

The Human Impact

EQUAL JUSTICE UNDER LAW

The Legacy of *Gideon v. Wainwright*

“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”

The United States Supreme Court

Gideon v. Wainwright, 372 U.S. 335 (1963)

On June 3, 1961, someone broke into a Panama City, Florida pool hall and stole alcohol and some change from a cigarette machine and a juke box. Clarence Earl Gideon, a fifty-one-year-old drifter, was charged with a felony – breaking and entering the pool hall with the intent to commit a misdemeanor. Trial commenced on August 4, 1961.

Gideon informed the trial judge that he was not ready to proceed because he was without counsel. Gideon asked that the court appoint an attorney for him, but the trial judge summarily denied the request. Too poor to hire an attorney, he was forced to go it alone. Attempting to mount his own defense, Gideon emphasized his innocence throughout the trial. But it was no use. The jury convicted him and he was sentenced to five years in prison – the maximum sentence for the crime.

With the aid of the prison library, Gideon drafted a five-page petition to the U.S. Supreme Court asking that the Court consider his appeal on constitutional grounds. The Court agreed to hear his case, and assigned him an attorney from the prominent Washington, DC, law firm of Arnold & Porter – Abe Fortas, who later became a Supreme Court Justice himself – to assist him in his appeal.

Justice Hugo Black delivered the unanimous opinion of the Court in the watershed case of *Gideon v. Wainwright*. Calling it an “obvious truth” that lawyers in criminal cases are “necessities, not luxuries,” the Court held that the Sixth Amendment’s guarantee of counsel is a fundamental and essential right made obligatory upon the states by the Fourteenth Amendment. Citing *Powell*, the Court reaffirmed that a meaningful right to counsel requires an attorney with the “skill and knowledge” that even an “intelligent” layman lacks.

Gideon’s “obvious truth” was made very apparent when Clarence Earl Gideon’s case was sent back to Florida for a new trial. This time, Gideon proceeded with the “guiding hand of counsel.” Fred Turner, a local attorney appointed by the court, spent three full days investigating the case before trial. He skillfully exposed the weaknesses in the testimony of the state’s witnesses, demonstrating how the state’s eyewitness was likely the real culprit. Turner called Gideon to the stand where Gideon denied any role in the break-in and provided evidence of his innocence, effectively rebutting testimony that went unchallenged during the first trial. The jury took merely an hour of deliberations to acquit Gideon of all charges.

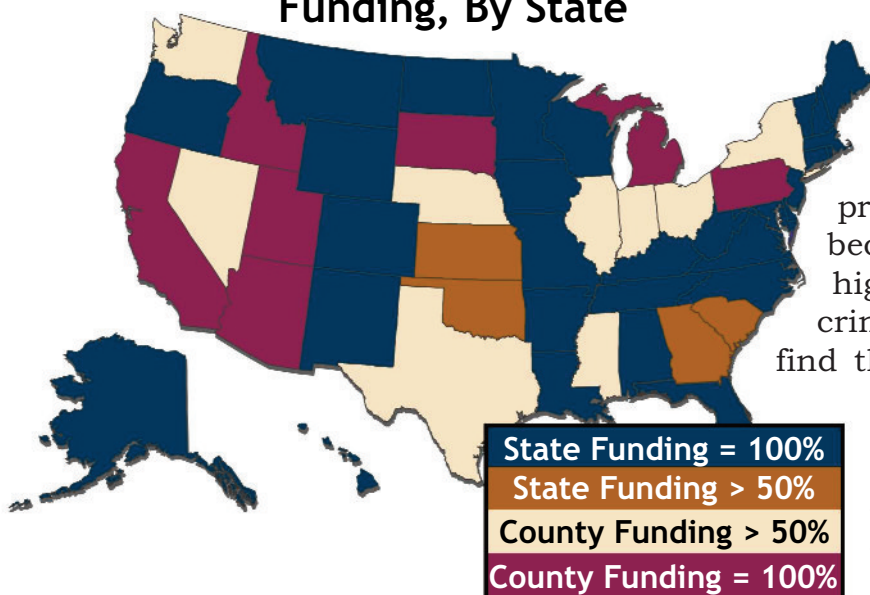
Michigan’s History of Muting *Gideon’s* Trumpet

In response to a request from the state of Florida for amicus briefs supporting its denial of the right to counsel to Clarence Earl Gideon, then-Minnesota Attorney General Walter Mondale spearheaded an effort to get other state Attorneys General to file an amicus brief in support of Gideon. The Attorneys General in 22 states – including Michigan – agreed that the right to counsel was a basic tenet of fairness in the court system, stating: “[The Right of Counsel] is indispensable to the idea of justice under law. An essential assumption of our Constitution, it transcends the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation.”

One of the critical but often overlooked aspects of the Court’s landmark ruling in *Gideon v. Wainwright* is that the Sixth Amendment’s guarantee of counsel was “made obligatory upon the States by the Fourteenth Amendment” – not upon county or local governments.⁵ National standards incorporate this aspect of the decision, emphasizing that state funding and oversight are required to ensure uniform quality.⁶ Unfortunately, the laws of Michigan require county governments to pay for the state’s responsibilities under *Gideon* at the trial-level⁷ without any statewide administration of to ensure adequacy of services rendered.

This stands in contradistinction to the majority of states, 30 of which relieve counties entirely from paying for the right to counsel at the trial-level.⁸ Another three states assume the vast majority of funding their right to counsel systems.⁹ Michigan is one of only seven states that still place the entire burden for funding trial-level right to counsel services on its counties as an unfunded mandate.¹⁰

Trial-Level Indigent Defense Funding, By State



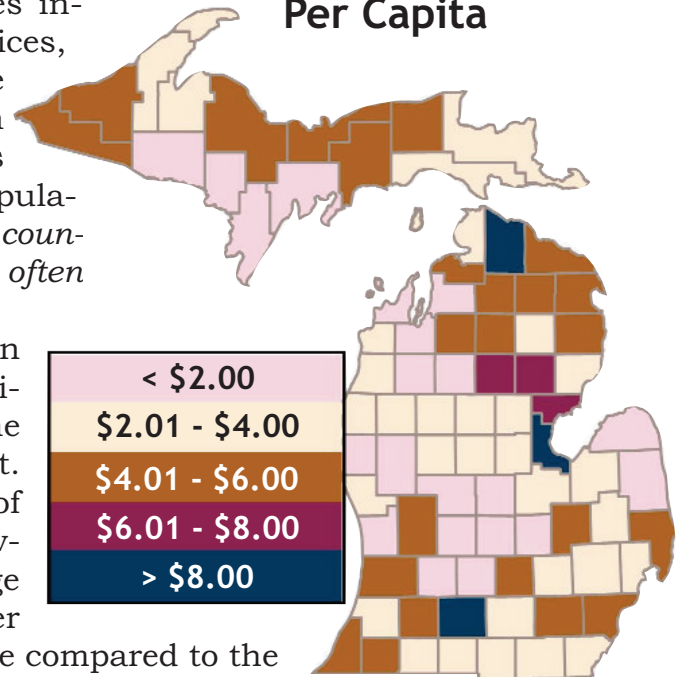
The practical necessity of state funding for the right to counsel is premised on the fact that county governments rely primarily on property tax as their main source of revenue. When property values are depressed because of factors such as high unemployment or high crime rates, poorer counties find themselves having to dedicate a far greater percentage of their budget toward criminal justice matters than more affluent counties. This, in turn, limits

CHAPTER III

the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could positively affect and/or retard rising crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime – further devaluing income possibilities from property taxes. And, since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, *the counties most in need of indigent defense services are often the ones that least can afford to pay for it.*¹¹

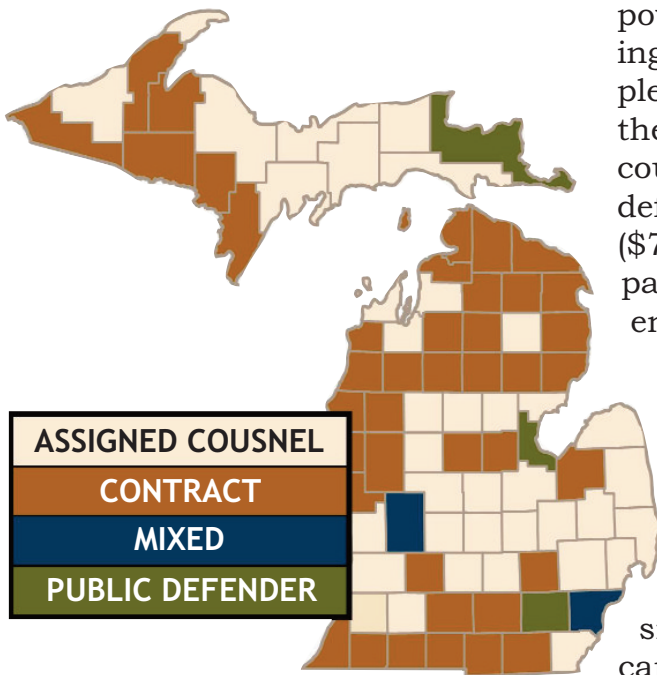
To see if this national phenomenon held true in Michigan, the NLADA site team studied comparison crime statistics and economic indicators. The median poverty rate for Michigan is 10.5 percent. The 38 counties that have a lower percentage of their population living in poverty than the state average also have a lower crime index percentage than the state average (8.21 index crimes per

Indigent Defense Spending Per Capita



1,000 people compared to the state average of 9.28). By contrast, the 44 counties with higher percentages of poverty than the state average have a correspondingly higher crime index (10.23 crimes per 1,000 people, or a 10 percent greater frequency of crime than the state average). Correspondingly, the poorer counties in Michigan indeed spend more on public defense services than the more affluent communities (\$7.88 per person in the poorer communities compared to a state average of \$7.35 and the more affluent county average of \$6.19).¹²

County-By-County Defender Systems



This dynamic puts a financial strain on less affluent counties – or in a state like Michigan experiencing an on-going recession – the majority of counties. Collectively, Michigan counties spend \$74,411,151¹³ (or \$7.35 per capita) on indigent defense services; 38 percent less than the national average of \$11.86). Michigan counties are significantly behind the national mean for per capita spending on defender services of \$10.39

(Michigan counties collectively spend 29 percent less than the national mean). Indeed, Michigan ranks 44th of the 50 states in indigent defense cost per capita). Michigan, for example, would need to spend approximately \$104,366,050 to meet the state funding per capita spending of a state like Alabama – a state that is generally seen as not providing

EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

constitutionally adequate representation.¹⁴ Indeed, the state of Michigan would need to spend \$120,033,400 to match the national average indigent defense cost-per-capita.¹⁵

County Attempts to Fund the State's Constitutional Mandate

Although national standards recommend the use of staffed public defender offices wherever the population and caseload are sufficient to support such programs,¹⁶ assigned counsel and contract attorneys provide most of the indigent defense services in Michigan. In fact, there are only five staffed public defender offices¹⁷ in the entire state. The Kent County Public Defender's Office maintains a staff of 13 attorneys and contracts with the county to handle about 50 percent of the cases for that jurisdiction each year. The other 50 percent are handled by assigned counsel holding annual contracts with the county. The Legal Aid and Defender Association of Detroit, a not-for-profit corporation,¹⁸ receives 25 percent of the assignments from Wayne County, while the rest are handled by assigned counsel. In Oakland and Macomb counties, both of which are heavily populated portions of the greater Detroit metropolitan area, there is no public defender office at all.

Per-Capita Spending

| | | |
|-----|-------------------------|----------------|
| 33. | Tennessee | \$9.30 |
| 34. | Alabama | \$9.17 |
| 35. | North Dakota | \$8.80 |
| 36. | Rhode Island | \$8.67 |
| 37. | Kansas | \$8.53 |
| 38. | Hawaii | \$8.26 |
| 39. | Maine | \$8.20 |
| 40. | Pennsylvania | \$8.10 |
| 41. | Oklahoma | \$8.02 |
| 42. | Idaho | \$7.83 |
| 43. | South Carolina | \$7.65 |
| 44. | Michigan | \$7.35 |
| 45. | Texas | \$7.04 |
| 46. | Indiana | \$6.77 |
| 47. | Arkansas | \$6.65 |
| 48. | Utah | \$5.22 |
| 49. | Missouri | \$5.20 |
| 50. | Mississippi | \$4.15 |
| | NATIONAL AVERAGE | \$11.86 |

Comparing indigent defense systems across state lines is difficult, at best, given jurisdictional variances related to: delivery model, population, geographical expanse, prosecutorial charging practices, crime rates, county versus state funding, three strikes laws, and the death penalty (among others). For example, the state of Alaska has the highest cost per capita indigent defense spending (\$40.96) due almost entirely to the fact that public defenders must travel by air for many court appearances. So, whereas a high cost per capita may not necessarily guarantee that a state is providing adequate representation, a low indigent defense cost per capita certainly is an indicator of a system in trouble. Michigan ranks 44th of the 50 states.

As recently as of the early 1990s when 34 counties paid by the hour, Michigan was known as a state that followed the assigned counsel model of indigent defense delivery. That is no longer the case, as most now rely on a mixture of assigned counsel and flat fee contracts. Twenty-nine counties (of 83 total, or 35 percent) rely exclusively on individual assigned counsel for trial level representation of indigent defendants. In addition, Wayne and Kent counties assign private counsel in 75 percent and 50 percent of their cases respectively.

Some courts set rates by the hour and others by event with so-called fee schedules. As of April 2006, twenty circuits pay their assigned counsel solely by an hourly rate. Hourly rates vary widely from one county to another; as high as \$88.82 in Ottawa County to as low as \$40 in Eaton County – a rate last reviewed in 1978.

A fee (or event) schedule pays an attorney a fixed amount per task, regardless of the number of hours actually spent completing that task. An attorney in Leelanau County,¹⁹ for example, will earn \$200 for the client interview and case preparation, \$100 for the preliminary hearing, another \$100 for a hearing on motion, \$600 for the first day of trial, and \$200 for each subsequent half-day in trial. Events tend to be further categorized in larger counties based on the seriousness of the charge. The use of fee schedules, it has been noted, rests “on the premise that if a lawyer handles enough assignments, things average out ... while fee schedules effectively pay at higher or lower rates depending on the number of hours invested in a given case, most will always pay more for a trial than a guilty plea.”²⁰ Often these fee schedules are adopted in jurisdictions with heavy caseloads as a cost-saving measure. Counties seeking to cut costs even further have often implemented low-bid flat-fee contracts.

Flat-fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation.²¹ Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled “Conflicts

Michigan's Financial Strains

Michigan counties may be the least suited to handle the burden of providing the right to counsel because of the serious financial strains of the local economy. State and local economists and policy-makers have been attempting to cope with an economy that has lagged toward the bottom of the nation for over a decade.^a In fact, the state's growth rate since 1997 has ranked 48th in the nation.^b Michigan ended 2006 with an unemployment rate of 7.1 percent (well above the national average of 4.5 percent).^c Since 2001, an estimated 346,500 jobs have vanished in Michigan as manufacturers have shed 25 percent of their workforce in that time-span.^d Michigan's flat tax rate on personal income is 3.90 percent giving it one of the lowest top brackets in the nation. Some cities impose additional income taxes. There is single business tax on small businesses that is set to expire by 2009,^e and a corporate tax is levied on larger concerns. Michigan's state sales tax is six percent. The state does not allow city or local sales taxes. Property taxes are assessed on the local, not state, level.

At the same time, Michigan imprisons significantly more of its population than the majority of the 50 states. In 2004, Michigan had 263,100 adults under correctional supervision and a supervision rate of 3,527 per 100,000 persons, which ranked 4th among the

states and was about 27 percent above the national average.^f That same year, the state's incarceration rate was 483 per 100,000 people, ranking 13th. The result of this reliance on the corrections system is a heavy cost to Michigan's taxpayers. Indeed in 2001, Michigan taxpayers paid 26 percent more per inmate than the national average; a cost per inmate of \$32,525 placed the state 8th nationwide.^g

^a Aguilar, Louis. “Economic Funk Won't End in 2006: As nation's outlook improves, Michigan will see 6th straight year of job losses, analysts say.” The Detroit News (Sunday, December 4, 2005). See: <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20051204/BIZ/512040341>

^b See “Table 1. Growth Rates in Real GDP by State, 1997-2005” <http://www.bea.gov/bea/newsrel/gspnewsrelease.htm>

^c Michigan Department of Labor & Economic Growth. (http://www.milmi.org/admin/uploadedPublications/463_econsit.htm).

^d See Aguilar.

^e http://www.detroitchamber.com/public_affairs/index.asp?id=4&scid=&rcid=498

^f Correctional supervision statistics include prisons, jails, probations, and parole.

^g National Institute of Corrections (<http://www.nicic.org/Features/StateStats/?State=MI>).

of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.²² For attorneys wanting to practice criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area where they prefer to live.

The trial courts of 41 Michigan counties ranging in size from Muskegon (pop 174,401) to Baraga (pop. 8,728) use flat-fee contracts with private firms, consortia of attorneys, individual attorneys, or some combination thereof. Contracts vary widely in the number of attorneys or firms who are parties and in the nature of the representation to be provided. Some cover misdemeanor and/or felony defense, and some include other assigned cases such as delinquency, neglect and abuse, and mental health. Not all contracts specify how many cases are to be handled for the contract fee. Some contracts include reimbursement for office expenses and additional fees for experts, while some do not. A few contracts do provide for year-end adjustments. Contracts for indigent defense services in Michigan are sometimes awarded primarily on the basis of cost, without regard to qualifications or any other considerations – an indictment of trial-level indigent defense services throughout the state.

How Michigan Counties Respond to Financial Strains

For counties in poor economic standing, there are only two ways to cut costs related to indigent defense: either reduce the number of cases coming into the system or cut spending on salaries and case-related expenses. Since public defenders do not control their own caseload, less affluent jurisdictions often turned to low-bid, flat fee contract systems in which an attorney takes all of the indigent defense cases in a jurisdiction for a single fixed fee. Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled "Conflicts of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.^a For attorneys wanting to practice criminal law in these jurisdictions, refusing to take every case for a single flat fee effectively precludes them from practicing their chosen vocation in the area where they prefer to live and work. Currently, 41 of Michigan's 83 counties (or 49 percent) favor this delivery method.

^a The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or "to waive a client's rights for reasons not related to the client's best interests." For these reasons, all national standards, as summarized in the eighth of the ABA's *Ten Principles*, direct that: "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, and separately fund expert, investigative and other litigation support services."

The Documentation of Michigan's Historic Struggles to Implement Gideon

This report is not the first instance in which the constitutionality of Michigan's indigent defense system has been called into question. In fact, it is not even the first NLADA report. In 1974, NLADA undertook a review of a federally-funded Wayne County Juvenile Defender Services project under a grant from the United States Department of Justice, Law Enforcement Assistance Administration. After noting several difficulties in case overload and political interference, and based on fears that the project would not survive beyond the federal grant period, NLADA recommended that the only answer to the problems plaguing juvenile justice representation in Detroit was enactment of statewide trial-level represen-

tation legislation.²³ When NLADA returned three years later – again under a United States Department of Justice grant – our comments were much more blunt and foreboding: “The juvenile system needs massive assistance. Unless serious changes are made in funding to provide adequate staff and facilities, especially social service programs, and unless programs in diversion, remedial schooling, and other approaches are tried, today’s juveniles will become alienated and impoverished adults who will flood the jails and infect our entire social existence.”²⁴

State actors have provided other documentation of systemic deficiencies. On July 10, 1975, the Honorable Thomas G. Kavanagh – then Chief Justice of the Michigan Supreme Court – appointed bar leaders to serve on a Defense Services Committee of the Michigan State Bar in order to review the entire trial and appellate procedure for legal representation of indigent defendants in criminal proceedings, and make such recommendations for improvement as they think best. Composed of judges, prosecutors, defenders, and court officials, the Committee met in ten all-day sessions in Lansing, heard oral testimony from a variety of witnesses, and then ultimately issued its report, subtitled *A Review of the Legal Representation of Indigent Defendants in Criminal Proceedings*.²⁵

At a final meeting on May 13, 1977, the Committee voted to make a set of recommendations to the Michigan Supreme Court. Among ten recommendations for reforming indigent defense services, the committee called for the following: “Appointed counsel shall receive reasonable adequate compensation to permit effective representation.” The committee also urged: “[t]he right of an indigent defendant to hire necessary expert witnesses is fundamental to the right to a fair trial.” As of this writing, some 30 years later, neither of these recommendations has been fulfilled.

In 1980, Public Acts 438 and 443 reorganized the trial courts in Wayne County, purportedly to provide state funding for three of Wayne County’s trial courts, and proposed to establish a timetable for funding all of the trial courts. Despite the legislation, state funding did not cover a range of expenses, including those associated with indigent defense counsel and witness fees. Interestingly, the House Legislative Analysis accompanying the

State Appellate Defender Office

Though the state provides no funding or oversight to the trial level indigent defense system, Michigan does provide a small amount of state funding to support the appellate defender system (in 2005, the state provided \$5,634,400).^a These funds are controlled by an independent seven-member Appellate Defender Commission,^b charged with the development and adoption of standards for all appellate counsel, and oversight of the two statewide divisions: the State Appellate Defender Office (SADO), and the Michigan Appellate Assigned Counsel System (MAACS). Such is the system created by the Appellate Defender Act of 1978 (effective 1979).^c Established in 1969, SADO actually predates the Appellate Defender Act. Indeed, the legislation was seen as a major reform for appellate representation when it was enacted 30 years ago, as it gave the independent commission the authority to set performance standards and control the workload of the

SADO attorneys.^d

^a ABA, *50 State and County Expenditures for Indigent Defense Services, Fiscal Year 2005*, available at <http://www.abanet.org/legalservices/sclaid/defenders/reports.html>

^b The Appellate Defender Commission is housed within the office of the state court administrator. Though the governor directly appoints all commissioners, the governor has no discretion to reject names offered by the nominating authorities.

^c Michigan Appellate Defender Act of 1978, MCL 780.705; MSA 28.1287 (105)

^d The Appellate Defender Act requires that SADO be assigned no less than 25 percent of all indigent criminal appeals, but limits the total cases the office accepts to “only that number of cases that will allow it to provide quality defense services consistent with the funds appropriated by the Legislature” (MCL 780.716(c)). All overflow cases are assigned to private attorneys on the MAACS roster.

bill that became Public Act 438, stated: “[t]he need for state government to streamline the operations and assume the costs of the state’s judicial system has been recognized for some time now. The increase in case backlogs throughout the state and the lessened ability of local units of government to meet the costs of court operation point toward the desirability of such an approach. However, nowhere is the need for court reorganization and state assumption of the costs of court operations more urgent than in the Detroit-Wayne County area.” The Act called for funding of all court operational expenses by October 1, 1988, through a phased-in process over eight years. Despite this seeming clear call for and progress toward state financing of the courts, including indigent defense services, broad reform never happened and even the state funding of the three Wayne County courts was eventually abandoned.

Frequent calls for reform were heard throughout the 1980s and ’90s. For example, in 1986, Chief Justice G. Mennen Williams, in his State of the Judiciary speech, called for a statewide system of “equal justice.” “This system remains to be fully implemented,” he said, “and it only can be fully implemented through state financing.” Acknowledging that the 1980 pledge to fully fund the trial courts had failed, he emphasized that counties could not live up to the task of funding the courts: “[f]unding units previously disinterested in state assistance for trial courts are faced with adverse financial circumstances and many are most interested in our 1986 program of state funding.” He urged the state to support funding for assigned trial and appellate counsel, as well as witness fees and various other court costs.

In her 1986 State of the Judiciary speech, then Chief Justice Dorothy Comstock Riley similarly urged the state to step in and relieve the counties of a burden that they could not afford to meet. She urged comprehensive reform of the courts, making the point again in her 1988 and 1990 State of the Judiciary speeches. Subsequent Chief Justices Michael Cavanagh and James H. Brickley also voiced these concerns, and in 1995 Chief Justice Brickley released the Michigan Supreme Court’s report entitled *Justice in Michigan, A Report to the People of Michigan from the Justices of the Michigan Supreme Court*, in which the court declared,

Financial Disincentives to Due Process

“The current system of court assignment and payment has gone far to do what it was designed to do, namely speed the court docket. It does however, as the plaintiffs allege, encourage defense attorneys to persuade their clients to plead guilty. The incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed. Under the current system, a lawyer can earn \$100 an hour for a guilty plea, whereas if he or she goes to trial the earnings may be \$15 an hour or less. Essential motions are neglected. In short, the system of reimbursement of assigned counsel as it now exists creates a conflict between the attorney’s need to be paid fully for his services and obtaining the full panoply of rights for the client. Only the very conscientious will do the latter against his or her own interests

The system of payment according to the seriousness of the crime rather than on hours spent or work performed (events) is not reasonable or just and is a disincentive to due process

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.”

The Hon. Tyrone Gillispie
Report of the Special Master, April 3, 1991

among other things, that: “[t]he state should assume the core costs of the court system, including judicial salaries and benefits, the salaries and benefits of court staff, due process costs including the cost of indigent representation, and the cost of statewide information technology.”

State Bar Leaders Speak Out

“We must finally recognize and value the critical role of indigent services in the criminal justice system Our system of justice will only work if we provide every defendant with competent, fully trained, and adequately paid defense counsel.”

Thomas W. Cranmer

President, State Bar of Michigan, 2005-06

“Our justice system works best with both a strong prosecution and a strong defense. This ensures that the rights of all citizens are protected Our belief in justice for all should not become justice for only those who can afford to pay.”

Nancy J. Diehl

President, State Bar of Michigan, 2004-05

In 1992, the Michigan Bar Journal devoted an edition of its magazine to addressing the woes of its state’s indigent defense system.²⁶ The publication focused on inadequate compensation for appointed counsel as the chief systemic flaw responsible for compromising the quality of representation provided the indigent accused. The problem, the authors argued, was only compounded when one considered the state’s failure to provide support services (investigators, expert witnesses, etc.) and training for defense attorneys; or the intrinsic lack of independence and freedom from judicial control; or the lack of supervision and qualification standards for appointed counsel; or the lack of a general and statewide institutional presence. In his forward, then Michigan Supreme Court Chief Justice Michael Cavanaugh remarked, “[i]t is unfortunate that as we mark the 200th Anniversary of the *Bill of Rights* and extol its important guarantees, we at the same time witness the failure to secure

those guarantees, adequately or at all, to significant segments of society.”²⁷

In 2003, following the racial tensions and civil unrest occurring in Benton Harbor, Governor Granholm established a Benton Harbor Taskforce that subsequently produced a report recommending, among other things, the substantial overhaul of the indigent defense system in Berrien County and the creation of an institutional public defender’s office. The reforms never happened.

According to a 2005 report of the ABA Standing Committee on Legal Aid & Indigent Defendants, “local elected officials are downright indifferent to indigent defense reform at best and opposed at worst.” During a public hearing regarding the right to counsel, a witness from Michigan related, “I once addressed the Michigan Association of Counties meeting, and a county commissioner raised his hand in the back and said: ‘Is there any way we could get defendants from the jail to the prison without going to court? Because you would save a lot of money.’ And that kind of sums up the attitude, especially in the rural counties.”²⁸

Despite historical support by the Michigan Supreme Court for state legislative funding for indigent criminal defense, relief through litigation and judicial decision has not been forthcoming. Less than a year after a June 2001 Administrative Order had decreased assigned counsel fees by 10 percent statewide (fees were increased again in 2003), the Criminal Defense Attorneys of Michigan and the Wayne County Criminal Defense Bar

Association (with *pro bono* assistance from the law firm of Kirkland & Ellis LLP) filed an unsuccessful lawsuit in the Michigan Supreme Court seeking an increase in assigned counsel fees in Wayne County (468 Mich. 1244, 663 N.W.2d 471).²⁹ The plaintiffs, arguing a statutory right to “reasonable fees,” sought an hourly rate of \$90 in Wayne County. The court disagreed, ruling that then-current rates of about \$67.50 did not “present the systemic failure to provide reasonable compensation that was found in the fixed fee schedule at issue in *In re Recorder’s Court Bar Association v. Wayne Circuit Court*, 443 Mich. 110, 503 N.W.2d 885 (1993).”³⁰ Since the court’s 2003 ruling on the Wayne County litigation, there have been no other complaints filed with the Michigan Supreme Court.

In an effort to spark indigent defense reform, in 2002 a core group of criminal and juvenile justice professionals formed the Michigan Public Defense Task Force,³¹ a broad-based citizens’ coalition. An *ABA Gideon Initiative* grant was awarded to support the Task Force. The Task Force developed a model plan for the state’s indigent defense services, based on the *ABA Ten Principles for the Delivery of Indigent Defense Services*, and began working to implement the plan through public education and advocacy programs. That same year, the State Bar of Michigan adopted the Task Force’s *Eleven Principles* for the delivery of indigent defense in the state.³² In 2003, the State Bar of Michigan’s Executive Committee adopted a resolution encouraging the legislature to establish a commission with the responsibility of investigating indigent defense services in Michigan and making recommendations for improvement. The Task Force even went so far, in May 2005, as to draft a Michigan Public Defense Act.³³ The public education and advocacy efforts of the coalition continue today.

In 2007, some local and national advocates thought the time had passed for the state of Michigan to reform indigent defense services legislatively and filed a class action lawsuit against Governor Granholm for failing to provide adequate services. The Michigan Coalition for Justice (MCJ) in the case *Duncan et al v. State of Michigan* argues that the failure of the state to ensure an adequate constitutional right to counsel is so stark in Berrien, Genessee, and Muskegon Counties that it has asked the court to compel the state to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation.³⁴