

Endnotes

¹ *Powell* established the right to counsel in capital cases. Thirty-one years later, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court extended the right to felony trials. The right to counsel has been consistently extended over the ensuing four and a half decades to include: direct appeals – *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation – *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement – *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings – *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment – *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002). Most recently, the Roberts Court found that indigent defendants who plead guilty at the trial-level do not give up their right to counsel on appeal to challenge their sentencing – *Halbert v. Michigan*, 545 U.S. 602 (2005).

² The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems*, infra n.12) (<http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf>); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). Other related national standards: American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Defense Function* (3rd ed., 1993); Report on Courts, Chapter 13: *The Defense* (National Advisory Commission on Criminal Justice Standards and Goals, 1973).

With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise. In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor. NLADA's Justice Standards, Evaluation & Research Initiative (JSERI) is a research project with a discrete national capacity for public defense data collection, research, standards-based evaluation, and technical assistance. NLADA standards-based assessments utilize a modified version of the Pieczenik *Evaluation Design for Public Defender Offices*, which has been used since 1976 by NLADA and other organizations, such as the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The design incorporates reviewing budgetary, caseload, and organizational information from a jurisdiction, in addition to site visits to perform court observations. JSERI has become the standard bearer in helping assure local compliance with national indigent defense norms of quality in areas where government policy-makers themselves may lack expertise.

³ MCL § 775.16. "This section, as originally enacted, reenacted, except proviso, section 1 of Pub Acts 1857, No. 109, being CL 1857, § 5675." See generally, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. Chicago: American Bar Association Standing Committee on Legal Aid and Indigent Defen-

dants (December, 2004).

⁴ The statewide study of public defender services was conducted under the auspices of a joint resolution of the Michigan Legislature (SCR 39) through a generous grant of the Atlantic Philanthropies. The resolution states whereas the people of Michigan “expect the government to administer a system of justice that is just, swift, accountable and frugal,” and “whereas there is no accounting of total indigent defense cases nor complete accounting of expenditures dedicated to public defense services, the Michigan Legislature requests the NLADA, in cooperation with the State Bar of Michigan, to issue a report respecting the fairness, cost and accountability of the various indigent defense systems throughout the state.”

⁵ Emphasis added.

⁶ The onus on state government to fund 100 percent of indigent defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 2: “*Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide*”. See also: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976), Guideline 2.4.

⁷ The Constitution of Michigan of 1963 echoes the right to counsel as provided in the U.S. Constitution, that “[i]n every criminal prosecution, the accused shall have the right to have the assistance of counsel for his or her defense.” Constitution of Michigan of 1963, Article I § 20. The Michigan Code of Criminal Procedure, Chapter XV § 775.16, states: “When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived examination on the charge upon which the person appears, the person shall be advised of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder's court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.”

⁸ Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

⁹ Kansas (state funds 77.3 percent of total \$23.4 million expenditure); Oklahoma (state funds 61.6 percent of total \$28.4 million expenditure); and South Carolina (state created statewide circuit public defender system in the 2007 legislative session. State now funds 63.8 percent of total \$32.5 million expenditure). State expenditures and percentages are based recent NLADA research and 2005 data collected by The Spangenberg Group under the auspices of the American Bar Association. See: *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005*. (November 2006).

¹⁰ The seven states that provide no state money for trial-level representation are: Arizona, California, Idaho, Michigan, Pennsylvania, Utah, and Washington.

¹¹ See, for example: The National Legal Aid & Defender Association. *Indigent Defense Assessment of Venango County, Pennsylvania*. June, 2002, at pp. 54-55. “In conclusion, NLADA believes that Venango County has the personnel to make the tough criminal justice decisions that lay ahead to ensure adequate representation to its indigent citizens. Unfortunately, the economic realities of the county are such that should all of the recommendations detailed in this report be enacted, we still believe that it is only a matter

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of time until the adequacy of indigent defense services is again put in jeopardy. The number of cases entering the Venango County criminal court system is growing and becoming more serious in nature with each passing year, despite a declining population. Thus, the burden of paying to protect the rights of defendants will continue to increase as the county tax-base further declines.”

¹² All county population and poverty rates obtained from the United States Census Bureau. See: <http://quickfacts.census.gov/qfd/states/26000.html>; County crime statistics obtained from the Michigan State Police, Uniform Crime Reports. See: http://www.michigan.gov/msp/0,1607,7-123-1645_3501_4621-25744--,00.html.

¹³ NLADA received a spreadsheet from the Administrative Office of Courts entitled *Totals by Court, 2004-2006* showing amounts paid to all attorneys by court (circuit, district, probate, and municipal). The spreadsheet did not breakout criminal case from civil proceedings such as neglect and abuse, termination of parental rights, etc. NLADA included the total costs for all circuit and district courts and estimated 2/3 of probate costs to cover representation in juvenile delinquency proceedings. We believe the approximate \$74 million dollar figure for indigent defense errs on the side of being overly cautious – we think the actual total being spent on right to counsel cases in criminal and delinquency cases is actually somewhat less.

¹⁴ See for example: Bright, Stephen B., *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake* (1997); The American Bar Association., *Gideon's Broken Promise*, 2004: “Problems resulting from funding and resource inadequacies were exacerbated in Alabama during 2003 due to the state’s fiscal crisis; ... A recent survey of 1,867 felony case files from contract defenders in four of the state’s judicial circuits revealed that no motions were filed for funds for experts or investigators in 99.4 percent of the cases; ... Despite national standards recommending that counsel be provided as soon as feasible after custody begins, many poor persons accused of crime in Alabama are arrested and detained in local jails for several months before finally entering a guilty plea, during which time they no nothing about their cases, not even the identity of their contract defenders.”

¹⁵ NLADA undertook a 50 state survey to collect indigent defense expenditure data. In instances in which counties are the main source of funding and a survey was impractical, NLADA relied on the most recent expenditure data collect by The Spangenberg Group under the auspices of the American Bar Association, Standing Committee on Legal Aid & Indigent Defense, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2005*, (December 2006).

¹⁶ American Bar Association, *Ten Principles of a Public Defense Delivery System*, (Principle 2): Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

¹⁷ The term “staffed public defender office” is meant to describe a public agency or private not-for-profit corporation with salaried staff attorneys whose sole function is to represent indigent clients upon appointment by a judge or court administrator. There are five such offices in Michigan in Bay, Chippewa, Kent, Washtenaw and Wayne Counties.

¹⁸ The Legal Aid and Defender Association of Detroit operates under Supreme Court Administrative Order 1972-2, which states:

“It appearing to the Court that the Defender's Office of the Legal Aid and Defender Association of Detroit is a nonprofit organization providing counsel to indigent defendants in the Wayne Circuit Court and the Recorder's Court of the City of Detroit, and that such method of providing counsel to indigent defendants should be encouraged for the efficient administration of criminal justice; and

“It further appearing that assignments from Recorder's Court have been irregular, sometimes involving

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too many such assignments and sometimes too few;

“Now, therefore, it is ordered that, from the date of this order until the further order of this Court, the Presiding Judge of Recorder’s Court of the City of Detroit shall assign as counsel, on a weekly basis, the Defender’s Office of the Legal Aid and Defender Association of Detroit in twenty-five percent of all cases wherein counsel are appointed for indigent defendants.”

Administrative Orders can be found at <http://courtofappeals.mijud.net/rules/public/default.asp>

¹⁹ NLADA reviewed a wide array of documents related to the delivery of indigent defense services throughout the state of Michigan, including county reports submitted to the state court administrator pursuant to Michigan Supreme Court Administrative Rules of Court (MCR 8.123, effective January 1, 2004) regarding the appointment of counsel, the method and manner of compensation, and the negotiation and awarding of contracts, among others. Though Leelanau County was not a subject of our site work, NLADA will use factual data from other counties throughout the report to demonstrate the statewide nature of the public defense systemic deficiencies.

²⁰ Levine, Barbara R., “Funding Indigent Criminal Defense in Michigan,” Michigan Bar Journal, February 1992, Vol. 71, No. 2., pg. 144.

²¹ See generally, Lemos, Margaret H. “Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense.” New York University Law Review Vol. 75:1808 (December 2000), available at: <http://www.law.nyu.edu/journals/lawreview/issues/vol75/no6/nyu606.pdf>. See also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984), in which the Supreme Court of Arizona found that the lowest bid system for obtaining indigent defense counsel in Mohave County violated the defendant’s right to due process and right to counsel under Arizona and U.S. Constitutions. Citing NLADA’s “Guidelines for Negotiating and Awarding Indigent Defense Contracts,” and other national standards, the court found a systemic failure in low-bid contracting as:

1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants.
2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.
3. The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned....
4. The system does not take into account the complexity of each case.

²² The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or “to waive a client’s rights for reasons not related to the client’s best interests.” For these reasons, all national standards, as summarized in the eighth of the ABA’s *Ten Principles*, direct that: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

²³ National Legal Aid & Defender Association. *Review of First Year Operations of the Juvenile Defender Services: Wayne County, Michigan*. August 1974. p. 2.

²⁴ National Legal Aid & Defender Association, National Center for Defense Management. *Evaluation of the Detroit-Wayne County Juvenile Defender Office*. 1978. (Preface, p. iii).

²⁵ Michigan State Bar Journal, at 242 (March 1978).

²⁶ Michigan Bar Journal, “Indigent Criminal Defense,” February 1992, Vol. 71, No. 2.

²⁷ Id.at 135.

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²⁸ Testimony recorded in 2003, was published in 2005 as part of "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." Michigan testimony can be found at: <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/mi.pdf>

²⁹ *In re Wayne County Criminal Defense Attorneys Association and Criminal Defense Attorneys Association of Michigan*, Complaint for Superintending Control against Chief Judges of Wayne Circuit Court, seeking enforcement of statutory right to "reasonable fees." Filed November 8, 2002; denied by Michigan Supreme Court on June 27, 2003. All materials available at: <http://www.sado.org/publicdefense/#II>.

³⁰ *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 503 N.W.2d 885 (1993). Complaint for superintending control against the chief judges of Wayne circuit court, asking that the "flat fee" schedule for assigned counsel compensation be set aside in favor of more reasonable fees. The Supreme Court issued an order appointing a special master, who then recommended that the flat fee schedule be removed in favor of a new schedule – either payment of \$75 per hour or enactment of the 1982 event-based fee schedule adjusted for inflation. The fee schedule in place in 2002 was established by Administrative Order 1998-03 (an order that mirrored the court's decision in *In the Matter of the Recorder's Court Bar Association*, with some minor adjustments), minus 10 percent resulting from an administrative action of the chief judges of Wayne circuit court, on June 25, 2001. See: <http://www.sado.org/publicdefense/complaint.pdf>, page 6.

³¹ <http://www.mipublicdefense.org/>

³² The 11th Michigan *Principle* states: "When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism. The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society."

³³ http://www.mipublicdefense.org/2005_bill.pdf

³⁴ As of this writing, the defendants in *Duncan* have appealed the trial court's denial of the defense of governmental immunity. Additionally, the defendants sought leave to appeal the trial court's denial of their motion to dismiss on grounds unrelated to governmental immunity. On February 22, 2008, the Court of Appeals granted this application for leave to appeal. The appeal covers numerous issues, including: whether the plaintiffs have standing; whether the plaintiffs' claims are ripe for adjudication; whether the plaintiffs have alleged facts sufficient to state a claim for equitable relief; whether the plaintiffs have adequately pleaded violations of their constitutional rights; whether the trial court has subject matter jurisdiction over this matter; and whether the plaintiffs are the proper parties to bring this suit and whether the state and the governor are the proper defendants. In evaluating this appeal, the Court of Appeals will review the trial court's order de novo. Finally, the defendants sought leave to appeal the trial court's class certification decision. The Court of Appeals also granted this application for leave to appeal on February 22, 2008. The Court of Appeals will reverse the trial court's decision to certify the class only if finds that the trial court's decision was clearly erroneous. The Court of Appeals has consolidated all three pending appeals.

³⁵ *Faretta v. California*, 422 U.S. 806 (1975).

³⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³⁷ *Tovar*, 541 U.S. at 88. While not purporting to prescribe a proper colloquy for waiver prior to entry of an uncounseled plea, *Tovar* acknowledges that the colloquy required may be less than that required for a waiver of counsel prior to representing oneself at trial, but is likely more than that required for preliminary matters such as a waiver of *Miranda* rights. *Tovar*, 541 U.S. at 90-92.

³⁸ *U.S. v. McDowell*, 814 F.2d 245, 249-50 (6th Cir. 1987). When a defendant states that he wishes to represent himself, you [the judge] should ... ask questions similar to the following: (a) Have you ever studied law?;

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(b) Have you ever represented yourself or any other defendant in a criminal action?; (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.); (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least \$50 (\$25 if a misdemeanor) and could sentence you to as much as __ years in prison and fine you as much as \$__? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.); (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?; (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case; (g) Are you familiar with the *Federal Rules of Evidence*?; (h) You realize, do you not, that the *Federal Rules of Evidence* govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?; (i) Are you familiar with the *Federal Rules of Criminal Procedure*?; (j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?; (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony; (l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself; (m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?; (n) Is your decision entirely voluntary on your part?; (o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself;" (p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself. *Guideline For District Judges from 1 Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986).

³⁹ *U.S. v. Akins*, 276 F.3d 1141, 1144 (9th Cir. 2002). *Tovar* suggests that the overall recommendations of *Akins* may be at the far end of the spectrum of what is required.

⁴⁰ As Justice Engel observed in his concurrence in *McDowell*, a detailed colloquy is "consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided [I]t would probably be useful for a judge to inquire as to the extent of any defendant's education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to represent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense." *McDowell*, 814 F.2d at 252.

⁴¹ We would note that the judge's unswerving confidence in the reliability of drug tests may be misplaced. *The Journal of Clinical Chemistry* Vol.33 No.6, 1987, reports: "the quantities of poppy seed ingested in this study (25 and 40 g) may be expected to be contained in one or two servings of poppy seed cake. Therefore, poppy seeds represent a potentially serious source of falsely positive results in testing opiate abuse." The article continues, "[n]ot only is it difficult to distinguish heroin or morphine abuse from codeine, but dietary poppy seeds can give a strong positive result for urinary opiate of several days duration that is confirmed by GC/MS analysis." See also, *National Guideline Clearinghouse*, "Medication-assisted treatment for opioid addiction in opioid treatment programs: Drug testing as a tool": "certain prescribed and over-the-counter medications and foods might generate false positive and false negative results for different substances." http://www.guideline.gov/summary/summary.aspx?ss=15&doc_id=8353&nbr=4676.

⁴² NLADA's site visit coincided with a meeting of criminal justice stake holders on the issue of indigent de-

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fense expenditures. In preparation for the meeting, Chief Circuit Judge Schmucker prepared and shared with us a memorandum on court-appointed attorney fees that covered a range of issues, including eligibility procedures and cost-recoupment. In that memorandum (“*Schmucker Memo 2/7/07*”) he states: “A defendant who earns \$800 per week can probably afford an attorney if the defendant is charged with a 2 year felony, such as resisting and obstructing an officer, or writing a check on a closed account. However, a defendant who earns \$800 per week will be unable to retain an attorney if the defendant is charged with a criminal sexual conduct, armed robbery, or murder. Almost all defense attorneys require a substantial retainer, if not pre-payment of the entire attorney fee. As such, even defendants who have good jobs are often unable to raise \$2500 to \$5000 for an initial retainer.” *Schmucker Memo 2/7/07*, p. 3.

⁴³ NSC commentary at 72-74.

⁴⁴ Cost recovery from partially indigent defendants was first authorized by the *National Advisory Commission on Criminal Justice Standards and Goals*, Defense Standard 13.2 (promulgated in 1973 pursuant to directions of the 1967 President’s Crime Commission), 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

“1(b) 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.”

⁴⁵ The lone exception is in instances where the client committed fraud in obtaining a determination of financial eligibility.

⁴⁶ *James v. Strange*, 407 U.S. 128 (1972) (Kansas recoupment statute; equal protection); *Rinaldi v. Yeager*, 384 U.S. 306 (New Jersey statute requiring repayment of the cost of a transcript on appeal; equal protection); *Giacco v. Pennsylvania*, 382 U.S. 399 (1966) (recoupment statute; due process/vagueness); *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) (Oregon recoupment statute; due process); *Fitch v. Belshaw*, 581 F. Supp. 273 (D. Or. 1984) (recoupment statute; due process and Sixth Amendment).

⁴⁷ *Bearden v. Georgia*, 461 U.S. 660 (1985) (imprisoning an indigent defendant who tried and failed to pay restitution violates equal protection and the fundamental fairness guaranteed by the Fourteenth Amendment).

⁴⁸ *Containing the Cost of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (National Institute of Justice, 1986), at 34-35.

⁴⁹ 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. The most effective cost recovery programs ask defendants to contribute a modest fee to help offset the costs of representation, generally between \$10 and \$50, at the time they are being screened.

⁵⁰ The U.S. Supreme Court, in upholding the concept that a convicted person could be required to pay recoupment of attorney fees, approved the idea that an acquitted person need not pay, as an effort to achieve elemental fairness. The court wrote:

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A defendant whose trial ends without conviction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. . . . Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the state for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.

Fuller v. Oregon 417 U.S. 40, 51(1974) (footnote omitted).

Other states have limited repayment to convicted defendants. See, e.g., *State v. Barklind*, 87 Wn.2d 814 (1976): “repayment is only to be imposed upon convicted defendants.”

⁵¹ It seems unlikely that any misdemeanor defendant could have incurred \$125 worth of appointed attorney fees. Based on a house counsel being paid \$300 per house counsel day, if they receive on average five appointments per day, then each appointment would only cost the court \$60.

⁵² The judge estimated that far more defendants retain attorneys for felony cases than request appointed counsel.

⁵³ The rights form enumerates the following rights: 1) The right to plead guilty, not guilty, or to stand mute; 2) the right to trial by judge or jury; 3) the right to assistance of counsel; 4) the right to an attorney at public expense, if indigent, and the charge requires a minimum jail sentence or the court determines it could impose a jail sentence (this right is couched with the information that the defendant may have to repay the cost of appointed counsel); 5) the right to be presumed innocent and, if the case proceeds to trial, to call witnesses, question witnesses, testify or stand mute; and 6) the right to be released on bond. The rights form is also informational in that defendants are told that, by pleading guilty, they are waiving rights two through five above. The form also informs those defendants on probation that a guilty plea may adversely affect the terms of their probation.

⁵⁴ Most of the same rights and information enumerated on the “rights form” are also on the “plea by mail” form.

⁵⁵ NLADA site team members were informed that the judges have discussed increasing this fee by \$100 to cover the cost of collecting the fees.

⁵⁶ NLADA retained statistics that verify that Judge Falahee’s estimation within an acceptable margin of error. In 2006, district court handled 8,910 misdemeanors. Appointed counsel were assigned in only 726 cases. This means that defendants waived counsel 92 percent of the time. Misdemeanor cases taken from the *12th District Court of Jackson County Summary 2006 Court Caseload Report*. Misdemeanor indigent defense cases obtained from District Court Administrator Michael J. Dillon.

⁵⁷ Court-appointed counsel in Michigan “shall be entitled to receive from the county treasurer the amount which the chief judge considers to be reasonable compensation for the services performed.” Michigan Code of Criminal Procedure, Chapter XV § 775.16.

⁵⁸ NCJ 181344, February 1999, at 10.

⁵⁹ NSC Report, at 220, citing National Advisory Commission on Criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

⁶⁰ Of the 30 states that currently have statewide indigent defense systems, 15 (or 50 percent) have a single state agency vested with the responsibility of overseeing all trial-level and appellate defender services – both primary and conflicts – including the payment of assigned counsel (CT, KY, IA, MD, MA, MT, NC, ND, NH, NM, OR, WI, WV, VA, and VT). Except for New Mexico, Vermont, and West Virginia, each of these state

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agencies is overseen by an autonomous commission. These commissions are housed in either the executive or judicial branch for budget purposes. Yet, even in those states which place their commissions in the judicial branch of government, the indigent defense system operates outside of the state court system and the judiciary takes no part in the day-to-day administration of the system. Funding in these states is a separate line item from the rest of the judiciary budget. Kentucky, Iowa, Maryland, Montana, North Dakota, and Wisconsin house their commissions in the executive branch of government. Connecticut, Massachusetts, North Carolina, New Hampshire, Oregon, and Virginia house the commission in the judicial branch. The public defender agencies in New Mexico, Vermont, and West Virginia are not overseen by independent commissions. In all three states, the indigent defense system is a department of the executive branch of government.

⁶¹ NLADA *Guidelines for Legal Defense Services*, Standard 2.10, *supra* n. 14.

⁶² Throughout our country, more than 80 percent of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, *Defense in Criminal Cases* at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, *Indigent Defense* at 1 (1996). See generally: Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997). The actual number of such individuals will increase as the number of poor people in the United States (currently estimated at 37 million) goes up. See A.P., *U.S. Poverty Rate Rises to 12.7 Percent*, N.Y. Times, August 30, 2005, [http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58.\(8/30/2005\)](http://www.nytimes.com/aponline/national/AP-Census-Poverty.html?ei=5094&en=d74b58.(8/30/2005)).

⁶³ American Bar Association, Standing Committee on Ethics and Professional Responsibility. *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. May 13, 2006. Opinion can be found online at: www.abanet.org/cpr/pubs/ethicopinions.html.

⁶⁴ *Id.*

⁶⁵ See *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

⁶⁶ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12. The National Advisory Commission accepted the numerical standards arrived at by the NLADA Defender Committee "with the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction." *Id.* at 277. Because many factors affect when a caseload becomes excessive, other standards do not set numerical standards. ABA *Principle 5* notes in commentary that national numerical standards should in no event be exceeded and that "workload" – caseload adjusted by factors including case complexity, availability of support services, and defense counsel's other duties – is a better measurement.

⁶⁷ The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. See *Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded public defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. See, e.g., *Missouri ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), cert. den. 454 U.S. 1142 (1982); *New Hampshire v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983); *Corenevsky v. California Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *Arizona v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *Arizona v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *California v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *Kansas ex rel.*

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Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den.* 495 U.S. 957 (1989); *Hatten v. Florida*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *Oklahoma v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (1993); *Louisiana v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

⁶⁸ *Michigan Bar Journal*. August 1993. p. 818.

⁶⁹ NLADA secured a copy of the circuit court administrator's database showing the number of cases assigned to the eight firms in calendar year 2006.

⁷⁰ This does not take into account those cases handled in 2006 that were assigned in prior years. So the caseload is in fact much greater.

⁷¹ Such services have multiple advantages. As with investigators, social workers are not only better trained to perform these tasks than attorneys, but more cost-effective; preparation of an effective community-based sentencing plan reduces reliance on jail and its attendant costs; defense-based social workers are, by virtue of the relationship of trust engendered by the attorney-client relationship, more likely to obtain candid information upon which to predicate an effective dispositional plan than an attorney; and the completion of an appropriate community-based sentencing plan can restore the client to a productive life, reduce the risk of future crime, and increase public safety.

⁷² *Schmucker Memo 2/7/07*, p.1.

⁷³ The following is just a partial list of ethical duties required under national performance guidelines. The black letter Performance Guidelines for Criminal Defense Representation (NLADA, 1995) is available on-line at: www.nlada.org/Defender/Defender_standards/Performance_Guidelines.

⁷⁴ These official figures vary greatly from Ms. Worth's own estimations. She told an NLADA site team member that she receives 34 appointments per month (or 408 case per year). If correct, this would put her in breach of national caseload figures by 100 percent. When NLADA is confronted with differing information regarding caseloads, we err on the side of caution and take the more conservative figure.

⁷⁵ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12.

⁷⁶ See: National Center for State Courts, *Updated Judicial Weighted Caseload Model*, November 1999; The American Prosecutors Research Institute, *Tennessee District Attorneys General Weighted Caseload Study*, April 1999; U.S Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Workload Measurement for Juvenile Justice System Personnel: Practice and Needs*, November 1999; The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*; April 1999. Moreover, discussions with the U.S. Department of Labor, Bureau of Labor Statistics, suggest that using a 40-hour work week for measuring workload of other local and state government exempt employees is the best method of approximating staffing needs.

⁷⁷ Significantly, this is a conservative estimate of the workload of the juvenile delinquency attorneys because the billable hours also include any abuse and neglect conflict cases these attorneys may have handled in 2006. The circuit court administrator staff person overseeing the assignments could not account for the number of such cases handled by the two defenders reflected in the hourly compensation.

⁷⁸ Recognizing this, other public defender systems have elevated the priority of juvenile representation and established special divisions, not only to promote assessment and placement of juveniles in appropriate community-based service programs, but also to train and collaborate with others in the system to support the same goals, such as jail officials, judges, prosecutors, and policy makers. See *Juvenile Sentencing Ad-*

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vocacy Project, Miami/Dade County, Florida (proposal for this and other successful federal Byrne grants on-line at www.nlada.org/Defender/Defender_Funding/Successful). See also Youth Advocacy Project, Roxbury, MA (www.nlada.org/News/NLADA_News/1005694565.43).

⁷⁹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12.

⁸⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸¹ *Kirby v. Illinois*, 406 U.S. 682 (1972).

⁸² *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁸³ *County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991).

⁸⁴ *ABA Defense Services*, commentary to Standard 5-6.1, at 78-79.

⁸⁵ *ABA Principle 4*: Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

⁸⁶ *ABA Model Rules of Professional Conduct*, Rule 1.6; *Model Code of Professional Responsibility*, DR 4-101; *ABA Defense Function*, Standard 4-3.1; *NLADA Performance Guidelines*, 2.2. State Performance Standards; New York's "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State" (NYSBA 2004); "New York State Bar Association Standards for Providing Mandated Representation" (NYSBA 2005); and "Client-Centered Representation Standards" (NYSBA Client Advisory Board 2005).

⁸⁷ *NSC*, Guideline 5.10

⁸⁸ *Id.*, and commentary at p. 460.

⁸⁹ *ABA Principle 7*: The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

⁹⁰ *NSC* at 470.

⁹¹ *ABA Defense Services*, commentary to Standard 5-6.2, at 83.

⁹² *NSC* at 462-470, citing *Wallace v. Kern* (slip op., E.D.N.Y. May 10, 1973), at 30; reported at 392 F. Supp. 834, rev'd on other grounds, 481 F.2d 621; *Moore v. U.S.*, 432 F.2d 730, 736 (3rd Cir. 1970); and *U.S. ex rel Thomas v. Zelker*, 332 F.Supp. 595, 599 (S.D.N.Y. 1971).

⁹³ If a person is arrested on Wednesday or Thursday, it might be the following week before they will be set for the preliminary examination conference.

⁹⁴ *Schmucker Memo 2/7/07*, p. 4. The judge acknowledges that he is unsure whether these cases resolved in the district court were "fully dismissed or simply reduced to misdemeanors."

⁹⁵ The change was the result of the elections of Judges Grant and McBain. Both Grant and McBain refuse to honor sentencing agreements entered into between the prosecutor and the defense and refuse to partici-

pate in plea bargain discussions (i.e., they will not give any indication of the sentence they will impose on a plea); only Judge Schmucker will do so. This means that the prosecutor and defense attorney can only charge bargain, but cannot bargain on sentence. During the transition period, defendants often accepted a plea offer with an agreed sentence, entered the plea in district court, and then were allotted to a circuit court only to find out that the circuit court judge would not be bound by the sentencing agreement. Judge Grant said those defendants were allowed to withdraw their guilty pleas and go forward in circuit court. As a partial fix to this dilemma, felony cases are now allotted to a circuit court before the preliminary examination conference, so that all of the parties know whether they are before Judge Grant, Judge McBain, or Judge Schmucker, and can bargain accordingly.

⁹⁶ It is mandatory that a child be provided with counsel if: 1) the juvenile requests counsel; 2) a parent requests counsel for the juvenile; or 3) a family member is the victim. Mich. Comp. Laws § 6.937(2).

⁹⁷ *Principle 6* of the ABA *Ten Principles* demands that “[d]efense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” *Ten Principles of a Public Defense Delivery System* (ABA 2002) at p. 3. See also *Performance Guidelines for Criminal Defense Representation* (NLADA 1995), Guidelines 1.2, 1.3(a); *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (ABA 1989), Guideline 5.1.

⁹⁸ For most public defender offices across the country, the training and practical experience gained by attorneys working on less serious criminal cases permits them, over time, to acquire the skills necessary to handle more serious cases. Consequently, public defender offices across the country generally assign misdemeanor charges, traffic offenses, and preliminary stages of a prosecution to newer attorneys. Over time—often measured in years—attorneys in these offices acquire the skills that support handling more challenging cases.

⁹⁹ Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a “cost-saving device” because of the “cost of retrials based on trial errors by defense counsel or on counsel’s ineffectiveness.” The preface to the NLADA *Defender Training and Development Standards* states that quality training makes staff members “more productive, efficient and effective.” www.nlada.org/Defender/Defender-Standards/Defender-Training-Standards.

¹⁰⁰ These can vary greatly both in kind and number but they commonly include such things as: fostering and supporting professional development; giving people clear guidance about what is expected of them; and supporting accountability. Moreover, effective performance plans are tied to and support the fulfillment of the agency’s mission and vision. Critically, effective plans emphasize a goal of promoting employees’ performance success.

¹⁰¹ People need to know what is expected of them in order to work to fulfill those expectations. Performance expectations should include, for example, attitudinal expectations and administrative responsibilities as well as substantive knowledge and skills.

¹⁰² People whose positions require them to conduct performance evaluations must be trained and evaluated as part of their performance plan, so that evaluations are done fairly and consistently.

¹⁰³ See, e.g., ABA *Model Rules of Professional Conduct*, Rule 1.1; ABA *Defense Function*, Standard 4-1.6(a); NLADA *Performance Guidelines*, 1.3(a).

¹⁰⁴ For example, if a defendant is charged with two separate burglaries of two unrelated houses on two different dates, the prosecutor counts two cases – as recommended – but the defender offices and appointed counsel are required to count that as one unit (that is, one client).

¹⁰⁵ One defender attorney reported that the Michigan Supreme Court recently removed the ethical provision forbidding attorneys from accepting more cases than they can handle. The Court’s reasoning was report-

edly that the prohibition is self-evident.

¹⁰⁶ However, the public defender reported that the prosecutor has a policy of withdrawing plea offers if defense counsel pursues pretrial motions. On the other hand, defenders reported that, as an office (really two offices), they have the “clout” to pressure the DA in some respects regarding handling of cases.

¹⁰⁷ See: “Manner of Disposition for Criminal Cases Filed in 28 Unified and General Jurisdiction Courts, 1999,” *Examining the Work of State Courts, 1999 - 2000*, National Center for State Courts. When a jurisdiction has a significant deviation from the figure, it begs the question: “Why?” A jurisdiction’s trial rate may be impacted by a number of factors. For instance, a jurisdiction where a prosecutor overcharges may have a very high trial rate (if the public defender is doing his or her job adequately). Similarly, a public defender trying to have her staff gain trial experience may cause an increase in trial rates in a jurisdiction. Conversely, a system in which the prosecutor has generous plea offers may have a significantly lower trial rate. So trial rates are just one indicator of a functioning criminal justice system, but one that must be gauged in conjunction with other criteria. In this instance, NLADA believes the low trial rate is an indicator of a system in trouble.

¹⁰⁸ The judge was also critical of the attorneys in the prosecuting attorney’s office, saying that both defenders and prosecutors do not have an incentive to work hard because they are salaried.

¹⁰⁹ The prosecutor reportedly tried to persuade the commissioners not to approve filling the public defender attorney vacancy, but rather to authorize him to hire another assistant prosecutor.

¹¹⁰ The chief judge, while stating that the assigned attorney fee schedule is “archaic” and needs to be changed, also said – disapprovingly – that there are members of the bar who believe indigent defense should be their entire practice and believe that the system should be paying them at a level they could live on.

¹¹¹ Dues for the WCCDBA cover the required Criminal Advocacy Program training, and also pay for computers and furniture for WCCDBA offices housed in the Hall of Justice.

¹¹² As national caseload standards call for a maximum of 400 misdemeanors or 150 felonies per attorney per year, we can multiply a felony case by 2.5 to weight it equal to a misdemeanor.

¹¹³ Reimbursements are sent directly to the county and not to the Public Defender Office.

¹¹⁴ http://www.nlada.org/Defender/Defender_ACCD/ACCD_TenTenets

¹¹⁵ Making alterations to the building is nearly an impossible task. For example, the building also holds most county offices and a handful are just now getting individual air conditioning units.

¹¹⁶ The obvious issue here is a client’s literacy skills. Frequently, a client will rely upon a friend – often a co-defendant – to write notes on his behalf to his attorney.

¹¹⁷ SADO is statutorily authorized to provide education to its own attorneys and private attorneys accepting appellate assignments and to maintain and share a brief bank. MCL 780.712 and 780.716.

¹¹⁸ Training offered by SADO's CDRC or its training partners is either free of charge to trainees or offered for a modest fee, due to grant support from the Michigan Commission on Law Enforcement Standards. SADO administers MCOLES training grants totalling about \$300,000 each year.

¹¹⁹ *The Defender Motions Book; Defender Trial Book; Defender Plea, Sentencing and Post-Conviction Book; and Defender Habeas Book* are published by the CDRC on an annual basis.

¹²⁰ ICLE's criminal law training generally focuses on drunk driving defense and sentencing.

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¹²¹ MCL 49.103.

¹²² 2006 PA 345.

¹²³ Michigan does not have Mandatory Continuing Legal Education (MCLE).

¹²⁴ www.capwayne.org. Other goals of the program include: educating the bench, bar and public about the need for quality and integrity in prosecution and defense representation; promoting alternatives to the present criminal justice system; guarding against erosion of the rights established by constitutional, statutory, case and other law governing the administration of the criminal system; and publishing, recording, and distributing written, video-taped and audio-taped materials pertinent to the administration of the criminal justice system. The CAP web site and grant are a project of the Criminal Defense Resource Center of the State Appellate Defender Office, www.sado.org, which offers training and support services to assigned criminal defense attorneys. The CDRC partners with C.A.P., Wayne County Circuit Court, and the Wayne County Criminal Defense Attorneys Association on this defense training project.

¹²⁵ Videotapes of the sessions can be viewed at any time after they become available on the CAP web site, but not all viewing of the videotapes qualifies for credit under the special makeup procedures. Handouts from the sessions can also be downloaded from the web site. And a CD containing all the written materials for the entire series is provided to attendees at the last session of the series.

¹²⁶ Administrative Order 2006-08, IV. L

¹²⁷ Administrative Order 2006-08, IV.I.2.c.

¹²⁸ Administrative Order 2006-08, IV.I.2.a-c

¹²⁹ The county prosecutor said sometimes prosecutors have to point out conflicts where defense lawyers inappropriately attempt to represent co-defendants. One judge told us he has no problem with attorneys representing co-defendants at arraignment or diversion hearings.

¹³⁰ The prosecuting attorney in the courtroom was either unaware of the written plea offer in the file or chose not to point out the defense lawyer's error.

¹³¹ *People v. Cobbs*, 505 NW 2d 208 (Mich. 1993). Under this case, a defendant (through his attorney) can ask the judge to review the file and indicate what his likely sentence will be if the defendant pleads guilty. This procedure results in many cases being disposed of through pleas, where there is no offer from the DA or the defendant is reluctant to accept the DA's offer.

¹³² *Principle 8* of the American Bar Association's *Ten Principles* states: "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." See also: National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.6, 3.4, 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office); American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-2.4, 5-3.1, 5-3.2, 5-3.3, 5-4.1, and 5-4.3; National Legal Aid & Defender Association *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines III-6, III-8, III-9, III-10, and III-12; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989), Standard 4.7.1 and 4.7.3; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) (Performance); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(B)(iv); and American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993), Standard 4-1.2(d). Cf. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

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¹³³ *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972).

¹³⁴ Judge Schmucker invited NLADA representatives to observe a meeting at which the costs of the indigent defense program were discussed with a number of County stakeholders. During that meeting it was revealed that indigent defense outspent the prosecution by approximately \$200,000 in 2006. The indigent defense expenditure figure, however, included a number of non-criminal, non-juvenile delinquency costs, such as representation of poor people in abuse and neglect cases, termination of parental rights, etc. To account for these cases, NLADA used the actual costs paid to the juvenile delinquency attorneys instead of the higher family court expenditures detailed in the *Schmucker Memo 2/7/2007*.

¹³⁵ Felony (\$901,000); juvenile delinquency (\$69,212); district court (\$179,000); and appeals (\$92,000). Per capita cost is based on the United States Census projected population estimates for Jackson County of 163,629.

¹³⁶ This has the potential to raise issues about the rule that lawyers should not be witnesses and advocates in the same case. Should the lawyer take a statement or observe something about which the lawyer would want to testify, it could raise a question under Michigan Rule of Professional Conduct Rule 3.7, Lawyer as Witness, which provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

¹³⁷ See *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

¹³⁸ The court administrator said the Michigan Supreme Court continues to monitor fees paid to individual assigned counsel – in particular when attorneys gross more per year than the justices make in salary. Obviously, the justices are not considering the fact that they do not pay for their own office space, staff, access to online legal research, law library, malpractice insurance, medical and retirement benefits, etc., as assigned counsel must.

¹³⁹ A court order has to accompany a voucher sent to court administration requesting funds for investigators, expert witnesses or extraordinary fees. If the voucher amount is more than \$500, it is sent to the chief court administrator.

¹⁴⁰ From U.S. Border Control to the Police of the Sault Ste. Marie Tribe of Chippewa Indians, there are 11 police agencies having jurisdiction spread throughout Chippewa County.

¹⁴¹ If Michigan were to create a statewide indigent defense system it could simultaneously commission an “adjudicative partnership” to study a whole host of criminal justice policies. An adjudication partnership is a formal collaborative effort in which representatives from key justice system agencies join together to identify problems, develop goals and strategies for addressing the problems, and oversee the implementation plans to manage or solve problems. In the best jurisdictions, adjudication partnerships produce joint criminal justice fiscal impact statements, such that the Legislature can make informed decisions on all pending criminal justice bills. For instance, increasing the funding to hire additional law enforcement officers will result in an increased workload on the courts, prosecutors, and defense attorneys. Jointly, the adjudication partnership can inform policy-makers that increasing law enforcement will require “X” number of new judges, “Y” prosecutors and “Z” public defenders.

