

# It's a Crime

Michigan's system of compensation for criminal defense of the indigent is inadequate



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Three important facts about the criminal justice system in Michigan:

- Our state is spared the enormous judicial system costs borne by states that impose the death penalty.
- Michigan has a well-deserved national reputation for the integrity of its prosecutors and defense lawyers, a basic for a criminal justice system.
- We lay claim to two of the towering giants of contemporary criminal jurisprudence. Both are well-known to members of this Bar and many have directly benefited from their teaching: Joe Grano, Distinguished Professor of Law at Wayne State University, and Yale Kamisar, Clarence Darrow Professor of Law at the University of Michigan.

So all is well, right?

Well, not exactly.

Fundamental to our system of criminal justice is the constitutional requirement that counsel will be appointed for those unable to afford to hire a lawyer. According to a recent study, Michigan ranks 49th in the amount of

funding provided by the state for the indigent defense function at the trial level. The State Bar has long held the policy position that lawyers should be adequately compensated for doing this constitutionally-mandated and very important work. There is no such thing as cut-rate justice, and indigent clients whose liberty is threatened should not have to face the power of the state without adequate legal assistance.

The reality is that the burden of indigent criminal defense in Michigan largely falls on the backs of a few lawyers who often work at outdated and indefensible rates of pay. It is these overworked and underpaid lawyers who define the criminal defense system in Michigan, since the indigency rate among criminal defendants in Michigan courts, as elsewhere, has been close to 90 percent for many years.

While many contribute more value to their clients than their pay deserves, only a few choose to do this important work.

The reason Michigan ranks so low among the states in compensation for criminal defense services is not very complex: there are no state standards and the burden of paying

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for indigent defense services falls on the counties. Most counties fall far short of devoting sufficient funds to pay for the services. Every county sets its own compensation schedule under the direction that the chief judge of the circuit court certify to the county treasurer "the amount which the chief judge considers to be reasonable compensation for the services performed."

In some counties, the chief judge leads a fight for reasonable compensation but is often beaten back by county government budget restrictions. In other counties the chief judge consents to low rates of pay. A review of county schedules for defense service payments in various Michigan counties shows widely varying rates and methods of payment. Counties that pay by the hour vary from a disgracefully low \$40 per hour in some

counties to \$80 per hour in others. To be sure, the compensation scheme for our prosecutors is also county-based and in many respects parallels that for criminal defense in arbitrariness and inadequacy. But, unlike our prosecutors, lawyers appointed to represent indigent clients must bear all the overhead costs themselves.

A recent ABA study found that it costs an average \$67 per hour in non-recoverable costs to run a law office. In many cases, the lawyer doing indigent criminal defense work does so for less than it costs to run the lawyer's office. At least half of all Michigan counties pay flat rates, which often amount to effective rates that are lower than \$40 per hour. Those serving indigent defendants in counties with flat

*(continued on page 52)*

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## President's Page—It's a Crime (continued from page 8)

rates, or "fee schedules," are faced with a disturbing disincentive to serve their clients well because in most cases the lawyer receives a maximum amount for the type of service rendered despite the time it takes to render the service. In some counties, the lawyer who needs to file a motion and hold a hearing to contest the validity of a search or confession does so with no more pay than the lawyer whose client pleads guilty.

A National Symposium on Indigent Defense was hosted by the United States Justice Department in Washington, D.C., in June 2000. According to the Justice Department, the symposium was held because, "the American people have begun a national conversation about innocent people who are wrongfully convicted and about the importance of competent counsel in the criminal justice system." The attorney general, the chief law enforcement officer in the country, hosted the symposium and said, "in the end, a good defense lawyer is what protects society against conviction of the innocent."

President John Adams, in his day, argued that the American people needed to believe more strongly that innocent persons go free than to believe that guilty persons are convicted. Adams believed that a system of justice that is not arbitrary and does not imprison people for crimes they did not commit is a hallmark of a civilized country. I believe that Americans continue in this day to want the same assurance.

Several events have focused our attention on the quality of defense services being provided in this country. Most important is the intersection of law and science in DNA cases. While DNA evidence can make it easier to convict the guilty, it can also protect innocent people who have been wrongfully charged

and vindicate some who have actually been convicted, perhaps because of mistaken identity or false confessions. Today, there are thousands of people in prison whose case-evidence has not had the benefit of DNA analysis. Through Barry Scheck's Innocence Project, some people now incarcerated have been scientifically proven innocent by DNA analysis that excludes them as the perpetrator.

There are two painful but predictable results from the revelation of false convictions through DNA analysis. First, the quality of representation afforded those proven innocent is under intense scrutiny. The second consequence flows from the first: we have

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begun to analyze the connection between inadequate representation and inadequate compensation. We as lawyers are sometimes embarrassed by what the DNA evidence has revealed about the competency of the criminal defense representation. Likewise, states should be embarrassed by their continuation of a system that encourages streamlined or corner-cutting "justice."

Michigan has so far been spared the microscopic examination cast upon the criminal justice system in states that impose the death penalty. However, in three states in which a serious evaluation of the effectiveness of their criminal defense services has been undertaken, extremely troubling problems have been discovered.

In Illinois, lawyers working with journalism students at Northwestern University and the *Chicago Tribune* have brought the criminal justice system under such damning accusations that Governor George Ryan put a moratorium on executions. A *New York Times* writer described the Illinois system as a "Kafka-eske experience of incompetent judges, corrupt police and sleeping or disbarred attorneys participating in a system in which largely white juries convicted largely black defendants of crimes that they did not commit."

Geographically and in most other ways, Illinois is comparable to Michigan. It has great law schools, wonderful lawyers, and a system that is fundamentally broken because of the quality of legal representation afforded those charged with crimes. Texas has also been exposed to considerable scrutiny. An *en banc* panel of the U.S. Court of Appeals for the 5th Circuit rendered an opinion this year in which it tried to determine how much sleep a defense lawyer was allowed to have during the trial of a capital case before his performance, as a lawyer for the defendant, was ineffective. The Texas legislature is in the process of making substantive changes in its state's criminal defense system, including appropriating state funds to counties to upgrade pay rates for lawyers representing indigent defendants.

In my home state of New York, a recent evaluation of the court-appointed counsel system was equally troubling. The state of New York found that one lawyer in New York City was appointed to represent 1,600 different people in one year. The committee also found that most lawyers appointed to represent criminal defendants never visited their clients outside of the courthouse, believing that a trip to the jail was too costly or too involved to justify the expense.

The problem was not unique to New York City. An evaluation of the rest of New York, whether in rural areas or smaller cities, yielded no better results. Consequently, New York has begun a serious discussion about the adequacy of criminal defense services for those not able to hire their own counsel. Lawyers in New York City have filed a lawsuit against the governor, asking the court to order him to raise the rates of pay for indigent defense counsel.

The National Symposium on Indigent Defense 2000 called for:

- Recognition of the critical role of the indigent defense lawyer in our justice system
- An effort to implement helpful standards for indigent defense that cover, among other things, skills, experience, and appropriate work loads
- The devotion of sufficient resources to indigent defense so that lawyers with skill and experience would be attracted and so that

they would be provided with the resources of experts and investigators

- Assurance that we need to provide training for defense lawyers
- A better understanding of how well or poorly our indigent defense systems in this country are faring

In trying to better understand how well indigent defense systems are working, the ABA gave the only grant this year to the Gideon Initiative to evaluate the Michigan indigent criminal defense system. Perhaps we will learn that Michigan is the exception to the rule when the Gideon Initiative completes its work. However, consider:

- Each year, one-third of those who volunteer to be appointed as criminal defense counsel in Michigan resign
- On average the state of Michigan spends less on court-appointed lawyers than all but one state
- We have a hodge-podge of compensation systems—most of which do not offer fair compensation or incentives for good lawyers to continue their important service

I predict that the Gideon Initiative will find that criminal defense lawyers serving Michigan's indigent population resign because of inadequate resources and pay. Based on conversations with those familiar with the appellate system in Michigan, I believe the initiative will also find legitimate concern about the preparation and adequacy of services provided to criminal clients by some appointed lawyers.

Compensation does make a difference. It impacts the level of experience that we can demand of those assigned defense representation and the amount of time they can reasonably be expected to give to a case. To ensure access to justice for all people accused of a crime, is it too much to ask that a state-funded public defender office provide all or a substantial part of these important services?

The 18th century British prime minister Horace Walpole wrote that justice was a virtue in itself. Truth, he said, "tells us what is due to others, and justice renders that due. Injustice is acting a lie." I believe we are lying to ourselves if we continue to pretend that our system of indigent defense compensation is the best we can do, or that it is good enough. It's not: it's a crime. ◆