

Eddie Joe Lloyd

In 1985, Eddie Joe Lloyd was convicted in Detroit of the rape and murder of an under-aged girl. The evidence of his guilt was overwhelming – Eddie Joe Lloyd’s written confession gave specific information about the crime scene only the perpetrator could have known. Police also had him on tape admitting to the brutal act. It was a slam dunk case; the jury took less than an hour to convict him of 1st degree felony murder. Lamenting the lack of the death penalty in Michigan, the judge sent Eddie Joe to a maximum security prison for the remainder of his life without the possibility of parole – a measured and appropriate sentence for such a heinous crime. Justice was served Except for one small problem – Eddie Joe Lloyd was innocent.

The road to Mr. Lloyd’s wrongful conviction began with a letter he drafted to the police suggesting that he had pertinent information on the case. The letter was not unique. Eddie Joe was convinced that he had the supernatural ability to solve crimes and wrote letters to the police offering his services on previous occasions. The particular letter that set in motion his wrongful conviction was written from his bed at the Detroit Psychiatric Institute where he was non-voluntarily committed. The police interrogated Eddie Joe on at least three separate occasions at the mental health facility. Mr. Lloyd was never offered a lawyer during these interviews, during which time, as it turned out, the police officers “allowed Lloyd to believe that, by confessing and getting arrested, he would help them ‘smoke out’ the real perpetrator.” They fed him salient information about the crime scene to make his confession more believable.

The high ethical demands of representing a capital case combined with the paltry compensation paid to lawyers in 1985 Detroit left the Wayne County district court two pools of attorneys from which to fulfill Mr. Lloyd’s constitutional right to counsel – 1) those that saw accepting court-appointments and zealously defending poor people as part of an attorney’s professional and ethical duty to the Bar, despite the significant personal financial loss it imposed; or, 2) those that maximized their economic return on court-appointed cases by taking on as many assignments as the courts would allow while disposing of them as quickly as possible. With such a high profile case as this – Detroit had been under curfew in the months that followed the crime – the appointing judge assigned a lawyer that would not put up too many hurdles to getting Mr. Lloyd off the streets and behind bars for good.

Aiding the goal of quick convictions, Wayne County only paid a single flat fee of \$150 to court appointed attorneys to cover the entire cost of pre-trial preparation and investigations. In Eddie Joe Lloyd’s case, his attorney gave \$50 to a convicted ex-felon to serve in the capacity of investigator and pocketed the extra \$100 to cover the rest of his pre-trial expenses. Not surprisingly, the “investigator” conducted no independent inquiry into Mr. Lloyd’s confession or his mental state. The lawyer too failed to interview both Mr. Lloyd’s doctors and his family members about Eddie Joe’s history of delusions of grandeur. And, no independent of the police can-

vass of the crime scene occurred – a simple endeavor that would have shown that a number of “facts” in Mr. Lloyd’s original letter were incorrect and that later admissions only matched the police’s prevailing theory of the case at the time and not the true particulars of the crime. No expert was retained to explain Mr. Lloyd’s mental history to the jury or to challenge the state’s expert testimony that Eddie Joe was competent despite his non-voluntarily committed status at the state facility. In 1985 Detroit, such defense expert witnesses were rarely granted by the court, and if they were, the measly reimbursement basically eliminated any decent expert unwilling to donate his time from testifying. Whether or not Eddie Joe’s attorney knew this to be the case from past experience, he never bothered to ask the court for an expert. And, despite the U.S. Supreme Court’s ruling in *Miranda v. Arizona*, Lloyd’s court-appointed attorney never appropriately challenged the non-counseled custodial interrogations at the mental health facility at pre-trial hearings.

Then, eight days before trial, Eddie Joe Lloyd’s attorney suddenly withdrew from the case. But that apparently was a mere inconvenience to the court which quickly hand-selected another attorney who saw no ethical problem with starting the trial in approximately one week’s time since the original attorney had done “all the necessary” pre-trial work. This second attorney did not even bother to meet with Mr. Lloyd’s original court-appointed attorney before trial or to cross-examine the police officer who was most responsible for Eddie Jo’s coerced confession on the stand. In fact, Mr. Lloyd’s new defense lawyer did not call a single defense witness to testify. His closing argument clocked in at less than five minutes. Post-conviction, Mr. Lloyd’s received another court-appointed lawyer to conduct his direct appeal. This one never even bothered to make a cursory visit to Eddie Joe in prison or to raise ineffective assistance of counsel claims against the two trial attorneys. After his direct appeal, Eddie Joe wrote the court to suggest he had not received an adequate defense, and act that spurred his appellate attorney to write a letter to the judge saying that Eddie Joe’s claims should not be taken seriously because he was “guilty and should die.”

Eddie Joe Lloyd fortunately experienced a few years of freedom after serving 17 years in prison before passing away from medical complications at the age of 54. Eddie Joe’s freedom was secured thanks to the efforts of The Innocence Project – a non-profit legal clinic at the Benjamin N. Cardozo School of Law that handles post-conviction cases where DNA evidence still exists in cases tried before the advent of DNA sciences – working in conjunction with local Michigan attorney Saul Green. For failing to provide an adequate defense up front, Wayne County cost its tax payers \$4 million in a settlement agreement with Mr. Lloyd’s estate. Sadly, the DNA evidence that completely exonerated Eddie Joe Lloyd has not led to a match on any law enforcement database. More than 20 years after the crime, the whereabouts of the real perpetrator remains unknown.

Prioritizing Speed in Michigan's District Courts

In 1972, the U.S. Supreme Court extended the right to counsel in *Gideon* to any misdemeanor cases involving the possibility of incarceration in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Thirty years later in *Shelton v. Alabama*, 535 U.S. 654 (2002), the Court mandated that governments must provide counsel to not only those indigent defendants who are sentenced to any term of incarceration, but to defendants who receive probationary or suspended sentences which may be subsequently converted into incarceration by virtue of violation of the terms of the probationary or suspended sentences.

Five staff members of the National Legal Aid & Defender Association plus 10 criminal defender contractors – the majority of whom are members of the American Council of Chief Defenders – went to Michigan at various times and sat in various courtrooms in each of the 10 survey counties. There was one singular experience that defined all of our experiences: the opinion that a large gap exists between the promise of both *Argersinger* and *Shelton* and the day-to-day realities in the district courts of Michigan. And, unlike the Eddie Joe Lloyd case, there is no national Innocence Project for the hundreds of thousands of misdemeanor cases that lack DNA evidence.

People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. 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. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution.

In fact, the emphasis on celerity of case processing has led many of the criminal justice stake holders we interviewed in one jurisdiction – Ottawa County – to colloquially refer to the district court arraignment dockets as “McJustice Day” (their terminology, not ours). The fact that clients are arraigned, pretrial conferences held, and, if a plea can be worked with the clients, sentences imposed generally all in a single day without defense counsel present led one defense attorney to tell us that the philosophical problem with “McJustice Day” is that it is “assembly line justice.” To be clear, many of the criminal justice stakeholders expressed some embarrassment at the use of the term. Still, our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michi-

gan's valuing of speed over substance. The failure to adequately implement the right to counsel in Michigan's district courts is entirely related to the desire to cut costs.

A. *The Failure to Provide Counsel At All*

The constitution grants a defendant the option to waive her right to counsel and represent herself.³⁵ To be valid, however, a waiver of counsel must be voluntary, knowing, and intelligent.³⁶ Therefore, before finding that a defendant has waived her right to an attorney, the criminal court judge has an obligation to make a thorough inquiry into the particular defendant's abilities and understanding. This inquiry includes whether the accused understands the nature of the charges against her, the range of allowable punishments, possible defenses to the charges, and any other essential facts to ensure that the defendant understands the consequences of the waiver. Moreover, although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation – all factors that tend to foster recidivism. Before a client knowingly waives her right to counsel, she must be fully aware of the consequences that a guilty plea may hold.

A simple enumeration of rights posted on a sign by the clerk's office does not amount to a knowing and valid waiver of rights. Too often, people in need of public defender services are undereducated, illiterate, mentally ill, and/or developmentally delayed. Without counsel to advise them and assess their competency to waive counsel, the Court is not guaranteeing that these waivers are valid. The U.S. Supreme Court most recently addressed the requirements for an effective waiver of the right to counsel prior to entry of a guilty plea in *Iowa v. Tovar*, 541 U.S. 77 (2004). Citing *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938), the Court confirmed that any waiver of the right to counsel must be knowing, voluntary, and intelligent, and must ensure that the defendant possesses sufficient information to make an intelligent election dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.³⁷ *Tovar* confirms that the warnings of the pitfalls of proceeding uncounseled must be "rigorous[ly]" conveyed per *Patterson v. Illinois*, 487 U. S. 285, 298 (1988). Toward this end, the Sixth Circuit United States Court of Appeals has suggested an extensive colloquy for every federal district judge to follow whenever a defendant desires to waive their right to counsel and represent themselves at trial.³⁸ Most assuredly, any waiver of the right to counsel must protect against the danger that "innocent men pitted against trained prosecutorial forces may waive counsel and plead guilty to crimes they have not committed, if they think that by doing so they will avoid the publicity of trial, secure a break at the sentencing stage, or simply get the whole thing over with."³⁹ Moreover, taking the time to ensure that a defendant actually knows what he is doing before accepting his waiver and allowing him to plead guilty without counsel protects the criminal justice system from unnecessary appeals, post-conviction, and retrials.⁴⁰

Upon arrival at district court in Alpena County, defendants are checked-in at the front clerk's window and receive an *Advice of Rights* form. District court clerks instruct misdemeanor defendants to read the form, sign-it, and return it to the front window. Once it is returned to the court's clerks, the form is placed in the court's file and it is available to the

judge for review. With regard to the right to counsel, item Number 1 on the form informs the misdemeanor defendant that s/he has three basic rights: a. to plead guilty/not guilty/or stand mute, in which case a not guilty plea will be entered, or a no contest plea with the permission of the court; b. to have a trial by judge or jury; and c. to have the assistance of an attorney;

Number 2 on the *Advice of Rights* form tells the defendant that s/he has the right to an attorney appointed at public expense if indigent and if the offense requires a minimum jail sentence or the court determines that it might sentence the defendant to jail. Under Number 3, it also states that the defendant “may have to repay” the expense of the court appointed attorney. Numbers 4 and 5 explain basic trial rights and the burden of proof for the state and what happens if the defendant pleads guilty or no contest. Number 6 references the right to be released on bond, while Number 7 advises probationers/parolees that a guilty/no contest finding violates probation or parole. Number 8 outlines the potential penalty for non-DWI/substance abuse cases up to 93 days in jail and a fine of up to \$100, plus costs and/or fines. It also states that the Court will advise if the crime involves a minimum sentence. Number 9 requires that all financial obligations be paid at time of assessment. Number 10 references the rear of the form for DWI/substance abuse/driving offenses, with the fine range, jail time, and community service and personal screening requirements, and the licensure implications. Number 11 outlines the right to a circuit court appeal taken within 21 days from sentence. Number 12 addresses special accommodation for disabilities and for foreign language interpreter through immediate notice to the court.

Despite the lengthy information, the form is absolutely not a waiver of counsel. Although the form advises misdemeanor defendants of their “basic rights,” including to an attorney, it does not explain waiver of counsel nor does it provide for waiver of counsel signatures by the defendant or counsel or the judge. The *Advice of Rights* form is signed by the defendant alone. So clients sign off and walk into district court where there are no public defenders (or prosecutors for that matter). Courtroom staff includes a court clerk and a sheriff who is armed. Felony defendants, including those participating in television/video arraignments from the county jail, receive quick, cursory, and perfunctory information from the judge regarding the charges, the setting of bail, and their preliminary hearing date. The judge is quick and perfunctory with the misdemeanor arraignments set for an initial appearance. Defendants are informed of the charges and asked how they want to

Alabama v. Shelton

In *Alabama v. Shelton* 535 U.S. 654 (2002), Justice Ginsburg opined that the extension of the right to counsel to all misdemeanor cases even when the threat of imprisonment is not immediate shall not cause undue financial strain because jurisdictions can opt for pre-trial probation programs. Pre-trial probation programs typically are structured whereby prosecutors and defendants agree to the participation in a pre-trial rehabilitative program which includes conditions typical of post-trial probation. As Justice Ginsburg states, “[a]djudication of guilt and the imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions.”^a

^a *Shelton* held that an accused person has a right to counsel at trial even if he is ultimately sentenced to a totally suspended period of incarceration, with the defendant’s continued freedom conditioned upon meeting one or more probationary requirement. Should the state accuse the probationer of violating the terms of his probation, the judge cannot punish him by locking him up unless the probationer was afforded the right to be represented by a lawyer when he originally went to trial or pled guilty. Moreover, the Court explained, the failure to initially provide the lawyer cannot be remedied by providing an attorney at the hearing where the judge determines whether to revoke the suspended sentence because, at that point, the attorney can only challenge the facts surrounding the probationer’s alleged failure to meet the conditions of the suspended sentence and not the facts of the underlying conviction.

Overview of Alpena County

Alpena is a smaller county in the Lower Peninsula's (LP) north-eastern corner. As of 2005, the county had an estimated 30,428 people, ranking it 35th among Michigan's counties.^a Alpena County has an 83.1 percent high school graduation rate and a median household income of \$34,177. Its poverty rate of 10.5 percent ranks in the middle among Michigan's counties. The county is extremely rural, as the Mackinaw State Forest occupies large tracts of land in the county. In fact, there is only one city in the entire county - the county seat, Alpena. The City of Alpena (pop. 11,304) sits on the shore of Lake Huron's Thunder Bay. Alpena is by far the largest city in the sparsely-populated northeast corner of Michigan's Lower Peninsula; it serves as the region's commercial and cultural hub.

Alpena County is home to the 26th Circuit and 88th District Courts.^b All public defender services in the county are handled via flat-fee contract with a private law firm based in Alpena.

Prior to the current contract system, all defender services for misdemeanor and delinquency cases were delivered through an assigned counsel program fully and completely administered by the district and probate court judges. Assigned counsel through that program were paid a rate of \$50 an hour. Felony representation was provided by the Office of the Public Advocate (OPA), which was initially funded in 1981 by a special \$80K federal grant obtained by then-Circuit Court Judge Swallow. OPA was a 501(c)(3) organization with a board of directors that handled the felony caseload of the then four counties that made up the 26th Circuit Court.

In 2003, the 26th Circuit Court was reorganized into just the two counties - Alpena and Montmorency - at which time it was determined that the OPA was costing Alpena County \$420K per year for felonies alone. The OPA was closed and the law firm of Lamble, Pfeifer & Bayot (LPB) was formed.^c A three-attorney firm, LPB maintains an office about a block away from the circuit and district courts in Alpena.

In 2004, LPB was awarded its first annual contract with Alpena County and another with Montmorency. While NLADA was visiting Alpena, LPB was in the second year of a three-year contract with the county (\$264K for 2006, \$269K for 2007, and \$276K for 2008). The county placed supervisory responsibility over the contract in the circuit court judge and merely pays monthly installments to LPB. Still, the circuit court judge does not supervise either LPB practices or its fiscal management. The only report from LPB is the firm's final calendar year statistics on number of cases handled for each court and the amount under the contract allocated to that court. LPB provided no per-attorney caseload information.

One attorney acts as lead felony attorney in Alpena and maintains a private practice for divorce and child custody representation. A second LPB attorney also takes felony cases in Alpena, but further handles the firm's contract cases with Presque Isle County (to the north of Alpena) and has a private practice with separate offices from his LPB office. He is also a part-time Alpena city attorney, but affirmed that he does no city work that would place him in conflict with representation under the criminal defense contract. The third LPB attorney primarily does probate, family, and some district court work. He also teaches at a local community college. LPB assigns conflict cases to two "conflict counsel." LPB attorneys try to match case severity with practice experience (including assignments to the two assigned conflict counsel).

^a U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26007.html>.

^b Both the circuit court and district court have jurisdiction over both Alpena and neighboring Montmorency Counties.

^c Mike Lamble, Bill Pfeifer, and Ron Bayot all served as staff attorneys in the Office of the Public Advocate.

plea. Only if they plead not guilty are they asked if they want counsel. Without the presence or advice of counsel and without any oral colloquy regarding waiver of counsel and without signing of a waiver of the right to counsel form, the judge accepts guilty pleas in misdemeanor cases.

One female defendant pled guilty without counsel or any oral or written waiver of counsel to disorderly conduct surrounding an incident at McKinley and Washington streets in Alpena. The judge accepted her plea after listening to her story of what had happened on the street outside her home. Supposedly a second woman broke the front window of the defendant's house and then began fighting on the street with a third woman. (Neither of these two women were in the courtroom.) The defendant admitted to pulling one woman off the other, but not to screaming or yelling. The judge seemed to question the factual basis for accepting the plea and asked the sheriff to go out and get the police report on the case. After setting aside the case and reading the police report, the judge reconvened, basically stated that the police report supports disorderly conduct, and accepted the plea. The woman was given a delayed adjudication with one year unsupervised probation, ordered to pay fines and costs, and told not to drink -- all despite clearly having legal aspects of her case that would raise questions with a defense attorney.

In Oakland's 47th District Court a judge will deny appointment of counsel if he deems the client's income to be "way too high." But this determination is only made in those cases where a defendant requested appointment of counsel and completed the petition and the petition was sent to the judge's court reporter. There are many cases where the petition is never even sent to the judge for review. One judge advised that considerations

are based on “what little information I know” in determining whether to appoint counsel to a defendant who has requested appointed counsel. As a rule of thumb, if the charge is punishable by more than 93 days the defendant will receive an attorney; if the charge is punishable by less than 93 days the judge will try to decide (at time of arraignment and before having any input from prosecution or defense) whether the defendant will actually go to jail. The judges *will not* appoint counsel in any case where they do not intend to send the defendant to jail, even if the charge carries a potential jail sentence. One judge will not appoint counsel for driving with license suspended 1st offense, urinating in public, disorderly person, and trespassing, “because he will not sentence defendant to jail.” The other judge *will not* appoint counsel for driving with license suspended 1st offense and for urinating in public, and makes a case-by-case decision on charges of disorderly person and trespassing. For those cases where the judges will not appoint counsel, the court personnel are instructed “do not even send the petition (if completed at arraignment)” to the court reporter. A court administration employee noted anecdotally that perhaps 5 percent of petitions are denied.

There are several problems here. First, the defendants are constitutionally entitled to appointment of counsel if they cannot afford their own attorney because the charges carry potential jail time. Second, the defendant may later be revoked on any imposed probation and additionally does not have an attorney to advocate for them with regard to length of probation, conditions of probation, and monetary assessments. Third and perhaps most importantly, the defendant is left without any understanding of why they did not receive an attorney and this is likely to deter them from requesting appointment of counsel in the future.

The process contributes mightily to the problem. The defendant is advised of his or her right to counsel at arraignment. If they want appointed counsel, they are given a form to complete providing basic financial information. The defendant is given a date to return to court for the pretrial and leaves the courthouse understanding that s/he will be given an appointed attorney. Then the defendant returns to the courthouse for the pretrial. If the defendant in fact received an appointed attorney, the defendant will likely meet their attorney at the courthouse in the hallway prior to the pretrial. But if the defendant did not receive an appointed attorney, s/he will only find that out when his or her name is called for the pretrial. The judge may or may not tell the defendant why they are not receiving an appointed attorney. The defendant who does not receive an attorney after requesting one will be directed to meet personally with the prosecutor to discuss the possibility of a

District Court Room Observation: Alpena County

An African American female appeared as a walk-in off of a bench warrant issued in November 2006 for probation violation. She had failed to pay fines and cost and had failed to do anger management counseling. There was no attorney present and no probation officer. After offering her explanations, the judge continued her probation, restated the fines and costs that must be paid, and ordered her to again complete anger management. Failure to comply with his probation requirements would result in a thirty day jail sentence.

We were troubled by this practice and, when meeting with the judge after the morning docket in his chambers, discussed these guilty pleas and the probation violation case with him. He still follows *Argersinger*: if people are not going to go to jail, then the state doesn't have an obligation to provide a free attorney. He only mentioned jail to “scare” the probationer into compliance. We brought up *Shelton* and its consequences, which change *Argersinger* if there is possible jail/loss of liberty consequences down the line. The judge just smiled at us....

plea agreement.

The NLADA team observed one defendant who was in jail, having been arrested on a show cause warrant for failure to appear and pay traffic tickets for no proof of insurance and a license plate charge. The total due on the tickets was \$612, but the defendant could not pay. The magistrate set the defendant's *bond* at \$612 and told the defendant that if he could post the bond the matter would be concluded (i.e., the bond would substitute for payment of the tickets), but if he could not post the bond then he would remain in jail at least until he returned to court on July 13, which was three days later. Although theoretically a defendant cannot be incarcerated on a traffic offense, this defendant was in jail without counsel and was *de facto* being incarcerated for failure to pay. At no time was this defendant advised of a right to counsel, even though he was being held in jail in essence for contempt of court.

In Grand Traverse County, our site team observed several probation revocations in which the defendant appeared pro se and was sent to jail. There was no prosecutor present. In one case, a judge informed a defendant that he could plead guilty or request a hearing for his alleged probation violation for missing a urine sample test and having marijuana in his system, and that he was entitled to an attorney. The defendant pled guilty to missing the urine screen, said nothing about an attorney, and denied using marijuana. The court conducted no colloquy on the waiver of counsel. The judge, saying that one does not test positive unless one has smoked marijuana, that being around second hand smoke "is not enough," sent the defendant to jail and said that he would lose his driving privileges for six months.⁴¹

We observed one district court judge in Ottawa engage in a series of questions with defendants on "McJustice Day," apparently for the purpose of determining whether they would be continued on the bond previously posted and what their conditions of bond

Overview of Grand Traverse County

Grand Traverse County is a population center in the LP's northwestern corner with an estimated population of 84,952, ranking it 24th among Michigan's counties.^a Grand Traverse County has an 89.3 percent high school graduation rate, which ranks near the top for the state, and a median household income of \$43,169. Its poverty rate - a low 5.9 percent - cracks the top ten of Michigan's counties. Traverse City, the county seat, has a population of 14,532. The city functions as the major commercial nexus for a seven-county area, and (along with Alpena) is one of Michigan's two anchor cities. Traverse City is a hub of tourism, with fresh-water beaches along Lake Michigan, a mild summer climate, and skiing during the winter. Agriculture is Grand Traverse County's other major economic force, as the countryside around Traverse City is renowned for its grape production and vineyards. Traverse City is also famous for its annual cherry festival.

Grand Traverse is home to the 13th Circuit Court and the 86th District Court. Both courts also encompass Antrim and Leelanau Counties. Indigent defense services in the county are provided exclusively by members of the private bar. There is no public defender office in the county. There is no full-time attorney administrator for this system and thus the delivery systems in both the circuit court and the district court are administered by the judges of the respective courts.

The attorneys accepting appointments are under the direct control of the judges. For example, although competitive bids for the district court contract are solicited, the attorneys have joined together as a single group and only one bid is submitted. For 2007-08, the attorneys' request for an increase in the compensation rate from \$350 to

\$400 per case was rejected by the judges and the group was told that the judges would find other attorneys to do the work if they would not accept the existing rate.

A smaller and more select group of attorneys are on the roster of attorneys who are approved to receive appointments in circuit court cases. There are currently seven such attorneys and two alternates who are approved by the judges.

Attorneys are required to have five (5) criminal jury trials to participate in the district court contract. The circuit court attorneys are the same attorneys who handle the majority of the privately retained cases in the court. Many of the circuit court roster attorneys also participate in the district court contract. Supervision of assigned counsel is limited to the court's exercise of its supervisory authority over these attorneys as members of the bar or to monitoring compliance with the provisions of the district court contract or the handling of individual cases. Systematic review for quality and efficiency does not take place. Review of attorney performance is done on an ad hoc basis by the judges to ensure that the attorneys are meeting the judges' expectations. The circuit court judges indicated that one attorney was removed from the roster in recent years because "he wasn't getting the job done" and was filing too many "frivolous motions," and another attorney was removed for an ethical breach. No attorney has been removed from the district court contract in at least four years.

^a U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26055.html>.

would be. This judge asked every defendant: (1) have you ever failed to appear for court?; (2) if we give you a drug test, are you going to be clean – it stays in your system for 30 days and it would not be in your best interest to lie to me?; (3) have you ever been convicted of any offense? The judge has their “LEIN” (Law Enforcement Information Network) sheet in front of them while asking these questions, so after they answer the judge then proceeds

to tell them everywhere they were mistaken (in our words, or “lied” in his words) about failures to appear and convictions. Understandably, defendants often had some confusion about these questions, as they forget that they paid a traffic ticket somewhere a long time ago or that some court showed them as having failed to appear when in fact the matter had already been resolved.

Regardless of whether a defendant says they will be clean when drug tested, this judge orders them as a condition of bond to be drug tested; the only difference is that if they say they will test clean he makes them be drug tested on the spot, and if they identify a date on which they last used he sets a drug test for them almost exactly 30 days later. The only time this judge refrained from asking these questions of a defendant was when there was a lawyer present with the defendant at court during arraignment, and – not surprisingly –

District Court Room Observation: Grand Traverse County

In one case, after being advised that he had the right to a lawyer, the defendant said “I’m pretty sure I’m guilty,” and then the judge asked a series of questions about what the defendant had done. He admitted punching his friend “through a wall.” The judge imposed a 60 day jail term, with an allowance for revision after ten days. There was no colloquy or waiver of rights and the entire proceeding took six minutes.

Overview of Ottawa County

Located in the LP’s center-west, Ottawa County maintains an assigned counsel program. Of note, it spends more per-capita on indigent defense than any other county in Michigan each year. As of 2005, the county had an estimated population of 255,406, ranking it 8th among Michigan’s counties.^a A small county by land-size, its 566 sq. miles ranks Ottawa County 48th of 83 in the state and yields 421.3 persons per sq. mile. The county has an above-average high school graduation rate (86.6 percent) and a median household income of \$52,347. Its poverty rate – a low 5.5 percent – is fifth among Michigan’s counties.

Ottawa County has 30 miles of Lake Michigan shoreline and this makes it a popular destination for visitors. Grand Haven (pop. 11,168), the county seat, is situated on the Grand River and was once a major fur-trading post between the Ottawa Tribe and the French. The city is now a resort and boating community and has a major charter fishing fleet. The U.S. Coast Guard operates out of Grand Haven. Inland Ottawa County is rich farmland.

The 20th Circuit Court is located in Grand Haven and the 58th District Court is made up of four district court judges, elected county-wide, operating out of three different cities (Holland, Grand Haven, and Hudsonville). The current indigent defense delivery system has been in place since the mid-1960s, when then Circuit Court Judge Raymond Smith established an assigned counsel panel intended to mimic private practice as closely as possible, including early appointment of counsel and hourly rates of pay. All felony (circuit court) and misdemeanor (district court) defenders in Ottawa County are appointed. Each of the sixteen attorneys are on the approved list to receive court appointments and they are paid an hourly rate for their work and maintain their own private offices. One attorney has held the nominal title of Chief Public Defender more or less since the system’s creation – he is said to handle 30 to 45 percent of all of the felonies in the county.^b

Of the 16 attorneys on the list: two are “Level I” attorneys who are paid \$91.75 per hour; nine are “Level II” attorneys who are paid \$79.84 per hour; and five are “Level III” attorneys who are paid \$72.55 per hour and handle only misdemeanors and non-capital felonies.^c As a practical

matter, most of these attorneys generally only work in one of the three cities, although they are all technically available to be appointed anywhere in the county.^d

The line item for indigent defense is the 2nd largest line item in the court budget, second only to employee payroll. The court administrator confirmed that they have not received any resistance at all from the county commissioners about the indigent defense budget.^e

Still, Ottawa County’s assigned counsel program is, in every aspect, controlled by the court. The court decides which attorneys will be admitted to the panel, whether they will be allowed to stay on the panel, what level they are rated at, what cases they are assigned, and the hourly rates they are paid. The court (thru a staff person who is not an attorney) reviews and approves the claims submitted by attorneys. The Court formally evaluates the attorneys on the panel on a yearly basis. The court resolves issues arising from client complaints. In short, this is a court run appointed counsel system.

^a U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26139.html>.

^b Juvenile defenders are on contract.

^c An additional attorney is not on the official list but was identified as an attorney who is available to be appointed in conflict situations. There is no formal system for getting onto the approved appointment list. One judge advised that a person does not have to be on the approved list in order to be appointed for misdemeanors. There is no formal system for removing attorneys from the approved appointment list.

^d One of the five Level III attorneys is also the City Attorney for the City of Grand Haven. No one was able to explain how a person who prosecutes for the City of Grand Haven could (or should) be defending in district or circuit court; but this attorney does not show up on the appointment rotation in either Holland or Hudsonville in any event.

^e The indigent defense budget has increased from approximately \$500,000 to approximately \$800,000 over about 5 years, due to an increase in the number of indigent defendants because of the economy and the expansion of the constitutional right to counsel in misdemeanor cases.

this only occurred when the defendant had been able to hire an attorney. The bailiff then walks the defendant over to the pretrial services officer to set them up for drug testing while on bond. This series of questions occurred only in Hudsonville. We discussed this situation with one of the appointed counsel in Hudsonville, who seemed unaware that this was occurring and had never thought about the fact that defendants were being forced to inculcate themselves in ways that could result in prosecution or increased sentence and in violation of their right to counsel.

If the defendant wants to plead guilty and waive their right to counsel, the judge will accept their plea to a misdemeanor without the defendant ever speaking to an attorney. In one court, the client will be required to make whatever payments are due that very day. If they cannot pay in full on that date, the judge requires them to surrender their driver's license to the court in order to have a payment plan. Again, all of this occurs without the defendant ever speaking to an attorney. There is an assigned "McJustice Day" attorney present at the courthouse, but because he or she is conducting pre-preliminary examination in a conference room with the prosecutor, s/he is never present to observe any of this or to warn defendants that this will occur.

B. Non-Uniformity of Eligibility Screening Processes Threaten Due Process

Though *Gideon v. Wainwright* and its progeny require states to provide counsel for those unable to afford counsel, none of the major right to counsel cases explicitly state how to determine financial eligibility. Jurisdictions across the country have weighed various in-

Holistic & Community Defense: The Alternative to McJustice

By investing in defender services for clients at the "entry" end of a criminal career, even when facing misdemeanor charges, jurisdictions may be able to retard the rate of more serious crimes and the consequent costs for indigent defense and the rest of the system. By investing up front in more staff but also particular types of staff, such as social workers, the cost of running a criminal justice system at the back end can be reduced.

As opposed to prosecutors, who necessarily have to take an adversarial approach to defendants, public defenders have a unique chance to not only address a client's specific criminal charges but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity. For instance, the client may have substance abuse issues, public housing issues, immigration issues, or, in the case of children, educational needs that are not being met. By addressing the full array of client issues, public defenders can both reduce justice expenditures and, more importantly, potentially reduce the chances that a client will re-offend. Client-centered offices typically have lawyers, investigators,

social workers, and psychologists on staff to offer this fuller range of services.

Such client-centered services work best when the defender office is woven into the fabric of the community that the public defender program represents. The most effective way to achieve this is to physically locate the public defender office in the community it serves. The community defender office is thereby seen as a safe-haven where anyone can seek legal advice or air community concerns of any nature. Some community-based offices around the country provide community education on what a juvenile or adult should do when arrested, understanding the court process, or advising persons on their rights and responsibilities even before an arrest has occurred. Because these suggestions come from a known and trusted source that is non-adversarial, public education campaigns by community-based public defender offices may result in the police encountering less hostility during arrests, courts experiencing defendants with more knowledge of the justice system, and the community at large experiencing a greater stability.

terests when considering how best to make such determinations. Many jurisdictions have determined that important fiscal goals of cost-control and accountability are served by implementing procedures to ensure that no one who can afford counsel is appointed one at public expense. In these areas of the country, there is often very thorough verification of financial information provided by the defendant – many times by an independent pre-trial services unit and often at substantial cost.

Many other jurisdictions throughout the nation have no eligibility guidelines and conduct no inquiry, or simply appoint a lawyer for all defendants who claim they cannot afford retained counsel. The reasons for such systems (or non-systems, to be more accurate) vary: poverty rates among the defendant population may have been empirically found to be so high that the cost of eligibility screening would exceed the potential cost-savings; the need to keep court dockets moving may have been determined by the judiciary to be more important than taking the time and effort to conduct eligibility screening; or the reason may be simple inertia on the part of the responsible officials.

Some or all of these reasons certainly apply to some of the regions of Michigan we visited. For example, NLADA site team members were told that Ottawa County judges approve almost every request for an attorney. One judge in Ottawa County even stated that doing so wasted less time and cost less than undergoing an attempt to try to make defendants find an attorney only to have them come back at a later date usually still not having retained private counsel. The screening process we observed there consisted of little more than a brief discussion between the defendant and the court (i.e., “Are you working, can you afford an attorney”). Similarly, Grand Traverse County appears to do little to no screening at all. Though there is some attempt to get financial information in Oakland County district courts, we were told that almost every client who wants an attorney there gets one as well. And, Marquette County leaves the discretion up to the judge.

However, some other Michigan jurisdictions do employ more rigorous eligibility screening procedures – though there is no uniform measure for doing so. At one Wayne County district court, defendants requesting counsel fill out a form, which is sent to the assigned counsel services manager and from there to the rotation judge (i.e. the judge who is making the appointments for that two-week period). There is no investigation before appointment of counsel as to a defendant’s ability to pay – reportedly because of time constraints. Rather, a defendant’s claim that she cannot afford counsel is accepted. Not surprisingly, the vast majority of defendants in Wayne County are represented

Flat-Fee Contracting in Downtown Detroit

The Misdemeanor Defender Professional Corporation maintains a contract with the City of Detroit for \$661,400 per year to handle the “state docket” (arraignments, pre-trials, show cause, and reviews) in three courtrooms of the 36th District Court.^a According to the head of Misdemeanor Defender PC, Philip A. Ragan, Jr., the office’s five part-time attorneys - with whom the office subcontracts assignments - and a handful of students from local law school clinics take between 12,000 and 14,000 cases each year. As Chief Judge Atkins put it, “[w]e operate by volume, but without stepping on anyone’s Constitutional Rights.” Divided evenly, the five part-time defenders carry between 2,400-2,800 cases each or 500-600 percent greater than the nationally-recognized misdemeanor caseload standard for a full time defender (400 cases per year). If one assumes that each of these attorneys work 75 percent of their time on public cases, then they are in breach of the standards by more than 700 percent-833 percent. To put this in perspective, their caseload averages out to 32 minutes of attorney time per case.

^a MDPC was first awarded the contract for \$661,400 beginning in 2001 after being the successful applicant in request to an RFP.

by court-appointed counsel.

In Bay County, if a defendant indicates she cannot afford counsel, she is referred to the Office of Assigned Counsel (OAC) to fill out a form detailing personal information (including marital status, number of children, etc.), and information about employment, assets, income, and expenses. Defendants who are not in custody may be further interviewed by the OAC staff. Yet, even there, the OAC Director indicated that there is no numerical formula used to determine eligibility for appointed counsel and that virtually all defendants who apply are found eligible. For example, in calendar year 2006 (the Court's fiscal year ends in February), 1,024 felony defendants received appointed counsel, while only two felony defendants were denied appointed counsel.

Alpena and Chippewa Counties have similar forms for screening. Alpena leaves it to the discretion of judges, whereas Chippewa charges the public defender instead of the court with conducting the screening process. Defense attorneys in Chippewa pointed out to us that caseload and technology constraints prohibited them from verifying the information provided by the client.

For those defendants seeking counsel in Jackson County, a "petition & order for court appointed attorney" form is given to be filled out truthfully under a punishment of perjury. The eligibility form asks for basic personal, income, and expense information, including: marital status, number of dependents, employer, average net and gross income (either bi-weekly, weekly, or monthly), other income, rent/mortgage amounts, child support payments, and car payments. The eligibility application is screened by staff in the circuit or district court administrator office. Defendants are not asked to provide any verification for their responses. Though there are no hard and fast rules, generally all people are approved unless a defendant earns more than \$700 per week net (or \$800 per week gross) or has car payments in excess of \$600 per month or house payments in excess of \$800 per month. In these rare instances, eligibility for publicly-financed defense counsel is made on a case-by-case basis.⁴²

Shiawassee County appears to be the one county we visited with a more stringent and formal eligibility process. Screening consists of a submission by each client of a financial declaration, setting forth their assets, income, expenses, and family situation. Unfortunately, it was clear from our conversation with the circuit court administrative staff that securing reimbursement for the cost to the county of court-appointed counsel was the primary objective of the financial review.

The wide ranging practices described above paint a clear picture showing that the ability of a poor person to have their constitutionally-mandated right to counsel met is entirely dependent on which side of a county line the crime is alleged to have been committed. Situations like Michigan, where individual courts and jurisdictions are free to define financial eligibility as they see fit, ranging from "absolutely destitute" to "inability to obtain adequate representation without substantial hardship," with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others, have long been decried. The National Study Commission on Defense Services found in 1976 that such practices constitute a violation of both due process and equal protection.⁴³ This becomes even more problematic when the lack of uniform standards allow courts to assess clients' fees for the cost of their public attorney.

C. *The Use of Cost Recovery Measures to Chill the Right to Counsel*

Across the country, more and more policy-makers are asking whether legal counsel at public expense should be provided for only the completely indigent – those unable to contribute any money towards their own defense – or whether public defense services also should be made available to those accused of crime who might have limited resources and can pay for only a portion of necessary representation expenses.

National standards permit cost recovery from partially indigent defendants under limited circumstances, but a preemptive notification that all defendants will be responsible – before the determination of the indigency status and without regard to their ability to pay – causes a chilling effect in which defendants waive counsel rather than incur charges for services that they do not believe they can pay. The American Bar Association's *Criminal Justice Standards, Providing Defense Services*, Standard 5-7.1 directs that: "Counsel should not be denied because of a person's ability to pay part of the cost of representation."⁴⁴

Even in instances where defendants are determined to be able to pay something for their representation, the practice of trying to recover defense costs after the representation has been provided is unconditionally prohibited under ABA Standard 5-7.2.⁴⁵ Although various states have tried it over the years, via statute, civil suit, lien, or court-ordered condition of probation, post-disposition recoupment has frequently been struck down by the courts and has been a practical failure. Courts have struck down recoupment statutes on equal protection, due process, and Sixth Amendment grounds.⁴⁶ Imposition of recoupment as a condition of probation can additionally lead to the incarceration of indigent people under circumstances to which a non-indigent person would not be exposed, in violation of equal protection.⁴⁷

The practical difficulties are obvious. Imposition of a debt on a marginally indigent person, already convicted of a criminal offense, with the option of incarceration for failure to pay being constitutionally barred, yields a likelihood of recovery so low (less than 10 percent, according to a U.S. Department of Justice Study⁴⁸) that the revenues produced are less than the administrative costs of processing recoupment orders.⁴⁹

Cost recovery from partially indigent defendants was first authorized by the National Advisory Commission on Criminal Justice Standards and Goals, Defense Standard 13.2, with the caveat that the amount should be "no more than an amount that can be paid without causing substantial hardship to the individual or his family." The concept was subsequently fleshed out in the *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, 1976), Guideline 1.7:

If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense...

The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided,

however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

Later standards further clarified the limitations of such plans. The American Bar Association's Criminal Justice Standards, Providing Defense Services, Standard 5-7.1 directs that "[c]ounsel should not be denied because of a person's ability to pay part of the cost of representation." Cost recovery after the representation has been provided (see below) is unconditionally prohibited (with one exception, where the client committed fraud in obtaining a determination of financial eligibility) under ABA Standard 5-7.2. However, pre-representation "contribution" is permitted if: 1) it does not impose a long-term financial debt; 2) there is a reasonable prospect that the defendant can make reasonably prompt payments; and 3) there are "satisfactory procedural safeguards," so as not to chill the exercise of the right to counsel. Such safeguards include: a) right to notice of the potential obligation; b) right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings; c) right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs; d) right to all civil judgment debtor protection; e) right to petition for remission of fees, in the event of future inability to pay; f) notice that failure to pay will not result in imprisonment, unless willful; g) notice of a limit, statutory or otherwise, on time for the recovery of fees; and h) adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs.

Suffice it to say that little if any of these national standards are met in the various cost recovery plans we encountered in Michigan. In many instances, district courts simply assessed a fee on anyone seeking public counsel. The district court in Bay County routinely assesses \$100 - \$150 in attorney fees to any indigent client. When a defendant fails to comply with a similar payment plan ordered at sentencing in Grand Traverse County, a civil contempt charge is brought which can result in jail time. Apparently only one defendant in 10 years has asked for counsel in a civil contempt proceeding. The administrator said it was rare that a client actually could not pay. The minimum payment is \$25 per month. She expressed the view that if a client "can afford cigarettes, or get her nails done," they can pay for an attorney especially if a victim is involved in the crime. She noted that if a person is mentally ill or going to prison, the judge usually will not assess the attorney fee. Reimbursement is sought in Grand Traverse even if there is an acquittal.⁵⁰

In Ottawa County, defendants are typically ordered as a condition of probation or as part of a misdemeanor sentence to repay the entire cost of their indigent defense representation. In misdemeanors, where the sentence is often imposed on the same day that the attorney was appointed and the plea of guilty was entered, the judge will often ask the appointed attorney what their attorney fees are and order the assessment to meet that cost (typically between \$250-\$350). The vigor of Shiawassee County's efforts to secure repayment is particularly troublesome, in light of the fact that repayment of the cost of court-appointed counsel is treated as a *condition of probation* and failure to make repay-

Overview of Wayne County: Representation in District Court

Wayne, home to Michigan's largest city, Detroit, is the state's most populated county (estimated in 2006 to have 1,971,853 residents).^a It is by far the state's most densely populated county as well; with only 614 sq. miles of land, there are 3,356.1 persons per sq. mile. The county populace is Michigan's most diverse. According to the 2000 US Census, the county is 51.7 percent white and 42.2 percent African-American, with small Asian (4.6 percent) and Hispanic/Latino (2.3 percent) populations. Wayne County has one of Michigan's worst high school graduation rates (77.0 percent), but an above-average median household income (\$40,776). The county's poverty rate (16.4 percent) is fourth-highest in the state. The county seat is the city of Detroit (pop. 951,270). The past decade has seen a good amount of economic recovery. But with its continued reliance on the auto-industry, Detroit is ever vulnerable to the peaks and troughs of economic cycles.

Wayne County is home to the Third Circuit Court (formerly known as Recorder's Court) and 23 district courts, with 65 judges, spread throughout the county. Indigent defender services in each of the county's 24 courthouses are administered and funded entirely separately from one another. The 36th District Court is the court of first appearance for all felonies and misdemeanors in downtown Detroit — with an annual caseload of 600,000, it is Michigan's busiest courthouse. District courts elsewhere in Wayne County — "out-county" — have by-and-large a miniscule caseload compared to the 36th District.

Representation in "Out-County" District Courts

The bulk of cases in out-county district courts are appointed to "house counsel," whereby an attorney will be assigned to a courtroom for a half-day or day and will represent every indigent defendant in that courtroom on that day.

In the 33rd District Court in Woodhaven (about 30 minutes south of Detroit) house counsel are paid each month by event. There is no contact between the attorney and client prior to the pre-trial; the court does not give out house counsel phone numbers until the day of court, which could be anywhere from 1-3 weeks after arraignment. Jury trials are rare, though motions are even rarer. The court administrator estimated that, in an average year, there would be one motion filed by house counsel and maybe two jury trials involving an indigent defendant. For comparison, she estimated that private attorneys might file 10 motions in that same year and hold nine jury trials.

The 18th District Court in Westland (about 30 minutes to the west of Detroit) has in place a plan for a competitive bidding process to secure counsel for indigents. This plan provides, in short, that the District will issue an RFP in even-numbered years and advertise it at least twice in two newspapers. The minimum qualifications for attorneys are that they: reside or practice law in Westland; be a member in good standing of the State Bar; be available a minimum of three days per week; have at least three years' experience in criminal defense; submit a plan to demonstrate coverage in the event of a schedule conflict; demonstrate community ties/involvement; and "submit lowest bid."^b Once contracted, payment is made to the attorney(s) on a monthly billing basis for 1/12th of the annual contract amount. The attorneys are obliged to represent all indigent misdemeanor defendants in all criminal court proceedings in the District. The contract is issued for a two-year term. The plan provides for performance review "on an on-going basis by the judges and court administrators based on information received from clients, other attorneys, and personal observation." If performance is unsatisfactory, as "determined solely by the judges," the court may terminate the contract upon 30 days written notice. So, in short, the plan is for a low-bid contract where satisfaction of the judges is the primary goal.

Two attorneys have held the contract for indigent misdemeanor representation in the 18th District for approximately 10 years. These two attorneys are personable and appear extremely conscientious and capable. About 10 years ago, they joined with another attorney to bid for representation. At that time, the three attorneys split the contract fee 1/3 each. Over time the third attorney dropped out. When the current attorneys became responsible for bidding for the contract, the court told them to keep the bid at the same level, which they did. They advised they are not aware of any "rhyme or reason" for the amount of the contract.

Representation in the 36th District Court

The 36th District Court, in Detroit, is the most active district court in the state with far and away the largest docket, processing approximately 600,000

cases each year.^c It is estimated that 90 percent of defendants are indigent. There are 31 judges, eight of whom will be holding criminal court in some form on any given day. Attorneys are assigned to courtrooms, generally: one attorney in each courtroom, except 1 ½ attorneys in the three arraignment courtrooms, and four or five attorneys in the traffic courtroom(s). The Court has a hybrid system for appointment of counsel in misdemeanor cases. All State Court Misdemeanors (also referred to as "high misdemeanors") are handled by the Misdemeanor Defenders Professional Corporation, which has held the contract with the 36th District Court since 2001. All other misdemeanors are handled by "house counsel," who are paid a flat rate of \$150 for a half day or \$300 for a full day, according to a complex plan promulgated by the court. These two systems are addressed separately below where appropriate.

There is a detailed plan for provision of attorneys to indigent non-state misdemeanor defendants, known as the house counsel system. In order to be appointed, an attorney must be on the approved roster of house counsel. To get onto the list, an attorney must: (1) attend a three-day training observation program (actually three mornings from 9:00 a.m. to noon) which "will encompass the arraignment, environmental and trial dockets" (in short, teaching attorneys the mechanics of the docket); and (2) sign a verification saying they have reviewed the *House Counsel Conduct Policy* and are familiar with *Chapter 38* of the City of Detroit Ordinance and the *Michigan Rules of Evidence*.

Getting onto the approved list is the first step, but this will not ever get any attorney appointed to represent an indigent misdemeanor defendant. The attorney must then find a way to convince a judge to actually appoint them. One judge estimated that there are 400 or 500 attorneys on the approved House Counsel list at any given moment, but each judge has favorites whom they will appoint. Attorneys drop off their business cards, writing on them whether they are requesting full day or half day appointments. Attorneys go by and visit judges and their staff asking and hoping for appointments. Some suggest anecdotally that attorneys make financial contributions to the campaigns of judges. An attorney must do something to garner sufficient favor or grace with a judge to get an appointment. The Court's formal plan explicitly says: "Attorneys seeking assignments are encouraged to meet with the judge or clerk to submit their business card or letter indicating their intent."

Each of the district court judges have responsibility for assigning counsel in all courtrooms for two weeks at a time. Approximately one month in advance, the judge will receive the roster of approved counsel and can only appoint lawyers who are on this roster. But in reality, judges use a wide variety of methods to actually appoint the lucky lawyers who will receive appointments during that rotation. Some judges do this personally and some judges have their staff do it. Some judges work their way through the stack of business cards that would have been dropped at their office that week. Some judges theoretically work their way down the entire approved roster. Everyone agrees that judges have favorite attorneys whom they consider to be good and whom they would prefer to assign, especially to their own courts. However they do it, they choose the attorneys and assign them to each of the courts during that 2-week rotation.

House counsel are appointed to half-day or full-day assignments in specific courtrooms where they will represent each indigent defendant appearing in that courtroom who has requested an attorney. At the end of their assignment, house counsel turn in their "per diem" to be paid the rate of \$150 for a half day or \$300 for a full day. Though the per diem lists all defendants represented by that house counsel during that day, the 36th District Court does not track individual clients. The court administrator counts half-days and full-days as "assignments." Thus there is no attorney caseload data for the court.

^a <http://quickfacts.census.gov/qfd/states/26/26163.html>

^b See Local Administrative Order 2003-05, Appointment of Counsel for Indigent Parties, effective January 1, 2004.

^c Just to get an idea of the scale, six magistrates handle 10 to 15,000 civil infractions (traffic tickets), that do not require a defense attorney. Felony arraignments occur 365 days a year, at 8:30 a.m., 1:00 p.m., and 7:00 p.m.

For a description of representation in Wayne County's Third Circuit Court, see page 66.

ment subjects the client to probation violation proceedings.

Wayne County recoupment practices vary among district courts and among judges within the same courts. One judge in the 36th District Court advised us that he could only speak to his own policy, but he typically assesses \$25 to \$50 for a defendant whose case resolves without a trial and \$100 for a defendant who has a trial. This judge has no idea what percentage of these assessments is actually collected. Each of the three judges in the 33rd District Court in Wayne County has their own system for ordering defendants to repay appointed attorney fees. One judge advised that he, at least, is “ridiculously low” in ordering defendants to repay for their appointed attorneys. If he places a defendant on probation, he said he will always order them to pay \$20 per month, typically setting the repayment for attorney fees at not more than \$125.⁵¹ Often he will reduce this later. If

Overview of Oakland County:

One of Michigan’s largest counties, Oakland has a broad economic base; some areas are fully urban while others are more suburban (or otherwise in transition). As of 2005, Oakland had an estimated population of 1,214,361, and is Michigan’s second-most populated county.³ Oakland County has Michigan’s fifth-best high school graduation rate (89.3 percent), and by Michigan standards a very high median household income (\$61,907, second best in the state). The county’s poverty rate (5.5 percent) is fifth-lowest in the state as well. Oakland’s county seat is Pontiac (pop. 67,500), an old bastion of the auto industry. Largely a satellite city of Detroit, Pontiac is surrounded by affluent metro-Detroit suburbs. The city is still an auto-manufacturing center, but less so today than it was 20 years ago.

The 6th Circuit Court has jurisdiction over all felony matters in the county, and its 10 district courts⁵ handle all misdemeanor cases and felony first appearances. The courts in Oakland County are entirely docket-driven. Indigent defense representation is 100 percent assigned counsel, with event-based fees (see fee schedule below) in circuit court. While it is generally true that district courts in Oakland County have limited jurisdiction over felonies—conducting or accepting a waiver of the preliminary hearing, binding the case over to the circuit court for trial or other disposition, and sentencing—a relatively new program (The Felony Plea Program) allows defendants to plea to a felony in district court and then be sentenced in the circuit court.

Representation in Circuit Court

The system for appointing individual lawyers in the 6th Circuit Court is a function of the judiciary and the court clerk’s office. In Category 1 cases (“capital” offenses with maximum life sentences) and Category 2 cases (felony offenses with sentences in excess of 5 years but less than life, and negligent homicide) the circuit court judge will appoint an attorney from the judge’s own list of qualified attorneys. In Category 3 cases (felony offenses with sentences greater than two years but not more than five years) and Category 4 cases (felony and high misdemeanor offenses with sentences up to and including two years, except negligent homicide) counsel shall be appointed in rotation according to the date of their last appointment. A person who is unavailable for an assignment shall not lose her place on the rotational list.

Funding of the defense function is a line item in the judicial budget. Since payment is “event based” and any increase to the amount paid would require an increase in the defense line item in the Court’s budget, payment of defense counsel is not independent of the judiciary. There has not been an increase to the defense function in eight years. During this same period, we were told, there

have been regular increases to the other two legs of the criminal justice stool (judges and prosecutors).

There is no defender office. In fact there is not a single office (or space within an office) provided to defense counsel at the circuit courthouse, even though the defense function is part of the court. On the other hand, the prosecutors occupy at least one floor (maybe more). Prosecutors have access to the judges’ private halls; defense does not, even though the defense function is part of the court. Prosecutors have “pass-cards” that allow them to enter the building without going through security; defense does not.

Again, there is not a single office (or space within an office) provided to defense counsel at the circuit courthouse, even though the defense function is part of the court. Defense attorneys were unanimous in stating that there is very little time to meet with their clients and absolutely nowhere that would be considered confidential according to ABA standards—a corner of the courtroom with a deputy standing close (even pushing the attorney back if she got too close to her client). Client visits (as paid events) are limited to two.

Defense counsel is notified only after the prosecutor finds out which judge is assigned and thus can assign the “right” assistant to that court. There is nothing about this system that is client-based and very little that is defense counsel-based. If appointment of defense counsel were done sooner, the system could save both time and money.

In C1 and C2 cases, defense counsel will take as many cases as the judge is willing to assign to her. In C3 and C4 cases it depends on the rotation. Quality of representation is left to the defense attorney to define, balance, and sometimes struggle with. Beyond that—and this cannot be overstated—nothing is done to ensure the rendering of quality representation.

On the positive side, while there are no CLE requirements in general, there are CLE requirements for defense counsel to be on the appointment list. In addition, there are strict requirements to move up the category ladder. Judges state that appointments at the C1 and C2 level are based on the judge’s knowledge of the skills and abilities of every attorney on his list. The defense attorneys we talked with—while a small sample—were all impressive. On the other hand, while prosecutors have well organized and abundant training paid for by the county, defense attorneys must find and pay for their own training.

Representation in District Court

Although the circuit court has jurisdiction over all felony cases, these cases originate in the district court for purposes of arraignment and preliminary examinations. In virtually all such cases, counsel is appointed while the case is still in the district court if pri-

the charge is being dismissed, then he will order them to pay \$15 per month. He advised that they may also participate in the court's work program to work off their fee in lieu of incarceration if they have not paid the assessment. During our observations, this judge only ordered one defendant to repay attorney fees and this was in the amount of \$65.00. And, each of the two judges in the 18th District Court has their own habits about ordering defendants to repay for their appointed counsel. One reportedly orders every defendant *whose charge is dismissed* to pay \$50, while making no assessment against convicted defendants. The other typically assesses \$100 in attorney fees to every defendant win or lose.

At a different Wayne County district court, a series of in-custody defendants in groups of five to eight based on gender, level of alleged offense, and whether or not they had re-

(Oakland continued)

private counsel is not retained. If the accused is determined by the district court judge to be eligible for a court appointed attorney, the case is referred to the circuit court and an attorney from the circuit court roster is assigned prior to the date of the preliminary examination. This attorney then represents the individual in the district court and in the circuit court if the case is bound over.

The delivery system for misdemeanor representation in the **50th District Court** is under the direct and total control of the judges and there is no independence. In most instances judges personally select the lawyers who will be assigned to individual cases. Although some use a "blind draw" method to select the attorneys, the judges individually determine which lawyers will be included in the group from which they make assignments in the cases before them. Indigent defense services in Oakland County, including the 50th District Court, are provided exclusively by members of the private bar. There is no public defender office in the 50th District Court or elsewhere in the county. There is no full-time attorney administrator for this system and no state funding. The 50th District Court is funded by the City of Pontiac, which has significant budgetary problems, and the court's budget for 2007-08 was cut by \$600,000 (from \$4.1 million to \$3.5 million).

Individuals who wish to request court appointed counsel at arraignment either complete a Petition or are questioned orally by the judge as to their financial eligibility. If the court determines that counsel should be appointed, the actual assignment of an attorney is deferred and the matter referred to the individual judge to whom the case is assigned for the designation of an attorney.

Typically, an attorney is not assigned to a defendant until an attempt is made to dispose of the case without counsel at the first pretrial conference. The time delay between arraignment and the pretrial conference is typically three weeks, during which time an individual is usually unrepresented. If the case cannot be resolved and counsel is appointed, the case is adjourned to a later date if the attorney is not present. If counsel is assigned prior to the first scheduled pretrial conference, the attorney typically does not meet with the client until the time of that court appearance.

In misdemeanor cases the vast majority of accused are not represented by counsel. Requests for counsel are often denied on the basis that there will be no jail sentence. Other defendants do not request counsel because they know that they will be assessed an attorney fee at the conclusion of the case. One judge indicated that he will only appoint counsel if there is a strong likelihood of going to jail so that the defendant will not have to repay the costs.

Defendants are not represented at the time of their initial arraignment, except if they have private counsel. Defendants are not represented during video arraignments.

The **47th District Court** is located in Farmington Hills and serves the relatively affluent communities of Farmington and Farmington Hills. The Court has primarily an assigned counsel system of providing counsel to indigent defendants. They have a small house counsel system that operates only in their Sobriety Court,^c which is held every Monday afternoon. Four attorneys take turns serving as house counsel (one on each Monday afternoon of the month). The house counsel is paid a flat \$250 to represent every sobriety court defendant set that day and, for no extra pay, to take all emergency appointments that occur while they are at the courthouse that afternoon.

For all other misdemeanors, assigned counsel are appointed at random by the court reporters of the court's two district court judges and are paid a flat fee of \$150 with no expense reimbursement whatsoever and without regard to the number of times they must come to court on a given case.

Defense attorneys and prosecutors are present for the first time in a proceeding at the pretrial, which is the first appearance for a defendant after arraignment. As one court employee put it, "the defense attorney only meets the defendant on the pretrial date." If a defendant is in custody, the pretrial will typically occur within three to ten days of the arraignment; if the defendant is not in custody, the pretrial may not occur until 35 days or so after the arraignment. The majority of cases, probably 90 percent, resolve at the pretrial. Thus the defense attorney will typically make only this one appearance in each cases, where she will meet the defendant for the first and last time.

^a U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/26/26125.html>.

^b Oakland County is home to the 43rd, 44th, 45A, 45B, 46th, 47th, 48th, 50th, 51st and 52nd District Courts. The 43rd District Court has three branches, while the 52nd has four. The county also has a probate court. See, <http://courts.michigan.gov/scao/services/dirs/county/Oakland%20County.html>

^c Sobriety Court cases are fast-tracked. If a person comes in for arraignment in district court on Monday morning on a DUI, for example, they will be screened for eligibility/appropriateness for sobriety court. Then they come back in the afternoon, plead, and are sentenced into sobriety court.

tained counsel were brought into the courtroom to be arraigned. To those groups without counsel, the judge addressed the defendants *en masse*, advising them of their right to counsel and that they could be charged a fee for exercising that right. The fee would be \$250. “Raise your hand if you want an attorney.”

At the conclusion of a case in Oakland County’s 47th District Court – whether by dismissal or conviction – the judge will review a defendant’s financial status and order the defendant to pay some amount of reimbursement for the public defender attorney based on the judge’s determination as to the defendant’s actual financial ability to pay. Anecdotally, the court administrator believes that probably 60 percent of defendants are ordered to pay some sort of reimbursement. One judge advised that the assessment is *always* \$150 (be-

Q & A

Q: Is there a uniform standard for determining indigency?

A: Yes. For those jurisdictions wanting to assure tax-payers that no one is getting a free ride, national standards are clear on how best to conduct eligibility screening. The Guidelines for Legal Defense Systems in the United States issued by the National Study Commission on Defense Services state that “[e]ffective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation.”^a “Substantial hardship” is also the standard promulgated by the ABA.^b While ABA Defense Services Standard 5-7.1 makes no effort to define need or hardship, it does prohibit denial of appointed counsel because of a person’s ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

In practice, the “substantial hardship” standard has led many jurisdictions to create a tiered screening system. At some minimum asset threshold, a defendant is presumed eligible without undergoing further screening. Defendants not falling below the presumptive threshold are then subjected to a more rigorous screening process to determine if their particular circumstances (including seriousness of the charges being faced, monthly ex-

penses, local private counsel rates) would result in a “substantial hardship” were they to seek to retain private counsel. Examples of such presumptive standards include: a) a defendant is presumed eligible if he or she receives public assistance, such as Food Stamps, Aid to Families of Dependent Children, Medicaid, Disability Insurance, or resides in public housing; and b) a defendant is presumed eligible if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

For those who do not meet the presumptive standard but who may still qualify under the “substantial hardship” standard, many jurisdictions have developed financial eligibility formulas that take into account a household’s net income, liquid assets, “reasonable” necessary expenses and other “exceptional” expenses. The National Study Commission on Defense Services Guidelines is more comprehensive than other national standards in guiding this second tier of eligibility determinations. The first step is to determine a defendant’s net income (usually verified through documented pay stubs) and liquid assets. Under Guideline 1.5, liquid assets include cash in hand, stocks and bonds, bank accounts, and any other property that can be readily converted to cash. Factors not to be considered include the person’s car,^c house,^d household furnishings, clothing, any property declared exempt from attachment or execution by law, the person’s release on bond, or the resources of a spouse, parent, or

Best Practices: Eligibility Screening

Nevada and Louisiana have both set uniform eligibility screening procedures to eliminate any bias in the determination of who gets a publicly financed attorney. Louisiana did it statutorily, while the Nevada Supreme Court did it through an Administrative Court Order. The language of the Nevada Order mirrors the Louisiana statute:

A person will be deemed “indigent” who is unable, without substantial fi-

ancial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. “Substantial financial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial

hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of the charges being faced, monthly expenses, and local private counsel rates, would result in a “substantial hardship” were they to seek to retain private counsel.

cause that is what is paid to the appointed attorney) and the judge “generally presumes the defendant can afford to reimburse” the District. This was justified on the basis that the District is located in a “relatively affluent community.”⁵² If a defendant is sentenced to jail with no probation, then the judge “may waive” the reimbursement fee. If a defendant is placed on probation, the court always orders that all fines and costs are due at time of sentencing, but the probation officer can work out a payment plan with the defendant.

If the defendant then fails to pay the reimbursement while on probation, they will be brought to court for a probation revocation proceeding. One method of collecting funds from a defendant who is on probation is wage garnishment. If the defendant is not on probation and fails to pay the reimbursement, they will be addressed by the “Show Cause

Federal Poverty Guidelines

Family Size	Poverty Guideline	250%
1	\$10,400	\$26,000
2	\$14,000	\$35,000
3	\$17,600	\$44,000
4	\$22,200	\$55,500

other person.

Next, the screening agency assesses a defendant’s reasonable necessary expenses and other money owed for exceptional expenses, like medical care not covered by insurance or court-ordered

family support. Though jurisdictions vary as to what constitutes “necessary” expenses, most include rent, day-care, and utilities. Screeners then determine an individual’s available funds to contribute toward defense representation by adding the net income and liquid assets and subtracting from the total the sum of reasonable and exceptional expenses. [(Net Income + Liquid Assets) – (Reasonable + Exceptional Expenses) = Available Funds]. The resulting “available funds” can then be measured against a second tier presumptive eligibility standard. In many jurisdictions, this second presumptive level is tied to a percentage of the Federal Poverty guidelines. For instance, both Louisiana and Nevada recently adopted a “presumptive threshold” of 250 percent of the Federal Poverty Guideline. In some jurisdictions across the country, eligibility screening is terminated if a person’s net income and liquid assets exceed these income thresholds, and the person is deemed ineligible for public appointment of counsel. In others, persons can be deemed eligible if their net income and liquid assets exceed these thresholds, but reasonable and exceptional expenses bring them under the threshold.

In lieu of the Federal Poverty guidelines, other jurisdictions take into account the going rate for private counsel to represent a defendant on various case types. For instance, private attorneys may routinely ask for a \$7,500 retainer to represent

a person on a felony indictment, in which case a defendant may fall above the 250 percent Federal Poverty index (\$2,166 monthly available funds) but would still face a “substantial hardship” if he or she were to attempt to retain private counsel. Similarly, private attorneys may routinely charge \$800 to defend a person against misdemeanor charges. In such an instance, the defendant in the above example would not qualify for counsel if facing a misdemeanor charge while qualifying if facing felony charges.

^a Guideline 1.5.

^b ABA Standards for Criminal Justice: Providing Defense Services 5-7.1 states: “Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”

^c A defendant’s vehicle may be the only thing keeping him or her off of public assistance by allowing him or her the means to get to work, or comply with conditions of probation or pretrial release such as drug or mental health treatment, or family counseling. In a county that is geographically expansive, including a car in a person’s liquid assets may be ultimately more costly than appointing the person a public defender.

^d It is assumed that the goals of the criminal justice system are not served by rendering homeless a charged-but-unadjudicated defendant or his or her family.

Best Practices: Eligibility Screening

Nationally, many states have Pre-Trial Services agencies tasked with, among other things, public defender eligibility screening, determining whether or not an arrestee should be detained or released on his or her own recognizance prior to initial court appearances, and presenting judges with independent assessments on bail recommendations. Pre-Trial Services often provide greater efficiencies throughout the court system while eliminating much of the bias in bail determinations. Since much of

the same information is required to determine both eligibility for a public defender and flight risk, having the indigency determination done at the same time of the risk assessment could allow for earlier notification of appointment to the public defender offices. This in turn will allow defenders to be more informed when meeting the client, leading to more informed bail hearings. Having a third party presenting objective information does not reduce the role of judges. The bail

determination is still their decision. But presenting more information, including accurate criminal histories, will produce better bail decisions. Pre-Trial Services agencies also often perform an oversight function that allows for defendants to be released through a type of pre-trial probation - a cheaper alternative to pre-trial detention that allows defendants to maintain their jobs and family life.

Program.” The judge referred us to Stacy Parke, the deputy court administrator, as an expert in recoupment of costs from defendants, and frankly the judge had very little information about exactly how the program works. Generally, the judge described that: a defendant would receive notice by letter that they were in arrears on paying; the defendant would be given an opportunity to pay; eventually the defendant would be brought to court to “show cause” why they had not paid (without counsel). It was the sense of the court that the collection efforts were definitely cost-effective for the District; as the judge pointed out, a defendant incurs an additional \$100 contempt fee (on top of what they already owe) for failure to appear.

For defendants sentenced to serve time, the sheriff operates a work release program at the Oakland County Jail, and any defendant participating in this program pays a supervision fee to the Oakland County Sheriff’s Department. But perhaps of more interest, the 47th District operates a Community Work Program. Under this program, a defendant will be ordered as a condition of probation to perform some number of hours of community service to one of the public agencies, such as the library, department of public works, or the courthouse. The defendant will be required to pay approximately \$30 - 40 per day as a supervisory cost in order to participate in this program.

One defense attorney in Oakland County summed things up this way: “I represent people who can afford to come into our office and hire me. But instead the county pays me less than I would charge, and the client has to reimburse the county. It is all designed to keep the assembly line moving. There is not a lot of work for private defense attorneys outside of begging judges for appointments.”

D. Putting it All Together: McJustice in Jackson County’s District Court

Upon entering the court building a non-custody defendant in Jackson County is directed to a district court clerk’s window, around which are prominently posted schedules of fines for common offenses. Defendants are asked by a clerk at the window how they wish to plead. If the answer is “guilty,” the defendant is provided with a “rights form” to sign and is subsequently directed into the courtroom.⁵³ For cases considered minor (but which nevertheless carry a possible jail sentence), a defendant may be offered by the clerk at the window a “plea by mail” form in order to plead guilty by mail.⁵⁴ Obviously, all of this is done without the benefit of counsel and before a defendant is even screen to see if they are eligible to receive public counsel under *Argersinger* or *Shelton*.

Defendants stating that they wish to plead “not guilty” are informed that they may be required to pay the entire cost of assigned counsel in their case: \$240 for misdemeanors and \$482 for non-capital felonies.⁵⁵ If they still want to continue to seek counsel and plead “not guilty” they are then sent into a court room where the only attorney is a prosecuting attorney. Perhaps not coincidentally, we were informed by District Court Judge Charles J. Falahee, Jr. that “95 percent of indigent defendants charged with misdemeanors waive assigned counsel”⁵⁶ and that “50 percent plead guilty at arraignment.”

In our opinion, the single biggest factor in the extremely high waiver rate is the coercive effect of telling poor defendants that they will be responsible for the entire cost of their representation. When a defendant enters the courthouse and is faced with a coercive message that they will not be provided a lawyer at no cost, the undeniable message is that they

will be penalized for exercising the rights guaranteed to them by the Constitution. The extent to which this problem is in play in the district courts of Jackson County is, perhaps, most noticeable in the ratio of public defense misdemeanor to felony cases. Nationally, the average ratio of indigent defense misdemeanors to felonies tends to be 3:1. In Jackson County, the ratio is inverted with appointed felony cases (1,732) far outnumbering appointed misdemeanor cases (729) – a ratio of 0.4:1. This strongly suggests rampant violations of the right to counsel cases in misdemeanor proceedings.

Unfortunately, even for those determined defendants in Jackson County still seeking their constitutional right to counsel, the battles to make that right meaningful continue throughout the court process up to and including circuit court – as we will see in the next chapter.