

Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers

By F. Randall Karfonta

According to the American Bar Association Code of Professional Responsibility "a lawyer should represent a client zealously within the bounds of the law."¹ For the criminal defense lawyer, zealous advocacy means vigorous investigation of every viable line of defense and equally vigorous presentation of defenses and mitigating circumstances. In order to put the government to its proof, defense counsel, like every effective advocate, must be ready to speak effectively, think logically and argue forcefully for the accused. The quality of representation provided by the defense lawyer is a product of that lawyer's training and the resources available to that lawyer to weave the threads of a defense.

In our system of justice, effective assistance of the criminal defense lawyer is essential to the fairness of each stage of the proceeding, and essential to the protection of the innocent person who has been wrongly accused. Whether a mistaken identification is ever shaken, a co-defendant's lies are ever exposed, circumstantial evidence is explained away, or favorable defense witnesses are ever located depends completely on the quality of defense representation.

The American system of justice contains within it a guarantee of the effective assistance of counsel at each stage of a criminal proceeding in order to fully protect the rights of the criminally accused.² In theory, at least, American justice does not have a price tag: Regardless of an individual's ability to pay, counsel must be provided by the government to any person accused of a serious crime or threatened with jail.³

For the criminal defense lawyer, zealous advocacy means vigorous investigation of every viable line of defense and equally vigorous presentation of defenses and mitigating circumstances.

When a poor person is accused of a crime, the only one who has the responsibility and the ability to help the accused is the defense lawyer assigned by the court. A recent survey disclosed that lawyers assigned by the court handle about 90% of all Michigan felony cases.⁴ Thus, the vast majority of criminal defense attorneys appearing in Michigan courts are appointed by the

court and paid by the government. Ironically, the state of Michigan, itself, pays little toward the cost of these attorneys, and, as will be explored by this article, there has been little effort to support and train the Michigan criminal defense bar.

CURRENT JUSTICE SYSTEM SUPPORT RESOURCES

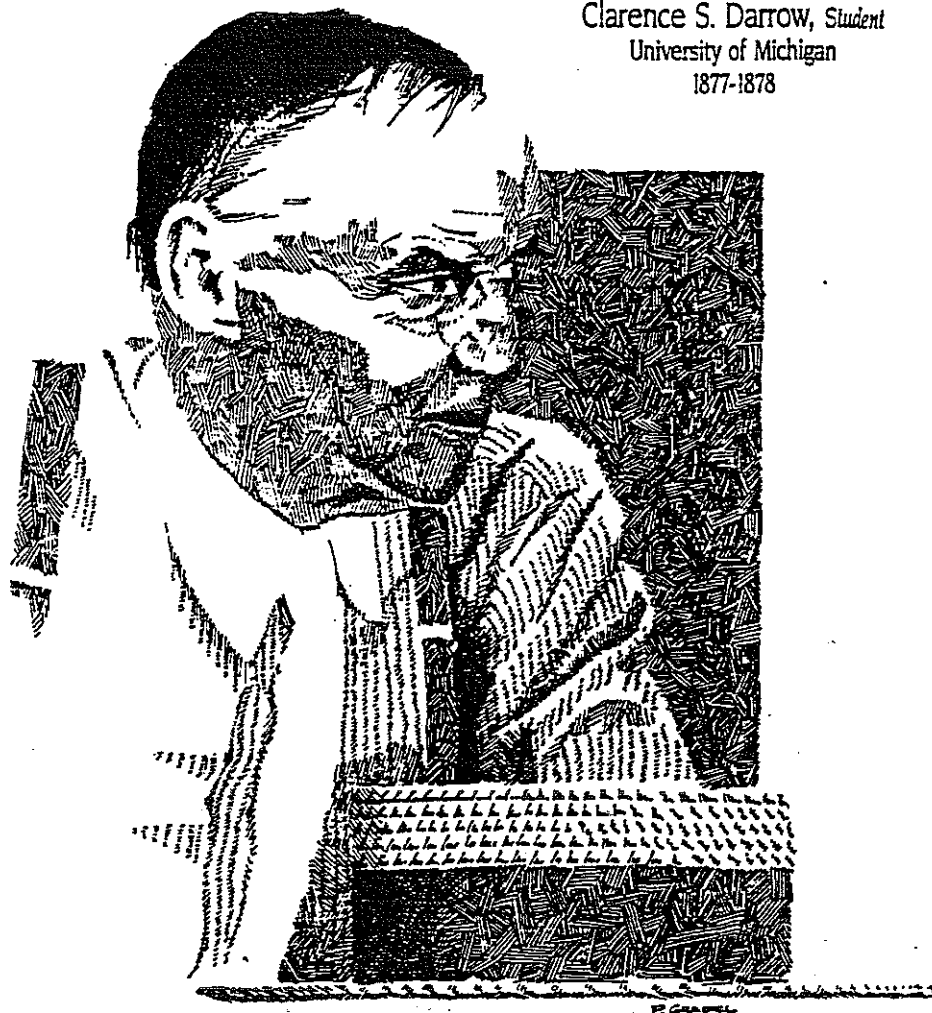
A study of ineffective assistance of counsel claims in Michigan revealed that the most common complaint was failure to investigate.⁵ All lawyers know that the failure to investigate one's case is poor lawyering. The American Bar Association Standards Relating to the Defense Function require a lawyer "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction."⁶

Most criminal defense attorneys are overburdened with cases. Because of inadequate funding, criminal defense attorneys, whether in private practice or working for a defender office, are often forced to take a large volume of cases. Since large volume often means that the defense lawyer does not have time to do his or her own investigation, the services of a trained investigator can be vital

to the adequate preparation of a case. However, assigned counsels in Michigan have extremely limited access to investigators. While some defender offices have their own investigators, most assigned counsels must petition the court to obtain an investigator, sometimes being required to give details of the investigation sought. It is nearly impossible to retain a competent investigator at the rates grudgingly paid by most circuit courts. Moreover, the total fees authorized are always extremely limited and rarely permit the kind of investigation that might turn up something overlooked by the prosecution. It is not unusual for defense attorneys to have to pay investigative costs out of their own pocket without hope of reimbursement.

In contrast, the prosecutor often has a detective in charge of the case who may command the resources of an investigative team, as well as the police department at large when its resources are required. Prosecutors also have the county medical examiner, local forensic experts and access to the extensive state police resources.

Also, vitally important to preparation and presentation of a defense is the assistance of expert witnesses. Are those really the defendant's fingerprints on the stolen goods? Has the gas chromatographic examination of carpet fibers produced a *bona fide* accelerant in an arson case? Could the fatal bullet actually have been fired from the angle alleged by the prosecution? These are questions which the defense attorney, even though experienced, cannot answer without expert assistance. But, like investigators, expert availability for indigent defense is virtually nil. Forensic evaluations are available, but primarily by prosecution-oriented, state-employed professionals. Expert witness fees, even when granted, are rarely adequate for a proper evaluation of the case.⁷ The reality is that proper resources are not available to defense counsel to prepare and investigate de-



Clarence S. Darrow, Student
University of Michigan
1877-1878

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fenses, and the defendant often loses his or her case without them.

CURRENT JUSTICE SYSTEM TRAINING

Judges and lawyers know that law school marks the beginning, not the end, of the practitioner's need for professional education. Little practical training and no specialization is offered at the academic level. Law schools train their students "to think like a

lawyer." The expectation, particularly in areas like criminal procedure where the law changes almost daily, is that professional expertise will ultimately be the product not only of experience but of regular participation in continuing legal education. To meet that expectation, both judges and prosecutors in Michigan have publicly funded training institutes.

The Michigan Judicial Institute was created by the Michigan Supreme Court in 1977 to provide judges and court

personnel with an opportunity to develop and enhance their professional skills. The Institute conducts formal continuing education programs for over 2,500 court personnel in the following areas: Judicial education, court administrative personnel development, court professional personnel development and court support personnel training. The Institute also publishes trial benchbooks for judges, a judges' law letter entitled IMPACT, and *Colleague*, the Michigan Judges' Journal. The Institute is funded through a combination of state appropriations and grant funding. For fiscal year 1990-91, the Institute's total budget was \$1,536,145, with \$1,145,798 coming from the state's general fund and \$390,347 in grants. There are 11 full-time, permanent staff members with five additional grant-funded staff positions.

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The Prosecuting Attorneys Coordinating Council (PACC), a division of the Attorney General's office, was created by MCL 49.101; MSA 5.820(1) in 1972. Its statutory purpose is broadly stated as being to "keep the prosecuting attorneys and assistant prosecuting attorneys of the state informed of all changes in legislation, law and matters pertaining to their office, to the end that a uniform system of conduct, duty and procedure is established in each county of the state."

PACC's primary functions are providing training, publications and technical support for all county prosecutors. It annually presents a full schedule

of training programs, including week-long seminars in basic and advanced trial practice and criminal appeals. It publishes newsletters for both prosecutors and police at least monthly, updates its warrant and trial manuals regularly, and periodically produces other manuals on specialized topics. Technical services include extensive automation support for prosecutors' offices and in-depth assessments, through site visits and interviews, of office policies, procedures and management systems. Law student interns are recruited and trained for positions both at PACC's central office and as full-time summer employees in county prosecutors' offices.

In addition to these functions, PACC manages about \$2.8 million in federal funds allocated to Michigan prosecutors for child support and food stamp fraud enforcement programs. It provides legal assistance to prosecutors' offices in such areas as contract review. It collects data and provides information to the Legislature on substantive and funding issues important to the prosecution. And PACC serves a liaison role with PAAM (Prosecuting Attorneys Association of Michigan) which includes conference planning and providing staff support for numerous committees.

The federal program money aside, PACC's budget for fiscal 1991 was \$1,076,035. This included \$595,300 from a state general fund appropriation, \$265,785 from a Michigan Justice Training Fund grant; \$197,500 from county service fees for prosecutor training and law student interns; and \$17,450 contributed by PAAM.

By contrast, there is no comprehensive statewide approach to training Michigan assigned trial defense counsel. There is no defense training institute; there are few organized attempts at quality control and little public funding. These deficiencies are compounded by two other factors. First, as documented in other articles in this issue, assigned counsel work is gener-

ally poorly paid lawyering; assigned counsels are hard pressed to justify training expenditures and days away from the office in an area of practice with so poor an economic return. Second, since the vast majority of assigned cases are handled by private practitioners, not public defenders, there are three to four times more individual defense lawyers to train than there are prosecutors or judges.

Although some high quality defense training exists, it is fragmented and underfunded. The Criminal Defense Attorneys of Michigan (CDAM) was formed by criminal defense lawyers from around the state in 1976 for the purpose of providing an educational and resource sharing forum. In addition to training events, CDAM files *amicus* briefs in important cases and actively represents the defense bar's views on criminal law issues.

Since its inception, CDAM has tried to fill the void in training for criminal defense attorneys by holding seminars that emphasize a nuts and bolts approach to defense advocacy. At present, CDAM presents two Advanced Criminal Defense Practice Conferences annually and occasionally smaller programs. Materials are sent to 1,000 assigned defense counsel throughout Michigan. CDAM training is funded exclusively by grants from the Michigan Justice Training Commission. The grant for 1991 was \$52,024.

The Legal Resources Project of the State Appellate Defender Office also helps fill the training void. It publishes Defender Trial and Sentencing Books and an appellate practice and procedure manual. It publishes the Criminal Defense Newsletter which is an outstanding service for keeping busy practitioners current on Michigan criminal defense issues. It is also developing computerized access to sentencing law for the three largest trial defender offices. Finally, the Legal Resources Project makes SADO's extensive brief bank available to private assigned counsel and provides as much assistance as it can to defense lawyers who call with

case-related questions. Except for a small portion that is funded by SADO's budget, most of the Legal Resource Project's services to private assigned counsel are funded by minimal user fees and Justice Training Commission grants. For 1991, the grants totalled \$119,902.

The Michigan Appellate Assigned Counsel System (MAACS) is the state agency that administers the roster of private attorneys who accept court assigned felony appeals. MAACS applies criteria for case eligibility and monitors compliance with attorney performance standards. MAACS also provides orientation and advanced training for its own roster members and publishes a series of reference manuals on topics relevant to criminal appeals. The advanced training includes a pilot project for an intensive small group course in appellate skills. Except for the largely videotaped semi-annual orientation program, which is paid for from MAACS' operating budget, all MAACS' training and publications are also supported by Justice Training Commission grants. The grant for 1991 was \$27,928.

Many local bar associations and the Criminal Law Section of the State Bar hold occasional programs surveying recent developments in criminal law or presenting speakers on criminal practice topics. Most notable is the Detroit/Wayne County Criminal Advocacy Program (CAP), a program started in 1983 through the efforts of the Recorder's Court bench and the Recorder's Court Bar Association because of a perceived need to train court appointed defense counsel. Each Fall, CAP has a series of Friday afternoon seminars that are directed primarily at assigned counsel but to which judges, prosecutors and police are also invited. Attorneys must attend six of nine seminars to be certified as eligible for the Recorder's Court trial assigned counsel roster.

The CAP program is funded by a ½% assessment on Wayne County as-

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signed counsel's own fee vouchers. For 1990, the program budget was \$42,000.

In sum, the vast majority of criminal defense training is funded by Justice Training Commission grants that total approximately \$200,000. Another \$42,000 is taken from the pockets of defense attorneys themselves to fund CAP. Small amounts of additional training and resources are provided through the budgets of SADO and MAACS. Overall, funding for defense training equals about one-quarter the amount available to prosecutors. It equals one-sixth the amount available for judicial education in all subjects. Funding obviously determines the variety of programs that can be offered and the number of lawyers who can be reached. Moreover, unlike prosecution and judicial training, defense training is not centrally organized and delivered by a full-time staff with specialized expertise.

LAWYER TRAINING FOR A BALANCED SYSTEM

The criminal justice system is out of balance. On one side are carefully trained and salaried prosecutors; in the middle are carefully trained and salaried judges; on the other side are poorly paid assigned counsel whose training is sporadic at best. Yet assigned defense attorneys, who are often underexperienced and unsupervised, need careful and regular training, at least as much as judges and prosecutors. This imbalance is costly and inefficient for the entire system.

At present, court assigned counsel is often ill-prepared to bring routine, much less innovative, pretrial motions on behalf of clients or to assert complicated or scientific defenses. Case

preparation and creative arguments are minimized or eliminated because of lack of pay, lack of available support services, and insufficient basic training and continuing legal education. Processing hundreds of cases in this fashion teaches no lesson of genuine value. Like most other tasks, doing it the wrong way case after case has negative value to the attorney. More importantly, it threatens the guarantee of due process and poses a great danger to the wrongly accused.

Properly trained defense lawyers are a benefit to the entire system. For example, CDAM, SADO and MAACS training in adequate representation at sentencing has helped to save millions of dollars in incarceration costs through the elimination of clerical, procedural and substantive errors which had led to unduly long sentences.

Properly trained defense lawyers know when to plead their clients guilty and when to go to trial. A client who has competent counsel and enters a plea which is consistent with his or her due process rights is a satisfied client. Not only are the costs of a trial avoided, so too are the costs of appeal. Similarly, where a competent attorney defends a client at a trial, if there is a conviction and a subsequent appeal, the issues will be clearly defined. All of these functions of competent and properly trained defense counsel affect the criminal justice system as a whole.

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They eliminate unnecessary trials, avoid inappropriate guilty pleas and sentences, and reduce the appellate case-load. Everyone benefits from the education of defense attorneys, not just the wrongfully accused.

Constitutionally adequate representation requires that the lawyer know procedure, law and a methodology for evaluating and litigating a criminal case. An appointed counsel who is not aware of current case law requirements may commit an error in the defense of his or her client, resulting in appellate review and retrial. A lawyer adequately informed as to the status of the law will avoid those errors, and fairness and finality of justice will result.

Obviously learning must begin at the orientation level. Currently the attorney's orientation usually occurs "on-the-job" when he or she is given a criminal assignment after graduation from law school. Further, the availability of continuing legal education as law and practice change rapidly is a critical fac-

tor in encouraging experienced practitioners to continue in this poorly paid work.

Of equal importance to the maintenance of a criminal defense bar is the renewal of energy and commitment to the task that intensive training events such as the CDAM conferences provide. Quality representation of any client requires a dedication to the task at hand quite beyond technical competence. Much benefit is gained from the gathering of professionals who perform the same services; the sharing of information and the assistance provided each other is a valuable part of the learning process.

Stated simply, the defense needs what the prosecution already has:

- A comprehensive plan for delivering training and resources statewide.
- An adequately staffed training institute capable of implementing the plan.
- A training seminar that provides initial exposure to Michigan criminal law and procedure.

• Regular updates to stay current in both the law and new developments in criminal practice.

• Trial practice seminars at all experience levels to facilitate courtroom problem solving as well as to fine tune trial and investigative techniques.

• Supervision of assigned counsel to give entry level lawyers the benefit of working with experienced lawyers and to monitor the performance and support needs of experienced lawyers.

At the present, some of these needs are met in an uneven fashion; mostly, they are not met at all. Defense resources are not even roughly equivalent to judicial or prosecutorial resources, even though the very justification for the adversary system is the assumed balance between equal parties. That balance can in fact best be struck by a centralized, state-funded system offering support and training services to the criminal defense bar. ■

Footnotes

1. ABA Code of Professional Responsibility, EC 7-1.
2. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Garcia*, 398 Mich 250 (1976).
3. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); *Argersigner v Hamlin*, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972).
4. See Eaman, "A Model System for Indigent Defense Services," *infra*, at note 2.
5. Levine, "Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation," 15 *Toledo Law Review*, 1275, 1371 (1984).
6. ABA Standards for Criminal Justice, Standard 4-4.1.
7. See, e.g., *In re Attorney Fees of Klevorn (People v Kosciecha)*, 185 Mich App 672 (1990), holding that the trial court abused its discretion by refusing to pay for a defense accident reconstruction expert in a homicide case because it felt the testimony of prosecution experts was sufficient. In that case defense counsel paid an expert \$2,605.89 out of his own pocket and the defendant was ultimately acquitted. See also *People v McPeters*, 181 Mich App 145 (1989) (convictions for four (+) offenses, including murder-2, reversed where trial court refused to pay defense psychiatrist's fees and witness refused to testify).

Lawyers and Judges AA/NA Groups MEETING DATES

Monday 12:30 PM
Detroit Bar Association
Conference Room
23rd Floor, Penobscot Building
Detroit

Monday 7:00 PM
Prince of Peace Lutheran Church
19100 Ford Road
Dearborn
Ford Rd. (Altar Rd.) just west of
Southfield Freeway

Monday 7:00 PM
Rehmann Health Center
147 S. Saginaw
Chesaning

Tuesday 6:00 PM
Kirk In The Hills
Presbyterian Church
1340 West Long Lake Road
½ mile west of Telegraph
Bloomfield Hills

Wednesday 6:00 PM
4609 Fenton Rd.
1½ blocks north of
South Flint Plaza
Flint

Thursday 8:00 PM
Central Methodist Church
(2nd Floor)
Corner of Capitol and Ottawa Streets
Lansing

