

# Meeting a Basic Constitutional Duty



Edward H. Pappas

“Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us, can freedom flourish and endure in our land.”

—United States Supreme Court  
Justice Frank Murphy

**T**he State Bar of Michigan has a long history of being a leader in the public discussion of how Michigan answers its constitutional obligation to provide counsel in criminal proceedings to those who can't afford counsel. I join a long line of State Bar presidents in calling on our membership to engage in this critical discussion. Despite the dire financial straits of the state, I believe that we are closer than we have ever been to our goal of making substantial and comprehensive improvement in how Michigan meets this fundamental constitutional obligation.

In June 2008, the National Legal Aid and Defender Association (NLADA) released a special report, “A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis.” The report was an in-depth evaluation of trial-level indigent defense systems in Michigan. Its conclusion was that our public defense delivery system is not constitutional. Justice is not equal or even available to all in our trial courts.

The NLADA report adds expertise, firsthand observation, and timely data to the stories that lawyers have been telling for decades about the deficiencies of criminal defense in Michigan. In the nine months since the NLADA report was released, new information has called further attention to the need for reform and points to potential savings that can be achieved when we succeed:

- A Michigan State Police audit concluded that evidence tested by the Detroit Crime Lab had an error rate potentially as

high as 10 percent. As a result, an unprecedented partnership has emerged between the Wayne County Prosecutor's office and the criminal defense community to review an immense backlog of cases extending back at least five years. The time and money now being requested to re-test evidence and re-try cases could well have been prevented with a stronger public defense system. With sufficient resources, criminal defense attorneys could have filed motions,

Justice is not equal  
or even available to  
all in our trial courts.

sought experts, and discovered the problems much earlier. The price tag on re-evaluating the evidence used to compel conviction is not yet known, but is expected to be significant.

- Sentencing-error corrections made by three attorneys with the State Appellate Defender Office (SADO) Plea Unit during the appellate review process saved the State of Michigan approximately \$855,000 in 2007 alone. SADO believes that these errors are not an aberration. Defense attorneys at the trial-court level are often unable to review presentencing reports on a timely basis, or do not have adequate training in the guidelines to identify sentencing errors. Implementing nationally recognized standards that have been adopted by the State Bar would rectify this problem before costly appellate review.

The current state of our public defense system has spurred a variety of important and promising responses:

- A special group of volunteers from the State Bar Criminal Issues Initiative is working toward a recommendation for a uniform standard of indigency in Michigan.
- On February 18, the State Bar's partner in reform, the Michigan Campaign for Justice, was officially launched with an impressive coalition of broad-based members that includes voices from the entire political spectrum, the legal community, faith-based organizations, and others.
- A new non-DNA Innocence Project, the Michigan Innocence Clinic, was started at the University of Michigan Law School to review the mounting claims of wrongful conviction. It joins the well-established and productive Innocence Project founded in 2001 at Thomas M. Cooley Law School.

A reformed criminal public defense system in Michigan will undoubtedly require substantial new expenditures, a daunting challenge in these times. But there is only one choice for lawyers: to fight to uphold the Constitution and defend individual rights. We must advocate aggressively for those expenditures, because investing in public defense reform will mean that juveniles will stand a better chance at rehabilitation, defendants in all courts will understand their right to counsel, and each person facing the loss of liberty will have an opportunity for a fair trial. The Constitution requires nothing less. ■

*I would like to acknowledge and thank Elizabeth Lyon, SBM director of governmental relations, for her contributions to this article.*