

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

Summer 2013



### Indigent Criminal Defense in Michigan: A New Approach By Suzanne Lowe, Associate Director

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On July 1, 2013, Governor Rick Snyder signed into law legislation that creates a new system for the appointment of counsel for indigent criminal defendants in Michigan, and establishes a new funding mechanism. Public Acts 93 and 94 of 2013 enacted the "Michigan Indigent Defense Commission Act" and amended the Code of Criminal Procedure, respectively. The legislation follows decades of efforts to reform the system, which has been found to be constitutionally inadequate and among the most poorly funded in the nation.

Terms used to describe Michigan's system range from a "patchwork quilt"<sup>1</sup> to a "train wreck"<sup>2</sup>. Each county in Michigan has had to devise its own system for the appointment of indigent defense counsel, with no statewide standards for payment, qualifications, caseload, expectations, or procedures. Judges are often involved in selecting the attorneys who may be appointed, and each county determines the level of compensation paid to appointed attorneys. Each county also is responsible for funding its own system.

This article discusses the background of Public Acts 93 and 94; provides an overview of the legislation; and touches on issues pertaining to its implementation.<sup>3</sup> (The article refers to the system that is being replaced as the "present" system because, as discussed below, the new system is not expected to be fully implemented for several years.)

#### Background

The right to defense counsel in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution. In the 1963 landmark case *Gideon v. Wainwright*, the U.S. Supreme Court held that states are mandated to provide legal counsel to criminal defendants who are unable to afford an attorney (372 US 335). Although *Gideon* involved a felony case, the Court subsequently held that the right to counsel extends to misdemeanor cases in which imprisonment is a possibility. While an examination of the case law is well beyond the scope of this article, the constitutional right to counsel is the foundation of efforts made by the government to ensure that indigent criminal defendants have adequate legal representation.

In Michigan, the right to counsel was included in the State's first constitution, in 1835, and remains in Article I, Section 20 of the State Constitution of 1963. Although Michigan started out as a leader in defending the rights of the accused, however, the next 150 years saw a steady decline.<sup>4</sup>

Under the present system, there are several principal approaches to the appointment of counsel, and numerous variations. Some counties maintain a list of attorneys for appointment; attorneys are selected from the list for particular cases, and paid either a flat fee or an hourly rate. Appointments might be made on a rotational basis, or otherwise. Fees can vary greatly from county to county, and might be different amounts in a single county depending on the type of case or whether it goes to trial. In other counties (after a bidding process, in some places), an attorney or firm is awarded a contract to handle a certain percentage of the cases for a set payment. Depending on the county, the local judges or the chief judge may be involved in awarding contracts or selecting attorneys to appoint. Also, some counties might require

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<sup>1</sup> Report of the Michigan Advisory Committee on Indigent Defense, 6-22-12.

<sup>2</sup> Written testimony of David A. Moran, Co-Director, Michigan Innocence Clinic, University of Michigan Law School, to the Senate Judiciary Committee, 10-9-12.

<sup>3</sup> For a detailed description and a fiscal analysis of the legislation, please see the Senate Fiscal Agency's Summary as Enacted of House Bill 4529 and Senate Bill 301, dated 7-2-13: <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/Senate/pdf/2013-SFA-0301-N.pdf>

<sup>4</sup> "State Bar of Michigan Heralds Legislative Passage of Indigent Criminal Defense Reform", State Bar of Michigan News Release, 6-19-13.



appointed attorneys to have a certain level of expertise (particularly for a serious felony), while others do not. A few counties maintain a public defender office, where the attorneys are employees of the county.

In June 2008, the National Legal Aid & Defender Association issued a report following a year-long study of 10 representative sample counties, conducted in partnership with the State Bar of Michigan pursuant to a request of the Legislature.<sup>5</sup> The following is the first paragraph of the report's Executive Summary:

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county -- giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case -- NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.<sup>6</sup>

According to the report, Michigan ranked 44<sup>th</sup> among the 50 states in per capita spending on indigent defense services. The Executive Summary continued, "Unfortunately, the laws of Michigan require county governments to pay for the state's responsibilities under *Gideon* at the trial-level stage without any statewide administration to ensure adequacy of services rendered...The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs." These systems, according to the report, create a conflict between the lawyer's ethical duty to competently defend every client and the lawyer's self-interest in investing the least amount of time possible in each case, in order to maximize profit.

The report also stated, "Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to 'get out of jail' for time served prior to meeting or being approved for a publicly-financed defense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures."

The NLADA report also documented the sample counties' failure to conform to the American Bar Association's (ABA's) "Ten Principles of a Public Defense Delivery System". The "Ten Principles" are a nationally recognized set of standards for providing trial-level indigent defense services, and had been adopted and endorsed by the State Bar of Michigan in 2002.

While the developments discussed above are relatively recent, an article in the August 2012 *Michigan Bar Journal* listed almost 40 years of efforts to reform Michigan's public defense system, in which the State Bar was involved.<sup>7</sup> These began with the appointment in 1975 of a Defense Services Committee of the State Bar, by then-Michigan Supreme Court Chief Justice Thomas Kavanagh. Subsequent efforts included the State Bar's creation of a Special Task Force on Standards for Assigned Counsel in 1986, the reconstitution of that task force as the Standing Committee on Assigned Counsel Standards in 1991, and, in 2002, approval by the State Bar's Representative Assembly of 11 principles for providing legal representation to indigent criminal defendants (the ABA's Ten Principles plus one added by the State Bar).

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<sup>5</sup> Senate Concurrent Resolution 39 of 2006.

<sup>6</sup> *Evaluation of Trial-Level Indigent Defense Systems in Michigan*, Executive Summary, National Legal Aid & Defender Association, June 2008.

<sup>7</sup> Fershtman, Julie I., "Indigent Criminal Defense in Michigan: After Decades of Struggle, Meaningful Reform May be in Reach", *Michigan Bar Journal*, August 2012, p. 10.



### **Costs of Inadequate Representation**

In addition to failing to meet constitutional standards, inadequate criminal defense can result in financial costs that are ultimately borne by the taxpayers. These costs were the subject of a July 2011 report of the Justice Policy Institute, which stated, "By not fully investing in public defense systems, states and counties are frequently choosing incarceration over justice..."<sup>8</sup> According to this report, "There are five primary ways in which inadequate public defense systems can increase the number of people that are unnecessarily incarcerated:

1. more pretrial detention for people who do not need it;
2. increased pressure to plead guilty;
3. wrongful convictions and other errors;
4. excessive and inappropriate sentences that fail to take into account the unique circumstances of the case; and
5. increased barriers to successful re-entry into the community."

The report also noted that a study in Michigan attempted to measure the costs of some of the problems that lead to excessive prison sentences. "Michigan's State Appellate Defender Office (SADO) showed that between 2004 and 2007, they were able to save at least \$3,675,000 by correcting sentencing errors. This means that throughout the entire state, Michigan could have saved nearly \$70 million...over that five-year period had sentencing mistakes been avoided in the first place, not to mention the additional costs from the appeals and litigation required to correct the mistakes."<sup>9</sup>

Although not everyone agrees that appointed counsel is less effective than retained counsel<sup>10</sup>, a March 2011 report of the State Bar's Judicial Crossroads Task Force also stated, "By almost every measure, indigent criminal defense as a whole in Michigan falls far short of accepted standards, undermining the quality of justice, jeopardizing public safety, and creating large and avoidable costs..."<sup>11</sup>

### **Advisory Commission; Legislative Developments**

In October 2011, Governor Snyder signed Executive Order 2011-12, establishing the Michigan Advisory Commission on Indigent Defense. The Commission's charge was to "analyze existing data that is needed to assist policymakers in making decisions on the appropriate funding and staffing levels to ensure effective public criminal defense services", and "make recommendations to the Governor and the Legislature for improvements to the system of providing legal representation for indigent criminal defendants".

The Commission issued its report on June 22, 2012.<sup>12</sup> The report contains 23 findings, including the following:

- "The obligation to provide counsel to indigent defendants belongs to the State, not the counties. However, Michigan's history has been to leave it to the counties to meet this State obligation.

<sup>8</sup> "System Overload: The Costs of Under-Resourcing Public Defense", Justice Policy Institute, July 2011.

<sup>9</sup> As explained in a footnote, "SADO is a statewide organization that handles about a quarter of...indigent appeals. The \$3,670,000 was saved by SADO's 2-4 person special unit of attorneys who handle appeals on guilty pleas. By correcting the errors, they reduced between 122.5 and 309 years from sentences. Assuming an annual cost of corrections of \$30,000, they saved \$3,670,000 between 2003 and 2007. If extended to a system-wide level, Michigan could have saved nearly \$70 million by avoiding these sentencing errors at the trial level."

<sup>10</sup> Testimony of 13<sup>th</sup> Circuit Court Judge Thomas G. Power, Senate Judiciary Committee, 5-7-13; and "Up North Judges Hold Noses on Indigent Defense Bills", *MIRS Capitol Capsule*, 6-24-13.

<sup>11</sup> "Report and Recommendations: Delivering Justice in the Face of Diminishing Resources", Judicial Crossroads Task Force, State Bar of Michigan, 2<sup>nd</sup> Edition, March 2011.

<sup>12</sup> See note 1.



The result has been an uncoordinated, 83-county patchwork quilt of service delivery systems, with each county's 'system' dependent on its own interpretation of what is adequate and on its own funding ability."

- "At present, there are no promulgated state-wide standards for defining and ensuring constitutionally adequate defense counsel for indigent defendants. Therefore, the counties have had no regulatory guidance as to what their service delivery systems should provide."
- "As a result of [the first two findings], the availability, quality, and funding resources of county-provided indigent defense services at the local level varies greatly across the State."
- "As a result of the many different public defense delivery systems, varying interpretations of what is adequate[,] and inconsistent funding availability, the current delivery of indigent criminal defense results in a public defense system that is too often subject to errors at the trial level, and at its worst, results in a wrongful conviction."

The Commission also pointed out the NLADA's finding that none of the counties studied met the ABA's Ten Principles of a Public Defense Delivery System. "Common examples of the ways in which these minimum standards are not met include local systems that are not independent of the judiciary, that do not control for attorney workload, and that do not match an attorney's training and experience to the nature and complexity of the case...[A] uniform complaint was that the local systems were significantly underfunded...Further, the underfunding is pervasive, meaning it impacts all aspects of the defense system...Currently, only 3 of our 57 circuit courts supports [sic] indigent criminal defense at or above the national average, and many provide only a fraction of the national average."

In its report, the Commission made 12 recommendations, including the following:

- A permanent commission on indigent defense should be created by legislation and authorized to establish and enforce minimum standards statewide for the delivery of constitutionally effective assistance of counsel to indigent criminal defendants.
- Michigan should continue to provide indigent defense through local delivery systems, which should be mandated to comply with statewide standards established by the commission.
- The commission should be an autonomous entity within the judicial branch, and the authority to appoint commission members should be balanced between the three branches of government.
- The legislation creating the commission should include procedural safeguards for local systems, which should be given an opportunity to come into compliance with the minimum standards after defects are identified.
- The commission should be empowered to provide indigent defense services directly with State resources if any local system fails to meet the minimum standards, and the State Treasurer should be authorized to withhold an amount equal to the cost of providing local defense services from any State payments to that local unit.
- Any new funding requirements should be fulfilled by the State, while each local government should be required to maintain at least the same level of funding for indigent defense services, adjusted for inflation, as the average spent annually in the three years preceding the creation of the commission.
- State funding should be made available through the annual appropriations process at times and in amounts necessary to meet the demonstrated and quantified needs of local systems to meet the minimum standards established.

The Advisory Commission also recommended that the Legislature adopt 10 guiding standards for the permanent commission and all local systems providing counsel to indigent criminal defendants. The first of these is, "The public defense function, including the selection, funding, and payment of defense counsel, is independent of the judiciary while assuring that local judges be allowed meaningful input." Another is, "Defense counsel's ability, training, and experience match the nature and complexity of the case."



Following the release of the Commission's report, Representative Tom McMillin introduced House Bill 5804 in November 2012. That bill proposed to create the Michigan Indigent Defense Commission Act. Although it was passed by the House of Representatives and was the subject of a Senate Judiciary Committee hearing, the bill was not passed by the Senate before the Legislature adjourned the 2011-2012 session.

In April 2013, Representative McMillin reintroduced the proposal as House Bill 4529, and Senator Bruce Caswell introduced the same legislation as Senate Bill 300. The two legislators also sponsored House Bill 4530 and Senate Bill 301 to bring the Code of Criminal Procedure into conformity with the proposed Act. Ultimately, House Bill 4529 was enacted as Public Act 93 of 2013 and Senate Bill 301 became Public Act 94 of 2013. Both Acts took effect on July 1, 2013.

### **Public Act 93 of 2013**

Public Act 93 enacted the Michigan Indigent Defense Commission Act to create a new system for the appointment of counsel for indigent criminal defendants, and establish a new funding mechanism.

The Act creates the Michigan Indigent Defense Commission (MIDC) as an autonomous entity in the judicial branch, and requires it to "propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state". The term "adult" includes an individual who is 17 years of age or older, as well as an individual who may be tried as an adult for a felony committed when he or she was under 17 years old. The term "indigent criminal defense services" refers to local legal defense services provided to an indigent defendant who is being prosecuted or sentenced for a crime punishable by imprisonment.

The Act requires the court to determine whether a person is indigent when he or she first appears in court. A defendant will be considered indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own. There will be a rebuttable presumption of substantial hardship if a defendant receives personal public assistance (such as food stamps); lives in public housing; earns an income less than 140% of the Federal poverty guideline; is serving a sentence in a correctional institution; or is receiving residential treatment in a mental health or substance abuse facility. If the presumption does not apply, a defendant must be subjected to a "more rigorous screening process", to determine whether he or she is indigent.

The MIDC must consist of 15 voting members plus the Chief Justice of the Michigan Supreme Court, who will serve as a nonvoting ex officio member. The voting members must be appointed by the Governor, primarily from names submitted by specific officials and associations. Not more than three judges may serve at one time, at least two members must not be attorneys, and the members may not include anyone who receives compensation from the State or an indigent criminal defense system for prosecuting or representing indigent adults in State courts. The Commission will be subject to the Open Meetings Act and, except for confidential case information, the Freedom of Information Act.

The minimum standards proposed by the MIDC must be submitted to the Michigan Supreme Court after a public hearing. A standard will not be final until it is approved by the Court. In establishing minimum standards, the MIDC must adhere to specific principles concerning defense counsel. For example, defense counsel will be given sufficient time and a space where attorney-client confidentiality will be safeguarded; defense counsel's workload will be controlled to permit effective representation; defense counsel's ability, training, and experience will match the nature and complexity of the case; and the same defense counsel will represent the defendant throughout the case.



Within 180 days after the Supreme Court approves a standard, each indigent criminal defense system must submit to the MIDC a plan for the provision of indigent criminal defense services, as well as a cost analysis. The Commission must approve or disapprove a plan and cost analysis; if disapproved, a new plan or cost analysis must be submitted. If a compromise is not reached after three submissions, the dispute must be submitted to mediation. (An indigent criminal defense system is either the local unit of government that funds a trial court combined with every trial court funded by that local unit; or the local units of government that collectively fund a trial court, combined with every trial court funded by those local units.)

Every local unit of government and every trial court that is part of an indigent criminal defense system has a duty under the Act to comply with an approved plan (contingent upon the receipt of a grant in the amount provided in the approved plan and cost analysis). If a system breaches its duty, the MIDC may proceed under the Act's provisions for dispute resolution.

The Act requires the MIDC to submit a report to the Governor, the Senate Majority Leader, the Speaker of the House, and the Senate and House Appropriations Committees, requesting the appropriation of funds necessary to implement the plan for each indigent criminal defense system approved by the Commission. A system must maintain at least its local share, which means the system's average annual expenditure for indigent criminal defense services in the three fiscal years before the creation of the MIDC. If the Commission determines that funding in excess of a system's local share is necessary for the system to comply with the minimum standards, the Act requires the State to pay the excess through a grant.

If a dispute arises between the MIDC and an indigent criminal defense system, the parties must attempt to resolve it by mediation, with a mediator appointed by the State Court Administrative Office. The time frame and requirements for mediation are based on disapproval of a system's plan and/or cost analysis, and provide for the MIDC to approve a final plan or cost analysis, or both. If a system is dissatisfied with a final plan and/or cost analysis, it may bring a court action for equitable relief. The MIDC or an indigent criminal defense system also may bring an action in the circuit court for equitable relief if the Commission determines that the system has breached its duty to comply with an approved plan.

Among other things, the court may order the State or the MIDC, in lieu of the indigent criminal defense system, to provide indigent criminal defense services if a party refuses or fails to comply with a previous court order or if the system has breached its duty to comply with an approved plan. If this occurs, the system will be required to pay 10% of the State's costs that are necessary to bring the system into compliance with the minimum standards. The amount will increase in increments of 10% until the system must pay 40% in the fourth or subsequent year, until the MIDC approves the system's plan and cost analysis.

The Act specifies that a system's failure to comply with the Act does not create a cause of action against the government or the system; statutory duties that create a higher standard than that imposed by the U.S. or State Constitution do not create a cause of action against a local unit, an indigent criminal defense system, or the State; and the Act may not be construed to override sections of the State Constitution that limit the State's imposition of new costs on local units of government.

### **Public Act 94 of 2013**

Public Act 94 amended the Code of Criminal Procedure to delete provisions that required a magistrate to notify the chief circuit court judge when a person charged with a felony stated that he could not procure counsel; required the judge to appoint or direct the magistrate to appoint counsel, upon a proper showing; and provided that the appointed attorney was entitled to receive from the county the amount the chief judge considered to be reasonable compensation.



Under the Act, when a person charged with a crime appears before a magistrate without counsel, the person must be advised of his or her right to have counsel appointed. (Previously, a similar provision referred to a person charged with a felony.) If the person states that he or she cannot procure counsel, the magistrate is required to appoint counsel if the person is eligible for appointed counsel under the Michigan Indigent Defense Commission Act.

### **Fiscal Impact**

Public Acts 93 and 94 will have an indeterminate, but potentially significant fiscal impact on State government. The primary cost will be the provision of grants to local indigent defense systems. In most cases, the only cost to local systems will be maintenance of effort consistent with the average of the most recent three years. The only exception to this will be if a court orders the MIDC, in lieu of the local system, to undertake the provision of indigent criminal defense services because of the local system's failure to comply.

Additional State costs will result from the provision of grants to cover local systems' data collection costs, the creation of the 15-member MIDC, and the hiring of an executive director and staff. Also, if the State and a local system are involved in mediation or litigation, the parties will have to share the costs equally.

As indicated above, the increased costs may be offset to some degree by a reduction in excessive and inappropriate sentencing, unnecessary and prolonged pretrial detention, the need to defend lawsuits for wrongful convictions, and appellate costs for inmates unjustly convicted or sentenced.

### **Implementation**

To a considerable extent, the Michigan Indigent Defense Commission Act reflects the recommendations made by the Michigan Advisory Commission on Indigent Defense, as well as the ABA's Ten Principles of a Public Defense Delivery System. The legislation is widely seen as a good fix to a broken system. According to a news release, "State Bar of Michigan President Bruce A. Courtade called the development 'game-changing' and 'a transformative first step' in making sure that a person's constitutional rights are no longer placed at risk simply because he or she cannot afford a lawyer."<sup>13</sup>

As the State Bar President indicated, the legislation is considered a first step. In fact, it is likely to take several years for the new system to be fully implemented. According to the State Court Administrator, "[T]he passage of this isn't going to change the system this month or this year...I think it will be two to three years before it filters down and we see [significant] changes."<sup>14</sup>

The time it will take for implementation depends on various factors. The MIDC Act does establish time frames for the submission and approval of local systems' plans and cost analyses, but this process has the potential to be protracted if there are disagreements, and will not begin until the MIDC develops and the Supreme Court approves the first minimum standard. The Act sets no deadlines for this to be accomplished, except to say that a proposed standard is not approved if the Supreme Court does not approve or disapprove it within 180 days after its submission.

In addition, the duty of a local system to comply with its plan is contingent upon the receipt of a grant in the amount contained in the plan and cost analysis approved by the MIDC. The provision of grants, of course, depends upon the appropriation of adequate funding. While the Act states that the Legislature "shall appropriate" the funds necessary to bring systems into compliance with the minimum standards, in excess of the local share, any such funding must be enacted in an appropriations bill, and it is well settled

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<sup>13</sup> See note 4.

<sup>14</sup> Gosselin, Gary, "Indigent Defense Reform is Enacted", *Michigan Lawyers Weekly*, 6-24-13. (Brackets added by *Michigan Lawyers Weekly*.)



that statutory language that purports to mandate the Legislature to appropriate funds in future years is nonbinding.<sup>15</sup>

The enacted legislation represents a delicate compromise among diverse interests, and many people will be keeping a close eye on how it is implemented. Needless to say, not all of the provisions are agreeable to all of the parties, and some of the stakeholders are more neutral than supportive. From the perspective of the counties, although the Act addresses (or, some might say, attempts to address) several issues that were considered problematic, such as the potential imposition of new costs, there remain concerns about how all of the parties will work together in implementing the legislation.<sup>16</sup>

Furthermore, not everyone believes that the new system will be an improvement at all. In some circuits, the existing system apparently has worked well, and there are strong fears that the Act will erode quality and diminish local control by excluding judges from the process of selecting attorneys.<sup>17</sup> However, although the Act does preclude judges from making direct appointments, judges still may have input and will remain involved to the extent provided for in a local system's approved plan. As the Act's supporters point out, the legislation is designed to maintain local flexibility as long as minimum standards are met.

For the time being, the counties' various methods of selecting, appointing, and compensating attorneys can be expected to continue, until minimum standards are approved by the Supreme Court, local systems' plans and cost analyses are approved by the MIDC, and funding is appropriated<sup>18</sup>. Until the MIDC Act is fully implemented, the State's new approach to indigent criminal defense will remain a work in progress.

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<sup>15</sup> Opinion of the Attorney General 1984, No. 6238.

<sup>16</sup> See note 14.

<sup>17</sup> See note 10.

<sup>18</sup> Telephone conversation with Chad Schmuker, State Court Administrator, 7-9-13.