# The Failure to Michigan's Counties to Adhere to the ABA *Ten Principles*

CHAPTER V

The United States Department of Justice *Report of the National Symposium on Indigent Defense* recommends that statewide standards be adopted to prevent disparate services between neighboring jurisdictions. There is simply no uniformity in how services are provided throughout the state of Michigan. This chapter explores how the seven other counties we studied in the Lower Peninsula fail the majority of the ABA *Ten Principles*.

***The United States Department of Justice on "Uniformity" & "Quality"***

"Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced and supervised, while the other gets a neophyte."

***U.S. Department of Justice, Report of the National Symposium on Indigent Defense***

## *A. The Failure to Adhere to ABA Principles 1, 5, & 6: the Lack of Independence, Workload Controls, & Attorney Qualification*

Bay County:

Many defense attorneys in Bay County insisted that the existence of a public defender office in their county helps to maintain independence from inappropriate actions by the courts. As an example, they cited an instance in which the public defender office went to the appeals court and won an order requiring the judge to stop removing attorneys from cases if he did not like what they were doing (that is, if the attorneys would not go along with what the judge wanted).

Despite this one instance, the independence of the public defender offices in Bay County is continually compromised. The county pressures the public defenders to accept too many new defendants for representation each month, in order to keep down the cost per defendant represented. The di-

rector of the Department of Criminal Defense reported that the average cost per defendant represented by the defender offices has remained at $300 for the last 15-20 years (with felony cases averaging more than $300, but misdemeanor cases about $100). This makes the defender offices cheaper for the county than outside counsel, whose fees average about $300 for a misdemeanor case and more for felonies.

To understand the workload concerns in Bay County requires a brief discussion of how best to "count" cases. The Conference of State Court Administrators and the National Center for State Courts publication *State Court Model Statistical Dictionary, 1989*, instructs administrators to "[c]ount each defendant and all charges involved in a single incident as a single case (page 19)." Throughout our study in Michigan we have been plagued in our attempts to quantify caseload because some counties count cases by "defendant," some by prosecution charging document, and some by charges. In Bay County, the prosecutor counts each incident or event as a case, while the Office of Assigned Counsel (which assigns cases to the two public defender offices and appointed counsel) counts each defendant as only one case no matter how many incidents or events are involved.[104] Cases are assigned to the five attorneys of the two public defense offices based on a formula that limits each of the attorneys to receiving no more than 38 new defendants per month, of whom no more than 13 can be charged with felonies. If all five attorneys in the two public defender offices have been assigned 38 defendants in a given month, assignments of additional defendants are made to appointed counsel.

Because of the definition of a "case" employed in Bay County, attorneys in both defender offices estimated that their "caseload" is probably 1.2 to 1.5 times higher when using the national "case" definition that would require factoring in the number defendants

## Overview of Bay County

A mid-sized county, Bay County sits in the center-east of the Lower Peninsula. As of 2005, the county had an estimated population of 109,029, ranking it 19th among Michigan's counties.[a] Bay County has an 82.4 percent high school graduation rate and a median household income of $38,646. Its poverty rate of 9.7 percent ranks slightly better than average among Michigan's counties. The county seat, Bay City (pop. 36,817), was once a major port of Michigan's famed lumber industry. Most of its sawmills have now closed, and the Defoe Shipbuilding Company (manufacturer of war vessels for the U.S. Navy) ceased operations on December 31, 1975. Today Bay County continues to play a role in the state's manufacturing industry (auto parts, machinery, cement, steel, and agriculture), though to a lesser extent than in earlier decades, and is a recreational center for boating, fishing, etc.

Bay County is home to the 18th Circuit Court and the 74th District Court, which jointly administer the county's public defense delivery system. The county's Office of Assigned Counsel (which is part of the court administration) assigns cases to the two public defender offices and appointed counsel. The Department of the Public Defender (three attorneys) and Department of Criminal Defense (two attorneys) are both county agencies under direct control of the county administration. Indeed, the heads of both offices are direct appointees of the county legislature.

Cases are assigned to the public defender offices through a formula that limits each of the five defender attorneys to 38 new defendants per month, of whom no more than 13 defendants can be charged with felonies. The five attorneys in the two defender programs all have extensive criminal case experience (some both as prosecutors and defense counsel). The heads of the offices attempt to divide up the most serious cases among the staff, in order to keep the workload among the five roughly even. Because of the small size of the two defender offices and the experience levels of the attorneys in those offices, the heads of the offices are considered first among equals, so there is no supervision/file review in the sense contemplated by national standards. The additional responsibilities of the directors of the two defender offices are administrative, rather than supervisory. There are no written performance guidelines for either office.

Assigned counsel (known in Bay County as "outside counsel") are appointed by the Office of Assigned Counsel (OAC), a division of the court administration for Bay County, from a list that office maintains. The OAC administrator assigns cases to outside counsel when the two defender offices are conflicted out or have reached their monthly case cap. Outside counsel also receive appointments in cases involving juvenile delinquency, abuse and neglect, FOC contempt, and paternity/PPO. Attorneys on the OAC list are ranked according to their experience, so that to a certain extent cases are assigned based on the severity of the charge, with the exception of delinquency cases where an effort is made to assign the case to the attorney who represented the juvenile before (if the juvenile has prior arrests). New attorneys are assigned to misdemeanor cases for at least 6 months, at which time the OAC administrator seeks permission from the chief judge to move the attorneys to the felony appointment list.

[a] U.S. Census Bureau, at http://quickfacts.census.gov/qfd/states/26/26017.html.

charged with multiple events. In calendar year 2006, the five attorneys in the two offices were assigned the following number of defendants: 806 felony defendants (or 161.2 per attorney); 694 misdemeanor defendants (or 138.8 per attorney); 453 traffic defendants (90.6 per attorney); and 212 circuit court violations of probation (42.4 per attorney). In other words, even without multiplying the above numbers by a factor of 1.2 or 1.5 to get the number of "cases," each attorney in the two public defender offices exceeded the national caseload standard for felony representation by 12 percent *before* factoring in all of the other work.[105]

Whereas some right to counsel systems would respond to such workload issues by using other types of public defender staff (social workers, investigators, or paraprofessionals) to support the attorneys, that is not the case in Bay County. The office has no social workers or staff investigators. Public counsel attorneys in Bay County have to apply to the courts for funds to hire investigators.

Similarly, the attorneys must seek judicial approval for expert witnesses. During the site visit, a public defender told an NLADA site team member that one of the judges was refusing to authorize more than $60 an hour for a forensic psychiatrist (which is far less than they charge), and the attorney was considering taking an interlocutory appeal if the judge could not be persuaded to approve a higher rate. The judge in question told an NLADA representative that he "had trouble" paying the forensic experts more than the outside counsel receive (that is, $60 an hour), but to his credit also said he would like to see a line item in the budgets of the two defender offices for expert witness fees.

The combination of high defender workloads and lack of investigators results in a system where very limited investigation and motions work is done on public defender cases and where the trial rate is less than 1 percent in the two public defender offices. Attorneys in the two defender offices attribute the low trial rate, in part, to the fact that Michigan's sentencing guidelines and the volume of cases generally produce good plea offers from the prosecutor.[106] Still, a trial rate of less than 1 percent is exceptionally low –the national average criminal justice trial rate is 3.1 percent.[107] Indeed, one defender said there is no time to try cases.

Public defender attorneys informed NLADA site team members that they had recently attempted - unsuccessfully - to stop accepting new defendants before they reached the 38 defendants per month cut-off. Some of the felony defendants whom the public defender had been assigned to represent had serious and/or capital cases, which dramatically affected the attorneys' workloads. The defenders first went to the OAC director, who said she did not have the authority to approve assignment of fewer than 38 new defendants per attorney per month. The defenders then asked the chief judge of the circuit court to order the OAC to stop assigning new defendants to the defender attorneys, but the judge told them to talk to their boss, the county executive (who is not an attorney).

The NLADA site team interviewed judges about public defender workload issues. One was very critical of both the defenders and assigned counsel, suggesting that the attorneys were not working very hard.[108] He said the defenders have a quota of cases and they have to accept them, just as he has to accept the cases assigned to his courtroom. The judge said cases are not adequately investigated because, he believes, the defenders often assume the case will result in a guilty plea. He said both prosecutors and defenders are unwilling to take cases to trial, and he believes the defendants would receive better plea offers from the prosecutor if the cases were "worked up" for trial and defenders indicated

they were ready to try cases.

If high workloads, judicial interference, and lack of support staff were not enough, attorneys in both defender offices in Bay County also said that, in the last few years, the county board of commissioners has been "micromanaging" the office. As examples, they cited: a county commissioner who came into the public defender office to look at the case numbers (although it did not appear that the commissioner looked at client files) before the county would approve filling a vacant public defender attorney slot;[109] and increased scrutiny of reimbursement requests for public defender attendance at meetings of the Michigan Public Defense Task Force and State Bar Criminal Law Section meetings.

But the story of Bay County does not stop there. After the NLADA site visit, the move to place cost concerns above constitutional due process continued. The county decided that the answer to high caseloads was not to add additional public defender staff, but rather to privatize pieces of existing work through the use of flat fee contracts. Not surprisingly when emphasizing cost control over the constitution, the county had to engage in two request for proposal processes in soliciting bids for misdemeanor representation. The first go round, bids came in too high for the county commissioners' liking. Suspecting that limiting bids to Bay County attorneys only was artificially inflating the cost, the county commissioners voted to redo the process and also allow attorneys from outside of the county to bid. This process worked as the county received lower bids, and the staff public defenders no longer handle misdemeanor cases. Misdemeanors are handled by private counsel on a flat-fee contract. This on-going devolution of independence in favor of cost containment is a common theme throughout Michigan.

_Alpena County:_

For example, felony representation services in Alpena County were provided for years by the Office of the Public Advocate (OPA). OPA was initially funded in 1981 by a special $80K federal grant obtained by a then sitting circuit court judge from the Department of Justice as part of a special rural legal services grant program. OPA was a 501(c)3 organization with its own board of directors and was charged with providing felony defense services for the four counties that made up the 26th Circuit Court at that time. OPA contracted for legal services with the Joint Judicial Commission, made up of representatives from those four counties.

In 2003, the 26th Circuit Court was reorganized into just two counties: Alpena and Montmorency. Judge Kowalski was the circuit court judge, and he conducted a regional survey of indigent defense costs, finding that OPA was costing the county around $420K per year for felonies only, while similarly situated county like Otsego County was reportedly only spending $330,000 per year on all indigent defense services. He determined that Alpena County was spending too much on indigent defense services. The end result was that OPA – with its own independent Board of Directors – was closed.

In its place, Alpena County entered into a flat fee contract with three former OPA staff attorneys – the law firm of Lamble, Pfeifer & Bayot (LPB). There is no longer any semblance of independence. While OPA had a staff investigator, LPB does not. If needed, LPB goes to the court with a request for services – but this is not an *ex parte* procedure; the prosecutor will know about the request. If experts are needed, LPB must also apply to the court.

Measuring caseload in Alpena is difficult because the three contract attorneys all do both public defense work outside of their Alpena County contract and private cases. For

example, though Lamble and Pfeifer handle the felony cases in Alpena and Montmorency, Pfeifer also handles the firm's contract cases in Presque Isle County to the north of Alpena, and he has a private practice with separate offices from his LPB office. He is also a part-time Alpena city attorney, but he affirmed that he does no city work that would place him in conflict with representation under the criminal defense contract. Bayot primarily does probate, family, and some district court work. Bayot says he does not do private work; but Lamble does – primarily divorce and child custody.

Moreover, some criminal justice stakeholders raised questions during our interviews regarding the LPB firm's definition of "conflict." Their allegation was that the firm inappropriately keeps conflict cases, due to financial concerns. They claimed that LPB will represent both the perpetrator in a child abuse case and represent the parent/guardian/custodian in the related dependency court proceeding. They also alleged that the lawyers do not meet with their clients until the court date, in part because they are juggling too many cases in too many courtrooms.

*Grand Traverse County:*

On their face the caseloads being handled by assigned counsel in Grand Traverse are well within nationally accepted caseload standards. Under the district court contract, an individual attorney is assigned approximately 60 misdemeanor cases per year. In the circuit court, it was reported that a roster attorney is assigned an average of 55 felony cases per year. In 2005, six felony attorneys received 63 cases each and one 62. But all of the assigned counsel attorneys are engaged in full-time private practice. Consequently, no conclusion can be reached about the reasonableness of their appointed caseloads without more information as to the percentage of their total time that is spent on court appointed cases and the extent and nature of their private practices. One attorney estimated that he did about 150 total cases in 2006, including felony and misdemeanor appointments and retained cases. He does some estate planning and divorce and about 10 abuse and neglect appointments each year. This attorney said there is not enough time to do the work he would like to do on his cases.

The lack of independence is a significant defect in Grand Traverse County as well. The delivery systems in both the circuit court and the district court are administered by the judges. The district court reserves the right to terminate contract attorneys without cause. While the judges exercise considerable control over the attorneys, they have not been willing to advocate on behalf of the attorneys with the county to obtain increases in compensation and improved access to resources. The terms and conditions of the contract and the amount of the compensation are supposed to be based upon competitive bidding, but there is no competition and the judges essentially dictate the flat rate compensation per case. Although competitive bids for the contract are solicited, the attorneys have joined together as a single group and only one bid is submitted. For 2007-08, the attorneys' request for an increase in the compensation rate from $350 to $400 per case was rejected by the judges, and the group was told that the judges would find other attorneys to do the work if they would not accept the existing rate.

Perhaps most seriously, the district court group of attorneys in Grand Traverse County is required by the judges to provide certain services under the contract for which they are not compensated, including: providing an arraignment attorney daily to consult with unrepresented individuals; staffing the drug ("Sobriety") court; and appearing at lineups. At-

torneys are generally willing to accept whatever terms the judges dictate, apparently so as to not jeopardize their contract.

*Oakland County:*

Funding of the defense function in Oakland County is a line item in the judicial budget. Since payment is event-based and any increase to the amount paid would require an increase in the defense line item in the court's budget, payment of defense counsel is not independent of the judiciary. Consequently, there has not been an increase to defense function funding in eight years. During this same period, we were told, there have been regular increases to the budgets of the other two legs of the stool (judges and prosecutors). In most instances district court judges personally select the lawyers who will be assigned to individual cases. Although some use a "blind draw" method to select the attorneys, the judges individually determine which lawyers will be included in the group from which they make assignments in the cases that are before them.

The system for appointing individual lawyers in the 6th Circuit Court in Oakland County is also a function of the judiciary and the court clerk's office. In Category 1 cases (capital offenses with maximum life sentences) and Category 2 cases (felony offenses with sentences in excess of five years but less than life, and negligent homicide), the circuit court judge appoints an attorney from the judge's own list of qualified attorneys. In Category 3 cases (felony offenses with sentences greater than two years but not more than five years) and Category 4 cases (felony and high misdemeanor offenses with sentences up to and including two years, except negligent homicide), counsel are appointed in rotation according to the date of their last appointment. An attorney who is unavailable for an assignment does not lose her place on the rotational list. Defense attorneys made clear that staying on a judge's category 1 or 2 list requires a clear understanding of what that judge wants and delivery of that performance. The general rule is that you have to keep things moving. A common refrain from the defense bar was that attorneys who know how to please a judge receive most of the big (C1 & C2) cases from that judge.

The experience level of the attorneys who are eligible to receive appointments in the district court is varied; however, there are no minimum standards or qualifications required in order to be included on the approved list. An individual is eligible if s/he is a member of the bar in good standing and requests to be included on the list. On the positive side, while there are no continuing legal education (CLE) requirements in general, there are CLE requirements for defense counsel to be on the appointment list. Judges state that appointments at the C1 and C2 level are based on the judge's knowledge of the skills and abilities of every attorney on his list.

All of the assigned counsel attorneys in Oakland County are engaged in the private practice of law and are not restricted from accepting assignments in other circuit court and/or district courts within the county or in other counties. One judge indicated that the circuit court attorneys who are assigned to felonies in the district court are overworked, spread too thin, and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance, and sometimes struggle with. Beyond that – and we cannot overstate this – nothing is done to ensure the rendering of quality representation. In two separate courtrooms we witnessed clear evidence of defense attorneys being more concerned about pleasing the judge than supporting their clients. In addition, there is strong sentiment among county and court officials

that lowering prosecutor pay would decrease the quality of the prosecutors in Oakland County; yet there are no parallel views supporting an increase for the defense function, even though all agree defense pay is too low. In Oakland County, the view is that the "defender quality is good enough."

*Shiawassee:*

A lack of independence also defines Shiawassee County. Lawyers there are appointed by name directly by the judge before whom they will appear on each assigned case. Their bills are scrutinized, approved, modified, or disapproved in whole or in part by each judge personally. The judges themselves decide who is added to or removed from the list of assigned counsel. The judges to whom we spoke indicated that they are aware of how many cases they have assigned to each lawyer before they appoint that lawyer to additional cases. What is clear, however, is that there is no mechanism in place for taking into account the "workload" of the lawyers, all of whom maintain private practices in a variety of legal disciplines. Absent too, it appears, is any way of determining how many (if any) cases from other jurisdictions are assigned to the lawyers on the list. While a review of the cases assigned to each of these lawyers by the Shiawassee County courts indicated that the num-

## Overview of Shiawassee County

Smaller in population than many neighboring counties, Shiawassee has an estimated population of 73,125, ranking 26th among Michigan's counties.a The county has an above-average high school graduation rate (84.4 percent) and a median household income of $42,553. The county's poverty rate is 7.8 percent. The county seat is Corunna, a city of 3,381.

Two judges handle the business of the 66th District Court, which has limited jurisdiction in criminal cases. It has jurisdiction over all misdemeanor cases from beginning to end. Felony cases are filed in the district court, but its jurisdiction over these cases is limited to conducting or accepting a waiver of the preliminary hearing and then binding the case over to the 35th Circuit Court for trial or other disposition and sentencing. The delivery method is entirely assigned counsel.

Appointment of counsel in both district court and circuit court is entirely by the individual judges. Lawyers are appointed by name directly by the judges before whom they will necessarily appear on each assigned case. Their bills are scrutinized, approved, modified, or disapproved in whole or in part by each judge personally. The judges themselves decide who is to be added to or removed from the list of assigned counsel.

There are 16 lawyers on the "list" of counsel available to accept appointments in both district court and circuit court. The circuit court judge makes appointments for all felony cases, assigning a lawyer to a felony case in district court when notified that a defendant has been determined to be indigent and thus eligible for the services of counsel at public expense. The circuit court judge assigns lawyers on felony cases based on the nature and seriousness of the charge and the availability of counsel with the requisite skill and experience. Occasionally, the circuit court judge asks a lawyer who is not on the list to accept appointment on a particular case where that lawyer had previously represented the client and/or when there is a particularly difficult and complex case or client.

The administrative staff of both courts keep track of the number of cases assigned and the amount of money paid to each lawyer. Tracking of types of cases assigned to each lawyer is limited to designation as circuit court cases and district court cases. There is no breakdown of the type of felony cases assigned to each lawyer, such as cases in which the maximum sentence was life imprisonment or those in which sentences could be enhanced by habitual criminal statutes.

All cases, misdemeanor and felony, are compensated in the same manner and at the same rate. Whether a petty theft or first degree murder, lawyers are paid at the rate of $50.00 per hour for both in-court and out-of court work. Itemized bills are submitted periodically by each lawyer and are reviewed by the judge who made the appointment.

All of the judges felt that appointed lawyers were clearly underpaid for their work. All indicated that a raise in the hourly rate was overdue. Most of the lawyers to whom we spoke described the $50 hourly rate as small but "fair." One lawyer, who had been on the court-appointed list for five years but who no longer accepted appointments, cited the low pay as a reason for "moving on" from court-appointed work to concentrate on his vastly more lucrative private practice. He indicated that the $50 per hour rate was so far beneath his $200 per hour private rate that he could simply no longer afford to accept appointments.

There is no mechanism in place for taking into account the "workload" of the lawyers, all of whom maintain private practices in a variety of legal disciplines. Absent too, it appears, is any way of determining how many (if any) cases from other jurisdictions are assigned to the lawyers on the list. While a review of the cases assigned to each of these lawyers by the Shiawassee County courts indicated that the number of cases assigned was actually very small, no clear picture emerged about how much time was available to these lawyers for the proper representation of their court-appointed clients.

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[a] U.S. Census Bureau, at http://quickfacts.census.gov/qfd/states/26/26155.html.

ber of cases assigned was actually very small, no clear picture emerged about how much time was available to these lawyers for the proper representation of their court-appointed clients.

In all fairness, the NLADA site team asked all of the judges and lawyers about the perception inherent in the structure of this system that vigorous advocacy on behalf of the clients could be compromised to avoid inconveniencing the court, upon which the lawyers must depend to make a living. Each of the three judges spoke convincingly, not only of their respect for vigorous advocacy by appointed counsel, but of how they would not want any lawyer on their "list" who did not defend his or her clients' interests appropriately. One lawyer, in fact, pointed with pride to a case where the Michigan Supreme Court reversed on an important issue he had unsuccessfully argued in the trial court. He said he was congratulated by the judge who was found to have erred and had experienced no negative feedback with respect to the nature or number of assignments he continued to receive from that judge. Another lawyer, on the other hand, indicated that he had received no cases from the district court for a period of a year and a half and only began receiving cases again after an internal audit by the administrative staff shined light on the fact that he had not received cases for an extended period of time. He was not, however, able to point to any particular reason for this and guessed that it had something to do with a member of the administrative staff rather than with either of the district court judges.

<u>Wayne County:</u>

Independence of the indigent defense function in Wayne County district courts and Third Circuit Court is also problematic. On the one hand, the current appointment system is subject to patronage and the potential for undue judicial influence (but some of the judges appear to make a sincere attempt to appoint qualified attorneys and match attorney skills and experience to the cases). On the other hand, the alternative being contemplated by then-Third Circuit Chief Judge Mary Beth Kelly is a contract system that could result in low-bid contracts. No one is talking about a system with an independent board of directors and an independent assigned counsel office that would comply with ABA *Principle 1*.

While visiting Wayne County, we witnessed a political struggle between the chief judge and the other judges of the circuit court. Partly in order to contain costs, partly (according to the chief judge) to improve quality of representation, and partly (according to judges who disagreed with the chief judge) to consolidate her power, the chief judge replaced the appointed counsel system in juvenile cases with several contracts, some of which are reportedly low-bid contracts. The chief judge reported that she was interested in seeing more contracts for representation of adult indigent defendants in circuit court.

Under Administrative Order 2006-08, each judge has one 2-week rotation per year to make appointments in criminal cases. During that time, the judge can assign no more than eight felonies to a given attorney. In addition, no attorney can receive more than 200 violation-of-probation appointments in a calendar year. However, there is no limit on how many cases overall an attorney may be appointed to in a given year, nor is there any examination of the attorney's entire workload/caseload (for example, cases the attorney is appointed to by other Third Circuit judges, by judges in other counties, and/or the attorney's private retained criminal and/or civil work). For example, in the Third Circuit alone, in addition to an unlimited number of felony appointments and up to 200 violation of pro-

bation appointments each year, attorneys can receive appointment as arraignment-on-information (AOI) house counsel and appointment in any of the twenty-three district courts of the county (not to mention all other state and federal courts). Judges, appointed attorneys, and the prosecutor all reported that defense workloads are very high. Most of those interviewed attributed the workload to the fact that many attorneys try to be appointed to as many cases as possible because the fees on each case are so low.[110] Some lawyers reported that other attorneys are accepting too many murder assignments to be able to represent each defendant properly. The heavy workload means that attorneys frequently have scheduling conflicts, resulting in continuances, use of stand-in attorneys, and – in some instances – removal of the attorney and replacement with another appointed attorney.

The Third Circuit system for matching an appointed attorney's ability, training, and experience to the complexity of the case is very limited and has no enforcement mechanism. Attorneys who are interested in receiving appointments to represent indigent defendants in felony cases must join the Wayne County Criminal Defense Bar Association (WCCDBA).[111] Attorneys usually submit their resumes to the judges (after applying to the Assigned Counsel Services Office to be placed on the appointments list) and may also ask to meet with the judges regarding their interest in receiving appointments. Judges report they try to assign attorneys to cases based on the attorneys' experience and competence, but there are no rules or guidelines requiring a minimum level of experience for handling certain types of cases. In practice, judges say they try to give newer attorneys violation of probation and other less serious cases, but in many instances "less serious" translates to any type of non-capital case. Judges say they generally require that an attorney have at least three years of experience before s/he is assigned to a capital case.

<u>*Ottawa County:*</u>

The attorneys interviewed in Ottawa County all stated that the judges are fair in the assignment of cases and payment of claims. All stated they have never had a claim reduced. All attorneys stated they can aggressively represent clients and this is not a problem for the judges. However, Ottawa County's assigned counsel program is still controlled completely by the judiciary. Judges decides which attorneys will be admitted to the panel, whether they will be allowed to stay on the panel, what level they are rated at, what cases they are assigned, and the hourly rates they are paid. The circuit court (through a staff person who is not an attorney) reviews and approves the claims submitted by attorneys. The judges formally evaluates the attorneys on the panel on a yearly basis. The judiciary resolves issues arising from client complaints. In short, this is a court-run assigned/appointed counsel system.

For example, Ottawa County does not have written standards for attorney classification. Attorneys are classified as either level 1, 2, or 3. While the level 1 attorneys are paid the highest hourly rates, the classification appears to be based on how long they have been on the panel and not necessarily how experienced they are. That is, a very experienced criminal defense attorney who applies to and is accepted on the panel will be made a level 3 attorney, regardless of whether he has years of experience doing serious and complex cases in another county. What does seem pretty clear is that when you apply to be on the panel, no matter how much experience you have, you start out getting misdemeanors until the judges decide you are competent enough and have been on the panel long enough to get felonies. This implies that, to move up, one must have proven themselves to a judge.

## Overview of Wayne County: Representation in Circuit Court

Wayne County is the home to Detroit and the Third Circuit Court. There are 28 circuit court judge seats, but not all of these judges hear criminal cases. The Third Circuit has a mixed system for providing representation to the poor. The court assigns 25 percent of its felony cases to the Legal Aid and Defender Association (see side bar) and the rest to an appointed counsel system administered by the court's Assigned Counsel Services Office with appointments made by the circuit court judges.[a] Each of the judges has a single two-week period annually in which she makes appointments. Attorneys let the judges know that they are available for, and interested in, receiving appointments. Attorneys who have not previously received appointments from a given judge will usually submit a resume and request an interview. In addition to filing a written application with the Assigned Counsel Services Office, attorneys must be members of the Wayne County Criminal Defense Bar Association, and attend a minimum number of hours of training presented by the Detroit-Wayne County Criminal Advocacy Program (CAP) before they can receive appointments in criminal cases.[b]

*Early Appointment of Counsel*

The vast majority of defendants (in excess of 95 percent according to the chief judge) in the Third Circuit are represented by court-appointed counsel (either from LADA or assigned counsel).[c] At arraignment in district court (arraignment on warrant), defendants requesting counsel fill out a form, which is sent to the Assigned Counsel Services Manager and from there to the rotation judge (i.e. the judge who is making the appointments for that two-week period). If a defendant has an open case, the new case is assigned to the attorney on the open case. The assigned counsel administrator tries to give LADA "clean" cases (i.e. cases that don't involve violations of probation, etc.). The request for an appointed attorney is usually received by the assigned counsel administrator within 4-5 hours of the district court arraignment, and forwarded to the rotation judge – who usually appoints an attorney within 24 hours.

Initial interviews are relatively timely – but the physical conditions in which they usually occur, and the lack of time to conduct a thorough interview. Initial interviews with defendants (particularly those in custody) are frequently conducted in court (or in the "bullpen" – a cell behind the courtroom), just prior to a hearing held within days of the district court arraignment.

Indigent defendants are usually assessed attorneys' fees at the conclusion of the case (the vast majority of cases are resolved through guilty pleas).[d] It is common for attorneys' fees to be assessed as a condition of probation (which means failure to pay can constitute a violation of probation). It is also common for attorneys' fees to be assessed in cases where the defendant is in custody, or has indicated that s/he is unemployed. In some cases, judges will substitute community service in lieu of fees.[e] In none of the cases we observed was there any colloquy by the judge into a defendant's ability to pay attorneys' fees – nor was there any objection by counsel, or even a request from counsel that attorneys' fees be waived.[f]

*Judicial Interference*

Since the assignment responsibility stays in one court for only two weeks out of each year, and since the cases themselves do not stay in the courtroom from which the assignments were made, that the lawyer appointed on a particular case by a judge would appear before that judge on that case would be relatively unusual. On its face, therefore, the independence of the defense bar would seem to be rather well protected from interference of the judges. Unfortunately, that simply is not the case.

But unlike the judges of many other jurisdictions we visited, many judges of the Third Circuit Court recognize the impact that the system in-place – the system they control – has on the level of quality in the representation of the poor. Some judges pointed to the event-based fee structure as a critical systemic flaw, and that its deficiencies play a role in the quality of representation some clients received. Because the fees are so low, some attorneys seek to generate a high volume of appointments to increase their income. Payment is event-based (as opposed to hourly), with the payment based on the seriousness of the case (potential sentence of five years/10 years/20 years/life in prison). As an example:

## Legal Aid & Defender Association, Inc.

Founded in 1909, the Legal Aid and Defender Association (LADA) Michigan's largest provider of legal services to those of insufficient means. Overseen by an 18-member Board of Directors (12 are attorneys), the non-profit's approximately 180 employees are divided among Administration (including finance and human resources) and LADA's four law groups. Each law group is funded independently of one-another. The Civil Law Group is LADA's largest program and is funded through the Legal Services Corporation, the Michigan State Bar Foundation, and other local entities. The Federal Defender Office is funded by the Administrative Office of U.S. Courts. The Juvenile Law Group holds a contract with the Family Division-Juvenile of the Third Circuit Court. The State Defender Office holds a contract with the Third Circuit Criminal Division to provide representation in 25 percent of indigent felony cases each year. Though the contract, originally negotiated in 2001, expired in October 2002, the terms of the agreement continue to be honored. LADA receives a flat $1.98 million each year for its services.[a]

The 17 attorneys in LADA's State Defender Office (all full-time employees) are divided into three teams with five trial attorneys each.[b] Two of the teams are lead by supervising attorneys (27 and 29 years experience) who maintain full trial loads. The third team is lead by Donald Johnson (29 years experience) who described his caseload as consisting of a "half-day plea docket each week" on top of his administrative duties as Chief Counsel of the State Defender Office. LADA attorneys are provided an office, secretarial services, health insurance, vacation/sick pay, and malpractice insurance. Attorneys are compensated by level of experience and length of tenure with the organization — first-year attorneys are paid $35,000 and the current maximum is $96,000. The flat-fee nature of the contract with the Third Circuit has left LADA unable to provide raises to any of its State Defender attorneys. LADA contracts Iverson Investigative Agency to do their investigation.

Each attorney has approximately 50 open felony files at any given moment, collectively handling about 5,000 cases each year. LADA's annual caseload per attorney is thus 96.07 percent above the national standard (or 294 felony cases each year). The heavy caseload forces the State Defender Office into a horizontal system of representation, whereby LADA attorneys substitute for each other in court on various matters (anywhere from preliminary examinations to sentencings). When we asked about the practice, Mr. Johnson agreed that it was in direct violation of national standards, but felt the circumstances of the arrangement between LADA and the Third Circuit left no alternative.

[a] At the time of our visit, LADA had recently submitted a proposal to the court for a new contract for representation of felony defendants. Nothing came of that. The court similarly requested LADA submit a proposal the year before, in Feb. 2006, but did not act.

[b] LADA originally employed 19 attorneys during the first year of the contract.

* the fee for preparation and investigation of a case carrying a potential maximum sentence of up to 20 years is $170;
* for preparation and investigation of a Life Maximum sentence is $210; and
* for preparation and investigation of a Murder One case is $270.

Attorneys receive payment for one jail visit to custody clients (a flat $50) facing a potential sentence less than life, and two jail visits for clients charged with capital offenses. The prosecutor said it has been calculated that assigned counsel make an effective hourly rate of $10 when the fees they receive are divided by the hours spent on cases.[g] Fees for investigators and expert witnesses for indigent defense cases are very low, and even then require a judge's approval.[h] For example, the fee schedule for a psychiatric expert in a case where the potential sentence is life in prison is a flat $500 for the interview and written evaluation, and $300 for attendance in court. Attorneys report that the low fees make it extremely difficult to establish a pool of expert witnesses who will work on their cases.

Regarding the jail visits portion of the fee schedule, one judge stated flatly that it was the cause of "cursory" visits to clients, and sometimes for the fact that there were no visits. That indigent clients are not receiving the appropriate assistance of investigators and experts for the preparation and presentation of their cases is indisputable fact. The amount of fees that are paid for experts and investigators makes it nearly impossible for a lawyer to retain them. The court schedule for expert witnesses was a flat $250 total in most instances, and that only $25 per hour, with a cap set by some judges of only a handful of hours, made hiring such crucial people nearly impossible. The lawyers believe that it is futile to ask the court for experts and investigators because they perceive that such requests will be routinely denied. Thus, they don't bother to make such requests. The low fees for investigators and experts, the requirement that requests have to be made to the judges, the difficulties that some attorneys have getting their requests approved, and the pressure to dispose of cases quickly have combined to create a culture where it is taken for granted that such requests are the exception rather than the rule.i Appointed attorneys reported that some lawyers have stopped accepting appointments in murder cases because there is not enough money to "do the job right".

Indeed, several judges and lawyers said that the miserable pay had cost the court-appointed attorney ranks the services of many talented lawyers. They could simply not afford to continue accepting appointed cases at the rates of pay provided by the fee schedule. As one circuit court judge candidly put it: "the plead-'em-out mentality is all pervasive here." While other judges were not as blunt, it became clear that this judge's opinion was shared by at least a few others. Meanwhile, Wayne County lawyers pointed out that they were compelled to hurry cases toward disposition because of the "90 day rule" promulgated by the Michigan Supreme Court. This rule compels the trial courts to dispose of criminal cases with 90 days. Put another way, the absence of resources and the pressure to resolve cases quickly, has created a culture in the defense community of despair and resignation. That culture is materially affecting the quality of the representation that is being provided to indigent clients in Wayne County.

*Attorney Qualification & Supervision*

The Third Circuit system for matching an appointed attorney's ability, training and experience to the complexity of the case is very limited and has no enforcement mechanism. Attorneys who are interested in receiving appointments to represent indigent defendants in felony cases must join the Wayne County Criminal Defense Bar Association (WCCDBA).[j] Attorneys usually submit their resumes to the judges (after applying to the Assigned Counsel Services Office to be placed on the appointments list), and may also ask to meet with the judges regarding their interest in receiving appointments.

Judges report they try to assign attorneys to cases based on the attorneys' experience and competence – but there are no rules or guidelines requiring a minimum level of experience for handling certain types of cases. In practice, judges say they try to give newer attorneys Violations of Probation and less serious cases – but in many instances "less serious" translates to any type of non-capital case. Judges say they generally require that an attorney have at least three years of experience before s/he is assigned to a capital case.[k]

Supervision and review of assigned counsel in Wayne County's Third Circuit Court are virtually non-existent, so Wayne County's indigent defense system does not comply with this *Principle*. This failure, along with constitutionally inadequate resources and excessive workloads, and the rule requiring cases be adjudicated in 91 days, mean that in many cases indigent defendants are not receiving competent representation.

Judges and appointed attorneys say attorneys handling assigned cases are, for the most part, very competent and do a thorough job. The chief judge said sometimes the newer lawyers are more zealous than those who have been practicing for a while. She also said that, while jail logs show attorneys representing adult defendants are interviewing their clients, attorneys don't request funds for investigators and expert witnesses as often as they probably should. Another judge, when asked about attorney competence, described good lawyers as those who are efficient and have good "client control", meaning (I assume) that the attorneys can persuade their clients to accept guilty pleas.

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[a] Administrative Order 2006-08 "Plan for Assignment of Counsel in the Third Judicial Circuit", issued by the chief judge on September 22, 2006.

[b] Attorneys with more than 10 years of experience are required to attend a minimum of four of the 10 sessions offered each year; less experienced attorneys are required to attend a minimum of six sessions annually.

[c] There is no investigation before appointment of counsel as to a defendant's ability to pay – reportedly because of time constraints. Rather, a defendant's claim that s/he cannot afford counsel is accepted.

[d] The court administrator reported that his office tabulates the dollar amount of attorneys' fees collected, but does not calculate the collection rate (i.e. the amount received versus the amount assessed).

[e] This might happen when a judge learns that a defendant is unemployed – but there is no discussion of whether the defendant has an ability to pay – and also represents a system where those who cannot afford to pay are required to "work out" the fees.

[f] There was also no judicial colloquy or defense objection/request concerning the imposition of other court costs and fees.

[g] The court administrator said the Michigan Supreme Court continues to monitor fees paid to individual assigned counsel – in particular when attorneys gross more per year than the justices make in salary. Obviously, the justices are not considering (or choosing to ignore) the fact that they don't pay for office space, staff, access to online legal research, law library, malpractice insurance, medical and retirement benefits, etc.

[h] A court order has to accompany a voucher sent to court administration requesting funds for investigators, expert witnesses or extraordinary fees. If the voucher amount is over $500, it is sent to the chief court administrator.

[i] Criminal Division Presiding Judge Ed Ewell, who is a former federal prosecutor, said defense preparation was a lot better in federal court, where there is more money, and assigned attorneys don't have to get an order from a judge before they can hire investigators and experts.

j Dues for the WCCDBA cover the required Criminal Advocacy Program training, and also pay for computers and furniture for WCCDBA offices housed in the Hall of Justice.

[k] The Third Circuit Court administrator said he believes a random case assignment system (where judges would not be involved) would be better than the current system. However, his deputy disagreed with respect to capital cases, saying the judges are in a position to know which attorneys have the experience and competence to handle capital cases.

The Ottawa County court culture leads to a lack of meaningful advocacy. In noting that there is a great rapport between defense attorneys, judges, and prosecutors, one defense attorney stated: "Everyone knows how it works . . . what can and can't be done . . . no wheel spinning . . . no time wasting . . . we know what a judge will do. It is an expeditious way of handling cases." He said he tells his clients, "the more time I put into a case the more money I make, but then you [client] will have to pay the court back . . . and the result will be worse than the offer you have right now." Such comments lead us to conclude that in Ottawa County you need to play by the judges' rules in order to stay in the game. For example, in asking a judge about defense attorneys' use of investigators, we were told that in all his years as a former prosecuting attorney and as a judge he had only seen two cases where a private investigator was requested. The judge volunteered that at one time a lawyer from Grand Rapids handled some cases, but she frequently asked for an investigator in routine cases, and the judge suggested that the attorney knew an investigator and was simply trying to generate revenue for him. Perhaps the most shocking revelation, acknowledged by both defense attorneys and the Prosecuting Attorney, was that when additional investigation is needed, the common practice is for the defense attorneys *to call the prosecuting attorney and ask him to have law enforcement do it or in some cases they will call the sheriff directly.*

The judge said the real reason for lack of investigations is the outstanding credibility of everyone involved in the Ottawa County criminal justice system. He stated: "Trust and respect is what our system is about. If you don't like that or buy into it, you leave." What the judge misses in his views is that our American system of justice presumes law enforcement officials are human and thus fallible. Despite the overall dedication and professionalism of the hundreds of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime in every single instance. If errorless law enforcement existed, there would be no need for a jury of one's peers to weigh the evidence in a case before an impartial judge. But because American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers' tactics, the police investigation, the lawfulness of any searches and seizures, the credibility of the evidence, and the prosecutor's theory of the case to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process that the United States is in the forefront of cutting edge public safety technologies – like DNA evidence – that help to exonerate the innocent while convicting the guilty.

*Marquette & Chippewa Counties:*

The assigned counsel program in Marquette County is not independent. There are three lists: two for felony cases of differing severity and one for misdemeanors. Standards for, admission to, and removal from these lists are completely within the control of the circuit court criminal session (for the felony lists) and district court (for the misdemeanor list) judges. Judicial responsibility and control is set forth explicitly in the circuit court's Local Administrative Order 2004-06 and in the January 1, 2004 circuit court notice regarding Appointment of Counsel in Circuit Court Criminal Cases.

Though Circuit Court Judge Weber has on several occasions persuaded the county board to increase hourly compensation to indigent defense attorneys in two stages (from

$40 to $45 and then $50, where it stands today), the judges can and, especially in the district court, do reduce bills submitted by counsel. An attorney's admission to or removal from the panel is entirely within the judge's discretion.

The Public Defender Office in Chippewa suffers a lack of independence of a different variety. The chief public defender is a county employee, directly hired and supervised by the Chippewa County Board of Commissioners. From all members of the justice community in Chippewa County it was noted that most commissioners consider the criminal justice system a low priority – and the public defender office the lowest of the low. It is well understood that some commissioners wish to dissolve the office entirely. This has produced what NLADA calls a "bunker mentality" on the part of the chief public defender. Though the chief public defender feels her rapport with the county board is somewhat better than others in the criminal justice community, this has been achieved based on years of "keeping my head down and not picking any fights." She does not ask for any budget increases or fees for investigators and would not think of declaring caseload overload. In return she is rewarded by being able to keep her job.

Though there are no workload standards in place, NLADA site tem members saw no indication in Marquette County that excessive assignments caused lawyers to cut back on their case preparation. One defense lawyer even said that, on occasion, when his private practice is busy or he has recently accepted several new court appointed cases, he will ask the district court assignment coordinator to delay new assignments for a period of time; he said she has always complied with such requests.

Chippewa County likewise has no workload standards. However, unlike Marquette County, attorney overload is an issue at the public defender office. Data is collected office-wide and not delineated by attorney. Prior to July 2006, cases were distributed equally between the two attorneys. Since that time, the chief public defender takes 80 percent of all misdemeanors and 33 percent of all felonies, and the assistant public defender handles the difference. From caseload data collected since 2002, NLADA finds an average caseload of 335.6 misdemeanors and 94.5 felonies per attorney per year. Weighting the mixed caseload to a misdemeanor caseload,[112] we find the office handles 591 cases per attorney per year, which is 191 cases or 48 percent above the national standard for misdemeanor representation alone.

The lone conflict attorney takes an average of 91.8 "transfers" each year. Assuming that all of these cases were assigned to the same attorney and that all were charged as felonies, this caseload is still reasonable for one attorney to handle. But the office has no ability to monitor the attorney's private workload to safeguard against overload and has no idea if the assignments can be handled adequately.

Because of pervasive lack of private counsel willing and available to take assignments in Chippewa County, there is no adequate safety valve for excessive cases or conflicts of interest. It is not a surprise therefore to find that workload becomes a major issue for the office with each case involving co-defendants. For example, Chippewa County is home to five state prisons. Crimes involving inmates in these facilities are automatically charged as felonies and usually involve multiple co-defendants. While NLADA was on-site in Sault Sainte Marie, the county was in the midst of one case involving 30 co-defendants. And, even though the Michigan Department of Corrections reimburses attorneys fees at a rate of $70 per hour,[113] the public defender has been unable to assign out all of the co-defendants cases to conflict counsel. Instead, the public defender has resolved to handle these

## Overview of Marquette County

Marquette is the most expansive of Michigan's 83 counties (1,821 sq. miles of land) but ranks 28th in population with 64,874 people.[a] The county has an 88.5 percent high school graduation rate and a median household income of $35,548. Its poverty rate of 10.9 percent ranks in the middle among Michigan's counties. The City of Marquette serves as the county seat. There are two other cities in the county: Ishpeming and Negaunee. Marquette, a city of about 20,000, is a major port on Lake Superior, dealing primarily with iron ore.

Marquette County utilizes an assigned counsel program. There is neither a public defender office nor, apart from court personnel, an assigned counsel administrator. The assigned counsel program is not independent. There are three attorney lists: two for felony cases of differing severity and one for misdemeanors. Standards for, admission to, and removal from these lists are completely within the control of the circuit court criminal session (for the felony lists) and district court (for the misdemeanor list) judges.

The caseload in Marquette County may not be "sufficiently high" to require both "a defender office and the active participation of the private bar." There are only about 380 felony arrests per year in the county and close to half of those charges are reduced to misdemeanors and resolved in the district court. While the lists of available counsel seem small (17 for misdemeanors, 12 for level 2 felonies, 10 for level 1 felonies), everyone seemed satisfied that the numbers are adequate, and no attorney is overloaded with cases. For example, in the busier district court, no lawyer received more than 59 assignments in 2006. Indeed, there was no indication in this very quiet county system that excessive assignments cause lawyers to cut back on their case preparation. One lawyer said that on occasion, when his private practice is busy or he has recently accepted several new court appointed cases, he will ask the district court assignment coordinator to delay new assignments for a period of time; the coordinator always complied with such requests.

Marquette and perhaps other rural Michigan counties as well do not need a county public defender office so much as they need an independent body to administer the defender system. There is currently no independent oversight board or agency to provide certification, training, supervision, trial and appellate litigation support, evaluation, and where necessary discipline – all with the interest of the clients first and foremost.

[a] To complete the picture, Marquette County ranks 63rd in density, with 35.5 persons per square mile. See http://quickfacts.census.gov/qfd/states/26/26103.html

cases one-at-a-time through disposition before taking the next case, as if that would resolve any actual conflicts of interest.

Chippewa County has no eligibility criteria for attorneys willing to take indigent defense cases. With only three attorneys to choose from, it is difficult for the court to exclude anyone. In Marquette County there is some baseline requirement for attorneys seeking appointment in felony cases. That requirement is imperfect, however, because on its face it honors bench trial experience equally with jury trials and prior prosecution practice equally with defense. One lawyer complained that a lawyer leaving the prosecutor's office after several completed trials would gain admission to the felony lists, while a more experienced defense attorney, whose first loyalty to his client may have limited the number of cases tried "to verdict" as the standard requires, might not. There is no standard for misdemeanor representation. One district court judge candidly stated that, if an applicant is a member of the bar and does not have a negative reputation in the local legal community, his application will be approved.

Each lawyer is an independent actor, subject to oversight by the judge and the judge only in both Chippewa and Marquette counties. Although a public defender office is the ideal model to provide independent supervision and evaluation of lawyers, workload and lack of funding prevents the office in Chippewa from doing so.

### *B. Failure to Adhere to ABA Principles 4 & 7: The Lack of Continuous Representation & Client Confidentiality*

If there is a set of standards that is more frequently met throughout the state of Michigan, it is the standards related to building an attorney-client relationship. Most counties we visited try to maintain the same attorney from assignment to disposition and provide

## Overview of Chippewa County

Chippewa County is the eastern-most county in Michigan's Upper Peninsula. It is also the population center of the eastern half. The county has an estimated population of 38,780, ranking it 42nd among Michigan's counties.[a] But Chippewa is the state's second largest county (1,561 sq. miles of land), yielding only 24.7 persons per sq. mile. According to the 2000 US Census, the county is 75.9 percent white, with a large American-Indian population (13.3 percent) from which the county takes its name.[b] The county has an 82.4 percent high school graduation rate, an average rate among the state's 83 counties, and a median household income of $34,464. Its poverty rate (12.8 percent) ranks Chippewa County among Michigan's 20 poorest counties.

Rich in history, the county's main city and seat, Sault Ste. Marie, is Michigan's oldest city. Indeed it is the third oldest city in the United States west of the Appalachians. Despite its strategic location on the St. Mary's River, between Lakes Superior and Huron, the county was somewhat isolated until the 1850's when work began on the Soo Locks.[c] Sault Ste. Marie is home to Lake Superior State University, and, as a border town with the Sault Ste. Marie International Bridge to Ontario, Canada, the city sees a good deal of tourism. Importantly, from the U.S. Border Control to the Police of the Sault Ste. Marie Tribe of Chippewa Indians, there are eleven police agencies with jurisdiction spread throughout Chippewa County.

The county formerly used assigned counsel to handle all indigent defense cases through direct appointments by the chief judge of the 91st District Court. As a cost-saving measure, in 1996, the county commission created the Office of the Public Defender as a county agency. The chief public defender is a county employee, directly hired and supervised by the Chippewa County Board of Commissioners. Since the agency's creation, the participation of the private bar in the public defense system has decreased dramatically.

The public defender office, with offices in the Courthouse Annex building in downtown Sault Sainte Marie, has a staff of only two attorneys and an administrative assistant. All clients who request counsel at arraignment in the 91st District Court are referred to the public defender for a determination of indigency and assignment of counsel. For any conflicts the public defender may assign cases to private counsel. Unfortunately, there is only one private attorney accepting "transfers" (conflict cases) from the public defender office. Thus, workload becomes a major issue for the office with each case involving co-defendants.

For example, Chippewa County is home to five state prisons.[d] Crimes involving inmates in these facilities are automatically charged as felonies and usually involve multiple co-defendants. While NLADA was on-site in Sault Sainte Marie, the county was in the midst of one case involving 30 co-defendants. Even though the Michigan Department of Corrections reimburses attorneys fees at a rate of $70 per hour,[e] the public defender is unable to assign out all co-defendants to conflict counsel. The only recourse available to the public defender is to handle cases one-at-a-time through disposition before taking the next case, in an attempt to lessen the conflict of interest.

Meanwhile, there are no caseload controls in place. Data is collected office-wide and not delineated by attorney. Prior to July 2006, however, cases were distributed equally between the two attorneys. Since that time, the chief public defender takes 80 percent of all misdemeanors and 33 percent of all felonies, and the assistant public defender handles the difference. From caseload data collected since 2002, we find an average caseload of 335.6 misdemeanors and 94.5 felonies per attorney per year. Weighting the mixed caseload to a misdemeanor caseload,[f] we find the office handles 591 cases per attorney per year, which is 191 cases or 48 percent above the national standard for misdemeanors.

Further complicating attorney workload, the 50th Circuit and 91st District Courts do not coordinate their docketing. Therefore, though the courts are no more than 30 yards apart (and the public defender office is just across the street), it is sometimes difficult for a defender to juggle both schedules. To cope, the two staff attorneys will occasionally sit in for one another on a sentencing or to waive a preliminary exam, for example.

From all members of the justice community in Chippewa County it was noted that the county commissioners consider the criminal justice system a low priority.[g] As all other stakeholders – judges, sheriff, prosecutor – are elected, while the public defender is a direct hire of the county board, the office of the public defender is subject to political interference of a particularly severe nature. It is well understood that some county commissioners wish to dissolve the office. The chief public defender knows not to ask for any budget increases or fees for investigators and would not think of declaring caseload overload. In return she is rewarded by being able to keep her job and the agency survives.

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[a] U.S. Census Bureau, at: http://quickfacts.census.gov/qfd/states/26/26033.html.

[b] The Sault Tribe of Chippewa Indians maintains an office in the city of Sault Ste. Marie. See: http://www.saulttribe.com/.

[c] Lake Superior is 21 feet higher in elevation than Lake Huron and the other Great Lakes. Locks were needed as the rapids of the St. Mary's River prevented ships from passing from one lake to the other. Major shipping on the Great Lakes was made possible with the completion of the first lock in 1855. See: http://www.infomi.com/county/chippewa/.

[d] Camp Koehler, Chippewa Correctional Facility, Hiawatha Correctional Facility, Kinross Correctional Facility, and Straits Correctional Facility. See: http://www.michigan.gov/corrections/1,1607,7-119-1381_1387_1701---,00.html.

[e] Reimbursements are sent directly to the county and not to the Public Defender Office.

[f] As national caseload standards call for a maximum of 400 misdemeanors or 150 felonies per attorney per year, we can multiply a felony case by 2.5 to weight it equally to a misdemeanor.

[g] There has been a long-standing battle between the county commission and the criminal justice system as the commission expects the courts to act as a money-making venture; a point the judges vehemently contest. The prosecutor recently sued the commissioners over their attempts at micro-managing his office, and in retaliation the board declined to give him a raise while all other county employees received one.

the defendants sufficient space to meet with attorneys. However, that statement must be understood with the knowledge that undue interference, high workloads, and the fast pace of dispositions combine to leave little time for informed discussions to take place.

Wayne County:

For example, the Third Circuit in Wayne County has a mixed approach when it comes to continuous representation and, as a result, only partially complies with ABA *Principle 7*. In felony cases, the same attorney ostensibly represents the defendant from appointment after arraignment on the warrant through sentencing. However, there are two significant exceptions - and it is rare for judges to conduct a colloquy with defendants to obtain their waiver of original counsel and agreement to be represented by stand-in or replacement counsel. The first exception is the widespread practice of both appointed and retained attorneys having a "stand-in" attorney represent the defendant if the appointed or retained attorney is unavailable. This is usually done at arraignment on the information, sometimes for guilty pleas, and sometimes for setting of a preliminary hearing date or trial date (called "blind draw" for a jury trial, because the case is randomly assigned to a trial judge). Some judges will not permit stand-ins for setting of trial dates because the stand-ins are frequently uninformed as to the original attorney's schedule, status of the case, etc.

One judge said he sees some weakness with how stand-in attorneys treat defendants, particularly those in custody, although this judge apparently permits the practice of stand-ins. The chief judge and the prosecuting attorney said the archaic fee schedule for defense attorneys is a major cause of the use of stand-ins (because attorneys accept a large number of appointments in order to compensate for the low fees on each case), and they believe the problem would be reduced if fees were raised.

One prosecuting attorney said stand-ins can actually cause delays in the disposition of cases. For example, she said stand-in attorneys at the pre-exam (see Sidebar) will not have the client waive a preliminary hearing, but when the case gets to the actual preliminary hearing day the defendant waives because the original attorney is present. According to the prosecuting attorney, more than 80 percent of the preliminary hearings are ultimately waived.

The other exception to vertical representation is when judges *sua sponte* appoint attorneys in the courtroom as stand-ins or remove the appointed attorney from the case and appoint an attorney in the courtroom. This can happen both for scheduled hearings and in cases where a defendant appears after the issuance of a *capias*. To the members of NLADA's site team, this appears to be an obvious docket moving measure. Some appointed attorneys say that attorneys who do a lot of criminal defense work can competently represent clients as stand-ins.

Because of the procedures described above, initial interviews with defendants in Wayne County (particularly those in custody) are frequently conducted in court (or in the "bullpen" – a cell behind the courtroom). Some of the courtrooms have interview rooms the attorneys can use to meet with clients who are not in custody – although frequently several attorneys are using the same room simultaneously, either to meet with their own clients or to make phone calls. During the AOI (arraignment on information) hearings that NLADA site team members observed, most attorneys spoke to their non-custody clients (whom most of them were meeting for the first time) in the hallway outside the courtroom or in the back of the courtroom. These conversations could be overheard by anyone within 10 feet or so. Similarly, most of the in-custody clients were interviewed while they were sitting in the jury box (next to other defendants, bailiffs, and court personnel).

## Wayne County: Early Case Resolution

In response to jail overcrowding and the Michigan Supreme Court's 91 day adjudication rule, the Third Circuit conducts what are called "pre-exams." Pre-exams are held sometime between the district court arraignment (arraignment on the warrant, held within 48 hours of arrest) and the preliminary examination (i.e. preliminary hearing, which must be held within 14 days of the district court arraignment). Pre-exams are designed to dispose of as many cases as early as possible, but mean that defendants and their attorneys (whom they are usually meeting for the first time) are pressured to settle cases without benefit of a thorough interview, investigation, meaningful discovery, etc.

States have adopted standards to balance the desire for speedy dispositions with a client's constitutional right to counsel. Such standards can: prohibit certain classifications of cases from ever going through an early case resolution program; demand that full discovery be turned over to the defense, including a cover letter or simple pleading that will be filed with the trial court wherein the prosecutor states that all discovery pursuant to the rules of court and that all exculpatory information in the possession of the state has been turned over to the defense; and, demand that the attorneys have confidential space and time to advise clients so that they can make a knowing and voluntary decision to resolve the case through an ECR program.

For example, the Oregon Public Defender Services Commission (OPDSC) was legislatively created to provide independent oversight of all indigent defense services in the state. OPDSC has adopted a series of guidelines for public defenders participating in early disposition programs (EDP). These guidelines include, among others:

1. An EDP should insure that the programs operation and rules permit the establishment and maintenance of attorney/client relationships.
2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions.
3. An EDP should provide for adequate physical space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.
4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.
5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.
6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict of interest for the client's original attorney.
7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

One of the more controversial aspects of the Oregon standards is found in Guideline 2, which states: "Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial."

Such an acknowledgement shows just how precariously close any early case resolution program comes to breaching clients' constitutional right to counsel. Indeed, the United States District Court, Eastern District for Michigan has held that early case resolution programs that dispose of cases prior to preliminary examination hearings violate clients' right to counsel. *United States v. Morris*, 470 F. 3d 596 (6th Cir. 2006), aff'd, 377 F. Supp. 2d 630 (E.D. Mich. 2005). NLADA asked judges and prosecuting attorneys in Wayne County whether they thought the *Morris* decision would result in systemic changes in the Third Circuit. Without exception, the judges and the prosecuting attorney were not familiar with the case (some recognized it after we described the facts and the holding) or tried to describe it as an isolated case that was not representative of how the indigent defense system works in the Third Circuit.

<u>*Grand Traverse County:*</u>

It is the practice in both the district court and the circuit court in Grand Traverse County for a single attorney to be appointed to represent an accused and to continuously represent that client until the case is concluded. The district court contract (Sec. 12E) expressly provides that "the signatory attorney to whom a particular case has been assigned shall perform and appear as record counsel to a full disposition of the matter." Although all felony cases originate in the district court for purposes of arraignment and preliminary hearing, an attorney on the circuit court roster is appointed to commence representation while the case is still in district court. That same attorney continues to represent the defendant in circuit court after the case is transferred.

Grand Traverse County's "sobriety court" practice, however, does not fully comply with the principle of continuous representation. No defense attorney assists the defendant at review hearings and, despite arguable defenses, the reviews often conclude with the defendant being sent to jail. In one case an NLADA representative observed, the defendant was accused of missing three drug tests. The judge ordered her to Transition House, to "stabilize things." She asked, "May I respond at all?" And the court responded: "We've discussed this and I've made my decision." The defendant said she had ridden her bike to the appointment and been two minutes late and that she was not drinking. The judge said two years of being sober still could result in failure if she did "not pay attention to details." While we cannot know whether an attorney actively advocating for her would have made a difference, we do know that a pro se defendant in that situation needs counsel. Also, we believe that for the judge to make the decision in advance and not permit mitigation advocacy by the defendant is a violation of due process. The entire proceeding took 12 minutes.

One attorney described the role of the defense attorney in the sobriety court. Three of the attorneys rotate participation. They stand with the client only when there is a probation violation and a threat to be removed from the program. The "sanction hearing" that we saw is not considered to be in that category. The defense attorney participates in a team meeting with the court, in which the lawyer agrees with the sanction that the judge will impose. The attorney we spoke to does not see himself as representing the client, but rather the defense bar, in those meetings. He told us that about half of the defendants who go into sobriety court do so without an attorney representing them when they make the decision. This practice violates the requirement of zealous and independent advocacy of NLADA's *Ten Tenets of Fair and Effective Problem Solving Courts*, which states: "Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions."[114]

Outside of this obstruction of due process, Grand Traverse County appears to do a good job of securing confidentiality for defense attorneys and their clients. Attorneys are able to meet with out-of-custody defendants in their private offices or in several private meeting rooms on the perimeter of the main lobby of the district court or in conference rooms in proximity to the courtroom in the circuit court. There does not appear to be confidential meeting space to meet with incarcerated clients in the courthouses. Incarcerated defendants were seated in the courtroom in the jury box in the circuit court. The district

court, a new facility, has holding cells off the courtrooms, but they were not being used because of issues with the security cameras and the lack of privacy from the public. Thus it would appear to be necessary to meet with in-custody clients in the county jail adjacent to the courthouses. The jail supervisor indicated that attorneys do meet with their clients regularly, although the meeting rooms are used by numerous professionals so there can be a wait for use of the rooms.

*Oakland County:*

For clients who are released on bail in Oakland County, attorney-client conferences take place in the courtroom, in the hallways, or outside the courthouse. Defense attorneys were unanimous in stating that there is very little time to meet with their clients and absolutely nowhere that would be considered confidential according to ABA standards – a corner of the courtroom with a deputy standing close (even pushing the attorney back if she got too close to her client). Client visits (as paid events) are limited to two.

For clients who are incarcerated, the lack of confidential space for attorney-client discussions is a serious and significant problem. Attorneys are not permitted to meet with clients in the courthouse lock-up and conversations with incarcerated clients take place in the courtroom. The clients are seated in the jury box with other defendants and the conversations can be overheard by the other prisoners, sheriffs, and to a lesser extent by anyone else present in the courtroom. It appeared that to have confidential meetings with incarcerated clients, it would be necessary to meet with them in the county jail. One judge indicated that some of the lawyers meet with their clients at the jail, but that there are others who probably do not do so; another said that most do not.

In felony cases, the circuit court in Oakland County appoints the attorney after being notified by the district court of the request for counsel. However, one district court judge indicated that the delay in the assignment of an attorney by the circuit court frequently results in late notice to the attorney and inadequate time to prepare for the preliminary examination in district court. There is excessive use of "stand-ins" and "substitutes."

*Shiawassee County:*

Each of the lawyers interviewed in Shiawassee County has an office adequate to meet with his or her out-of-custody clients. And, since the circuit court judge makes all appointments on felony cases from the time of arraignment in the district court, the same lawyer represents the client throughout the pendency of the proceedings in all cases. The problem in Shiawassee County is for those clients who remain in custody during the pendency of their cases. An NLADA representative was told by both the sheriff and the under-sheriff that there are only about six appointed lawyers who regularly meet with their clients in the county jail. Both pointed to this as a sign of the indifference of the majority of court-appointed lawyers toward their clients. The under-sheriff (who had been a court administrator and court-appointed lawyer himself for a number of years) noted that many lawyers first meet with their in-custody felony clients at the preliminary hearing in court. He expressed the opinion that this is a pervasive problem. He also assigned part of the reason for this to the fact that the county jail is anything but a "user-friendly" environment for lawyers to meet with their clients.

However, one lawyer (who told us that he always visits his in-custody clients promptly after appointment) said that the lack of jail visits had been a big problem in felony cases

and had been addressed by the chief judge of the district court. The chief judge issued an order to all court-appointed counsel compelling them to visit their clients *before* the day of the preliminary hearing. The lawyer thought this order was made because the lack of client visits before the day of the preliminary hearing slowed the process to a crawl while the lawyers conferred with their clients at the courthouse before proceeding with the hearings.

*Alpena & Ottawa Counties:*

The right to counsel systems in two counties (Alpena and Ottawa) merit recognition for securing space for client-attorney confidential talks and ensuring continuous representation. For example, the appointed defense lawyers and prosecuting attorney's office in Ottawa County both practice strict vertical representation. Prosecuting Attorney Ron Franz stated that, while vertical representation is not as efficient, it means a lot to the victims to have one prosecutor and to defendants to have one attorney. All the courts in Ottawa County have some private space that defense counsel can use to meet clients. The newer court in Hudsonville has several private meeting rooms that the attorneys can use.

Likewise, all of the attorneys interviewed in Alpena County have professional office space. The law firm of Lamble, Pfeifer & Bayot (LPB) owns its office building; the offices include a waiting area in which a secretary/receptionist is located. There is a reasonably-sized conference room/law library directly to the left of the waiting area. Mr. Lamble indicated that they maintain vertical representation whenever possible, especially for serious felony cases, but they do cover for one another when necessary due to trial or court assignments.

*Marquette & Chippewa:*

There are private rooms in the courthouse for attorney-client consultation, and respect for the role of counsel permeated all conversations during our visit to Marquette County. Thus the physical aspects for promotion of attorney-client confidentiality are honored. It is not clear, however, that it is the practice of lawyers to rush to the jail and see their detained clients as early as possible. Indeed, in some cases the notice of assignment is mailed to the defense attorney's office, ensuring additional delay beyond the arraignment date. Thus, compliance with the much more important, albeit implicit, promptness aspect of this principle is doubtful. Failure to provide counsel at arraignment almost guarantees unacceptable delay in counsel conferring with her client "as soon as practicable," as the commentary to this principle urges.

In Chippewa County, the chief judge of the 50th Circuit Court noted that, despite having two to three weeks between preliminary exam in district court (at which time the case is "bound over" to circuit court) and the arraignment in circuit court, defense attorneys routinely meet with their clients for the first time inside the courthouse on the day of their arraignment. The assistant public defender was able to show that, in fact, there is a lag of four to six weeks in the average case between bind-over and arraignment in circuit court. The implication is that public defenders' workload is too great to allow them to meet with their clients. They are forced then to make do with the time and space provided within the courthouse.

The public defender office in Chippewa County has adequate space for confidential meetings with clients. There is a dedicated room for client interviews. In circuit court, a

building on the national register of historic places,[115] there are two rooms available as "confidential" spaces within which to meet with the client. In-custody clients are brought as a group into an auxiliary meeting room attached to the hallway outside the courtroom. Attached to the meeting room is another smaller room (about the size of a walk-in closet) where the defense attorney can call in individuals one-by-one – she must talk softly however as it is possible to hear through the door and a sheriff's deputy will usually stand guard outside the door. For out-of-custody clients, attorneys make use of the jury room adjacent to the courtroom or the hallway outside.

The district court in Chippewa provides no confidential space within which an attorney may meet with clients. The morning of arraignment in district court, the corridor outside the courtroom is bustling with attorneys meeting clients for the first time. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor. For in-custody clients, the attorney is allowed to bring her clients out to the corridor, but only so far as the other side of the courtroom door, behind which the sheriff's deputy stands guard over the rest of the detained accused, very much within earshot of the conversation on the other side of the door.

Client interview rooms at the county jail in Chippewa County are laughable. The attorney enters the room from the corridor outside the 91st District Courtroom, the client from within the jail, and the two can converse by a telephone handset on either side of a Plexiglas barrier. To the attorney's right, a second Plexiglas barrier separates the client interview room from the general inmate visiting room, which has three or four chairs and phones on both sides of the divider. To the attorney's left, a sheriff's deputy sits in a security control room behind black Plexiglas for observation of both the client interview room and the general visiting room. At the base of the black glass dividing the attorney from the sheriff's deputy, one can see an opening through which the attorney can pass a document so that the deputy would pass the document along to the client on the other side through an identical opening. There is no way to close the opening, and eavesdropping by sheriff's deputies was reported to be a problem.

Confidentiality in the jail's client meeting room is further compromised when one considers that the door securing the room from the corridor outside is far from soundproof – when speaking at a normal volume we were able to maintain a conversation through the door with a public defender on the other side. This corridor is the same used by all attorneys as the primary space for meeting clients prior to appearances in district court, as the chief judge's route of access to his chambers, and as the means of access to the general visiting room through which family members of other inmates will necessarily pass.

Finally, as there is no funding available for accepting collect calls from the jail to the public defender office, the agency has made it a policy not to accept such calls. In-custody clients who wish to communicate with counsel between in-person meetings will write notes addressed to the public defender's office.[116] The note cannot be sealed, per jail security regulations, and is therefore tri-folded and handed to the deputy on duty who then places the note in a drop box at the jail designated for inmate-to-public defender correspondence (the public defender office's administrative assistant checks the box every weekday). Should the public defender have a need to send information back to the defendant, she will send it in an envelope clearly marked as confidential attorney-client correspondence. Some inmates began using such envelopes as means for hiding contraband, how-

ever, so they became subject to search by the sheriff's department. It was noted that under both circumstances, client-to-attorney mail and attorney-to-client mail, sensitive information relating to a case had from time to time been read by a sheriff's deputy.

If there is a benefit to clients of having a small pool of available attorneys willing to take right to counsel cases, it is that the same attorney oftentimes will handle the case continuously from assignment through disposition and sentencing. Certainly this is the case in Marquette County. Felony assignments are made by the district court judge from the appropriate felony list, subject to the approval of the circuit court judge if and when the case gets to the higher court.

Though the Chippewa County public defenders maintain vertical representation in most instances, the lack of coordination between the 50th Circuit and 91st District Courts forces the office to occasionally substitute attorneys. While the courts are no more than 30 yards apart (and the defender office is just across the street), it is sometimes difficult for a defender to juggle both schedules. To cope, the two staff attorneys will occasionally sit in for one another on a sentencing or to waive a preliminary exam, for example.

### *C. The Failure to Adhere to ABA Principle 9: The Lack of Adequate Training for the Defense Function*

It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually every county-based indigent defense system outside of the largest urban centers. And, even those are inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against, and present scientific evidence and testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more "life-in-prison" sentences, and complex sentencing practices that require significant legal and factual research time to prepare and present sentencing recommendations.

To give the reader a sense of how other jurisdictions respond to this ever-evolving complexity, all newly hired lawyers at the Public Defender Services of the District of Columbia (PDS) experience a full 15 months of dedicated training resources. For the first eight-weeks of employment, recent hires undergo all day training, agency and justice system orientation, and an advocacy skills building program, during which time the new attorneys have no client or caseload responsibilities. Current and former PDS attorneys and staff actively participate in this training process, which communicates PDS' client centered culture and expectation of excellence. The new attorney class also receives extensive written materials to support their advocacy and practice needs, as well as their ethical and professional responsibilities.

The closest thing to adequate training in Michigan comes from the State Appellate Defender Office (SADO), Criminal Defense Resource Center (CDRC), through a combination of grants, the SADO budget,[117] and user fees.[118] The CDRC maintains a deep-content web site and help desk and publishes a monthly newsletter and four defense manuals.[119] The CDRC also conducts 18 technology training events each year, at approximately a dozen locations statewide, training trial and appellate attorneys on how to present and challenge

demonstrative evidence, prepare electronic pleadings, and conduct Web-based legal research. And, the CDRC coordinates two three-day-long statewide training conferences and a week-long trial skills college (partnering with the Criminal Defense Attorneys of Michigan), a 10-seminar program on hot legal topics (partnering with the Wayne County Circuit Court), and scholarships for Michigan attorneys to attend national skills training events (the Trial Practice Institute of the National Criminal Defense College and the Appellate Training Conference of the National Legal Aid & Defender Association). A limited amount of other criminal defense training is provided by larger local bar associations, typically through "brown bag lunch" seminars and by the Institute for Continuing Legal Education (ICLE).[120]

Most of the funding for criminal defense training comes from grants awarded by the Michigan Commission on Law Enforcement Standards and from fees paid by trainees. A small percentage of SADO's state general fund budget is devoted to training, and it is inadequate to reach the large number of potential trainees. In contrast to the very limited state-funded training for the criminal defense bar, Michigan's prosecutors are served by the Prosecuting Attorneys Coordinating Council (PACC).[121] There are a total of approximately 650 state court prosecutors statewide. The PAAC was funded at $1,860,900 during the 2006 budget year, with a staff of 15 full time employees.[122] The MCOLES award for prosecutor training that year was approximately $330,000.

So, while the district court contract in Grand Traverse County requires each attorney participant to attend at least one two-day ICLE seminar or its equivalent during each calendar year, there is no provision in the contract for the court to make such training available or to pay for the training. Consequently, any training is at the individual attorney's own expense. The free training provided by SADO can be expensive to get to and it is time consuming for the attorneys to attend. We heard similar complaints about the SADO training from attorneys in Ottawa County. Bay County pays for defender attorneys to attend the two conferences conducted each year by the Criminal Defense Attorneys of Michigan (CDAM). However, the county will not pay for attendance at SADO training or any national training conferences. One attorney in Shiawassee said that, while the CDAM and the State Appellate Public Defender offer a wide variety of excellent education and training, "I can't really afford the courses offered, since they can cost $200 to $300, and are offered out of our area."

The only area of the state[123] that partially complies with the training principle is Wayne County. Wayne County has a Criminal Advocacy Program (CAP) run by the Wayne County Criminal Defense Bar Association ("WCCDBA"). CAP was established in 1983 "for the purpose of developing, expanding, and maintaining high professional standards of representation in felony cases."[124] CAP has a board of directors, composed of judges, private attorneys, the deputy director of the State Appellate Defender Office, the head of LADA, and the county prosecutor.

In order to be placed on the court administration list of attorneys eligible to receive appointments in the Wayne County Circuit Court, attorneys with fewer than 10 years of experience must attend at least six of the 10 CAP sessions offered each year, and those with more than 10 years of experience must attend at least four of the annual sessions. No more than two of the required sessions may be made up by viewing videotapes according to a specified "makeup" procedure.[125] For the Fall 2006 series, the sessions included: A View from the Bench; Civil Consequences of Pleas/Trials; Sentencing Guidelines; How to Get

Your Client Medical and Psychological Services While In the Wayne County Jail; Power Up Your Trial Presentation (Use of Technology in the Courtroom); Drug Court and Treatment Facilities; Preliminary Exams; Demonstrative Evidence; Criminal Law Update; and US Supreme Court Update.

### *D. Failure to Adhere to Principle 10: The Lack of Supervision over Attorney Performance*

An assessment of attorney supervision against national standards serves as an appropriate conclusion to this chapter since, for the most part, what little supervision is occurring is being conducted by judges in violation (again) of ABA *Principle 1*. For example, there are no national or local performance standards adopted by Grand Traverse County under which assigned counsel are evaluated. Supervision of assigned counsel is limited to the court's exercise of its supervisory authority over these attorneys as members of the bar or to monitoring compliance with the provisions of the district court contract or in the handling of individual cases. Systematic review for quality and efficiency does not take place. Review of attorney performance is done on an ad hoc basis by the judges to ensure that the attorneys are meeting the judges' expectations.

One circuit court judge indicated that one attorney was removed from the roster in recent years because "he wasn't getting the job done" and was filing too many "frivolous motions" and another attorney was removed for an ethical breach. No attorney has been removed from the district court contract in at least four years. Judges indicated that there is currently one contract attorney regarding whom they have some concerns about his performance. The district court administrator said that, while some attorneys "give it their all," others "give the bare minimum." She said they could get rid of the attorneys who do the bare minimum, but they do not. She said she has never received a client complaint about the defense attorneys. Judges indicated that they like to control the assigned counsel system to ensure that only competent lawyers are appointed. Attorneys complained that the system in the circuit court is "too efficient" and that the judges put them under a lot of pressure to dispose of cases quickly under a very short timetable. Efficiency is an issue in the outlying counties also (Antrim; Leelanau). Because of the infrequency of court sessions (e.g., one per week), cases are scheduled quickly with little time to prepare.

The judges believe that they exercise oversight in that they see the lawyers every day in their courts and "know if they are doing a good job." They said if they have a problem with a lawyer, they could call him in and talk with him and if things didn't change he might be removed from the list; if a complaint is made about a lawyer they follow-up on it. The judges stated that once a year every attorney on the list is evaluated. An evaluation form for each attorney is sent to every judge before whom the attorney has appeared. Each judge prepares an independent evaluation and then, as a group, the judges meet to discuss each attorney evaluated. At this evaluation attorneys can be removed from the list, have their level changed – up or down, and new attorneys may be added to the list.

Defense attorneys in Oakland County are not "supervised" in any formal sense. Some of the circuit court judges who make appointments informally assess the ability and experience of the lawyers they appoint, but there is no formal mechanism for such evaluation. A similar informal judicial assessment is done in Shiawassee County.

The Third Circuit Administrative Order in Wayne County governing the appointment and removal of assigned counsel establishes an Attorney Review Committee, including the presiding judge of the Criminal Division, the executive court administrator and two Criminal Division judges.[126] This committee reviews referrals made by judges regarding attorneys whom they believe should be considered for removal from the appointment list.[127] The chief judge said it is unusual for an attorney to be removed from the appointment list, unless it is something of a "grievable nature." The Administrative Order also states that individual judges may remove appointed attorneys from particular cases: if a defendant demands that appointed counsel be replaced; if a defendant appears after the issuance of a capias; if an attorney fails to appear at a scheduled hearing; or "for other good cause," which is not defined.[128]

While some appointed attorneys attempt to and do provide quality representation to their clients in Wayne County, there is a disturbing lack of competence and diligence in too many cases – not all of which can be attributed to lack of resources, excessive caseloads, and the 91-day rule. In the space of two days of court observations, NLADA site team members observed the following:

- Attorneys representing co-defendants at arraignment with no on-the-record waiver of the conflict of interest;[129]
- An attorney prepared to have the defendant plead as charged, because he had not read, or re-read, the prosecuting attorney's offer. The judge asked the attorney if he really wanted to do that, since the prosecuting attorney's written offer (a copy of which was in the court file) was for a plea to reduced charges.[130] The defendant then pled to the reduced charges.
- Another attorney (before the same judge) wanted to set for trial a DUI case where the defendant had a .22 blood alcohol reading, without asking the judge for a Cobbs hearing.[131] The judge said in open court that it was "almost malpractice" for the attorney not to request a Cobbs hearing, and, after some back and forth, the attorney finally requested a Cobbs hearing;
- An attorney at a sentencing hearing did not object, or request a reduction, when the judge included various fees plus $300 in court fees and $400 in attorneys' fees on each of two cases for which the defendant was being sentenced;
- An attorney at an arraignment hearing did not know that the offense of serving liquor without a license is a one-year felony, not a one-year misdemeanor – even though it was in both the information and complaint. The judge read it as a misdemeanor, and the prosecuting attorney had to point out the error.