STATEMENT OF

DENNIS ARCHER

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

Hearing on Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and other States

March 26, 2009
Good morning. I want to thank the Chairman of the Judiciary Committee, Representative John Conyers, the Subcommittee Chair, Representative Bobby Scott, the Ranking Member, Representative Louie Gohmert, and the Members of the Subcommittee for scheduling this important hearing on the crisis in indigent defense for criminal defendants today. I am Dennis Archer and I am pleased to appear today on behalf of the American Bar Association (ABA), for which I served as President in 2003-2004. I also appear in my capacity as past President of the State Bar of Michigan, as a former Mayor of the City of Detroit, and as a former Justice of the Supreme Court of Michigan.

Led by Walter Mondale, then Attorney General of Minnesota, 22 State Attorneys General in 1963 filed an Amicus brief in support of Earl Gideon’s handwritten request to the United States Supreme Court -- for an attorney. Earl Gideon’s unlikely allies recognized that Gideon’s request went to the very heart of our country’s sense of justice and fundamental fairness. No one should face the prospect of losing his or her life or liberty without the guiding hand of counsel.

Indeed the United States Supreme Court has held that the right to counsel is the seminal right that makes meaningful all the other rights guaranteed to us by our Constitution.

But, how meaningful is advice whispered in a crowded hallway minutes before trial? How thoughtful is advice spread over staggering caseloads? How independent is the advice given by attorneys beholden to judges for their daily work and the essential tools of their profession – investigators and experts? And, how guiding is the hand of a poorly trained lawyer?

Over the five decades since Gideon, the ABA has played an instrumental role in developing standards and guidelines setting forth what competent counsel must do to adequately represent his or her clients. It has published white papers describing the state of public defense in America and, finally, the ABA has provided technical assistance to every state attempting to improve its public defense delivery systems. Those efforts have not been enough.

Too many states still fall far below an adequate standard, and my home state, Michigan, a state that has led the country in so many important ways, is one of the worst.

Thirty years ago, the ABA recommended that the federal government establish and fund an independent, non-profit Center for Defense Services to administer matching grants and other programs to strengthen the services of public defenders, private assigned counsel, and contract defenders. As envisioned by the ABA, the proposed Center would receive funds directly from Congress and be governed by an independent Board of Directors appointed by the President. The establishment of such a program continues to be an ABA goal.

In an effort to speak directly to policy-makers, we developed the ABA Ten Principles of a Public Defense System. Their straightforward language describes what a sound public defense system must look like. It is the constitutional floor below which no system should go. These 10 Principles provide a template to measure a system’s health, find what is broken, and then tell how to fix it. They are now used across the country in jurisdictions large and small. They have
been used to guide the improvement of public defense systems in Nevada, Montana, and even post-Katrina Louisiana. And they have been used to evaluate the health of existing systems – most recently that of my home state, Michigan. Michigan fails nearly all of the Principles. I have attached the ABA Ten Principles, which I request be made part of the hearing record.

In 2003 and 2004, the ABA held hearings across the United States to honor Gideon’s fortieth anniversary. The resulting report, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice, (2004), concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.” The ABA report recommended that in order to fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings. While some federal funding reaches state criminal defenders and defender offices under the Byrne Grant and Justice Assistance Grant programs, indigent defense services have remained a “poor stepchild” compared to state prosecutors and prosecutorial resources funded through the administration of those programs. The ABA believes that state indigent defense should be made a priority area of support for those critical federal programs.

Rules of professional responsibility, underscored by a recent ABA ethics opinion, require defenders and their supervisors to provide competent services and not to accept excessive caseloads that undermine the quality of their representation. However, the relentless assignment of new cases routinely prevents adherence to this admonition. And the situation has gotten much worse due to the economic downturn.

The ABA believes that the need is urgent. A chronic, persistent indigent defense crisis has reached a point of system breakdown in a number of states and lawyers increasingly have sought relief in the courts, often unsuccessfully. For example, last year in Knoxville, Tennessee, the public defender filed a motion to limit the office’s overwhelming caseload. However, judges refused to rule on the motion for more than eight months and, finally, despite uncontroverted evidence, rejected all relief. Just last month in Kentucky, a declaratory action filed by that state’s Department of Public Advocacy was dismissed, although that agency’s excessive caseload has repeatedly been documented. The judiciary is not responding to the crisis; the legislature must.

Let me briefly describe to you what is happening in Michigan. Two years ago the National Legal Aid and Defender Association in conjunction with the State Bar of Michigan conducted the first comprehensive study of the state’s public defense system in response to a bi-partisan, joint resolution passed by both chambers of the Michigan legislature. The report’s conclusions were devastating, describing a system failing in nearly every way. For example, a judge in Oakland County indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. In the district court in Chippewa County, there is no confidential space for an attorney to meet his or her client. 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 talk in the corridor. Another example takes place in Grand Traverse Country, where the judiciary forces public defense attorneys to provide
certain legal services for which they are not compensated if they wish to be awarded public defender contracts. This in a state that once led the nation in providing assigned counsel to its citizens.

In the 1850’s Michigan became the first state to provide paid appointed counsel in criminal cases. It placed this cost and the method of providing counsel on the county government, a choice that was practical and efficient in the 1800’s. Today, that method of funding has resulted in a patchwork of underfunded, unaccountable systems where the private bar remains the primary method of providing counsel.

I sat on the Michigan Supreme Court when serious challenge to this system came before the Court. That effort attempted to raise the level of attorney fees paid to the private bar to handle the criminal cases in Detroit. The fees had not changed in over twenty years – during a period of extreme inflation. The challenge went to the very heart of the system itself, because the fees were relied on to fund the entire public defense system in Detroit, in every case from homicides to homelessness. From these fees, attorneys had to pay not only their salary, but all the tools of the trade – their training, libraries, computers, support staff – indeed all those things necessary to be effective. In homicide cases, if you did what was needed, attorneys earned as little as $10 an hour. Sadly, the reform attempt was not successful. After I left the Court, Judge Tyrone Gillespie was appointed as a master to make findings on the adequacy of the fees paid in the criminal courts of Detroit. Almost 15 years after he made them, all of the failings he found still remain, and the changes he recommended have yet to be made.

I have attached a summary of Judge Gillespie’s report that I request be made part of the hearing record.

When fees are not reasonable and do not even cover the overhead of the attorney, one devastating result is that experienced attorneys are driven from the roster and those who remain are forced to accept crushing caseloads to earn sufficient money to stay on the lists. When turnover is high, training is impossible, serious cases go without competent counsel and our system that depends on equal adversaries cannot function.

And the noble, practical, and constitutional vision expressed by Earl Gideon and those 22 Attorneys General remains unfulfilled.

In Michigan our counties cannot fund our public defense system. Likewise we know that the states cannot fund their systems without help from the federal government.

We are all in this struggle together. We at the ABA know that learned lessons can be shared and implemented. The payoff will be not only a justice system that meets all our standards of fundamental fairness, but a system that is effective and efficient at all levels and in all corners of our country.

Thank you for the opportunity to appear today. I would be glad to answer any questions you may have.
STATE OF MICHIGAN
IN THE SUPREME COURT

86099

IN THE MATTER OF THE RECORDER'S COURT
BAR ASSOCIATION, THE CRIMINAL DEFENSE
ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL
LAWYERS ASSOCIATION, WOMEN LAWYERS
ASSOCIATION OF MICHIGAN, and THE SUBURBAN
BAR ASSOCIATION,

Petitioners,

v

WAYNE COUNTY CIRCUIT COURT AND
RECORDER'S COURT,

Respondents,

and

WAYNE COUNTY,

Intervening Respondent.

REPORT OF SPECIAL MASTER - HONORABLE TYRONE GILLESPIE
FINDINGS OF FACT
FINDINGS OF FACT

A. The Third Circuit and the Recorder's Court of Detroit were merged in 1987. The Chief Judges of each court still sit as Chief Judge of their courts, but they interchange as Executive Chief Judge.

There are 29 Recorder's Court judges and 35 Circuit Court judges.

The Recorder's Court of Detroit has jurisdiction of all criminal matters arising out of crimes charged in the City of Detroit. Since the merger a panel of five judges from the circuit court are assigned for arraignment and trial purposes to the Recorder's Court so, in essence, it is one court for the county handling all criminal matters within the county. If a defendant is not a resident of Detroit, he or she technically under Local Court Rule 6.102 could demand arraignment before one of the circuit judges, but practically the judges operate interchangeably between the two courts in criminal matters on an assigned basis.

The procedure, upon arrest, is that the defendant is arraigned on the warrant before a magistrate or judge in the 36th District Court, either in the city or out county. At that point it is determined whether the defendant will be incarcerated or bonded and whether he demands or is unable to hire counsel. In the event that he or she wants counsel, the matter is assigned to an assignment judge, which judge is assigned by the Executive Chief Judge for a brief period of one week. This position is not provided for by statute and some judges refuse the assignment.
Consequently, not all judges serve in this capacity. The assignment judge assigns the defendant an attorney from either the public defender's office (which takes 25% of the cases) or from a list of over 600 attorneys who have indicated desire for assignments. Assigned counsel are notified of their appointments by telephone and have 24 hours to appear at the clerk's office to pick up paperwork. If they do not appear in time and have not made other arrangements, the case is reassigned. In addition to the order of appointment, the lawyer is given an early discovery packet that includes the police investigator's report (warrant request), the defendant's prior record, and a standard signed discovery order. In January, 1990, a sentencing guidelines calculation was added to the discovery packet.

Preliminary examinations are scheduled for 7-10 days after arraignment on the warrant. Since early discovery packets are available on the third day after the arraignment, counsel has 4-7 days to confer with the defendant and review the case. If no lawyer appears for the preliminary examination, the case is assigned to "house counsel", a standby lawyer who is assigned to be available in District Court to cover such situations. On occasion, the defender office has been removed from a capital case by a district judge for refusing to conduct a preliminary examination without additional discovery and other counsel was appointed. If the case is bound over, arraignment on the information (AOI) occurs in seven days if the defendant is in jail and fourteen days if the defendant is free on bond. Thus the total
time elapsed from the appointment of counsel to AOI is 17 days in jail cases and 24 days in bail cases. If the defendant pleads guilty at AOI, sentencing is set for 10 days later.

If the defendant is bound over, he or she is next required to appear before one of the executive floor judges who will arraign him or her on the information or indictment. If at that time the defendant stands mute or pleads not guilty, the case is assigned to a judge for trial. The attorneys then meet with the trial judge to establish a trial track for motions to quash, Walker hearings and trial date and other preliminary matters.

The Chief Judge of the Recorder’s Court is responsible for moving the docket and he may, and often does if there is an overload, remove a case or cases to his docket for disposition. If the trial lasts for more than three days, the Recorder’s Court automatically allows $300 per day for trial time. In circuit court, the attorney must apply to the Chief Judge for extraordinary fees which are often allowed in whole or in part. Many attorneys are reluctant to ask for extraordinary fees or compensation for unusual expenses, fearing that such requests may prejudice their standing or possibilities for assignment with the judges and, accordingly, pay such costs themselves. Petitions for extraordinary fees are filed in two percent of the cases and are rarely granted in full. The Public Defender’s Office is rarely granted any fees beyond the schedule amounts.

B. The present system of paying for assigned counsel on a flat fee basis has merit for the following reasons:
1. The system shortens the time between arrest and disposition, thus alleviating some of the pressure for more jail space.

2. The system tends to keep the docket moving and in better control by speeding resolution and disposition of cases.

3. If a client is pled guilty quickly, the compensation is very adequate as it represents payment for only three or four hours of attorney time.

4. Frivolous motions are reduced as there is no financial incentive to do work which merely takes time.

5. Alternative resolutions, such as work release and probation, are encouraged.

6. Dismissals of weak cases occur at an early stage.

7. Much judicial time in review of schedules and expense accounts is eliminated.

8. Padding of hourly accounts is eliminated.

9. The system is administratively easier to operate.

The negative side of paying assigned counsel on a flat fee basis is:

1. The system encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply
of constitutional rights.

2. While the system discourages the filing of frivolous motions, it also gives disincentive to file serious motions, as no additional compensation is paid for greater effort.

3. The system discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge.

4. While the flat fee system is not directly related, the fact that guilty pleas are well rewarded allows assigning judges to appoint favorites to a volume of cases. One case was cited where an assigning judge appointed a female attorney, with whom he was friendly, to the majority of his assigned cases which required only pleas to be entered.

5. The system also supports a group of substandard attorneys, estimated to be 10 to 15% of the criminal bar, to operate without offices, secretaries, files, from pocket notes and to make a living on guilty pleas.

C. At the beginning of 1990, there were 630 attorneys eligible for appointment. One hundred eighty-six of those did not receive appointments, leaving four hundred forty-four who were appointed in 1989. One hundred seventy-seven attorneys who were not on the eligible list did receive assignments; forty-five
attorneys on the list receiving appointments received $1,000 or less.

The total sum paid for services was $7,130,333 in 1989. Seventy attorneys, about 12% of those eligible for appointment, were paid $3,556,662, or approximately 50% of the total payments made. $1,777,674 of the amount paid to the first seventy attorneys was paid to attorneys not qualified to try capital cases.

The payments of the first seventy attorneys break down as follows:

| Over $100,000 | 1 attorney | $148,102* |
| Between $90,000 and $100,000 | 1 attorney | 91,264 |
| Between $80,000 and $90,000 | 1 attorney | 81,510 |
| Between $70,000 and $80,000 | 4 attorneys | 302,149 |
| Between $60,000 and $70,000 | 5 attorneys | 325,147 |
| Between $50,000 and $60,000 | 10 attorneys | 555,123 |
| Between $40,000 and $50,000 | 11 attorneys | 476,665 |
| Between $30,000 and $40,000 | 37 attorneys | 1,580,633 |
| Total | 70 attorneys | $3,556,662 |

* Public Defender's Office

Eighty-five percent of the criminal cases in both the Recorder's Court and the Circuit Court require assigned counsel. There are about 12,000 assignments annually in Recorder's Court and 3,400 annually in Wayne Circuit. Indigent defense fees approximate three and-a-half percent of Wayne County's General Fund.

D. The finance situation in Wayne County is extremely fragile and an increase in sums paid for attorneys fees for the indigent could have serious financial repercussions. Wayne County at the close of its fiscal year, November 30, 1987, had a deficit of $134 million in its general fund and an additional debt of
$56 million owed to the State from previous loans to help the county's deficit situation.

In order to rectify this situation, the County, in 1988, negotiated the debt settlement agreement with the State of Michigan, wherein the county was able to borrow $120 million from the State Emergency Loan Board and the county received permission to borrow $103 million in fiscal stabilization bonds.

As conditions for the debt settlement agreement, the county, pursuant to state law, its charter and the additional debt settlement agreement, is required to maintain a balanced budget.

A failure on the part of Wayne County to maintain a balanced budget would require it to pay 10% interest on the sum owing to the state, e.g., $10 million, and may result in the state invoking the provisions of the legislation authorizing the solvency package and place the county in receivership.

In 1989, the county's budget for indigent attorney fees was $13.2 million for circuit, Recorder's, and probate courts, and expenses were approximately $16.7 million, an overrun of approximately $3 1/2 million.

The county budgeted approximately $15.8 million for indigent attorney fees for 1990 -- $9.2 million for Circuit and Recorder's Courts and $6.6 million for probate.

In 1989, by comparison, the county budgeted approximately $12.9 million for the prosecutor's office. The prosecutor's office, of course, has no rent factor in its budget. It also has no factor for investigations or fringe benefits and has some income
through grants and forfeiture money which amount to $5- or $6 million a year.

The county receives no reimbursement from the state or any other source for the sums spent on attorneys fees for the indigent. The county has fiscal responsibility for payment of indigent attorney fees, but has no authority to effect the rate structure. The county addresses indigent attorney fees as a priority in its budget process.

E. From the testimony, the average overhead rate in the Detroit area varies from $35 to $45 an hour. Several attorneys who have been assigned to high publicity, complex cases which have resulted in protracted trials have not been paid enough to meet overhead. Some reported receipt of less than $15 per hour on critical cases.

On the other hand, attorneys with no secretaries, no offices and working from telephone contacts may be paid $675 for a non-capital case in which there was a guilty plea which might be concluded in less than three hours.

F. There is no screening process for indigent defendants in Circuit or Recorder's Court and consequently 87% of the criminal cases in Wayne County require the assistance of appointed counsel. It was the opinion of several witnesses that any attempt to set up standards of indigency or to attempt to recover all or part of the fees paid for defense counsel appointed would be counterproductive. No experiments were reported which would verify these opinions.

Experiments in Genesee County of "loaning" attorney
services to defendants who are unable to pay in full for representation have been somewhat successful. This system would refer a defendant who pleads indigency to an assignment attorney who works for the system. The assignment attorney would determine what, if any, assets are available to the defendant to fund the defense. If the defendant is employed or has other assets, the attorney would take an assignment of the assets or note payable over a period of time from the defendant. On some occasions, a credit card has been used. In any case, the payment of the attorney's fee is guaranteed by the court and collection, if any, is made by the assignment attorney. It has been the experience in some counties that 10% of assessed attorney fees are collected from defendants, usually as a condition of probation.

G. The Federal Court for the Eastern District of Michigan reimburses assigned attorneys at a rate of $75 an hour. There is no distinction made between in-court and out-of-court time and expenses are routinely reimbursed.

Testimony revealed that in Wayne County, when extraordinary fees are requested and allowed, the Chief Judge in Recorder's Court utilizes a figure of $300 a day which is fairly automatic. The Chief Judge in Wayne Circuit computes such fee at $35 an hour.

The fees paid for expert witnesses such as psychologists, psychiatrists, medical experts, interpreters, investigators and other supplemental requirements are so low as to make their services unavailable without supplementation of funds by the
attorney. Some costs, such as postage, copy and local travel, are never reimbursed.

H. Wayne County's fee schedule is unique in Michigan. All other schedules in the state are event based. Only Wayne County pays a flat fee based on the potential maximum sentence. Under this system, the amount paid bears an inverse relationship to the amount of effort expended. The lawyer who puts three or four hours into a case may earn $200 per hour; a lawyer who engaged in a protracted jury trial may earn as little as $12 an hour under the Wayne County system.

The flat fee schedule had a decided impact on the Public Defender's Office, which operates in Wayne County, on the same basis as an attorney who accepts appointments in private practice. The result has been a diminution of funds to run that office to the extent of about $200,000 per year.

I. Several witnesses claimed that the schedule currently in effect, which has the result of rewarding a guilty plea and providing disincentive for going to trial, is in some measure supporting overcharging and stiffness in the prosecutor's office in negotiation of pleas as the prosecution is aware that the defense lawyer is at a personal disadvantage by going to trial as it will cost him money personally. No witnesses were called from the prosecutor's office, consequently such statements went unrebutted. These thoughts do sound facially logical and certainly in the realm of probability.
J. From a review of the Prosecuting Attorneys Association Report for 1989 (Pl. Ex. 35) and the State Bar Association Defender and Services Committee Report for 1989 (Pl. Ex. 36) the following information would appear. The reliability of the information was not tested.

The annual budget for prosecutors in Michigan in 1989 was $61.5 million. The annual budget for prosecutors in Wayne County was $14,110,982, or 23% of the total state budget for prosecutors. The state population was shown to be 9,201,716 according to the 1980 census. Wayne County’s population was shown as 2,337,240 or 25.4% of the state population. There were 73,857 felony warrants issued in Michigan. 19,024 of such warrants, or 25.75%, emanated in Wayne County. The above figures are fairly consistent, however the statewide budget for felony defense in the state totalled about $22.5 million. The amount spent in Wayne County on felony defense was listed as $9.26 million, or 41% of the state total budget for defense. This figure was affirmed by the testimony of Mrs. Lannoye as to the Wayne County expenditure.

It is interesting to note that statewide the budget for defense is 36% of the budget for prosecution, which does not include rent, investigations and other factors before mentioned.

K. Under the present system of assigning attorneys, there are at all times over 400 attorneys willing to take assignments which is a number that is entirely adequate.

It appears that in a few complex and unpopular cases, such as the famous Easter Case, the judges have had to use their
personal influence with good attorneys to persuade them to take the case.

The Detroit Bar Association has made a giant step toward improving the quality and capability of the defense bar in organizing the Criminal Advocacy Program (CAP) which was testified to by Judge Ravitz and others and funded by 1% of the assigned counsel fees. Judges and competent trial attorneys have lent their support by teaching in this program.

The plaintiffs allege that good attorneys are dropping out of the assignment program because of low fees. This was not borne out by the testimony as a problem in Wayne County. It was shown that a few very capable attorneys who have made their reputations as superior defense attorneys are taking more private work because it is undeniable that private, criminal practice pays infinitely better than assigned work. Typical of this phenomena was Thomas Loeb, a witness in this case, who has become a very well known and highly capable defense attorney who no longer seeks assignments because he commands sufficient private clients to occupy his time. There have been some drop out of attorneys seeking assignments, but that has not been in Wayne County.

Assigning judges are well aware of the competent attorneys and tend to assign them to a number of cases. This may cause an imbalance in income of attorneys depending on assignments but, in all probability, it is to the advantage of the defendants that the best lawyers are assigned most often.
The 1982 recommendation on assigned attorneys fees was a carefully considered plan of compensation on an event basis. It had the endorsement of attorneys and judges. Fear on the part of Wayne County Administrators induced them to dissuade the Chief Judges from putting it into effect because of a possible impact on the budget.

Criminal defense does not have great popular appeal and administrators and supervisors, when allocating limited money, are not inclined to give top priority to defending people who have committed crimes.

The current schedule was developed by George Gish at the direction of Judge Roberson. The schedule was adopted by Judge Roberson and Judge Kaufman with the best of motives of moving their crowded dockets and keeping the jail from overcrowding.

The record reflects little change in case movement since the advent of the present schedule. There are a few more guilty pleas. There are more short bench trials, known as "long pleas", due to the hard position on plea bargaining taken by the prosecutor. Due to lack of plea bargaining, the success rate on trial has dropped. On cases that go to trial, 63.5% of murder charges result in conviction of lesser offenses. 76.7% of all assault with intent to murder charges are reduced. The Wayne County bench trial rate is 15 times higher than the state average.
RECOMMENDATIONS
RECOMMENDATIONS

1. That the fixed fee schedule based on maximum possible sentence be found unreasonable in that it only includes one factor of what this Court found to be the test of reasonableness in *Wood v. D.A.I.E.*, 413 Mich 573, 588 (1982). That decision did not determine "reasonableness" in a criminal context but discussed reasonableness in a general context.

   The factors to be considered, as in that case defined, are:

   1. The professional standing and experience of the attorney;
   2. The skill, time and labor involved;
   3. The amount in question (in this case maximum potential sentence.
   4. The results achieved;
   5. The difficulty of the case;
   6. The expenses incurred;
   7. The nature and length of the professional relationship.

Having found the schedule based solely on maximum possible sentence unreasonable, several alternatives could be offered.

   A. That a study be made of reasonable time involved to defend each of the crimes in the present schedule, thus establishing a norm similar to those used by garages in estimating repair work. If the fee request submitted falls within the norm, it would be automatically approved for the time expended at a reasonable rate of $60 to $70 per hour. Excesses would have to be justified.

   B. Do as the plaintiff asks and install the Jobes Committee report with a reasonable escalator based on inflation since 1982.

   C. Direct the court to devise an alternative plan within a reasonable time which would: (1) compensate attorneys
fairly for time spent, and (2) put no pressure on defendants to plead guilty. It is believed that Mr. Gish could do that if so directed knowing of the criticism of the present plan and in the parameters of present sums expended.

These objectives could be reached by:

1. Conference with the Chief Judges.
2. A letter to the Recorder's and Circuit Court requesting a restudy of the present plan recognizing its weaknesses as defined by these hearings.
3. An Order of Superintending Control.

2. That the Supreme Court in an opinion in this case, or another appropriate case, bring to the attention of the legislature that convictions for felonies are under laws passed by the state, that appeals are to state courts and from state courts and all Michigan prison inmates are state prisoners. Such appeals should, therefore, be state funded.

Circuit and Recorder's Court judges, unless specially assigned, have no control or even knowledge, during the appellate process of the work performed by the assigned attorneys but are expected to approve payment therefor from their respective counties. Each circuit has a different rate or method of payment. In Jewell v. Maynard, 383 SE2d 536 (1989), the Supreme Court of West Virginia, in a case with facts very similar to those posed here, called upon the state of West Virginia to pay $45 an hour for out-of-court work and $60 an hour for in-court work in spite of a statute which provided for $20 an hour for out-of-court work and $25 for in-court work and gave the legislature one year to implement the decision. Prior attempts to obtain money for appeals in Michigan have become snarled with debates on judges salaries and
pensions and have been pushed back by the legislature and thereafter forgotten. It seems appropriate that, if due process in Michigan is to be maintained, the state should include the cost in the budget.

In the matter of In re Frederick, SC No. 90310, which was heard by this Court on March 7, 1991, this precise issue was raised. Frederick was appointed to defend an indigent, David Cook, on appeal. The Court of Appeals found no law to effect payment for his services. This Court must find the system to pay Frederick. If this Court finds Frederick must be paid, then it must be decided by whom.

The mechanism for designating attorneys for appeals was set up in detail in MCL 780.711 et seq. (the Appellate Defender Act). In this Act, section MCL 780.717 provides for contracts for special assistant appellate defenders, but does not provide for single appointments of non-contract attorneys.

The Supreme Court could clarify in an appropriate opinion that it was the intent of the legislature to set up an appellate scheme to handle all appeals to the Michigan Court of Appeals and to the Michigan Supreme Court between the State Appellate Defender's Office and the Michigan Appellate Assigned Counsel Service.

That having been decided, then the legislature should be called upon to correct the glaring funding omission of the Appellate Defender Act.

If this were accomplished not only would the system in Wayne County be relieved, but also the system in every county of
the state where the counties are with great difficulty bearing a burden on strained budgets which properly belong to the state.

3. The discussion in the previous recommendation is in reference only to appeals from the 55 circuit courts and Recorder's Court of Detroit.

There is another problem in that each of the 55 circuits has a different plan for compensation of assigned counsel for trial in that circuit. Even the Recorder's Court and the Third Circuit for Wayne County have slight differences in their plans.

As a result of these differences, all Michigan defense representation is not equal. Indigent defendants charged in counties that pay assigned counsel very low rates are treated differently than those defendants who can afford to hire their own attorneys. They are also treated differently than defendants in counties that provide skilled representation. Much of the information on these problems has been gathered by the Supreme Court Administrator and MAACS and should be amenable to fast assembly.

It is recommended that this Wayne County study be expanded to encompass the assignment of counsel throughout the entire state to unify the hodgepodge of plans for indigent representation that now exist.

While much of the information has already been gathered for such a study by existing organizations, it is the recommendation that such study be conducted by an independent group or agency to diminish any appearance of empire building. Too, such a study must consider the responsibilities and sensitivity of
sitting judges who must accept the recommendations, as it is their responsibility to operate their courts efficiently and economically. It is also their responsibility to convince county supervisors to fund the program.

4. In Wayne County, the chief judges should be encouraged to devise a plan to eliminate the criticism of assigning attorneys who operate from their cars and by telephone and live on payment for pleas and waivers.

Likewise chief judges should be made aware that the Supreme Court is aware that instances exist of appointment of attorneys who have personal relationships with assigning judges and that such appointments are not favored. There is, of course, no criticism of those judges who have had to use personal relationships to obtain competent counsel for hard cases.

5. It should be pointed out that MCL 780.711, § 2 specifically puts the supervision of the state agencies whose duties are the operation and management of appellate defense under the State Court Administrator. In practice, it does not operate that way.

If the appellate services were centralized in the Supreme Court Administrator's Office and funded by the state, much of the problems on the appellate level statewide would disappear.

At the trial level, if the 55 circuits were operating under standard rules for those utilizing public defender offices, and a separate set of standards for those not using the public defender system, most of the grievances of the plaintiffs in the Wayne County case would be met.
It is hoped that the comment and recommendations herein contained will be helpful in the solution and not part of the problem posed by this case.

-- Tyrone Gillespie
Special Master

Dated: March 18, 1991
Ten Principles of a Public Defense Delivery System

February 2002
Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.
INTRODUCTION

The ABA Ten Principles of a Public Defense Delivery System were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

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Chair, Standing Committee on Legal Aid and Indigent Defendants
### ABA Ten Principles of a Public Defense Delivery System

**Black Letter**

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5. Defense counsel’s workload is controlled to permit the rendering of quality representation.

6. Defense counsel’s ability, training, and experience match the complexity of the case.

7. The same attorney continuously represents the client until completion of the case.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9. Defense counsel is provided with and required to attend continuing legal education.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.
ABA TEN PRINCIPLES
OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

5. Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.
Defense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.21

The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing.22 The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.23 Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.24 Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,25 and separately fund expert, investigative, and other litigation support services.26 No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.27 This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.28

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.29
"Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.


3 NSC, supra note 2, Guidelines 2.10-2.13; ABA, supra note 2, Standard 5-1.3(b); Assigned Counsel, supra note 2, Standards 3.2.1, 2; Contracting, supra note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, Juvenile Justice Standards Relating to Monitoring (1979) [hereinafter “ABA Monitoring”], Standard 3.2.

2 Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

4 ABA, supra note 2, Standard 5-4.1

5 “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

7 NAC, supra note 2, Standard 13.5; ABA, supra note 2, Standard 5-1.2; ABA Counsel for Private Parties, supra note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

8 ABA, supra note 2, Standard 5-1.2(a) and (b); NSC, supra note 2, Guideline 2.3; ABA, supra note 2, Standard 5-2.1.

9 NSC, supra note 2, Guideline 2.3; ABA, supra note 2, Standard 5-2.1.

10 ABA, supra note 2, Standard 5-2.1 and commentary; Assigned Counsel, supra note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

11 NSC, supra note 2, Guideline 2.4; Model Act, supra note 2, § 10; ABA, supra note 2, Standard 5-1.2(c); Gideon v. Wainwright, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

12 For screening approaches, see NSC, supra note 2, Guideline 1.6 and ABA, supra note 2, Standard 5-7.3.

13 NAC, supra note 2, Standard 13.3; ABA, supra note 2, Standard 5-6.1; Model Act, supra note 2, § 3; NSC, supra note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, supra note 2, Standard 2.4(A).

14 NSC, supra note 2, Guideline 1.3.

16 NSC, supra note 2, Guideline 5.10; ABA Defense Function, supra note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, supra note 15, Guideline 2.2.


18 NSC, supra note 2, Guideline 5.1, 5.3; ABA, supra note 2, Standards 5-5.3; ABA Defense Function, supra note 15, Standard 4-1.3(e); NAC, supra note 2, Standard 13.12; Contracting, supra note 2, Guidelines III-6, III-12; Assigned Counsel, supra note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, supra note 2, Standard 2.2(B)(iv).

19 Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (Judicial Conference of the United States, 1998). See also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

20 ABA, supra note 2, Standard 5-5.3; NSC, supra note 2, Guideline 5.1; Standards and Evaluation Design for Appellate Defender Offices (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

21 Performance Guidelines, supra note 15, Guidelines 1.2, 1.3(a); Death Penalty, supra note 19, Guideline 5.1.

22 NSC, supra note 2, Guidelines 5.11, 5.12; ABA, supra note 2, Standard 5-6.2; NAC, supra note 2, Standard 13.1; Assigned Counsel, supra note 2, Standard 2.6; Contracting, supra note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, supra note 2, Standard 2.4(B)(i).

23 NSC, supra note 2, Guideline 3.4; ABA, supra note 2, Standards 5-4.1, 5-4.3; Contracting, supra note 2, Guideline III-10; Assigned Counsel, supra note 2, Standard 4.7.1; Appellate, supra note 20 (Performance); ABA Counsel for Private Parties, supra note 2, Standard 2.1(B)(iv). See NSC, supra note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, supra note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

24 ABA, supra note 2, Standard 5-2.4; Assigned Counsel, supra note 2, Standard 4.7.3.

25 NSC, supra note 2, Guideline 2.6; ABA, supra note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, supra note 2, Guidelines III-6, III-12, and passim.

26 ABA, supra note 2, Standard 5-3.3(b)(x); Contracting, supra note 2, Guidelines III-8, III-9.

27 ABA Defense Function, supra note 15, Standard 4-1.2(d).

28 NAC, supra note 2, Standards 13.15, 13.16; NSC, supra note 2, Guidelines 2.4(4), 5.6-5.8; ABA, supra note 2, Standards 5-1.5; Model Act, supra note 2, § 10(e); Contracting, supra note 2, Guideline III-17; Assigned Counsel, supra note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA Defender Training and Development Standards (1997); ABA Counsel for Private Parties, supra note 2, Standard 2.1(A).

29 NSC, supra note 2, Guidelines 5.4, 5.5; Contracting, supra note 2, Guidelines III-16; Assigned Counsel, supra note 2, Standard 4.4; ABA Counsel for Private Parties, supra note 2, Standards 2.1 (A), 2.2; ABA Monitoring, supra note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.
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