

Indigent Criminal Defense in Michigan

After Decades of Struggle, Meaningful Reform May Be in Reach



Julie I. Fershtman

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.... The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

Forty-nine years ago, the United States Supreme Court justices wrote these words in *Gideon v. Wainwright*.¹ The problem is, our state has spent most of those years struggling to satisfy that constitutional mandate.

The State Bar of Michigan—through almost 40 years of meetings, symposia, articles, task forces, reports, testimony, and proposals—has tirelessly advocated for constitutionally adequate indigent criminal representation. Ten years ago when I chaired the State Bar's Representative Assembly, the Assembly adopted the Eleven Principles of a Public Defense Delivery System. In June, the governor's Indigent Defense Advisory Commission issued its report and recommendations, which in large part were based on the 11 principles adopted by the State Bar. The commission's report alerted the legislative and executive branches in Michigan to the magnitude of the problem on which the Bar, working with stakeholders, has been seeking reform for years. Long-awaited and potentially sweeping changes may finally be within reach.

The Desperate Need for Reform

Michigan's public defenders and assigned criminal defense counsel work hard to protect the rights of their clients, some of whom are charged with crimes they never committed or face stiff, undeserved sentences. These attorneys are part of a system that has for decades been in serious need of reform. Some of the well-documented criticisms over the years include:

- *Fragmentation.* In Michigan, individual counties, as the funding unit for local courts, are principally involved in the selection and payment of public defense counsel. Despite past efforts to advance statewide improvements,² this fragmented system creates disparate practices and resources across the state.
- *No meaningful oversight on a state level.* Michigan, for example, has no state training of trial-level counsel, statewide performance standards, or performance review process.
- *Serious underfunding, low pay for assigned counsel, and limited resources.* According to a report released by the National Legal Aid & Defender Association (NLADA), Michigan ranks 44th in the nation for public defense spending.³ Local funding units have long been accused of focusing more on cost savings than on the quality of representation. When lawyers receive so little for each matter handled, many believe the quality of representation suffers. For example, the NLADA study reported that five part-time public defenders working in the 36th District Court in Detroit spent an average of 32 minutes per case and each handled 2,400–2,800 cases annually.

The national standard for a full-time public defender is only 400 cases per year.⁴

The State Bar's Involvement Over the Years

Lawyers best understand the magnitude of the problem when justice is denied. With the breadth of our knowledge and expertise, the State Bar of Michigan is uniquely qualified to offer solutions. The Bar's advocacy of reforming Michigan's public defense system has involved sustained efforts over several years. Here is a sampling:

- **1975**—Michigan Supreme Court Chief Justice Thomas Kavanagh appointed a Defense Services Committee of the State Bar composed of bar leaders, judges, prosecutors, defense counsel, and court officials. The committee was charged with reviewing the entire trial and appellate procedure for legal representation of indigent defendants and making recommendations to improve the public defense system. The committee's recommendations called for appointed counsel to receive "reasonable adequate compensation to permit effective representation" and urged that the "right of an indigent defendant to hire necessary expert witnesses is fundamental to the right of a fair trial."⁵
- **1986**—The State Bar created a Special Task Force on Standards for Assigned Counsel "to assist the Michigan Supreme Court in developing a plan and process for state funding of criminal defense in assigned counsel programs throughout Michigan." The September 1986 issue of the *Michigan Bar Journal* included the task force's *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel* report and invited members to offer comment and criticism.

- **1987**—The State Bar's Defender Systems and Services Committee drafted a "statute for providing defense services pursuant to state funding" to be reviewed by the task force.
- **1987**—The State Bar Representative Assembly adopted the Minimum Standards for Court-Appointed Criminal Trial Counsel.
- **1988**—Michigan's Supreme Court declined to adopt the minimum standards but appointed Justice Levin to work with the Bar on this area.
- **1989**—The task force proposed a special committee to "create and monitor standards for assigned counsel" and "promulgate standards for performance, eligibility and reasonable compensation for assigned counsel."
- **1990**—The task force was reportedly expected to disband for failure to hold meetings.
- **1991**—The Bar reconstituted the Standards for Assigned Counsel Task Force as the Standing Committee on Assigned Counsel Standards.
- **2002**—The State Bar's Representative Assembly approved a proposal to strengthen criminal defense assigned counsel guidelines for public defense services on the basis of recommendations of the Michigan Public Defense Task Force, specifying 11 principles to serve as a foundation for providing legal representation to indigent criminal defendants.⁶
- **2002**—The Task Force on Improving Public Defense Services in Michigan issued its Model Plan for Public Defense Services in Michigan, which advised establishing a governor-appointed commission for public defense services and implementing recommendations from several stakeholders, including the State Bar.
- **2003**—The State Bar adopted a resolution encouraging the legislature to establish a commission responsible for investigating indigent defense services in Michigan and offering recommendations for improvement.
- **2006**—The Michigan legislature, consistent with a joint resolution, ordered a review of indigent defense services in a representative sample of counties. The State Bar was asked to appoint representatives to an advisory group for part of the review.
- **2008**—The NLADA issued a report entitled *A Race to the Bottom—Speed & Savings Over Due Process: A Constitutional Crisis* that evaluated trial-level indigent defense services in 10 counties around the state and concluded that Michigan's system failed to provide competent representation to indigent criminal defendants. The report recognized the State Bar's assistance as an "important collaborator and contributor."⁷
- **2009**—The U.S. House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on "Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?" Among those testifying were State Bar past presidents Dennis W. Archer and Nancy J. Diehl.
- **2009**—A new Michigan State House Subcommittee on Indigent Defense was charged with examining problems within our public defense system and developing legislative solutions. Two committee members, Reps. Bob Constan (D—Dearborn Heights) and Justin Amash (R—Kentwood), drafted legislation to establish a new statewide system for administering and funding public defense services. The State Bar offered extensive assistance, though no reforms passed.
- **2011**—The State Bar's Judicial Crossroads Task Force Report and Recommendations was issued with the request that the "immeasurable costs of injustice and the costs the system's inadequacies impose haphazardly on local and state governments demand that the system's failings be addressed urgently, even in the face of Michigan's current and ongoing budget crisis."⁸
- **2011**—A few months after the release of the Judicial Crossroads Task Force Report and Recommendations, Governor Rick Snyder issued an executive order

appointing a bipartisan Indigent Defense Advisory Commission to evaluate Michigan's indigent defense system and recommend improvements. Included in its membership were Michigan judges, members of the public, local government representatives, state legislators, and members of the Bar, including both defense and prosecuting attorneys. The order specified that the commission include one person representing the interests of the State Bar, and that the Bar can provide the commission with resources and services.

- **June 2012**—The Indigent Defense Advisory Commission issued its 15-page report, which acknowledges the State Bar's assistance.

The Indigent Defense Advisory Commission's June 2012 Report

The report of the Michigan Indigent Defense Advisory Commission recommends sweeping reform for trial-level indigent defense services involving adult defendants and juveniles waived into the adult system. The commission found "Michigan's current system of providing legal representation for indigent criminal defendants lacks procedural safeguards to ensure effective public criminal defense services" and recommended indigent defense services continue to be provided through local delivery systems overseen by a new, permanent state commission.

This new commission would be charged with establishing and enforcing minimum statewide standards for the delivery of legal services to indigent defendants. The minimum standards would be based in part on the 11 principles adopted by the State Bar in 2002 and include establishing benchmarks for workload that would permit the rendering of quality representation, adequate funding for the defense to fulfill its role, and requiring relevant continuing legal education for defense counsel.

The commission also recommended that indigent defense services be funded through a blend of local and state sources. Their recommendations included a requirement that each local government maintain its current

level of funding with a minimum level for indigent defense services suggested at \$7.25 per capita, and that state funding should be made available annually to ensure local systems meet the minimum established standards. The report also states that the new 13-member commission should include one member selected from names offered by the State Bar.

I strongly encourage everyone to read this very important report. You can find it on the State Bar website at <http://www.michbar.org/publicpolicy/updates/ppupdate062512.cfm>.

Hope on the Horizon

Next year, the *Gideon v Wainwright* ruling will be 50 years old. We remain hopeful that before then our legislature will capitalize on the momentum created by the Indigent Defense Advisory Commission report and bring us legislation offering long-awaited and meaningful reforms. Indications already exist that our hopes may materialize. At a July 18 hearing, Speaker Pro Tempore John Walsh (R–Livonia), who chairs

the House Judiciary Committee, expressed a willingness to work toward passing legislation based on the recommendations. Better still, House Bill 5804, which reflects the commission's recommendations, will be introduced at the August 15 House session. Sponsored by Rep. Tom McMillin (R–Rochester Hills), the bill has more than 70 cosponsors, both Democrats and Republicans—more than two-thirds of the entire Michigan House membership. You can stay informed of developments through the Bar's online Public Policy Resource Center.

The State Bar of Michigan is committed to continuing its involvement as a valued stakeholder on the issue and will steadfastly advocate for reasonable reforms ensuring justice for all. ■

FOOTNOTES

1. *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963).
2. For example, in 2003 the Michigan Supreme Court adopted Michigan Court Rule 8.123 which, among other things, required all trial courts to adopt a local administrative order that describes its method for selection, appointment, and payment of assigned defense counsel for indigent criminal defendants. In 2005, the Michigan Supreme Court revised its minimum standards for indigent criminal appellate defense services. See Childress and Boomer, *Supreme Court improves state's indigent defense system*, 85 Mich B J 22 (September 2006), available at <<http://www.michbar.org/journal/pdf/pdf4article1050.pdf>>. All websites cited in this article were accessed July 26, 2012.
3. Report of the Michigan Advisory Commission on Indigent Defense (June 22, 2012), p 4, available at <http://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf>.
4. National Legal Aid & Defender Association, *A Race to the Bottom—Speed & Savings Over Due Process: A Constitutional Crisis* (June 2008), p 28, available at <http://www.michbar.org/publicpolicy/pdfs/indigentdefense_report.pdf>.
5. *Report of the Defense Services Committee: A review of the legal representation of indigent defendants in criminal proceedings*, 57 Mich St B J 242 (March 1978).
6. Michigan Public Defense Task Force, *Eleven Principles of a Public Defense Delivery System* <<http://www.michigancampaignforjustice.org/docs/Eleven%20Principles.pdf>>.
7. National Legal Aid & Defender Association, n 4 *supra* at vii (recognizing the State Bar of Michigan).
8. State Bar of Michigan, *Judicial Crossroads Task Force: Report and Recommendations* (March 2011), p 15, available at <<http://www.michbar.org/judicialcrossroads/JudicialCrossroadsReport.pdf>>.