (223-263b.) All parties and amicus curiae Michigan Appellate Assigned Counsel System ("MAACS") submitted briefs in response to the Special Master's Report.

On July 2, 1992, the Court, on its own motion, ordered that this case be argued with Kent County Defense Bar v Kent County, et al, Docket No. 91553. (7-2-92 Order) (265b.) By letter to counsel dated August 17, 1992, it invited calendar briefs. (266b.)

ARGUMENT

Introduction

Petitioners are not entitled to the relief they seek in this Court. They have not established that the graduated flat fee schedule is "unreasonable," either per se or as applied. Accordingly, the complaint for a writ for superintending control should be dismissed.

The 226-page Report of Special Master, although obviously a painstaking and prodigious effort, does not comply with this Court's November 6, 1989 Order. It does not contain findings of fact on each of the five topics expressly requested by the Court but does contain unrequested comments and recommendations. Moreover, the findings on which the Report bases its most critical recommendations are not supported by the record.

As is discussed below, this Court should reject summarily the Special Master's "Comments" and "Recommendations" because they clearly are beyond the scope of his assignment as expressed in the Court's November 6, 1989 Order. The Court should reject also the Special Master's "Findings of Fact" because they are not supported by competent evidence which would have been admissible pursuant to the Michigan Rules of Evidence. See MRE 101, 1101(a).

I. THIS COURT SHOULD DISMISS THE COMPLAINT FOR SUPERINTENDING CONTROL BECAUSE PETITIONERS FAILED TO DEMONSTRATE THAT THE FEE SCHEDULE ADOPTED BY RESPONDENT CHIEF JUDGES DOES NOT PROVIDE FOR "REASONABLE COMPENSATION" AS REQUIRED BY MCL 775.16.

Summary of Argument I

Petitioners' argument that the Wayne County Circuit and Detroit Recorder's Court assigned attorney compensation system is unreasonable per se or as applied because the graduated flat fee schedule it employs does not provide for "reasonable compensation" as required under MCL 775.16 is not supported by the record or the law.

The unrefuted evidence establishes that the fee schedule in effect is directly related to the amount of work a lawyer is expected to perform given the degree of seriousness of the crime. Further, the system provides a means to obtain additional compensation where necessary. Finally, there is no legal requirement that "reasonable" compensation should be defined to mean overhead plus attorney profit or fees equivalent to those charged by retained counsel.

Nor have petitioners been able to document any change in lawyer behavior prejudicial to the 6th Amendment rights of assigned criminal defendants since the graduated flat fee schedule was adopted, nor have they shown that application of the flat fee schedule deprives the assigned attorneys of any consitutional rights.

Petitioners' request for a writ of superintending control is based, in part, on their assertion that the fee schedule adopted by the respondent Chief Judges does not provide for reasonable compensation as required by MCL 775.16; MSA 28.1253. That statute requires the appointment and compensation of counsel for indigent defendants and states, in relevant part:

> Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.

(Emphasis added.) As discussed below, however, petitioners failed to show that AO 1988-2 and Schedule G do not provide "reasonable compensation."

A. There Is No Legal Or Factual Support For Petitioners' Assertion That The Fee Schedule Is Unreasonable Per Se.

In an effort to show that this dispute involves the failure of the Chief Judges to discharge a clear legal duty imposed by the statute, petitioners attempt to argue that the graduated flat fee schedule is unreasonable per se. Neither the case law nor the record in this proceeding, however, supports this bald assertion.

1. Although there is no legal requirement that "reasonable" compensation be determined on a case-by-case basis, the fee schedule permits such determination by authorizing petitions for extraordinary fees.

Although petitioners do not develop this point, they insinuate that the mere fact that attorneys are compensated according to a schedule, rather than on a case-by-case basis, is "unreasonable." See, e.g., Petitioners' Brief in Support of Complaint, p 10, and Petitioners' Proposed Findings/Conclusions at p 33. (Their half-hearted advocacy of this point may be related to the fact that petitioners have recommended another fee schedule to supplant the one currently in effect.) They acknowledge that this Court, in In re Meizlish, 387 Mich 228; 196 NW2d 129 (1972), upheld use of the fee schedule there under attack, but seek to distinguish that result because Meizlish did not involve a challenge under MCL 775.16. They do not cite any other authority in connection with the argument.

Even if, however, there were authority requiring reasonable attorney fees to be determined on a case-by-case basis, the graduated flat-fee schedule would pass the test because, although Schedule G sets presumptive fees, it expressly allows for individualized increases by the mechanism of the petition for extraordinary fees. (Kaufman, Tr 2-15-90, pp 97-98, 158-159b.)

2. There is no support for petitioners' argument that only an attorney compensation system that is "event-based" is "reasonable" because it is the only system that ties the amount of compensation to the amount of work lawyers perform on behalf of indigent defendants.

Petitioners argue that the graduated flat fee schedule is unreasonable per se because it does not expressly tie the amount of compensation to the tasks the attorney performs or to the number of hours he or she works. Petitioners cite no authority, however, for the proposition that to be "reasonable" an attorney compensation system must be event-based.

Moreover, even if there were such authority, it would not support the argument that the graduated flat fee schedule is unreasonable. That is because petitioners' assertion that attorney compensation under Schedule G is totally unrelated to the amount of work lawyers perform on behalf of their assigned clients is flatly contradicted by unrefuted evidence about the data on which the graduated flat fee schedule was based. As discussed at pp 4-5, supra, Mr. Gish, who devised Schedule G, studied two years' compensation data under the events-based fee schedule in effect before Schedule G was adopted. The graduated flat fee schedule was developed in light of this data and pays, as the presumptive fee for defense of a crime in a given maximum sentence guideline category, the average amount paid to lawyers for such work, on a per-event basis, under the former schedule. See, generally, Gish, Tr 2-14-90, pp 80, 91-92, 103-104) (138b-140b, 146b-147b).

Mr. Gish's testimony was not refuted by any witness, but was corroborated by petitioners' expert, Robert Spangenberg, who testified that all the studies he and his group have done show that, "as a general rule, the more serious the case, the more serious the penalty, the more time required." (Spangenberg, Tr 1-18-90, p 100; pp 27-28.) (91-92, 93b.) Accordingly, although the graduated flat fee schedule on its face ties basic compensation levels to sentence guideline categories identified by maximum sentences, it assumes that the amount of work which was compensated by that fee under the former, per-event schedule, will continue to be done for the same amount of compensation.

3. The only cases in which courts have held indigent defenders should be paid fees comparable to those charged by lawyers of clients who can afford to pay them involve compulsory indigent representation systems or statutes which provide that fees must equal the "ordinary and customary charges for like services in the community."

Petitioners also argue that the graduated flat fee schedule is unreasonable per se because the fees the schedule provides are at rates below those paid to lawyers by clients who can afford to pay for their services. Petitioners cannot provide any legal support for the notion that the measure of a "reasonable" fee is the amount paid to privately retained counsel.

The one decision on which petitioners rely, Hulse v Van Wifuat, 306 NW2d 707 (Iowa, 1981), is distinguishable. Hulse is from a state which has amended its attorney fee statute to make it clear that a court-appointed attorney is entitled to a fee "which shall be the ordinary and customary charges for like services in the community."6/ Other courts, in the absence of a statute, have expressly held that assigned counsel need not be paid equivalent fees to those charged by retained counsel. See, e.g., State v Rush, 46 NJ 399; 217 A2d 441 (1966), In re Petition for Fees In People v Johnson, 93 Ill App 3d 848; 417 NE2d 1062 (1981), Makemson v Martin County, 491 So 2d 1109 (Fla, 1986) cited by petitioners.

Petitioners and amicus curiae MAACS suggest (but cite no authority to support the suggestion) that "reasonable" compensation should be defined to mean overhead plus attorney profit. In fact, the only case in which a court has held that court appointed counsel must be paid an amount which includes compensation of defense counsel's reasonable overhead and out-of-pocket expenses is State v Lynch, 796 P2d 1150, 1161 (Okla, 1990), which involved a compulsory indigent representation system.

6/ Our Legislature, of course, has made no such determination. If assigned attorney fees in Michigan were to be changed as drastically as they were in Iowa, however, legislation, not judicial decisions such as petitioners seek, would be the appropriate means.

No support exists for petitioners' argument that assigned counsel who volunteer to be appointed must be paid "fees equivalent to those charged" by retained counsel or that compensation should be defined to mean overhead plus attorney profit.

4. Even assuming there were case law support for petitioners' argument that overhead and out-of-pocket expenses are relevant to the issue whether the graduated flat fee schedule results in unreasonable compensation, which there is not, the record would not support such conclusion.

Even if there were case law support for petitioners' argument that overhead and out-of-pocket expenses are relevant to the determination whether a fee schedule results in "unreasonable" compensation, this record would not support the conclusion that compensation under AO 1988-2 and Schedule G is "unreasonable." Although the Special Master "found" that the average overhead rate in the Detroit area "varies from $35 to $45 an hour" (Report, p 212, 249b), the evidence was unclear on this point. Even petitioners concede that the "testimony revealed that overhead of attorneys [varies]," Petitioners' Proposed Findings, Conclusions, p 16, and amicus curiae MAACS acknowledges that the testimony "cannot be reconciled perfectly," Amicus Curiae MAACS' Proposed Findings of Fact, etc, p 8.

Although three of petitioners' witnesses purported to testify from knowledge as to overhead rates of $39.30 (Loeb, Tr

1-17-90, pp 98-99 67-68b; and Exhibit 21, 216b),[7/] $45.00 (Evelyn, Tr 1-18-90, pp 219-220, 97-98b.) and $43.00 (Lorence, Tr 1-17-90, p 190, 89b) per hour, none of them testified that, as a matter of course, they keep records of their working time. Those who attempted to produce overtime figures expressed as dollars per hour apparently did not know how many hours they typically devote to assigned criminal cases -- or to any particular matter -- in a year or month. Witness Lorence, for example, testified that in arriving at his hourly overhead rate, he originally computed it on the basis of 35 hours per week, then recomputed it based on 40 hours per week. Id. Witness Loeb divided his total of $81,739.30 in expenses by 52 then divided $1571.90 by 40 to arrive at $39.30 an hour. (Loeb, Tr 1-17-90, p 154.) (79b.)

Most of petitioners' witnesses could only approximate or speculate their hourly overhead. Some could not do even that. See, e.g., cross examination of Patricia Slomski:

> Q. Can you estimate your overhead in gross?
>
> A. I can't, I cannot do it.
>
> Q. Percentage basis could you estimate?
>
> A. I really can't.

7/ Mr. Loeb's list of "overhead" items included $3374.72 for travel and entertainment and $12,785.80 for advertising. See Ex 21. Mr. Loeb admitted that neither of these expenses is related to the portion of his caseload comprised by assigned cases. Tr 1-17-90, pp 155-6, 80-81b.

(Tr 1-16-90, p 220). (64b.)[8/] Petitioners' expert, Dr. Lawrence Stiffman, testified that he gathered his overhead data from responses to a survey which inquired, inter alia, about the responding lawyers' "office overhead perceptions." (Stiffman, Tr 1-17-90, p 7, emphasis added). (66b.)

Wayne County submits that this record is not adequate to permit any conclusion about "the amount of overhead and expenses typically incurred by attorneys who accept appointments to represent indigent criminal defendants." Order, 11-6-89 Addendum A, 54b. It is thus an inadequate basis on which to judge that the graduated flat fee system is "unreasonable."

5. The evidence is unrefuted that attorney compensation under the allegedly "unreasonable" graduated flat fee schedule is not significantly lower than under the previous, event-based schedule.

Although attorney compensation under the graduated flat fee schedule is conceded to be lower than that paid by "private" clients, it is not significantly lower than the

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8/ See also, cross examination of James Horwarth ("I did some calculation, and I didn't break it down hourly. I can tell you what I have." Tr 1-18-90, p 212, 96b) and Kenneth Mogill (estimating 1989 office overhead at between $50,000 and $55,000, which he thought was "in the neighborhood of" $30-31 per hour. Tr 1-17-90, pp 168-169, 83-84b). Mr. Mogill also testified that he has not accepted a criminal assignment since the graduated flat fee schedule was adopted so that none of the overhead to which he testified is related to such work. Tr 1-17-90, p 164. (82b.)

compensation assigned attorneys received under the former, events-based schedule. This fact was made clear by data reflected in petitioners' Exhibit 9, "Impact of Flat Fee Schedule on Court Proceedings and Attorney Fees" ("impact study") (188-215b), which George Gish compiled from reports produced by Dr. Donald Tippman (Tippman, Tr 2-12-90, pp 160-161) (123-124b), and by the unrefuted testimony of Dr. Tippman and Mr. Gish. The impact study revealed that the average fees paid across categories of cases before and after Schedule G was put into effect decreased only slightly. Specifically, it showed that in 1987, 1988 and 1989, the average fees across categories were: $628.99, $634.50 and $627.34. (Id., 162-63, 125-126b.) See also, Gish, Tr 2-14-90, pp 93-94 (141-142b, and Exhibit 9, p 6 (195b)).

The statistical evidence that the actual impact of the graduated flat fee schedule on assigned lawyer compensation has been de minimis undermines petitioners' assertion that the graduated flat fee schedule is unreasonable per se.

B. There Is No Legal Or Factual Support For Petitioners' Assertion That Application Of The Graduated Flat Fee Schedule Violates The U.S. Or Michigan Constitutions.

1. The record does not support petitioners' assertion that application of the graduated flat fee schedule denies indigent criminal defendants effective assistance of counsel.

Petitioners contend that the graduated flat fee schedule denies the indigent criminal defendant effective

assistance of counsel. Complaint, ¶22E. (8-12b.) They argue that the amount paid assigned counsel is too low, creating an economic disincentive to counsel to exert the effort to represent an indigent criminal defendant effectively. Allegedly, that economic disincentive increases the number of guilty pleas and reduces the number of trials.

Notwithstanding the volumes of testimony they presented, however, petitioners did not support their claim that an attorney compensated under the graduated flat fee schedule fails or shirks the full measure of the attorney's obligation to the indigent criminal defendant. Indeed, witness Justin Ravitz testified that the quality of legal representation has not been negatively affected by the graduated flat fee schedule. Ravitz, Tr 1-16-90, p 91. (60b.) Other witnesses testified similarly or by implication. See e.g., Jobes, Tr 1-16-90, p 135 (62b); Edison, Tr 2-12-90, p 153 (122b).

There is no question that under both the Michigan and United States constitutions, Michigan has a duty to provide each criminally accused person with effective assistance of counsel. Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); Strickland v Washington, 466 US 668. Under the constitutional standard, however, effective assistance of counsel is presumed unless the adversarial process is so undermined by counsel's conduct that the trial cannot be relied upon to have produced a just result. Strickland v Washington, 372 US at 692-93. To disprove the presumption, the totality of circumstances must show that counsel's performance was

unreasonable under the circumstances and that but for counsel's performance, the result of the proceeding would have been different. Strickland, supra. In no case has the amount or method by which counsel was compensated been considered one of the circumstances to be examined. Typically, a claim of ineffective assistance can be made out only by specifying particular errors of trial counsel. United States v Cronic, 466 US 648, 665-66; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Such is not possible on the record before the Special Master.

a. There is no credible evidence that any lawyer failed to exercise his or her duty of diligent representation because of the graduated flat fee schedule or the compensation received thereunder.

The record before the Special Master does not specify any particular errors of any trial counsel. It is devoid of any evidence that a particular lawyer prepared inadequately for trial, failed to investigate a particular avenue of exculpatory or mitigating discovery, failed to raise certain defenses, or even failed to advise an indigent of his or her rights, including the right to a jury trial. That is, there is not one iota of testimony that any counsel's performance was so deficient that it amounted to ineffective assistance of counsel. Not one judge is suggested to have witnessed

ineffectiveness which violates the constitutions.9/

Instead, the record is replete with innuendo, rumor and unsupported anecdotal testimony about other, unnamed lawyers' derelictions as well as statements that the witnesses believe that the graduated flat fee schedule has encouraged ineffectiveness.10/ In the one or two attorney anecdotes in

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9/ If one had, he or she would have been required to act. Judges are under an obligation to report unprofessional conduct of lawyers. The Code of Judicial Conduct (Canon 3B(3)) provides: "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Unlike the Code of Professional Responsibility, the ABA Code of Judicial Conduct generally employs "should" as an indication of a mandatory rule. Wolfram, C., Modern Legal Ethics § 12.10.1, pp 685-686 (1986). In addition, the court's contempt power may be invoked in order to deal with the rendering of ineffective assistance of counsel in a criminal proceeding. Martin v Rose, 744 F2d 1245, 1252 (CA 6, 1984).

10/ Conversely, however, the record does contain testimony that is generally contrary to petitioners' allegation of ineffectiveness. For example, witness Judge Clarice Jobes testified that the quality of counsel in Recorders Court is not lacking. According to Judge Jobes, "we have outstanding trial lawyers." See Tr 1-16-90, p 118. (61b.) According to witness William Daniel, there are "plenty of good lawyers" representing indigent criminal defendants. See Tr 1-18-90, p 144. (94b.) Witness Myzell Sowell succinctly testified that Wayne County has "an unusually well-qualified criminal defense bar particularly when it comes to the representation of indigent defendants." See Tr 2-12-90, p 83. (116b.)

These lawyers confirm the sentiments expressed by this Court in In re Meizlish, where it quoted the New Jersey Supreme Court in rejecting the notion that lawyer performance necessarily is tied to compensation and stated:

> As to the rights of an accused, appellant contends that counsel, if unpaid, cannot by his performance satisfy the constitutional guarantee of the right to the aid of counsel.

FOOTNOTE 10 CONTINUED ON NEXT PAGE.

which one or two indigent criminal co-defendants are identified, the conduct of their counsel is not alleged to constitute "ineffective assistance." The parade of less-than specific, non-documented alleged errors is not enough to demonstrate either that ineffective assistance has occurred or that there is a causal connection between the graduated flat fee schedule or rates thereunder and lawyer performance.

Nor is there any support in the record for petitioners' assertion that the graduated flat fee schedule is an economic disincentive which has increased the number of

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FOOTNOTE 10 CONTINUED FROM PREVIOUS PAGE

> We know of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligation to a client. Our own experience, both at the bar and on the bench, runs the other way. A lawyer needs no motivation beyond his sense of duty and his pride.

In re Meizlish, 387 Mich at 238-39 (emphasis added); State v Rush, 46 NJ at 405-07. See also testimony of Loeb, Tr 1-17-90, p 108 ("I don't think my prime motive in life is money"), 109 (69-70b); and see testimony of Jeff Edison, Tr 2-12-90, p 130. (120b.)

The individual sense of duty noted in In re Meizlish is embodied in part in the attorney's oath of office. See Supreme Court Rules Concerning State Bar of Michigan, Rule 15, Section 3. That oath, coupled with the obligations imposed by the Michigan Rules of Professional Conduct and exposure to liability for professional malpractice, is a compelling motivation to perform effectively, regardless of the amount of compensation involved.

guilty pleas.[11/] As witness Donald Tippman testified, there has been no statistically significant difference in the number of guilty pleas entered since the move from an event-based fee system to the graduated flat fee schedule. See Tippman, Tr 2-12-90, p 163. (126b.) Even if there were, however, as witness Thomas Loeb conceded, a number of factors other than attorney compensation could cause the number of guilty pleas to increase. Those factors include the "four executive judge system" and the "personalities" and sentencing patterns of these executive floor judges. See Tr 1-17-90, pp 131-33. (71-73b.)

Petitioners have not offered any evidence purporting to trace the effect of any of these factors, or of the graduated flat fee schedule, any criminal defendant's decision to plead guilty. That is, there is no evidence showing how specific guilty pleas came about. Until petitioners present evidence isolating each factor affecting each guilty plea, it will be impossible for this Court to conclude that attorney compensation, in and of itself, caused any increase in guilty pleas.

11/ Petitioners apparently assume that more guilty pleas, ipso facto, would mean less effective representation. In fact, of course, even if the data showed the number of guilty pleas had increased, that in itself would not be evidence that any rights whether to effective assistance of counsel or anything else, of the indigent defendants who pled, had been violated.

The deficient record before this Court demonstrates that petitioners' claim of ineffective assistance of counsel amounts to nothing more than fears, concerns, and beliefs based on the theoretical construct that a flat fee system must create an incentive to do as little work as possible. See, e.g., testimony of Myzell Sowell, Tr 2-12-90, pp 84-85. (117-118b.)

Petitioners' theoretical and conceptual problems, however, do not amount to a constitutional denial of effective assistance of counsel. The Supreme Court of Kansas so held in the case of State Ex Rel Stephan v Smith, 242 Kan 336; 747 P2d 816 (1987) which petitioners cite. In Smith, the court stated:

> While the system thus creates the potential for ineffective assistance of counsel, there is no specific evidence in the record here of any deficient performance that adversely affected the outcome of a trial... Simply because the system could result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts.

747 P2d at 831 (citations omitted).

Similarly, although the record before the Special Master is full of petitioners' insinuations and their witnesses' indignant opinions, it is absolutely devoid of specific evidence demonstrating ineffective assistance of counsel.

b. The unrefuted statistical evidence shows no significant difference in criminal procedural events under the former fee schedule and the allegedly "unreasonable" graduated flat fee schedule.

If ineffective assistance of counsel has occurred as a result of the adoption of the graduated flat fee schedule, presumably, it would be revealed in behavior of lawyers which could be observed and objectively documented. In this case, the observations and documentation of assigned attorney practices since the graduated flat fee schedule was adopted reveal no statistically significant change in the number of criminal procedural "events" which occur in the process of representing an assigned defendant. (These are the events for which separate compensation must be paid, according to petitioners and the Special Master, in order to motivate lawyers to perform them.)

George Gish's impact study compared events during the first five months of 1988 and the first five months of 1989. His report, Exhibit 9 (188-215b), sets forth these irrefutable findings:

1. The average fee paid per case was $634.50 in 1988 and $627.34 in 1989.

2. There was no statistically significant change in the percentage of motions or

hearings held in 1988 as compared to 1989.12/

3. There was no statistically significant change in the percentage of cases reaching disposition by trial. There was no statistically significant change in the percentage of cases found guilty versus not guilty.

4. There was no statistically significant change in the percentage of defendants sentenced to confinement or probation.

5. The overall amount of money paid for attorney fees increased by 15.1% in 1989 as compared to 1988.

6. The number of attorneys submitting vouchers for payment increased 11.5% in 1989 over 1988.

7. While the overall plea rate did not change, the percentage of pleas taken at the Arraignment on the Information stage increased 5% while the percentage of pleas taken after the Arraignment on the Information decreased 5%.

8. A comparison of dispositions shows that the number of pleas at the Arraignment on the Information increased 12% while dismissals increased 25.5%.

9. Between January and May 1988, 305 jury trials were held in 1987, 364 in 1988, and 339 during the same period in 1989.

10. In the first five months of 1989 as compared to 1988, the percentage of pleas after setting a trial date at final conference declined from 12% to 10%.

12/ Although they do not dispute the underlying numbers, petitioners do argue with Dr. Tippman's conclusion that the change in the percentage of motions, from 10% in 1988 to 6.2% in 1989, is not statistically significant. See Tippman, Tr 2-12-90, pp 194-195. (127-128b.) Even if the decrease in the percentage of motions were statistically significant, however, it would not necessarily implicate the graduated flat fee schedule as the cause, nor would it prove that ineffective assistance of counsel has occurred.

11. During the first five months of 1988 the total number of dispositions increased from 6,495 to 7,064 during the same period in 1989, an increase in productivity of 9%.

12. The average pretrial jail time for incarcerated defendants was reduced, due to a reduced time to disposition, by approximately 20 days for defendants whose cases reach a non-trial disposition.

Ex 9, pp 1-2. (190-191b.)

These results were included in the report of a study conducted under a grant from the State Justice Institute for the purpose of examining indigent defense systems in nine jurisdictions across the country. See, Indigent Defenders Get The Job Done And Done Well, National Center For State Courts (May, 1992). The results which indicated no statistically significant change in the number of procedural events is consistent with the Report's conclusion that no single organizational model of public defenders is inherently better than another. Id. at 77. The Report concluded after looking at the systems in the nine courts that indigent defense systems cannot and should not be assessed simply in terms of organizational structure and the assumed advantages of the preferred structure. Instead, the performance of a given structure must be measured in terms of how well the indigent defenders actually handle their cases. Id. at 35.

Measured by that yardstick, the system attacked by petitioners here is not unreasonable. Petitioners have not been able to document any change in lawyer behavior prejudicial

to the 6th Amendment rights of assigned criminal defendants since the graduated flat fee schedule was adopted. Accordingly, their argument that the schedule causes deprivations of those rights must be dismissed.

2. Neither the record nor the law supports petitioners' assertion that the graduated flat fee schedule deprives them their property without just compensation and due process of law.

Petitioners argue that the low rate compensation provided by Schedule G "takes" their professional services, law practices, or both without reasonable compensation and due process of law. Complaint, ¶ 25D. (11-12b.) The Special Master did not analyze or make a finding with respect to this assertion. It is not, in fact, supported by competent evidence in the record or by constitutional case law.

The Michigan and United States constitutions provide that private property may not be "taken" by the government for public use without just compensation and due process of law. US Const, Admts 5 and 14; Const 1963, art 10, § 2. The record in this case would not support a finding that there has been (1) a "taking" (2) of "property" (3) without "just compensation" or (4) without due process of law, as those concepts are established in the caselaw.

a. The graduated flat fee schedule does not "take" petitioners' property.

There is no exact definition of or formula for identifying a "taking." Detroit Bd of Educ v Clarke, 89 Mich App 504, 508; 280 NW2d 574 (1979); see generally, Rotunda, Nowak, Young, Treatise on Constitutional Law Substance and Procedure, § 15.12 "The 'Taking' Issue" (1986); De Feld, "Supreme Court's Views As To What Constitutes "Taking," Within Meaning Of Fifth Amendment's Command That Private Property Not Be Taken For Public Use Without Just Compensation," anno, 57 L Ed 2d 1254 (1978). "Taking" is a term of art that refers to a constitutional right to just compensation and neither means the actual and total conversion of the property, nor requires a direct, physical invasion of the property. Hart v Detroit, 416 Mich 488, 500; 331 NW2d 438 (1982); Blue Waters Isles Co v DNR, 171 Mich App 526, 535; 431 NW2d 53 (1988); Jones v Water & Sewer Authority, 98 Mich App 104, 110; 296 NW2d 202 (1980).

A court must consider the totality of facts and circumstances in deciding whether a "taking" has occurred. Hart, 416 Mich at 500; Keystone Bituminous Coal Ass'n v DeBenedictis, 480 US 470, 473; 107 S Ct 1232; 94 L Ed 2d 472 (1987) (citing Kaiser Aetna v United States, 444 US 164, 175; 100 S Ct 383; 62 L Ed 2d 332 (1979)). In deciding whether the graduated flat fee schedule effects a "taking," this Court should consider the underlying intent of the state and federal "takings" clauses and other relevant factors, including the economic impact of the fee schedule, its interference with

reasonable investment-backed expectations, and the character of the governmental action embodied in the schedule. Id; see also Blue Water Isles Co, 171 Mich App at 536; Pennsylvania Coal Co v Mahon, 260 US 393; 43 S Ct 158, 67 L Ed 322 (1922). As is discussed below, none of these factors, legal or factual, supports petitioners' argument that the fee schedule results in an unconstitutional "taking" of their property.

Moreover, none of the cases cited by petitioners supports their "takings" argument. For example, petitioners cite Makemson v Martin County, 491 So 2d 1107, 1115 (Fla 1986), where the Florida Supreme Court held, in pertinent part, that a statute setting a maximum fee limitation for compensation for attorneys who were appointed by the court to represent indigent criminal defendants was not unconstitutional on its face but was unconstitutional as applied. The fee statute in Makemson, however, had an absolute cap on the amount an attorney could be compensated. In contrast, here AO 1988-2 expressly allows the Chief Judge, upon the assigned attorney's petition, to allow extraordinary fees.

Another of petitioners' "taking" cases, DeLisio v Alaska Superior Court, 740 P2d 437 (Alaska, 1987), held, in pertinent part, that a private attorney may refuse a court's compulsory appointment to represent a criminally accused indigent and that such compelled representation constitutes a "taking." In contrast to the compelled representation in DeLisio, here, there is no dispute that assigned counsel

volunteer to be appointed. See, e.g., testimony of Thomas, Tr 1-19-90, p 143 (103b); Sowell, Tr 2-12-90, p 108 (119b).

Like Delisio, State Ex Rel Stephan v Smith, 747 P2d 816 (Kan, 1987), and State v Lynch, 796 P2d 1150 (Okla, 1990), involved compelled representation of criminal indigents. Thus, the Smith holding that a statute compelling court-appointed counsel to represent the criminally accused is confiscatory is inapposite to the instant case. Also inapposite is the holding in Lynch that, as applied, the statute setting a maximum fee was confiscatory and unconstitutional.

i. The intent of the "takings" clauses does not support petitioners' argument.

The intent underlying the "takings" clauses is dual: to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of government projects benefiting the public at large, and to make the property owner whole. See Jones, 98 Mich App at 110; In Re Kent County Airport, 368 Mich 678, 685; 118 NW2d 991 (1962) ("[t]he clear intent of the eminent domain provision of the constitution ... is to protect a property owner and save him whole ...."); see also L. Tribe, American Constitutional Law, § 9-4, at 463-65 (1978).

Here, there is no unfair burden. Petitioners have volunteered to represent indigent criminal defendants. They had full knowledge of the compensation provided by AO 1988-2

and Fee Schedule G before voluntarily making themselves available for assignments.

Moreover, the extent to which petitioners are "burdened" by the amount of compensation they receive under the fee schedule for their volunteered representation is largely within petitioners' control. For example, upon assessing their total caseloads (including cases not involving indigent criminal defendants) and any economic or professional hardship that their volunteered representation may bring, petitioners may decide to accept fewer assignments and more retained clients. Indeed, petitioners' witnesses agreed that an attorney always can decline to represent an indigent criminal defendant. See Thomas, Tr 1-19-90, p 143. (103b.)

Further, the intent of the "takings" clauses is to ensure that private property has not been pressed into public service. See Jones, 98 Mich App at 110. Here, petitioners have not been impressed into public service but instead initiated, by placing their names on the attorney roster, their representation of indigent criminal defendants. See Testimony of Sowell, Tr 2-12-90, p 108. (119b.)

The intent of the "takings" clauses is also to make the property owner whole when government is the primary beneficiary of the "taking." See, e.g., In re Kent County Airport, 368 Mich at 685-86; Tamulion v Waterways Comm, 50 Mich App 60, 70; 212 NW2d 828 (1973). Under the facts of this case, however, government is not the primary beneficiary of the indigent criminal representation compensated by the fee

schedule. Rather, the indigent criminal defendant, the government, and counsel all benefit from that representation. Hence, the fee schedule can provide only a "reciprocity of advantage" to all involved. See Mahon, 260 US at 315.

As the foregoing makes clear, petitioners' argument is at odds with the intent of the "takings" clauses. Application of that intent reveals that the fee schedule does not effect a "taking." Petitioners neither have been compelled to represent indigents nor impressed into public service. Any burden petitioners experience is not unfair or disproportionate because they volunteered, knowing roughly the amount of compensation they would receive, and petitioners may control the amount of any hardship they experience by continuing or discontinuing their volunteered representation.

ii. Other relevant factors demonstrate that AO 1988-2 and fee schedule G do not amount to a "Taking."

When determining whether governmental action constitutes a "taking," the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action also are relevant factors to be examined. Blue Water Isles Co, 171 Mich App at 536; Keystone Bituminous Coal Ass'n, supra; Kaiser, supra; Penn Central Transp Co v New York City, 438 US 104, 127; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

Aside from the fact that attorney compensation per case is not significantly lower under the graduated flat fee

schedule than it was under the former system, the evidence on this record of the economic impact of the graduated flat fee schedule is not monolithic. Some things are clear, however. First, there are enough lawyers willing to be compensated under the fee schedule for the needs of indigent criminal defendants in Wayne County Circuit Court and Detroit Recorder's Court to be met. See, e.g., Harper, Tr 2-12-90, pp 11-12, 14-17 (110-115b.); Gish, 2-14-90, pp 101-02. (144-145b.) Second, the fee schedule clearly does not conscript petitioners into criminal indigency representation nor does it make it commercially impracticable for petitioners to pursue their practices of law. See, e.g., Sowell, Tr 2-12-90, p 108 (119b); Edison, Tr 2-12-90, p 132 (121b). Indeed, much of the economic impact of the fee schedule on petitioners' law practices is within petitioners' control.

The fee schedule does not interfere with petitioners' reasonable investment-backed expectations. "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" Ruckelshaus v Monsanto Co, 467 US 986; 104 S Ct 2862; 81 L Ed 2d 815. Here, petitioners have not shown that they have a "reasonable investment-backed expectation" of compensation beyond the amounts provided by the fee schedule. In fact, because the fee schedule clearly specifies the rates of compensation to be paid with allowance for extraordinary fees upon the approval of the Chief Judge, and because petitioners volunteered to be assigned knowing they would be compensated under the fee schedule, petitioners could

not reasonably have expected to be paid amounts other than those specified in AO 1988-2 and Schedule G. As a result, any of petitioners' expectations are limited to the amounts provided in the graduated flat fee schedule. Any expectation of compensation beyond those amounts is a unilateral expectation not protected by the constitution.13/

b. Under the circumstances, petitioners have no "property" right.

The term "property" as used in the guarantees against taking of property without due process of law embraces:

> 'everything over which a man may have exclusive control or dominion, and it has been held broad enough to embrace all character of vested rights whether or not they may technically be called property rights. It includes not only title and possession, but also the rights of acquisition and control, the right to make any legitimate use or disposal of the thing owned, such as to pledge it for a debt, or to sell or transfer it.'

13/ "Takings" caselaw requires that the character of the governmental action involved in the graduated flat fee schedule be reasonably necessary to the effectuation of a substantial public purpose. See Penn Central Transp Co v New York City, 438 US 104. Besides its intended relationship to the length of the criminal docket, discussed in the Equal Protection argument which follows, the "character" of this governmental action is that it regulates the compensation of counsel for criminal indigents. This regulation arises from a public program, which petitioners volunteered to be a part of, that adjusts "the benefits and burdens of economic life to promote the common good." It is not a regulation which "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v United States, 364 US 40, 49; 80 S Ct 1563, 4 L Ed 2d 1554 (1960) (emphasis added). Under the caselaw, therefore, it does not constitute a "taking." Connolly v Pension Guaranty Corp, 475 US 211, 225; 106 S Ct 1018; 89 L Ed 2d 166 (1986).

Rassner v Federal Collateral Society, 299 Mich 206, 214; 300 NW2d 45 (1941) (quoting 16 CJS 1195, 1196); Butcher v Detroit, 131 Mich App 698, 706; 347 NW2d 702 (1984), lv den 428 Mich 862 (1986); Department of Transp v Jorissen, 146 Mich App 207, 215; 379 NW2d 424 (1985). Despite that broad definition, petitioners must have more than an abstract need, desire, or unilateral expectation of property in order to establish a property interest protected by the constitutional guarantees. Slocum v Holton Bd of Educ, 171 Mich App 92, 100; 429 NW2d 607 (1988); Board of Regents of State Colleges v Roth, 408 US 564, 576-78; 92 S Ct 2701; 33 L Ed 2d 548 (1978).

Petitioners would have this Court believe that the "property" interest at stake is their legal skills or law practices. None of their complaints about the effect of the graduated flat fee schedule, however, is of jeopardized skills or restrictions on their ability to practice. Instead, the interest that is at stake is petitioners' claimed right to compensation beyond that provided in the fee schedule. Petitioners can point to no statutory or other source for a right to "more money."

As a result, petitioners have only a unilateral expectation of compensation beyond the rates specified in AO 1988-2 and fee schedule G. A unilateral expectation, however, is not a "property" interest deserving of constitutional protection. See Slocum, supra; Roth, supra.

c. Petitioners have no constitutional right to compensation equivalent to fair market value.

Under the law of "takings," there is no methodology or general rule for fixing or determining just compensation. In re Grand Haven Hwy, 357 Mich 26, 28; 97 NW2d 748 (1959). Just compensation is the amount of compensation that places the injured party in as good a position as that party would have been had no injury occurred. Id. Hence, fixing just compensation is a matter of judgment and discretion exercised after considering all of the facts. Id.

Even assuming, arguendo, that "takings" jurisprudence is relevant to their claim for increased compensation and that the "injury" is petitioners' voluntary undertaking of indigent criminal representation, the "just compensation" concept affords them no relief.

Petitioners claim that they should receive the amount of compensation paid to an attorney working in private practice or in a prosecutor's office or as a judge participating in the criminal justice system. The amount of compensation received by a private practitioner, a prosecutor, or a criminal trial judge may be more, however, than the amount needed to place petitioners in the positions they were in before their voluntary court-appointed representation began. There certainly is no evidence to the contrary in the record before the Special Master. Hence, fair market value, whether based upon the amount of compensation provided to private

practitioners, prosecutors or judges, cannot be the meaning of "just compensation" for volunteer counsel.

Moreover, the caselaw does not require compensation to be at market rates to be just. See, e.g., United States v Fuller, 409 US 488; 93 S Ct 801; 35 L Ed 2d 16 (1973). Instead, the just compensation determination is governed by the basic equitable principle of fairness. Id.; see, e.g., In re Grand Haven Hwy, supra. Here, petitioners have failed to show that the flat fee schedule, with allowance for extraordinary fees, does not provide just compensation.

d. The graduated flat fee schedule does not violate due process.

"The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v Eldridge, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976) (citation omitted). As the United States Supreme Court has stated and the Michigan Court of Appeals agrees:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35 (citation omitted); In re Jacobs, 185 Mich App 642, 645; 463 NW2d 171 (1990). Consequently, the amount of procedural process due petitioners depends upon the circumstances. Id. at 645.[14/] Substantive due process protects petitioners from arbitrary action. Pioneer State Mut Ins Co v Allstate Ins Co, 417 Mich 590, 690; 339 NW2d 470 (1983).

Petitioners do not specify whether they claim to be denied substantive or procedural due process under the graduated flat fee schedule, but under the controlling caselaw, which also does not distinguish between procedural and

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14/ AO 1988-2 and Schedule G provide petitioners with the amount of notice required for procedural due process. The very first sentence of AO 1988-2 and the title of Schedule G both inform petitioners that fee vouchers submitted after July 1, 1988 will be subject to Schedule G and the balance of the documents identifies the rates of compensation and states certain requirements for conducting the criminal representation and for receiving reimbursement of fees.

Additionally, AO 1988-2 provides petitioners with an opportunity to be heard at a meaningful time. It states, in pertinent part:

> Counsel appointed for indigent defendants may make no expenditure, other than for subpoena fees, for which he or she expects reimbursement except upon prior approval and order of the trial judge on motion for good cause shown.
>
> * * *
>
> In all cases, counsel may petition the Chief Judge for the payment of extraordinary fees. All petitions for extraordinary fees must include an analysis of all assigned cases for the previous one year.

See In re Jacobs, 185 Mich App at 645-46.

substantive due process, their claim must be denied. In In re Meizlish, 387 Mich 228, which controls disposition of petitioners' due process argument, this Court rejected claims that an earlier Wayne County fixed fee schedule deprived assigned counsel of (unspecified) due process. Specifically, this Court held that:

> Appellant's contention that he has been deprived of due process and equal protection under the United States Constitution and Michigan Constitution 1963 has been discussed and decided adversely to him by numerous courts in this country . . . .

Id. at 236-37. Nothing in petitioners' arguments or in the record suggests that the due process issue raised in their complaint is essentially different from that in In re Meizlish. In fact, two recent Court of Appeals cases involving assigned attorney fee awards have held that the issue remains the same. In In re Jacobs, 185 Mich App at 647-48; In In re Klevorn, 185 Mich App at 677; 463 NW2d 175 (1990). See also In re Burgess, 69 Mich App 689; 245 NW2d 348 (1976); In re Hayes, 55 Mich App 30; 222 NW2d 20 (1974). Here, in the absence of detailed allegations or specific arguments, this Court should rely on In re Meizlish and reject petitioners' due process claim.

3. Petitioners cannot show that they have been denied Equal Protection Of The Law by the operation of the graduated flat fee schedule.

Although petitioners have not specifically addressed in their brief whether Wayne County's fee schedule violates the

Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, they make that assertion in their complaint for superintending control. The protection afforded under Michigan's Equal Protection Clause, Const 1963, art 1, § 2, is coextensive with that under the Equal Protection Clause in the U.S. Constitution. Doe v Dep't Of Social Services, 439 Mich 670-674; ___ NW2d ___ (1992) ("[O]ur Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection."). According to the complaint, the graduated flat fee schedule violates the Equal Protection Clause (1) by inadequately compensating attorneys appointed to represent indigent criminal defendants, as compared to the compensation paid to judges and prosecutors in the criminal courts, and to attorneys retained by non-indigent criminal defendants, and (2) by placing the burden of providing low cost services only on certain members of the bar. Complaint ¶ 25B, D, E. (11-12b.) Petitioners' equal protection challenge to the fee system is groundless, however, and should be rejected by this Court.

Under settled authority, economic classifications such as those challenged by the petitioners merit only the mildest standard of review. Craig v Boren, 429 US 190, 207; 97 S Ct 451; 50 L Ed 2d 397 (1976); Dandridge v Williams, 397 US 471; 190 S Ct 1153; 25 L Ed 2d 491 (1970). Doe v Dep't Of Social Services, 439 Mich 650, 664 (1992) ("financial need alone" does not identify "a suspect class for purposes of equal protection analysis."). Petitioners' right to earn a living as lawyers is

not so fundamental that it triggers strict judicial scrutiny of the challenged fee system; if the fee schedule reflects a rational choice aimed at furthering legitimate state interests, a court must uphold it. Family Div of Trial Lawyers v Moultrie, 233 US App DC 168; 725 F2d 695, 709-710 (1984); State Ex Rel Stephan v Smith, 747 P2d at 844.

Under the rationality standard, the challenged classification comes into the case with a presumption of constitutionality. See Doe, supra at 662. To satisfy the heavy burden of overcoming that presumption, petitioners must negate every reasonably conceivable state of facts which supports the classification's rationality. Minnesota v Clover Leaf Creamery Co, 449 US 456; 101 S Ct 715; 66 L Ed 2d 659 (1981). In Minnesota v Clover Leaf, the United States Supreme Court held:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' Vance v Bradley, 440 US [93,] 111 [1979]....
>
> Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational ..., they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' [United States v Carolene Products Co, 304 US 144, 153-154 (1938)]. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation

> merely by tendering evidence in court that the legislature was mistaken.

449 US at 464.

The United States Supreme Court reaffirmed the rational basis test in Pennell v San Jose, 485 US 1; 108 S Ct 849; 99 L Ed 2d 1 (1988). The Court held that it would not overturn a statute that did not affect a suspect class or fundamental interest "unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Id. at 14.

The evidence in this case establishes that the graduated flat fee schedule was implemented to expedite the disposition of cases, foster administrative efficiency and alleviate the problem of jail overcrowding. All of these are legitimate state interests and of themselves establish that the fee system at issue conforms with equal protection requirements.

Petitioners assert, however, that it is irrational for appointed counsel to be paid "at a rate less than the going rates for attorneys in retained cases," and "at a rate which is less than the comparable rates received by judges and prosecutors... ." (Complaint, ¶ 25B). (11-12b.) This assertion, however, ignores the principle that a state has a legitimate interest in reducing the cost of operating its judicial system. See Ortwein v Schwab, 410 US 656; 93 S Ct 1172; 35 L Ed 2d 572 (1973); United States v Kras, 409 US 434, 449; 93 S Ct 631; 34 L Ed 2d 626 (1973). See also, testimony of Chief Judge Kaufman:

Q: So as long as you can find lawyers to provide 6th Amendment rights to the defendant in the court, that as long as you are satisfied with the quality, you'll pay the lowest rate that you can to obtain his service?

A: Yes. I think that is the duty, to pay an adequate rate, under the statute and the Constitution. But as a government official responsible for wisely spending tax dollars, that's my duty not to pay more than that.

(Tr 2-15-90, p 177). (176b.)

Courts have held that paying appointed counsel less than the "going rate" is a perfectly sensible and constitutionally permissible action in view of state and local governments' legitimate need to be fiscally responsible. See Wilson v State, 574 So 2d 1338, 1341 (Miss, 1990) (attorneys' equal protection rights were not violated where appointed attorneys were subject to a "cap" on the amount of compensation they could receive for representing an indigent criminal); State ex Rel Stephan v Smith, 747 P2d at 845 (limiting appointed counsels' pay to something less than that of privately retained counsel is not constitutionally prohibited). Furthermore, this Court rejected a similar challenge In re Meizlish, supra, where it held that a court rule under which appellate attorneys' compensation was limited to $50 did not violate appointed counsels' rights under the due process and equal protection clauses of the United States Constitution. In re Meizlish, 327 Mich at 237.

With respect to the compensatory distinction between court appointed counsel and other officers of the court who participate in the criminal justice system, the rational rela-

tionship threshold is met because neither a judge, prosecutor nor stenographer can provide legal representation to the accused indigent. Division of Youth & Family Services v D C, 571 A2d 1295, 1301 (NJ, 1990). In Ferri v Ackerman, 444 US 193; 100 S Ct 402; 62 L Ed 2d 355 (1979), Mr. Justice Stevens observed:

> There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of individuals, each of whom may be a potential source of future controversy....
>
> In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large except in that general way. His principal responsibility is to serve the individual interests of his client.

Id. at 202-204.

In light of the separate and distinct roles of judges, prosecutors and appointed counsel in the criminal justice process, it is not "irrational" to establish separate compensatory mechanisms for those positions.

Petitioners' last equal protection argument is that the burden of providing low cost services to indigents is unfairly placed upon certain members of the bar. This allegation lacks any legal justification or factual support. Wayne County does not require that attorneys participate in the

assigned counsel system. Whether an attorney places his or her name on the eligibility roster for indigent assignments is purely a matter of voluntary choice. Although some witnesses testified to the effect that they or other attorneys no longer take assignments, the data show that there has been no dimunition in the number of attorneys available to take assignemnts since the adoption of the graduated flat fee system. There is simply no evidence in the record to support the notion that Wayne County somehow has "imposed" the "burden" of taking indigent assignments upon "certain members" of the bar.

Finally, amicus curiae MAACS makes an equal protection argument based on alleged differences in the quality of defense provided to indigent defendants by appointed counsel as compared to public defenders or privately retained counsel. This equal protection argument, if factually supported, would raise more serious concerns than do petitioners' unequal compensation arguments because it appears to be concerned with indigent defendants' Sixth Amendment right to counsel. Courts which have addressed directly the same argument as made by amicus here, however, have not found it necessary to scrutinize strictly the fee schedule in question. Instead, they have held that claims of ineffective assistance should be addressed on a case-by-case basis. Wilson v State, 574 So 2d 1338, 1341 (Miss, 1990); State ex rel Stephan v Smith, 747 P2d at 831 (Kan, 1987). The court in Stephan v Smith stated:

> Simply because the system could result in the appointment of ineffective counsel is not sufficient reason to declare the system

> unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts.

747 P2d at 831 (original emphasis).

As is discussed above, there has been no showing in this case by competent evidence that indigent defendants failed to receive effective representation by their appointed counsel as a result of the graduated flat fee schedule (or at all). Amicus curiae MAACS' argument that the fee system violates indigent defendants' equal protection rights must, therefore, fail. The graduated flat fee schedule cannot be shown to be "unreasonable" because of any constitutional defect.

II. THIS COURT SHOULD DISMISS THE COMPLAINT FOR SUPERINTENDING CONTROL BECAUSE PETITIONERS HAVE ANOTHER ADEQUATE REMEDY AND BECAUSE THEY CANNOT SHOW THAT ANY RESPONDENT HAS VIOLATED A CLEAR LEGAL DUTY.

In seeking a writ of superintending control to the Chief Judges of the Wayne County Circuit Court and Recorder's Court for the City of Detroit, petitioners request that "there be put in place a schedule of fees which provides for reasonable fees for counsel appointed to represent indigent defendants." (Complaint ¶1.) (3-4b.) The replacement schedule they request is that adopted but never implemented in

1982, "the Jobes Schedule."15/ (Complaint, ¶¶ 2-4). (4b, Addendum D)

Much of petitioners' argument is devoted to the proposition that this Court has superintending control over the general practices of a lower court or tribunal.16/ In addition, petitioners assert the over-broad proposition that the Court possesses inherent power to determine and compel

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15/ Although their Complaint requests implementation of "the fee schedule of 1982," petitioners' Proposed Findings of Fact, Conclusions of Law and Recommendations, requests the additional relief of ordering that the schedule of 1982 be amended "to increase the rates by .31," allegedly the rate of inflation in the Consumer Price Index in Detroit since 1982. Petitioners' Proposed Findings, etc., p 40. Assuming the adjusted amounts petitioners have projected per event to be accurate, if the Jobes Schedule, adjusted for inflation, had been in effect in 1990, it would have increased the Wayne County budget at least $3.05 million. See Argument IVC, infra, and Affidavit of K. Kent Batty, Addendum E.

16/ (Complaint, p 3.) (5b.) See also, Petitioners' Brief in Support of Complaint For Superintending Control, p 19. While this general proposition is true, none of the authority relied on by petitioners would hold that superintending control is appropriate in this case. Petitioners cite to Morcom v Recorder's Court Judges, 15 Mich App 358, 360; 166 NW2d 646 (1968), in which the Court of Appeals simply acknowledged the limitations of its own superintending control power as compared to the Supreme Court's general superintending power over the lower courts. This was the holding which the dissent in People v Blachura, 390 Mich 326, 344-345; 212 NW2d 182 (1973), also relied on by petitioners, noted with approval.

payment of funds necessary for the judiciary to carry out its mandated responsibilities.17/

These arguments have nothing to do, however, with the question whether petitioners have shown that an order of superintending control is appropriate in the specific circumstances of this case. The answer is that it is not. Petitioners have failed to show two of the three requirements for issuance of an order of superintending control, i.e., (1) that any of the respondents has violated a clear legal duty under MCL 775.16 or (2) that petitioners do not have another adequate remedy.18/

17/ See Petitioners' Brief, p 5. Petitioners argue that the payment of "reasonable compensation" cannot be limited to "funds appropriated" and rely on the holding of Wayne Circuit Judges v Wayne County, 386 Mich 1; 190 NW2d 228 (1970), in which the Supreme Court ordered the County to appropriate funds to pay for additional court personnel as required under statute. This decision has no application to the present case because Wayne County has not refused to pay the fees that the Chief Judge determines are reasonable as mandated by MCL 775.16.

In any event, petitioners' reading of Wayne Circuit Judges is far too broad. That opinion was not intended to be authority for either the proposition that the Court may, under any circumstances, compel payment of sums, or that the Court is the final arbiter of what sums are necessary or reasonable for a lower court to carry out its mandated responsibilities. As was well-stated in the 1969 Dethmers-Black opinion in Wayne Circuit Judges, which became the Opinion of the Court on rehearing, the "inherent power called up by this case must be cautiously exercised" and should "pass every test of that guarded control which self-restraint exacts when there can be no review or appeal beyond impeachment, removal, or appeal to the people, say [sic] for a constitutional change or the defeat of some allegedly over-activistic Justice or Justices." Wayne Circuit Judges v Wayne County, 383 Mich 10, 33 (1969); see also 386 Mich at 9.

18/ Wayne County does not contest for purposes of this argument that petitioners have standing to bring this action. That is, they possess an interest in the outcome of the litigation "that will ensure sincere and vigorous advocacy." Beer v Fraser Civil Serv Comm, 127 Mich App at 243. See also, Michigan License Beverage Ass'n v Behnan Hall, Inc, 82 Mich App 319, 324; 266 NW2d 808 (1978).

See Beer v Fraser Civil Serv Comm, 127 Mich App 239, 242-243; 338 NW2d 197 (1983). Accordingly, the complaint for superintending control should be dismissed.

A. Petitioners Cannot Show That Any Respondent Has Violated a Clear Legal Duty Under The Statute.

The purpose of superintending control is to order a defendant to perform a clearly defined legal duty. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 680; 194 NW2d 693 (1972). See also, People v Flint Mun Judge, 383 Mich 429, 432; 175 NW2d 750 (1970) (superintending control is proper to review the discretion of an examining magistrate and to require the magistrate to perform a function where there is a clear legal duty to act); People v Rehkof, 422 Mich 198, 226; 370 NW2d 296 (1985) (superintending control order is appropriate to review a decision of the lower court invalidating a criminal statute); In re Huff, 352 Mich 402, 418-420; 91 NW2d 613 (1958) (superintending control order is appropriate to compel a judge to serve in a circuit other than the circuit in which he was elected).

In asserting that superintending control is appropriate in this case, petitioners mischaracterize this dispute as one in which respondents have failed to discharge their clear legal duty to provide for reasonable fees as required by the statute. See Petitioners' Brief, p 18. ("If the Chief Judges set a 'fee schedule' which by its operation provides for an unreasonable fee, the judges, by general

practice and policy, have violated the 'reasonable fee' dictates of statute MCL 775.16").

It has been clear for almost 100 years in this state, however, that the determination of what constitutes reasonable compensation under MCL 775.16 and predecessor statutes lies within the trial court's discretion. Withey v Oscola Circuit Judge, 108 Mich 168, 169; 65 NW 668 (1895); See also, In re Hayes, 55 Mich App 30; 222 NW2d 20 (1974), lv den 394 Mich 794 (1975). Therefore, in order for this Court to grant the relief petitioners request, it must find that the adoption and enforcement of the graduated flat fee schedule was a clear abuse of discretion. Genesee Prosecutor v Circuit Judge, 386 Mich at 681-682. See also, People v Flint Mun Judge, 383 Mich at 432.

Petitioners have not attempted to argue that the decision of the Chief Judges was an abuse of discretion and they would not be successful if they had. The record is clear that Chief Judge Kaufman, under judicial order to reduce the population of the Wayne County Jail and informed by study findings which indicated that for each day the docket was reduced, the need for 456 jail beds would be eliminated, began to look for ways to reduce the time in the docket. See Kaufman, Tr 2-15-90, pp 88-94, (151-157b); Gish, Tr 2-14-90, p 91, (139b). The record also is clear that in their search for a mechanism which might reduce the time it took to process cases, the Chief Judges were mindful of constitutional, statutory and judicial, as well as fiscal, constraints on whatever they might decide to do. See, e.g., Kaufman, Tr 2-15-90 pp 92, 97, 117, 119-120 (155, 158, 167-169b); Roberson, Tr 2-16-90, p 55 (184b).

In this context, whether the Chief Judges' decision to adopt the graduated flat fee schedule is measured against the abuse of discretion standard set forth in Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959),[19] or the alternative standard proposed by the concurring opinion in People v Talley, 410 Mich 378, 387; 301 NW2d 809 (1981), adopted from Langnes v Green, 282 US 531; 51 S Ct 243; 75 L Ed 520 (1931),[20] it was not an abuse of discretion. Absent a finding of an abuse of

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19/ In Spalding, this Court set forth the following standard for reviewing a claim of abuse of discretion in a civil matter:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

In Marrs v Board of Medicine, 422 Mich 688, 694; 375 NW2d 321 (1985), this Court viewed the Spalding test as "essentially intact."

20/ In his concurring opinion in People v Talley, 410 Mich 378, 399; 301 NW2d 809 (1981), Justice Levin described the Spalding test as "simplistic and misleading" and expressed approval of the standard discussed by the United States Supreme Court in Langnes v Green, 282 US 531 (1931):

> The term 'discretion' denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Talley, supra, p 398, quoting Langnes, supra, p 541.

discretion, petitioners are unable to show a failure of the Chief Judges to perform a clear legal duty under the statute.

In light of petitioners' failure to show that any respondent has violated a clear legal duty, there is no authority for the Court to resolve this case by issuing an order of superintending control. In order to grant the relief petitioners request, the Court would have to usurp the trial court's statutory duty to determine reasonable compensation for counsel appointed to represent indigent defendants. There is no basis for issuance of an order of superintending control and the Complaint should be dismissed.

B. Petitioners Have Another Remedy By Way Of An Appeal.

Actions for superintending control are not appropriate where parties have another adequate remedy. MCR 3.302(B) and (D). Here petitioners and similarly situated lawyers can petition the trial court for extraordinary fees when warranted and, if not satisfied with the amount granted, can appeal the decision to the Court of Appeals.

Petitioners give scant attention to the entire subject of the appointed lawyer's option to petition for extraordinary fees. They imply that the remedy is not important because Chief Judge Kaufman does not grant petitions in the full amount requested and because of the purportedly widespread, although untested, belief that lawyers who request extraordinary fees will be penalized. See, e.g., Loeb, 1-17-90, pp 149-150 (77-78b); Tarnow, 1-31-90, p 171 (105b). The unrefuted

evidence, however, is that although few petitions for extraordinary fees are granted in full (the reasons for which were explained by Chief Judge Kaufman at Tr 2-15-90, pp 101; 102-04, 162-165b), 89% of all such petitions filed in 1988 were granted to some extent.

Petitioners' real dissatisfaction is not with the lack of an available remedy for perceived inadequate fees in a given case, it is with the fact that the Chief Judge views such requests in the context of other compensation the lawyer has received for assigned cases and that, in any event, he does not agree with them on the rate at which extraordinary fees should be paid.

Petitioners assert that the right of each attorney to appeal an insufficient extraordinary fee award, although available, is not adequate because of the volume of criminal cases in Wayne County Circuit and Detroit Recorder's Courts. See Petitioners' Brief, p 19. The "too-many-to-appeal-individually" argument, however, assumes that the basic fee is inadequate in every case and that an allowance of extraordinary fees also will be inadequate in every case in which such fees are sought. These assumptions are not supported by the record; there is no evidence that every fee is petitioned or appealed. In fact, petitioners presented no statistical evidence of any percentage of cases in which assigned attorneys request extra fees or otherwise challenge and appeal the amount of compensation they receive per case under the graduated flat fee schedule.

Even as they disparage the efficacy of such appeals, however, petitioners misrepresent the standard under which they are reviewed. According to petitioners, that standard is a "case-by-case review of attorney fees awarded under MCL 775.16 on a basis of reasonableness and on a basis of schedules then in effect for attorney fees as petitioners claim." Petitioners' Brief, p 10. A review of the cases cited by petitioners, however, indicates that when fees allowed under MCL 775.16 have been appealed, the reviewing court has not substituted its judgment for that of the lower court as to "reasonableness." Instead, it has declined to disturb the determination of the lower court as to reasonable compensation absent an abuse of discretion. See In re Burgess, 69 Mich App 689, 692; 245 NW2d 348 (1976); In re Hayes, 55 Mich App 30 at 34; In re Mullkoff, 176 Mich App 82 at 85; 438 NW2d 878, lv den 433 Mich 869 (1989); In re Ritter, 63 Mich App 24 at 28; 233 NW2d 876 (1975), rev'd 399 Mich 563; 249 NW2d 301 (1977).

In Burgess, for example, the Court of Appeals did not decide that the trial court erred in awarding an unreasonable amount, but that the trial court's refusal to permit compensation in the circumstances was a gross abuse of discretion. The court said:

> Petitioners furnished capable representation in the trial court, diligently pursued the matter through the Court of Appeals and eventually secured the dismissal of charges in the Supreme Court. To allow them nothing for their effective advocacy in the appellate courts is simply outrageous.

Id. at 693.

In Hayes, the Court of Appeals affirmed the trial judge's decision to deny appointed counsel fees where counsel abandoned his client's case five days after trial commenced. 55 Mich App at 32. The trial judge stated he denied counsel's petition for fees because (1) counsel refused to conduct the defense for his client; (2) there were numerous instances of totally unprofessional and contemptuous conduct; and, (3) the judge did not believe that the time counsel stated that he spent in preparation was true (the expenses counsel claimed were without verification). Id. at 32. The reviewing court upheld the right of the trial judge to determine or deny fees under MCL 775.16, which right the appellate court noted should remain clear and unalterable save for a gross abuse of discretion. Id. at 34.

By contrast, in Mullkoff the Court of Appeals found that the lower court abused its discretion when it denied compensation for services which this Court's Minimum Standards for Indigent Criminal Appellate Defense Services encourages assigned appellate counsel to provide. In re Mullkoff, 176 Mich App at 86-88.21/

21/ See also In re Klevorn, 185 Mich App 672, 678-679; 463 NW2d 175 (1990) (denial of payment of expert witnesses fees was an abuse of discretion where counsel used the expert at trial to show that the tests and conclusions of the prosecution's experts were faulty and that their testing procedures were inadequate); In re Jacobs, 185 Mich App 642; 463 NW2d 171 (1990) (trial court's order reflected the careful exercise of discretion with respect to its reduction of counsel's requested fee).

In In re Ritter, where the appealing lawyers argued that the amount that constituted "reasonable compensation" was set by the fee schedule in Recorder's Court Rule 10, the issue on appeal was whether a judge of Recorder's Court erred in ordering attorney fees lower than those provided for in the schedule. Id. at 25. The Court of Appeals affirmed the lower court, noting that appellants had not argued that the trial court abused its discretion. Id. at 28. Although the Supreme Court, in reversing the trial court and the Court of Appeals, did not articulate its standard of review, it gave as the reason for reversal that it was not persuaded that there was adequate justification for deviating from the schedule. See 399 Mich at 563. Ritter does not, as petitioners suggest, stand for the proposition that appeals of assigned attorney fee awards are reviewed for reasonableness. The real significance of Ritter, Mullkoff, Hayes, Klevorn, Jacobs and the other Michigan fee appeal cases cited by petitioners is that they illustrate the availability of an adequate remedy short of superintending control.

The availability of an adequate remedy and the absence of a violation of clear legal duty require that the complaint for superintending control be dismissed.

III. THIS COURT SHOULD REJECT THE SPECIAL MASTER'S FINDINGS THAT THE GRADUATED FLAT FEE SCHEDULE (1) IS BASED ON "THE POTENTIAL MAXIMUM SENTENCE"; (2) ENCOURAGES LAWYERS TO PERSUADE CLIENTS TO PLEAD GUILTY AND DISCOURAGES THEIR USE OF THE FULL PANOPLY OF CONSTITUTIONAL RIGHTS; (3) IS A DISINCENTIVE TO FILING SERIOUS MOTIONS; AND (4) DISCOURAGES PLEA BARGAINING, BECAUSE SUCH FINDINGS ARE NOT SUPPORTED BY COMPETENT EVIDENCE.

A. The Special Master's Finding That The Graduated Flat Fee Schedule Is "Based On The Potential Maximum Sentence" Disregards Unrefuted Testimony About The Data On Which The Schedule Was Based And Gives Insufficient Weight To Unrefuted Evidence That Extraordinary Fees Are Available.

A fundamental error pervades the Special Master's Report. It is expressed as a "Finding of Fact," as a "Comment" and as the basis for a "Recommendation." That erroneous concept is that the fees paid pursuant to AO 1988-2 and Schedule G are "based on the potential maximum sentence" (Report, p 214) (251b), and that they compensate "according to the seriousness of the crime rather than on hours spent or work performed" (Report, p 220) (257b). The misinformed notion that attorney compensation under the graduated flat fee schedule is totally unrelated to the amount of work lawyers perform on behalf of their assigned clients is flatly contradicted by unrefuted evidence about the data on which the graduated flat fee schedule was based. See, Argument IA2, supra at 13. Those data showed a direct correlation between the number of procedural events conducted by defense counsel and the

category, identified by sentence guideline maximum, of the offense charged. Id.

Moreover, when the basic compensation (the average for events performed in each category under the previous system) is not adequate because more events -- and lawyer time -- must be expended than the schedule contemplated, attorneys may petition the Chief Judge for extraordinary fees. See AO 1988-2 and testimony of Chief Judge Kaufman at Tr 2-15-90, pp 98-105 (158-166b), and testimony of Chief Judge Roberson at Tr 2-16-90, p 99 (185b).

Although the Special Master made a finding that extraordinary fees are available, see Report, p 213, (250b) he failed to comprehend that the opportunity to apply for and be paid extraordinary fees for work beyond that presumed by Schedule G absolutely distinguishes this system from one "based on potential maximum sentence," which does not pay "according to hours spent or work performed." (Report, pp 214, 220.) (251, 257b.) The Special Master's fundamentally erroneous finding should be rejected by this Court.

B. The Special Master's Findings That The Graduated Flat Fee Schedule Encourages Lawyers To Persuade Clients To Plead Guilty, Discourages Their Exercise Of Constitutional Rights, Is A Disincentive To Filing Serious Motions And Discourages Plea Bargaining Are Not Based Upon Verifiable Historical Data Or Fact Testimony By Witnesses With Personal Knowledge, But Upon Suppositions and Speculation.

In the Findings of Fact Section of his Report, at pp 208-209 under the heading, "the negative side of paying counsel

on a flat fee basis," the Special Master lists five purported findings. They are:

> 1. The system encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply of constitutional rights.
>
> 2. While the system discourages the filing of frivolous motions, it also gives disincentive to file serious motions, as no additional compensation is paid for greater effort.
>
> 3. The system discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge.
>
> 4. While the flat fee system is not directly related, the fact that guilty pleas are well rewarded allows assigning judges to appoint favorites to a volume of cases. One case was cited where an assigning judge appointed a female attorney, with whom he was friendly, to the majority of his assigned cases which required only pleas to be entered.
>
> 5. The system also supports a group of substandard attorneys, estimated to be 10 to 15% of the criminal bar, to operate without offices, secretaries, files, from pocket notes and to make a living on guilty pleas.

Report, 208-209 (245-246b).22/

22/ Although the Special Master concedes that the fourth "finding" is not directly related to the graduated flat fee schedule, in fact, the fifth is not either. The witnesses who testified about seeing attorneys operating in the manner described in the fifth finding did not claim this type of behavior started when Fee Schedule G went into effect in 1988, and, in some instances, even acknowledged that this was typical behavior of a small percentage of attorneys they have observed throughout the years, regardless of the fee schedule in effect. See testimony of Howarth, Tr 1-18-90, pp 169-170 (95-96b); Mogill, Tr 1-17-90, pp 174-177 (85-88b); and, Kerwin, Tr 2-1-90, pp 149-150 (107-108b). In any event, none of the findings is supported by competent, admissible evidence.

The first of these "findings," which seriously indicts the system of assigned criminal attorney compensation currently in effect in Wayne Circuit and Detroit Recorder's Courts, and which underlies several of the recommendations volunteered by the Special Master in another section of his Report (see Argument IV, infra), is not supported by any competent, admissible evidence in this record. There is not a shred of non-hearsay, non-opinion, non-anecdotal testimony by a witness with personal knowledge that the graduated flat fee schedule actually has "encourage[d] ... attorneys to persuade clients to plead guilty" or has "discourage[d] use of the full panoply of constitutional rights." Moreover, as set forth in detail in Section IB1b, the objective data measuring the number of guilty pleas under the former system and under the graduated flat fee schedule shows no significant difference. See also Exhibit 9, 182-215b; and testimony of Recorder's Court statistical consultant, Dr. Donald Tippman, Tr 2-12-90, pp 194-195 (127-128b.) (1988 to 1989 increase in guilty pleas from 33.5% to 34.5% is not statistically significant).

Nor is there any competent evidence to support the second finding, that the graduated flat fee schedule actually has operated as a disincentive to file serious motions, or the third finding, that it has discouraged the prosecutor from plea bargaining. Only one witness offered hearsay testimony about another attorney's refusal to file a motion, allegedly because of the low flat fee. Evelyn, Tr 1-18-90, pp 222-224. (99-101b.) No witness testified that he or she believed that

prosecutors were refusing to plea bargain because defense attorneys have no incentive to go to trial and will assent to a guilty plea.23/ Most witnesses testified that the decrease in plea bargaining was more the result of a strict no-reduced plea policy within the prosecutor's office, as well as that office's increased bureaucratization, and not at all related to the adoption of the graduated flat fee schedule. See Loeb, Tr 1-17-90, pp 135-137 (74-76b); Kaufman, Tr 2-15-90, pp 137-40 (172-175b); and Roberson, Tr 2-16-90, pp 131-132 (186-187b).

That the Special Master arrived at these so-called "findings" in the absence of evidence to support them is remarkable but not persuasive. This Court should reject the findings concerning the "negative side" of the graduated flat fee schedule.

IV. THIS COURT SHOULD REJECT THE SPECIAL MASTER'S RECOMMENDATIONS BECAUSE THEY EXCEED THE SCOPE OF HIS ASSIGNMENT AND, IN ANY EVENT, ARE NOT SUPPORTED BY THE RECORD OR WARRANTED BY LAW.

A. The Special Master's Recommendations Should Be Rejected Because They Exceed The Scope Of His Assignment.

The Special Master's recommendations should be rejected, summarily, as a body, because they clearly exceed the scope of his assignment as expressed in the November 6, 1989

23/ In fact, as Ms. Levine acknowledged, "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." See amicus curiae's Proposed Findings of Fact, Conclusions of Law and Recommendations, p 21.

Order of this Court.[24/] In addition, many of the recommendations are beyond the scope of the allegations in the complaint, and thus could not possibly "facilitate resolution of the complaint for superintending control," as required by the November 6, 1989 Order. These non-relevant recommendations concern the method by which counsel are assigned to represent indigent criminal defendants in Wayne Circuit and Detroit Recorder's Courts, an indigency screening program, state-wide funding of indigent criminal appeals and expansion of the "Wayne County study" to include statewide data. Report, pp 222-225. (259-262b.) Whatever their intrinsic merit and notwithstanding the good intentions of the Special Master, these recommendations have nothing to do with the relief requested by petitioners. They should not be considered in resolving this dispute.

B. The Special Master's Recommendations Concerning The Graduated Flat Fee Schedule Should Be Rejected Because They Rely On An Inapplicable Legal Standard And On Erroneous Findings And Suppositions Which Are Not Supported By The Record.

The Special Master made two recommendations concerning the graduated flat fee schedule. Both recommendations depend on his erroneous finding discussed in Argument IIIA, supra, i.e., that the schedule compensates assigned attorneys

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24/ His unrequested comments should be rejected for the same reason and for the reason that many of them are not supported by evidence.

exclusively according to the maximum potential sentence for the crime defended. In addition, one recommendation depends on an inapplicable legal standard. Both should be rejected by this Court.

1. The test of "reasonableness" adopted by this court in the civil case of Wood v DAIIE is inapposite in the assigned criminal defense context and does not require finding that the graduated flat fee schedule is unreasonable.

At p 221 of his Report (258b), the Special Master recommended that the graduated flat fee schedule be found unreasonable:

> in that it only includes one factor of what this Court found to be the test of reasonableness in WOOD [sic] v D.A.I.I.E.

(Citation omitted). There is no legal support for this recommendation or for its rationale. No decision of this Court or the Court of Appeals has suggested that the Wood factors have any relevance to the question what constitutes "reasonable compensation" of a lawyer assigned to represent an indigent criminal defendant.

a. The Wood factors were developed to facilitate the enforcement of "reasonable attorney fee" provisions of regulatory statutes which grant such relief to deter statutory violations or to promote voluntary access to courts; they were not developed to define what constitutes a governmental unit's "reasonable compensation" of attorneys it hires to fulfill a constitutional mandate.

Wood v DAIIE, 413 Mich 573; 321 NW2d 653 (1982), involved an action brought under the no-fault act for personal injury protection benefits. In Wood the Court adopted the guidelines articulated in another civil case, Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 (1973), which involved an action brought under the worker's compensation act, for determining "reasonableness" with respect to attorney fees. 413 Mich at 588. The guidelines consist of six factors: (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. Id.

In Wood, in order for attorney fees to be a charge against the insurer, the trial court had to find the insurer acted unreasonably. 413 Mich at 587. It is clear that in the statutes under which the actions in Wood and Crawley were brought, the purpose of granting fees is to punish wrongdoers and to reimburse litigants who must seek redress in the courts to obtain that to which they were entitled from the outset.

413 Mich at 586; 48 Mich App at 733. It is also clear that in these situations "reasonable" attorney fees must be determined on a case-by-case basis and what is "reasonable" in each case must be reviewed in light of its own particular facts. Crawley, 48 Mich App at 737. Wood, 413 Mich at 587.

By contrast, the provision in MCL 775.16 is not intended as a sanction. It is not intended to compensate the litigant or to encourage him or her to sue. It is intended to insure that indigent defendants receive the competent representation which the state is required to provide by ensuring that their counsel are compensated for the representation. No legal support exists for the conclusion that the Legislature intended that "reasonable compensation" for the defender of an indigent defendant be defined by the same factors which determine "reasonable compensation" in the former, entirely different context.

b. Even assuming the Wood factors have any relevance to this discussion, they are intended only as guidelines and it is not mandatory that a court consider only those factors or that a court consider each of the factors in determining what is "reasonable compensation."

Even if Wood applied in the assigned criminal defense context, the Special Master's recommendation would be useless because of its erroneous factual premise.

According to the Special Master (who, in his recitation of the Wood criteria, divided the third factor into

two separate factors), "the amount in question" translates in the criminal defense context into "maximum potential sentence." As is discussed above, the Special Master "found," erroneously, that the graduated flat fee schedule compensates only on the basis of maximum sentence.

No witness testified to that effect, however. Further, as the testimony of George Gish, the designer of the graduated flat fee schedule (whom the Special Master described in a comment as a "sincere, brilliant person who is an expert in court management," Report, p 219, 256b), illustrated, the fees established in Schedule G are the average fees paid under an events-based system for the events performed for each offense category. See Argument IA, supra. The categories -- and fees -- are graduated according to guideline maximum sentences because a study of two years' data under the per-event compensation system revealed that more events were performed in the defense of charges that carried higher maximum sentences. Petitioners' expert, Robert Spangenberg, testified that all studies in which he has been involved show the same direct correlation. Thus, based on the evidence, if it is true that only one Wood factor is represented in the graduated flat fee schedule, that factor actually is "the skill, time and

labor involved," not "the amount in question."25/

The Wood factors, however, do not and should not apply in this context. They assume both a mutually voluntary attorney-client relationship and that the client selects and pays the lawyer. Here, the clients do not choose or compensate their lawyers and the entity which does choose the lawyers and determines the amount they will be paid does so under the requirement of the Michigan and U.S. Constitutions. Even then, its duty is to provide only competent representation, as that term is interpreted under the relevant constitutional provisions.

25/ Assuming, arguendo, that the Wood criteria have any relevance to "reasonableness" in the assigned criminal defense context, AO 1988-2 and Schedule G should be found to take into account at least the second, fourth and fifth factors. The skill, time and labor involved are reflected in the schedule of graduated fees because they correlate to tasks performed under the previous, events-based schedule. Extraordinary fee petitions also reflect this factor and the difficulty of the case. Schedule G itself and the opportunity for extraordinary fees reflect the "expenses incurred" factor. Although separate from the graduated flat fee schedule, the feature of the courts' assignment system which qualifies only more experienced lawyers for capital cases (which carry higher guideline sentences) reflects the professional standing and experience of the attorney factor. Thus, the graduated flat fee schedule and related programs reflect all of the Wood factors except the third, on which the Special Master relied, and the sixth. Notwithstanding the possibility that recidivism may create opportunities for repeat representation, it is ludicrous to consider as a fee influencing factor the length of an assigned lawyer's relationship with his or her client.

c. Under Wood, the Chief Judge's determination of reasonable compensation must be upheld unless the reviewing court finds it an "abuse of discretion."

The real teaching of the Wood decision for this case is in language following that adopted by the Special Master. This Court held that, although a trial court should consider the enumerated guidelines, "it is not limited to those factors in making its [reasonableness] determination." Most important, it stated:

> 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.

413 Mich at 588. See also, Argument II.B., supra.

The Special Master's recommendation that the graduated flat fee schedule "be found unreasonable" because it does not measure up under the Wood v DAIIE test should be rejected by this Court.

2. A "study ... of reasonable time involved to defend each of the crimes in the present schedule," recommended by the special master, is unnecessary in light of the basis for the graduated flat fee schedule.

The second recommendation of the Special Master concerning the graduated flat fee schedule is:

> that a study be made of reasonable time involved to defend each of the crimes in the

> present schedule, thus establishing a norm similar to those used by garages in estimating repair work....

Report, p 221, 258b.[26/] As discussed in preceding arguments, the record is uncontradicted that a study was conducted by George Gish at the direction of the Chief Judges. The study disclosed the information sought by this recommendation, expressed as the average amount of money paid for the number of events performed, for "each of the crimes in the present schedule." See Argument III.A., supra; Argument I.B.1., supra, and transcript references therein. The study recommended by the Special Master is thus unnecessary and the recommendation should be rejected.

26/ The second part of the recommendation, i.e., that vouchers for the times within the "reasonable time" norms be paid at a "reasonable" rate of $60 to $70 per hour, is totally gratuitous. It is not even supported by a "finding" as to what makes up a reasonable rate, or by any evidence. Moreover, nowhere does the Special Master attempt to reconcile this recommended upward adjustment in his notion of "reasonable rate" with his finding, at p 210, 247b of his Report, that "the finance situation in Wayne County is extremely fragile and an increase in sums paid for attorney's fees for the indigent could have serious financial repercussions." See Argument IV.C., infra. Nor does he attempt to reconcile this recommendation with his comment, at p 219, 256b, of the Report, that "the record reflects that certainly enough money is spent in Wayne County for assigned case work." For the reasons given in Argument IV.C., infra, this $60 to $70 per hour recommendation, too, should be rejected.

C. The Special Master's Recommendations That The Jobes Schedule, Adjusted For Inflation, Be Implemented And That An Alternative Plan Be Devised Should Be Rejected Because They Are Not Warranted By The Evidence And Would Result In Financial Disaster For Wayne County.

The Special Master also recommends two alternative assigned attorney compensation plans. One is the 1982 Jobes schedule, adjusted for inflation; the other is an alternative plan, yet to be devised, which would "(1) compensate attorneys fairly for time spent, and (2) put no pressure on defendants to plead guilty." Report at 222, 259b. These recommendations, like the others, assume erroneously and in the absence of competent, admissible evidence, that the graduated flat fee schedule does not compensate attorneys fairly for time spent representing their assigned clients and that it does put pressure on defendants to plead guilty.

The first proposition has been refuted at length and repeatedly. See Arguments III.A., IV.B., etc., supra. The graduated flat fee schedule does not compensate assigned counsel as generously as a private client might, but it has not been shown to compensate unfairly. The second proposition also has been addressed, see Argument III.B. That is, there is no evidence in this record by any witness testifying from personal knowledge, that the graduated flat fee schedule, in any single instance, has caused any lawyer to put pressure on a client to plead guilty. Moreover, the statistical evidence of actual

events under the graduated flat fee schedule shows no significant increase in the number of guilty pleas.

Although the absence of evidence indicating a need for a different system is sufficient reason to reject these recommendations to install different compensation systems, the recommendations should be rejected also because of their potential to cause financial disaster to Wayne County.

One finding of the Special Master which is supported by competent evidence is that "the finance situation in Wayne County is extremely fragile and an increase in sums paid for attorney's fees for the indigent could have serous financial repercussions." Report, p 210. (247b.) See testimony of Jack Dodge, Tr 2-16-90, pp 29-32. (180-183b.) The Special Master made further findings on the County's financial condition, supported by the testimony of Jack Dodge, the County's Chief Financial officer, Mary Lannoye, its Budget Director, and Bryan Amann, then an Assistant County Executive. See Tr 2-13-90, pp 130-133 (134-136b). Those findings include that the County currently operates under the constraints of a debt settlement agreement with the State of Michigan under the terms of which, and pursuant to state law and its charter, the County is required to maintain a balanced budget. So long as the County's budget is balanced, its $120 million deficit reduction loan is interest-free. (Dodge, Tr 2-16-90, pp 25-26.) (178-179b.) An unbalanced budget -- even a $10.00 overrun -- would require the County to pay the State a penalty of 10% interest on the outstanding balance of the loan, or more than

$10 million. (Id., 29, 31.) It could send the County into receivership. (Amann, Tr 2-13-90, p 111.) (135b.)

Budget Director Lannoye testified that the 1990 General Fund Budget was $273 million, Tr 2-13-90, p 17, (130b) and that the 1990 fiscal year budget for indigent criminal defendant representation was $9.2 million (out of a total assigned counsel budget of $15.8 million, which includes $6.6 million for Probate Court representation). (Lannoye, id., p 24.) (131b.) Ms. Lannoye testified that when a budget item is $2 million or $3 million over budget, it constitutes 1% of her general budget and is a major concern. (Id., 74.) (133b.) Offsets of overruns, such as occurred when the 1988 actual attorney fees exceeded budget by $2 million, cannot be predicted or counted on. (Id. p 36.) (132)

The County has fiscal responsibility for indigent attorney fees but no authority to affect the program because under the statute, the Chief Judges set the fees. Assistant County Executive Bryan Amann testified, "they set the rates and we have to just pay the bill." Amann, Tr 2-13-90, p 100. (134b.) Mr. Amann testified that if the effective hourly rate were increased to $65.00 per hour, it would mean increasing the fee schedule by approximately 50%, thus raising the budgeted amount from $9.2 million to approximately $13 million. Such an increase "would make the County's solvency a serious question." Id., 129. (136b.)

Against this background, to adopt the Special Master's recommendations to implement compensation systems which

inevitably would cost the County more than it has budgeted is to risk fiscal disaster.

If, for example, the amount of actual fees paid to court appointed attorneys in Recorder's and Circuit Courts in 1989, or $9,569,326, had been "adjusted for inflation" in the manner proposed by petitioners, i.e., by increasing it by 31%, it would have been $12.5 million. The county budgeted only $7,653,003 for indigent criminal representation fees for that year (Ex E) and, although it "got lucky" (Dodge, Tr 2-16-90, p 31) (182b) and received some unexpected revenues, it would have taken nearly $5 million extra to offset this "inflationary" increase. K. Kent Batty, Executive Court Administrator, calculates that the total cost of the Jobes Schedule, conservatively inflated, would be $3.05 million. See Affidavit of K. Kent Batty, Addendum E.

CONCLUSION

Procedurally and substantively, petitioners are not entitled to the relief they seek in this Court. Their claim does not require the extraordinary remedy of superintending control and their attack on the graduated flat fee schedule has not shown it to be "unreasonable," either per se or as applied.

In these proceedings, petitioners' witnesses have had a forum in which to express sincerely felt frustrations about how much they are paid by the County for the indigent criminal representation they have volunteered to undertake. Nonetheless, the war-stories, rumors and anecdotes offered up by petitioners'

witnesses are not evidence that the graduated flat fee schedule actually influences lawyers to underrepresent their assigned clients.

To the contrary, the evidence shows that judges, who acknowledge that poor lawyering can occur in any compensation system, generally have high regard for the skill, dedication and professionalism of the lawyers who practice in the criminal courts of Wayne County. Moreover, most of the lawyers, despite their frustration over the low fees available, continue to exercise the full panoply of their indigent clients' rights. Finally, the objective data, the statistics of what actually has happened under the graduated flat fee schedule compared to what happened under the per-event system which preceded it, show that nothing has changed significantly.

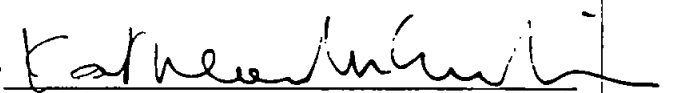
Petitioners have not shown that this Court should make a change -- at least one involving the payment of more money -- where such would put the County at risk of budget imbalance, crippling penalties and receivership. On this record, a decision to deny relief is prudent, as well as required under substantive and procedural law.

RELIEF REQUESTED

WHEREFORE, for the reason set forth above, intervening respondent Wayne County respectfully requests that the findings, comments and recommendations of the Report of the Special Master which exceed the scope of the Court's November 6, 1989 Order or which are not supported by competent, admissible evidence be rejected and that the Complaint for superintending control be dismissed.

Respectfully submitted,

DYKEMA GOSSETT

By: 

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