

# Criminal Defense Services for Indigents: A Prosecution View

By James L. Shonkwiler

**T**he Bar Journal Advisory Board supplied me with early drafts of articles which are included in this issue. I agreed to react on behalf of Michigan prosecutors.

Several authors, and Barbara Levine in particular, convincingly document substantial statewide disparity in the quality and quantity of defense services available. I agree that local court control of defense appointments sets a bias in favor of moving cases—a court priority—rather than quality defense as such. Aggressive defense practice can act against the trial courts' efforts to keep dockets clear and costs low.

It is clear that compensation for defense service varies widely, and is too low by any professional standard in most Michigan counties. On the other hand, I do not believe that differences between rates of pay for legal services in different counties is inherently unfair, or necessarily results in unconstitutional service. A problem develops when defense counsel, who is also in private practice, is paid a fixed defense fee regardless of the amount of time invested per case. The attorney is under great pressure to cut corners. When private practice is mixed with public

duty there is an incentive to minimize time allocation to public duty. This circumstance also applies to the 23 Michigan counties in which the prosecuting attorney must practice privately to supplement a low salary.

Unfortunately, my experience has verified for me that corner-cutting is a reality in the case of contract defenders. In working with prosecutors, I have witnessed defenders who serve under a low-bid contract, bargain for package plea-deals on a number of cases at once. Several of the cases involved in an instance I observed could have been defended on constitutional infirmities at the evidence-gathering stage. The defender either did not take the necessary time to study the file, or in his haste to settle, chose to ignore the possibilities in his client's favor. I was satisfied that in each case the defendant had committed the charged act; I was also satisfied that the client was being poorly served.

I agree with the observation that defense services at the trial level are a hodgepodge across the state. While it may be less obvious, this is also true of prosecution in Michigan. Levels of funding and staffing in relation to workload are widely disparate from county to county. In 1991, the average prosecuting attorney was paid \$51,696. In the 60 counties in which the PA

did not practice privately, the salary ranged from \$93,141 to \$36,235. PAs who also maintained a private practice had salaries as high as \$62,533, and as low as \$24,000 (excluding Keweenaw County). The compensation for assistant prosecutors varies even more widely. For prosecutors, as with defenders, turnover is also related to compensation, and plea policies are also dictated by high workload in relation to insufficient staff.

**M**s. Levine notes in her article which starts at page 142 that defense fees are limited "...while judges and prosecutors routinely get pay raises..." She may be right about judges, but this is hardly true for prosecutors. Salaries are stagnant in many counties. In one southwest Michigan county, the prosecuting attorney's salary has been unchanged for the past four years.

Ms. Levine makes a good case for state funding of all defense work on criminal appeals. Most appellate work for the prosecution is also at the county level, and the funding support also varies widely. I do not take issue with Ms. Levine's call for state funding of appeals. We are concerned, however, with minimizing appeals of right without substance; a free shot without arguable ground for claimed error.

Defendants should be able to bargain away appeal of right. The Court of Appeals recently agreed in *People v Rodriguez*, C/A 138082, November 18, 1991.

Frank Eaman writes in support of the State Bar task force proposal for a centralized state-funded criminal defense system. I served on the task force and I support the proposal for many of the reasons he expresses.

What should be a reasonable standard for delivery of defense services? The authors of "The View from the Criminal Defense Bar" at page 154 found "the most dramatic and most damning" survey response, was that indigent defense services were seen as "lower" (in quality) than that provided by retained counsel. This should not be the test. There are significant differences in the quality of retained counsel from attorney to attorney depending on many factors, the level of compensation being only one of them. This is true, of course, for any professional service. The appropriate test should be the *minimum performance standards for assigned counsel* as proposed by Mr. Eaman's task force.

In his article, Mr. Eaman sees great hostility on the part of the "public," in opposition to adequate defense services, a hostility which "the press mirrors." In my view, this overstates the situation. I believe a majority of the bench, bar, and public would support the task force proposal in principle. Whether the proposal can be elevated to a state funding priority is another issue. As a matter of fact, neither is prosecution a state funding priority. In Michigan all primary prosecution costs are also paid at the county level. Michigan is one of a diminishing minority of states which have neither state standards for prosecutor compensation, nor state participation in prosecution costs.

I acknowledge that state level supporting services for prosecutors are currently broader in scope than those for the defense. Training seminars do provide a boost in esprit de corps, and

can motivate a renewal of commitment for public servants who are under-compensated. In his article at page 164, Randall Karfonta states that training for defense is sporadic at best, while prosecutors and judges "...are carefully trained." I wish this were uniformly so. We are proud of the quality of training we offer, but many prosecutors are not reached as pressures of workload and understaffing prevent their participation. The information services provided to the defense by SADO are excellent. I would support, however, the establishment of a state-level staff capability to conduct training for defenders. PACC has two full-time persons assigned to this task.

***A problem develops when defense counsel, who is also in private practice, is paid a fixed defense fee regardless of the amount of time invested per case.***

I recognize that the portion of Cynthia Oberg's article at page 158 that deals with corrections and corrections costs may be outside the scope of this series of articles. I will respond only briefly. She states "clearly the most restrictive appropriate sentence is the most cost-effective." This can be true only if there is no crime-deterrence benefit from enforcing rules. The rules, themselves, will become irrelevant if they are not enforced. She appears to see no possible correlation between the rate of crime, and what, if anything, society does to apprehend and punish offenders. Ms. Oberg's answer may reduce corrections costs in the short run, but "cost-effectiveness" of corrections is a different equation. The "cost" of the criminal justice process is finally determined by its effectiveness in deterring crime.

Thomas Daniels suggests in his article that only the defense attorney is

active in the search for justice. I would not diminish the important role of the defender to act for the accused to assure an accurate record, but he overstates his case. Judges and prosecutors are obligated, indeed sworn, to seek justice, to disclose all known information bearing on guilt or innocence, and incorporate such information into all official decision-making. In fact, it is the assumed obligation of the defender to aggressively advance the cause of the client at the expense of "justice," if necessary, even if acquittal of a guilty defendant is the result. As others have pointed out in these articles, it is not uncommon for contract defenders in Michigan to be the "numbers crunchers" in the process, moving cases so as to minimize the time invested per case. Indeed, that is the problem that most strongly suggests that reform is needed in the manner in which Michigan defense services are provided.

In summary, I see merit in the product of the State Bar Task Force on Assigned Counsel Standards, and the proposal for a state-funded centralized system for assigned counsel. In my view, however, the processing of criminal cases by local government should be examined in its entirety, rather than piecemeal, if it is to be reformed. Both prosecution and defense structures in Michigan are based on 19th century assumptions. Decentralization of both services to the county level protects local prerogatives, but extracts a price. I believe that it is possible in both cases to preserve a necessary measure of local autonomy while establishing state standards for minimum service with state participation in the costs. ■

*James Shonkwiler has been Executive Director of the Prosecuting Attorneys Association of Michigan since 1970. Previously, he was associate director of the Michigan Commission on Crime and assistant prosecuting attorney for Kalamazoo County. Mr. Shonkwiler has also practiced privately, which included criminal defense.*