

MEMORANDUM



DATE: December 11, 2009
TO: Interested parties
FROM: Ben Gielczyk, Fiscal Analyst
RE: Michigan Public Defense Act (Draft)

States are constitutionally charged with providing effective legal counsel to defendants who lack the means to retain counsel. A recent study by the National Legal Aid and Defender Association (NLADA), in partnership with the Michigan State Bar Association, found Michigan to be providing less than adequate indigent defense services by forcing counties to fully fund the public defender system and failing to implement a statewide oversight and supervisory system. The counties' various funding mechanisms coupled with the lack of oversight often leads to similarly situated defendants in different counties receiving disparate levels of justice. Often, the counties that are most in need of indigent defense services are the ones that can least afford to pay for it.

In an effort to address the numerous problems in the Michigan public defender system, the Michigan Public Defense Act ("Act") has been proposed. The goal of the Act is to create a consistently delivered, efficient, statewide public defense system. Through a central Office of Public Defense accompanied by regional public defense offices, the bill seeks to provide "effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."

Fiscal Impact

Under the proposed Michigan Public Defense Act, the State of Michigan would be responsible for all costs of public defense services through the creation of a "Public Defense Fund" in the Department of Treasury. The Office of Public Defense would annually submit a budget proposal and the legislature would annually make an appropriation to ensure that the public defense delivery system is adequately funded.

As noted above, Michigan counties are currently charged with the state's responsibilities under *Gideon v. Wainwright* to provide constitutionally-adequate legal representation at the trial level. Furthermore, there is no statewide administration to ensure that effective and adequate representation is rendered on the part of the defendant. Most recent numbers show that Michigan counties collectively spend \$74.4 million on indigent defense services. This amounts to approximately \$7.35 per capita, which is 38 percent below the national average of \$11.86, and ranks Michigan 44th out of the 50 states in indigent defense cost per capita. Under Michigan's current system, counties would have to collectively spend \$120.1 million in order to match the national average indigent defense cost per capita. This would represent an increase of \$45.7 million from current expenditures. It is unknown what kind of funding structure the new Michigan Public Defense Act would create, therefore, the amount of funding needed to provide "adequate" indigent defense services under a new system cannot be estimated with any accuracy.

Under the Act, all costs associated with public defense would shift to the state. Because of ongoing budget constraints and lack of oversight from the state, the amount counties currently pay for public defense is more a function of what their budgets will allow rather than what would truly be considered "reasonable." Implementing the provisions of the Act would presumably increase the operational costs of the state's public defender system. Total funding needed to implement the Act would be a function of the Act's following prescriptions:

Prescription #1 Creation of a Public Defense Commission

Fiscal Impact: Costs would likely be minimal due to commission members only receiving per diem compensation coupled with reasonable and necessary expenses.

Prescription #2 Creation of the Office of Public Defense and Appellate Defense Bureau

Fiscal Impact: Associated costs would consist of salaries and benefits of the State Public Defender, chief deputy defenders, and associated staff. In addition, there would be administrative costs associated with implementing the duties of the office and enforcing the rules promulgated under the Act. Finally, the state would have to cover facility costs for the Office of Public Defense.

Prescription #3 Creation of regional public defense offices throughout the state

Fiscal Impact: Associated costs would consist of salaries and benefits of regional director, local appointing authority/authorities, and accompanying staff. In addition, there would be administrative costs associated with implementing the duties of the office and enforcing the rules promulgated under the Act. Finally, the state would have to cover facility costs for the regional offices. NOTE: The number of regional offices is unknown.

Prescription #4 Access to training, professionals, legal resources, and technology for all indigent defense attorneys

Fiscal Impact: Associated costs would consist of training programs for all attorneys and professionals providing indigent defense services. In addition, attorneys deemed to have insufficient legal resources, facilities, or technology to provide adequate and effective legal counsel to indigent defendants would have to be provided access to those resources by the Office of Public Defender under the Act. These costs have the potential to be quite substantial. The American Bar Association (ABA) recommends parity between defense counsel and the prosecution with respect to resources available.

Prescription #5 Oversight and performance reviews of attorneys, experts, and other professionals

Fiscal Impact: The Office of Public defender would be charged with supervision and performance reviews of individual attorneys. The increased supervision and review of attorney performance would increase administrative costs associated with the delivery of indigent defense.

Prescription #6 Decreasing workload limits using an empirical case-weighted system

Fiscal Impact: Implementation of workload limits would increase the number of required attorneys needed to provide services and therefore lead to an increase in attorney costs. Implementing more manageable workload limits would eliminate the low-bid, flat-fee contract systems that are often implemented in Michigan counties as a cost saving measure. As an example, it was reported that five part-time public defenders in Detroit handle approximately 2,400 to 2,800 cases each per year. The national standard for a full-time public defender is only 400 cases per year. Increased costs associated with workload limits will be a function of the workload standard implemented by Michigan and the compensation received by the attorneys.

Prescription #7 Authorized use of contracts for the delivery of public defense services

Fiscal Impact: The Act would create a competitive bidding process designed to eliminate both conflicts of interest and the awarding of contracts solely on the basis of the amount of the bid. This provision would

also help eliminate the low-bid, flat fee contracts that Michigan counties have increasingly implemented by requiring all contracts to take into account workload limits and attorney qualifications.

Prescription #8 Promulgate formula to provide reasonable compensation for indigent defense services

Fiscal Impact: Compared to the current mixture of hourly rate and fee schedule payment schedules, instituting a formula to provide reasonable compensation to assigned counsel would increase compensation costs statewide. Michigan currently uses of mixture of hourly rates (ranging from \$40 in Eaton County to \$88.82 in Ottawa County), fee (or event) schedules, and low-bid flat-fee contracts. In almost all instances, attorneys are paid well below national recommendations. National recommendations indicate that compensation levels for public defense attorneys should be more on par with those of the prosecution.

Potential Cost Savings from Michigan Public Defense Act

Despite the substantial increase in indigent defense delivery system costs, there is the potential for both short- and long-term savings to the state with the implementation of the Michigan Public Defense Act. Providing adequate and efficient indigent defense services would save state and local resources by reducing wrongful-convictions and accompanying lawsuits, ensuring proper sentencing, keeping innocent people out prison, and identifying problems on the front end of the legal process, among other things. It would not be unreasonable to assume that the short- and long-term savings would underwrite a significant portion of a state-funded system.

From an appellate perspective, the State Appellate Defender Office (SADO) has reported that sentencing errors are one of the most notable examples of wasted resources. Sentencing errors are often caused by a rush to sentencing, lack of defense counsel training, and the complex and specialized sentencing process in Michigan. SADO reported that between the calendar years 2003 and 2007, they achieved a cumulative reduction in minimum prison terms of 122 1/2 years, and a cumulative reduction of maximum prison terms of 309 years. Assuming an average incarceration cost of \$30,000/annually, SADO estimated that the cumulative total of prison costs saved was \$3,675,000 over the five year period. *NOTE: SADO created a special unit of attorneys to handle appeals from guilty pleas (guilty pleas most likely to have appellate claims related to sentencing). The number of attorneys ranged between two and four in any given year and each attorney was assigned approximately 80 cases per year.*

If these numbers were extrapolated to state-wide appellate assignments using the same sentencing error rate for trials and guilty pleas, SADO projected statewide savings of nearly \$70 million in prison costs. It should be noted that appellate process costs are not included in the prison cost savings so total cost savings may be higher. Competent, effective, and efficient counsel from the outset would presumably have mitigated many of the sentencing errors at the trial level, saving the state, counties, and cities much needed resources.

Savings would also be realized through a reduction in the number of wrongfully convicted criminal defendants. However, cost savings are hard to estimate because of the individual nature of each exoneration. In addition to the cost of appeals and years in prison, civil judgments can greatly increase the cost to taxpayers. It is not uncommon for civil judgments to reach into the millions and can be borne by the state, county, or city. Although the number of wrongful convictions yet to be uncovered is unknown, we can surmise that wrongful convictions will continue to surface. For example, the effects of the unreliable testing at the Detroit Police Crime Lab (10% ballistics error rate) are yet to be known. Inadequate funding of defense services can be partly to blame because the Lab's results were often taken at face value. Lack of resources made requesting independent forensic tests a rarity. Public safety is also put at risk when the wrong person is imprisoned and the guilty party remains free. As evidenced above, the mitigation of wrongful convictions has the potential to save the state and its localities much needed resources.

Finally, by having competent, trained defense counsel issues like mental health and drug abuse can be identified at the front end of the legal process. By identifying these issues at the front end, defendants suffering from these problems can be diverted from jail and into necessary treatment programs at a lower cost. For criminal defendants with mental illness or drug addiction, treatment programs can provide a path to recovery, which can lead to savings in incarceration costs through reduced recidivism.