

THE RIGHT TO COUNSEL IN WAYNE COUNTY, MICHIGAN

EVALUATION OF THE STATE DEFENDER OFFICE OF THE METROPOLITAN JUSTICE CENTER OF SOUTHEAST MICHIGAN

APRIL 2018



SIXTH
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The Right to Counsel in Wayne County, Michigan: Evaluation of the State Defender Office of the Metropolitan Justice Center of Southeastern Michigan

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Publication Number: 2018.002

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The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case.

For this evaluation, the 6AC worked in collaboration with the Defender Initiative of the Seattle University School of Law (SUSL). The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

A representative from the National Legal Aid & Defender Association and an attorney from the Federal Defender Office in Detroit participated in the site visit team and contributed to the report.

DISCLAIMER

Wayne County commissioned this report under a generous grant of the Michigan Indigent Defense Commission. The report solely reflects the opinions of the authors and does not necessarily reflect the views of Wayne County or the Michigan Indigent Defense Commission.

On June 8, 2018, the Sixth Amendment Center was made aware of a publication error. Any downloaded copy of the Executive Summary prior to that date is erroneous. Please use the body of the report for any analysis or future reporting. The corrected Executive Summary is now available.

EXECUTIVE SUMMARY

In September 2017, the Sixth Amendment Center (6AC), in cooperation with the Defender Initiative at Seattle University School of Law (SUSL), conducted an evaluation of the State Defender Office of the Metropolitan Justice Center of Southeast Michigan. Wayne County requested the evaluation under a grant from the Michigan Indigent Defense Commission.

Chapter I (pages 3 – 12) provides general background information on right to counsel services in Michigan and on the State Defender Office specifically. The State Defender Office (SDO) has only existed in its current incarnation since 2016, after its former parent organization Legal Aid and Defender Association, Inc. (LADA) was reorganized. LADA was founded in 1909 as a non-profit organization to provide legal services to poor people in civil actions; it later began to provide criminal defense and juvenile representation. Since 1972, the Michigan Supreme Court has required that the SDO be appointed on a weekly basis to 25% of all indigent felony cases. In 1973, LADA began providing criminal defense services in federal courts.

In 2008, on behalf of the Michigan Legislature, the National Legal Aid & Defender Association (NLADA), in partnership with the State Bar of Michigan, evaluated trial level indigent defense representation throughout the state and found that all services – including those in Wayne County – were constitutionally inadequate. With regard to the SDO specifically, the statewide evaluation found that attorneys were working at nearly twice the workload allowed under national standards.

The statewide NLADA evaluation coincided with the launch of an American Civil Liberties Union (ACLU) systemic class action lawsuit. The evaluation and lawsuit led Governor Snyder to issue an executive order in 2011 creating the Indigent Defense Advisory Commission. The commission recommended comprehensive legislation that was subsequently passed by the legislature in 2013. The legislation created the Michigan Indigent Defense Commission (MIDC) as a state-level body charged with drafting and implementing standards for the provision of effective assistance of counsel throughout the state. MIDC administers grants of state funding to the counties to ensure compliance with those standards.

Before and during the implementation of the MIDC statute, LADA began experiencing a diminution of funding across its various service areas, leading to significant corporate restructuring. The juvenile law group was affected first when LADA's juvenile services contract was terminated in 2009. The civil law group was the next to see a reduction in

funding when the federally funded Legal Services Corporation (LSC) notified LADA in late 2015 that it decided against continuing to award funding to LADA.

In light of its reduced funding, in December 2015 LADA restructured its organization into four non-profit organizations, with the changes taking effect on July 1, 2016. The Southeastern Michigan Administration Services Group (SEMASG) is organized as a parent organization that directs and provides administrative services to the other three subsidiary entities, including the Metropolitan Justice Center of Southeast Michigan (MJCSM). MJCSM operates two legal divisions: the Federal Defender Office, and the State Defender Office.

FINDING #1: The State Defender Office attorneys are unable to put each and every prosecution to the “crucible of meaningful adversarial testing,” as is their ethical duty and constitutional obligation.

Chapter II (pages 13 – 28) details the parameters of effective representation under U.S. Supreme Court case law and determines that the SDO fails to meet those thresholds, due primarily to underfunding. From October 2000 through August 2016, Wayne County paid the same flat rate of \$1,980,000 annually for the State Defender Office to handle one quarter of felony cases in the Third Judicial Circuit. Wayne County did not increase funding for indigent defense representation by the SDO even after the 2008 NLADA report concluded that indigent defense services in Wayne County, and specifically the representation provided by SDO attorneys, were constitutionally deficient.

To say that the SDO experienced flat funding, however, is a bit of a misnomer. Although Wayne County paid the same dollar amount each year, two factors caused the amount available to SDO for defending each case to decrease.

Overhead expenses increased

In January 2007, LADA purchased for \$12,640,000 the office building at 613 Abbott Street that currently houses the reorganized non-profit organizations. LADA did not have the financial resources to purchase the building outright and took out a mortgage. After the elimination of LADA’s juvenile division in 2009, each of the remaining three service divisions (civil, federal, and state) were allocated a separate floor of the building, so LADA divided up the monthly cost of the mortgage more or less evenly among them. Despite LADA’s allocation to the SDO of a whole floor of 613 Abbott, the SDO did not need as large a space as the federal and civil divisions because they had significantly fewer staff than each of those other divisions at that time. After the loss of LSC funding in 2015, even more of the mortgage cost was shifted to the SDO.

Over the same period of time, the administrative costs attributed to the SDO by its parent organization also increased. Historically, LADA allocated its administrative costs to each of its service divisions based on the percentage of administrative time dedicated to each division. Around the time of the reorganization, the accounting procedures were changed to charge administrative costs proportionally based on numbers of staff in each of the resulting four non-profit organizations. After the loss of the civil division's LSC funding in 2015, the parent organization had little beyond the resources earned by the federal and state divisions with which to pay the administrative costs assessed by the parent organization. Of the \$1,980,000 that Wayne County paid SDO annually from October 2000 through July 2016, by 2016 the SDO's parent organization would allocate roughly \$756,244 to the overhead costs of office space and administrative services.

Then, in 2017, the Office of the General Counsel for the U.S. Courts disallowed any increased fees and informed the parent organization that the federal Defender Services Office would obtain its administrative services from elsewhere. Thus, as of September 2017, the SDO was shouldering the vast majority of administrative costs too.

Workload increased

As a lessening portion of the amount paid by Wayne County was available to the SDO for representing indigent felony defendants, the actual number of felony cases handled by the SDO attorneys each year was increasing. From the beginning of 2011 through the end of 2017, the Third Judicial Circuit's felony appointments to the SDO increased from 2,528 appointments per year to 3,469.

In August 2016, Wayne County and the parent organization entered into a new contract. In short, Wayne County began paying \$300,000 more per year for the SDO to also provide representation to indigents on the "welfare fraud" and "felony child non-support" dockets. However, SDO's parent organization did not use the new funding to hire additional SDO lawyers, as it expressly stated to Wayne County officials that it would do. Now, the same 16 SDO attorneys are doing even more work, with no additional support.

Although the SDO attorneys are increasingly asked to do more with less, they are poorly paid for their work. In the 17 year period from October 2000 through September 2017, only one salary increase occurred, circa 2003, raising starting level attorney salaries from \$28,000 to \$35,000 per year. Extremely low salaries have contributed to high turnover among the SDO attorneys, and some attorney positions have been left vacant.

FINDING #2: The State Defender Office attorneys are prevented from providing effective representation because they lack sufficient time, resources, and support staff to properly prepare cases.

Chapter III (pages 29 – 48) shows how the SDO attorneys lack sufficient time to provide effective representation. National standards, as summarized by the American Bar Association, agree that a defense lawyer’s workload must be controlled to permit the rendering of quality representation. For example, national standards state that a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, and nothing else. In 2017, the SDO attorneys collectively handled 3,469 newly appointed cases, plus any cases appointed in previous years that had not concluded. The 16 SDO attorneys each had on average 217 new felony cases (or 145% of the national standard). And, the SDO does not have any social workers, investigators, paralegals, or interns on staff to aid the attorneys in conducting their work.

Moreover, the 16 SDO attorneys are contractually obliged to be in 29 different courtrooms on Monday through Thursday, and in 30 different courtrooms on Friday, for virtually the entire time those courts are in session. Five of these courtrooms are located between 20 and 30 minutes away from the SDO offices. The limited number of SDO attorneys, combined with the large number of courtrooms to be covered, means that the same attorney rarely ever represents an indigent defendant from appointment through disposition of the case – another violation of national standards.

The final Chapter IV (pages 49 – 63) sets out recommendations.

Recommendation #1: The State of Michigan must share the financial burden for providing felony representation in the Third Judicial Circuit.

Providing the Sixth Amendment right to effective assistance of counsel is a state obligation under the due process clause of the Fourteenth Amendment. Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate this responsibility to its counties and cities, if a state chooses to place this responsibility on its local governments, then the state must guarantee that the local governments are not only capable of providing adequate representation, but that they are in fact doing so. The State of Michigan has failed to ensure that Wayne County adequately funds felony representation. Although the state is to be commended for the comprehensive MIDC reforms, those reforms have yet to take root. The ultimate liability remains with the state.

This by no means lets Wayne County off the financial hook. Although the SDO’s parent organizations share blame for rarely submitting requests for additional funding from 2001 through 2015, the NLADA report in 2008 stated that felony services were constitutionally inadequate. By the time the MIDC legislation was enacted, Wayne County officials had already flat funded the defender office for more than a decade, while its costs rose every single year. The MIDC legislation was designed to ensure

that the state share the financial burden for indigent defense that the state is required to provide. Wayne County must continue to pay its local share amount, but the state must also recognize its responsibilities mandated by the legislation.

Recommendation #2: The Michigan Indigent Defense Commission and Wayne County should work together to determine the most effective service delivery model, in consultation with the Third Judicial Circuit Court.

There is no single “cookie-cutter” delivery model that guarantees effective indigent defense services in every jurisdiction. Jurisdictions must tailor the systems they use to meet unique local demands. The Michigan Indigent Defense Commission and Wayne County have an opportunity to reimagine how services can most efficiently and effectively be delivered.

The private attorney roster system used in the Third Judicial Circuit and the district courts within Wayne County was not the subject of this evaluation. That system, though, was part of the 2008 NLADA report that found indigent representation in Wayne County to be constitutionally deficient and subject to undue judicial influence. MIDC and Wayne County presently have the opportunity to redesign the private attorney roster system, in addition to the public defender office component, to ensure independence of the entire defense function.

Recommendation #3: Sixth Amendment indigent defense services in Wayne County must be adequately funded to provide effective representation.

Given the many decisions that state and county authorities must make about how Sixth Amendment representation will be provided to indigent people, it is not possible at this point to develop a definitive and comprehensive budget. To begin that conversation, however, a budget is recommended that assumes a reorganized State Defender Office, under contract with the state or county, will be appointed to 25% of felony cases.

Attorneys

National workload standards prescribe that attorneys should handle no more than 150 felonies in a single year. The SDO needs approximately 33 attorneys carrying a full caseload (5,000 cases/150 per attorney = 33.33 attorneys) to meet this standard. National standards require one supervising attorney for every 10 attorneys carrying a full caseload. Therefore, SDO needs three supervising attorneys, in addition to the chief defender. All national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program. Therefore, MIDC and Wayne County should require the SDO to have a full-time attorney designated to developing its own formalized training program for new hires.

In accord with MIDC's proposed Standard 8, supervisor and line attorney salaries are budgeted to compensate attorneys of varying experience levels within the range of salaries paid to Michigan assistant attorneys general. In total, attorney salary costs for all 38 attorneys are projected to be \$2,633,993.

Non-Attorneys

National standards require one investigator and one social worker for every three staff attorneys. This means the public defense system needs 11 investigators and 11 social workers. Investigators and social worker salaries are projected to be \$456,750 each. National standards require one paralegal for every four staff attorneys. This means SDO needs eight paralegals. The same national standards require one legal secretary for every six attorneys, so SDO will require 5.5 such positions. Each are projected to earn \$28,000 per year. Total annual support staff salaries are projected at \$442,000.

The chief financial officer will oversee all financial planning, accounting, and budgeting operations and is projected to be paid \$70,000. An office manager is to be paid at \$58,000 per year to oversee clerical and data entry staff and to provide human resource support.

Total Personnel Costs

In total, projected annual salaries for all personnel is \$4,117,493. The recommended budget uses a fringe benefit rate of 33%, which is an approximate standard for a public law office. Fringe benefits are projected at \$1,358,772.69. The final personnel costs are therefore estimated at \$5,476,265.69.

Expenses

Office space projections use a rate of \$25 per square foot charged against 200 square feet per staff (for a total of \$5,000 per staff member). This results in an annual rent of \$375,000 ($\$25/\text{ft}^2 \times 200\text{ft}^2 \times 75 \text{ staff}$). In total, annual overhead is projected to be \$835,383.

Of course, expanding the size of the SDO staff will require a one-time capital outlay. Capital costs to expand the office and upgrade existing equipment, including computers and cell phones for all staff, are estimated to be approximately \$228,300.

Total Projected Budget

The final annual budget (personnel, fringe, and overhead) is \$6,311,649 – approximately three times the SDO's current budget – plus one-time capital costs of \$228,300.

