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News Story

Indigent Criminal Services Strained By 'Underfunding'

By *Todd C. Berg, Esq.*

The "underfunding" of indigent criminal defense services in Michigan is a serious and growing problem for both lawyers and taxpayers, experts tell Lawyers Weekly.

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Prosecutors, judges, criminal defense practitioners, legislators and citizens have stated, unequivocally, that the problem is real and affects more than just lawyers' bottom lines.

Sen. Alan Cropsy, R-DeWitt, chair of the Senate Judiciary Committee, declared that inadequate funding often begets disadvantaged and inexperienced counsel, which ultimately results in higher

incarceration rates.

"[When criminal defendants] don't have the legal representation they really should have ... that impacts the people of Michigan through their taxes supporting the prison system," he explained, adding that the state currently pays between \$25,000 and \$35,000 for each of its 48,000 inmates.

Grand Ledge attorney James L. Shonkwiler, former executive director of the Prosecuting Attorneys Association of Michigan for 27 years, agreed.

"The reality is that people end up in jail or [are incarcerated] for longer periods of time because their counsel screwed up," he asserted. "[Underfunded and inexperienced counsel] will miss a lot of things that will result in an expensive incarceration where a less-expensive result may be possible."

But Shonkwiler advised there is more to current funding reform efforts than just keeping down incarceration costs.

"From my perspective as a prosecutor, properly funded defense counsel can be extremely helpful to their clients in finding ways for the clients to work themselves out of the situation that got them into trouble," he observed. "By working with their clients — who need the

help — we don't see the clients cycle back in again. Not only will the help keep them out of jail but for many it will effectively end up turning their lives around."

Meanwhile, Michigan Judges Association President Judge Robert M. Ransom, who served as chief judge of Genesee County for 16 years and currently serves as a circuit court judge, said he knows from experience exactly how real the problem is.

"There's no question that, in order to stay within budget, we have had to pay counsel at hourly rates that are far below what they ought to be compensated at," the judge recounted. "The only way that we are able to manage our budget is simply through the willingness of counsel to work at very reduced incomes. If we were to compensate assigned counsel at what is a fair market rate for attorneys, it would break the bank."

Face Of Underfunding

State Bar President Nancy J. Diehl, who is also chief of the trial division for the Wayne County Prosecutor's Office, said she is not aware of a single county where the lawyers feel they are being fairly compensated, including her home turf.

In her article for the November 2004 Michigan Bar Journal, and during an interview with Lawyers Weekly, she stated that the hourly fee for assigned counsel handling capital cases often worked out to about \$10 per hour.

"What do they pay at McDonalds these days?" she asked. "There are all sorts of people without even a college degree making \$10 an hour. I don't know what the fairest amount would be, but I can tell you that \$10 an hour is not it."

Appellate specialist F. Martin Tieber of East Lansing explained that the hourly rates assigned counsel are permitted to charge at both the trial and appellate levels are often so low the attorneys cannot afford even the most basic professional necessities, such as an office or a desk, let alone a receptionist.

"My understanding is there are a lot of people doing appointed work in the Detroit area who are operating out of their vehicles or meeting clients in restaurants, doing jobs at night, and even working as baggage handlers at the airport," he noted.

Moreover, Harper Woods attorney Frank D. Eaman said the rock-bottom fees being paid assigned counsel drive away the lawyers who are needed most.

"Experienced lawyers are dropping out of the system," he asserted. "You don't find lawyers with 10, 15, or 20 years experience taking assigned counsel cases anymore because they can't afford to work at these rates."

Cropsey concurred.

"I have seen it in so many areas where the attorneys are underfunded, it's next to impossible for them to do the job that really ought to be done," he recalled.

Tieber pointed out it's not uncommon to hear about coerced guilty pleas occurring under these circumstances.

"When you get those kinds of rates, that's what happens," he said. "The attorney is financially motivated to plead the cases."

Meanwhile, Diehl said her experience as a prosecutor gives her a slightly different perspective, explaining that delays, substitutions of counsel and reversible error are frequently the end result when underfunding pushes out seasoned trial lawyers and brings in inexperienced ones.

"Adjournments hurt victims," she stated. "Appellate matters which result in reversal hurt victims."

Nevertheless, Washtenaw County Public Defender Lloyd E. Powell boasted that his office stands as an example of what can be done with adequate funding.

"Having achieved parity with the prosecutor's office in terms of resources, we are able to attract higher quality staff members who see the work not just as a living, but as a calling," he explained. "We are providing crime prevention at its best by affording our clients legal representation that not only addresses the aspect of defending the charge they're coping with but ensures they get the mental health or substance addiction treatment they need. This stops recidivism and makes a significant contribution to the overall public safety in the community."

Compared To What?

For those who may have doubts about the extent of the underfunding problem, Tieber urged them to consider the state's recent national ranking in terms of indigent defense expenditures.

According to a September 2003 report prepared by The Spangenberg Group for the American Bar Association, the only two states that spent less than Michigan in fiscal year 2002 were North Dakota and Wyoming, whose respective populations were 634,000 and 498,000 compared to Michigan's 10 million.

Within the state, Eaman pointed out the defense has historically been underfunded relative to the prosecution.

Citing data from the 1993 Supreme Court decision, *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, he explained that "at that time, the defense budget in Michigan was 36 percent of the prosecution budget."

Shonkwiler agreed.

"In Michigan, defense services are far worse off than the prosecution, even though neither of them get the help they need," he observed.

Meanwhile, Ransom noted the hourly rates for assigned counsel have failed to keep pace with the increases seen by judges and prosecutors.

"We have made some adjustments but I doubt they have kept up with the cost of living," he stated. "They don't equate to the other players in the system."

Diehl concurred wholeheartedly.

"Prosecutors, we've had our salaries increased over the years. Judges have. Court staff has. It seems like everyone has. No one makes now what they did 10 years ago, 20 years ago," she observed. "Why are the defense lawyers not seeing an increase?"

Detroit attorney James R. Neuhard, director of the State Appellate Defender Office (SADO), said the extent of the underfunding problem becomes even more obvious when you compare assigned counsel's hourly rates with their overhead costs.

"You can't justify paying a lawyer below their overhead," he declared. "It's an unreasonable taking of property, yet it happens every day in this state."

Tieber agreed, noting that attorneys wind up doing more than just de facto pro bono work.

"When your average overhead rate per hour is not being met by what you're being paid per hour, that means you're donating your time," he explained. "Worse than that, if you've got the average office, then you're probably paying out of pocket to do the work."

According to economist Dr. Lawrence Stiffman, who has conducted the Economics of Law Survey for the State Bar of Michigan since 1980, the results of the 2003 survey showed

the median hourly overhead rate for survey year 2002-03 to be approximately \$34, based on 50 weeks and 37.5 hours per week.

Catching Up

Elizabeth Arnovits, executive director of the Michigan Council on Crime and Delinquency, said the underfunding problem will not go away until needed changes are made to the system.

"We are looking at having legislation introduced to have the state participate and assist communities in funding and establishing standards for indigent defense counsel," she explained. "Right now, it's up to every county and what we're looking for are some incentives from the state to upgrade those systems."

Arnovits insisted Michigan is out-of-step with the times.

According to the October 2002 "Model Plan for Public Defense Services in Michigan," which was co-written by Arnovits and prepared by the Task Force on Improving Public Defense Services in Michigan, 46 states provide state funding for indigent defense services, 24 of which provide 100 percent of the funding.

Michigan was one of only four states where the entire financial burden was borne by the counties, she reported.

Marea L. Beeman, vice president of The Spangenberg Group and contributor to the September 2003 report, agreed that Arnovits had the right idea.

"One hundred percent state-funded indigent defense systems tend to be healthier and more stable than systems funded at the county or local level," she observed.

But Neuhard cautioned that all the money in world won't accomplish a thing if standards governing lawyer conduct are not also put in place.

"Accountability is a really critical part, both from a taxpayer's perspective and from an ethical, good-lawyer, best-practices standpoint," he explained. "You're spending taxpayers' money and you're representing people who can't choose their lawyer."

Neuhard suggested the reform effort could learn a lot from the success the Michigan Appellate Assigned Counsel System (MAACS) has had with its Minimum Standards for Indigent Criminal Appellate Defense Services.

Make Culprits Pay

Beeman explained that if Michigan wants to switch over to a state-funded system, it's going to have to get creative like other states have done.

"There's a trend among states to steer away from the general fund revenues and seek out non-general fund revenue sources," she noted. "For example, New York and Georgia recently turned to different types of user fees, such as up-front application fees for indigent defendants seeking counsel or surcharges on all parking tickets that people accumulate."

According to the 2003 Spangenberg report, other states have raised revenue by increasing civil filing fees, attorney registration fees, and costs and assessments in criminal cases.

However, Beeman warned these alternative funding sources are not without problems.

"Sometimes these revenue streams are unpredictable and the projections for what they're going to amount to are overestimated and you're left with the dilemma of not having the funding to support the services you have already put into place," she noted.

Moreover, Cropsey said another dilemma is that somebody else might have already beaten you to the punch.

"The problem with [restricted revenue sources like Michigan's Justice System Fund and the Civil Filing Fee Fund] is that they are usually already spoken for," he remarked. "The fees are high enough now that we're starting to get serious resistance on further increases. I'm wary about going to that well again."

Nevertheless, Neuhard said he still has a few funding ideas of his own.

"One of the most logical areas to tax to support our services is the sale of alcohol," he stated. "There's nothing more related to the commission of serious crimes of violence than alcohol. It exceeds drugs as a principal contributor to violent behavior."

He also mentioned a tax on ammunition would make sense given its natural connection to violent crime.

"I know the political lobbies for both of these are strong, which makes them unlikely, but from a standpoint of what makes sense, taxes in these areas make sense," Neuhard urged.

For example, he highlighted the revenue-generating potential of an alcohol tax.

"A penny a bottle of beer would raise millions of dollars," he declared. "That's separate from a barrel tax on hard liquor. Between those two alone, with modest increases, if what you wanted to do was raise more than \$50 million, you'd certainly be well on your way."

'Reasonable Compensation' Milestones

Since 1857, Michigan has provided a statutory right to reasonable compensation for lawyers willing to represent indigent criminal defendants.

Limits on the maximum compensation collectible by counsel were abolished with the 1927 enactment of MCL 775.16, where the Legislature required only that counsel be paid what the chief judge of the county deems to be "reasonable compensation for the services performed."

In its 1993 decision, *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, the Michigan Supreme Court applied the "reasonable compensation" statute to invalidate the fixed-fee compensation system for assigned counsel in Wayne County Circuit Court and Detroit Recorder's Court.

Moreover, in granting the petitioners' complaint for superintending control, the court instructed the respondent courts to develop and implement "a payment system that reasonably compensates assigned counsel for the services performed."

Writing for the 6-1 majority, then-Chief Justice Michael F. Cavanagh concluded that, not only did the statute entitle assigned counsel to reasonable compensation "for providing criminal defense services to indigent defendants," but that the "compensation actually paid must be reasonably related to the representational services the individual attorneys actually perform."

Cavanagh relied heavily on the findings of the Hon. Tyrone Gillespie, whom the Supreme Court had appointed special master and empowered to conduct evidentiary hearings on such issues as:

- * Michigan's appointed counsel reimbursement rates;
- * overhead and expenses incurred by assigned counsel;

* income that can be generated from assignments and the amount of time necessary to generate the income; and

* "instances of pressures to under-represent indigent defendants."

Nevertheless, the court stopped short of declaring what constituted reasonable compensation, "electing instead to leave that determination to the sound discretion of the chief judges of the respective courts."

In a June 2003 order, the Supreme Court rejected another complaint for superintending control against Wayne County.

The court explained it was not persuaded by petitioners' — Wayne County Criminal Defense Bar Association, The Criminal Defense Attorneys of Michigan, and Legal Aid and Defender Association of Detroit, Inc., — claims that the fee schedule denied assigned counsel reasonable compensation.

In her concurrence, then-Chief Justice Maura D. Corrigan noted, among other things, that: (1) the county's compensation system allowed attorneys to petition for "additional fees in exceptional cases"; (2) "[p]laintiff's anecdotal claims of unreasonably low compensation do not show that the fees paid to appointed counsel are generally unreasonable"; (3) "[a] comparison of fees paid currently to fees paid in the past or to fees paid to nonappointed attorneys is not dispositive"; (4) "overhead costs for attorneys assigned to indigent criminal defendants are sometimes lower than similar costs for attorneys performing other types of work"; and (5) "[a]lthough plaintiffs have shown that fees paid under the Wayne Circuit Court fee schedule are frequently low, plaintiffs have not shown that the fee schedule generally results in unreasonable compensation."

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