THE RIGHT TO COUNSEL IN OAKLAND COUNTY, MICHIGAN

EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN ADULT CRIMINAL CASES

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The Right to Counsel in Oakland County, Michigan: Evaluation of Trial-Level Indigent Defense Services in Adult Criminal Cases
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Prepared by
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 at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, https://sixthamendment.org/.

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EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for indigent people accused of crimes in state trial courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment. Today, the State of Michigan delegates to its counties, cities, townships, and villages the responsibility for establishing and administering indigent defense systems to effectively represent indigent adult defendants who face possible incarceration for crimes in the trial courts.

The state has accepted a portion of the responsibility for funding the right to counsel of those defendants, while continuing to delegate a portion of the funding responsibility to its local governments. The State of Michigan created the Michigan Indigent Defense Commission (MIDC) to promulgate and oversee the implementation of statewide standards, rules, and procedures to meet the requirements of the Sixth Amendment for adult criminal indigent defense representation in the trial courts and to distribute state funds to local governments to comply with those standards.

The State of Michigan is not the focus of this report. This study, funded through MIDC at the request of Oakland County, evaluated Oakland County’s system for providing the right to counsel in those trial courts for which the county government is fiscally responsible – the Sixth Judicial Circuit Court and the 52nd District Court – to aid the county in determining the feasibility of creating a public defender office. The findings and recommendations of this report are addressed to Oakland County.

Indigent defense services in Michigan were created to service individual courts. Within Oakland County, there are 12 separate indigent defense systems, administered and funded by at least 11 different county and municipal governments, providing right to counsel services in 31 courtrooms at 14 separate court locations. This decentralization of right to counsel services impedes the ability of any of the 12 indigent defense systems within Oakland County to ensure the effective representation of indigent adult criminal defendants in the trial courts. For example:

- Each of the 12 indigent defense systems within Oakland County maintains its own list of private attorneys whom they appoint to represent indigent defendants. An individual private attorney may be available for appointment through more than one of these lists. Of the 287 attorneys who accept appointed cases in trial courts in the county at the time of this study, 217 of them are appointed by multiple indigent defense systems. Yet there is no means for the heads of those indigent defense systems to know how much work each attorney is appointed to do by the other indigent defense systems within the county.
- The same private attorneys who are appointed in the trial courts within Oakland County are frequently also appointed through indigent defense systems in other Michigan counties (most notably, in Macomb and Wayne counties), as well as accepting appointments to represent indigent defendants for state appeals and in the federal courts. Additionally, each private attorney is also free to represent privately retained clients.
There is no way for the manager of each indigent defense system within Oakland County to know how much work these attorneys are trying to handle.

MIDC is required by state law to promulgate standards addressing many aspects of indigent defense representation, and it has not yet completed that work. Of the nine standards proposed by MIDC as of October 2021, six have been approved by LARA and funded by the state thus far. There are not yet any statewide standards, for example, regarding reasonable indigent defense caseloads, preventing conflicts between the financial interests of attorneys and the legal interests of their appointed clients, and the need for continuous representation of a defendant by a single attorney, among others. Because the State of Michigan has delegated its constitutional responsibilities to local governments, the local governments – including Oakland County – have exposure to liability for structuring their indigent defense systems in ways that currently violate defendants’ rights to effective assistance of counsel, as discussed in the first three findings of this report.

**FINDING 1: Oakland County’s assigned counsel compensation method creates economic disincentives that impair defense counsel’s ability to provide effective representation.**

The Oakland County indigent defense system compensates attorneys according to a fee schedule that pays a flat fee per half-day in misdemeanor cases and a flat fee per event in felonies. Both payment methods pit the lawyer’s financial interests against the client’s legal interests. To understand how, consider the following hypothetical. Shortly after being appointed to represent a felony defendant at the preliminary stages of the case in district court, the appointed lawyer sees that one or more elements of the crime cannot be proven and points that out to the assistant prosecuting attorney handling the case. If the prosecutor offers a plea to a reduced misdemeanor offense and if the defendant accepts the offer and pleads guilty, the appointed attorney is paid $375 (the standard fee for entering a plea to a misdemeanor in district court). However, if the attorney convinces the prosecutor to dismiss the felony charge altogether in district court – a better outcome for the defendant, which may require several more hours and several rounds of discussion between the appointed attorney and the prosecutor – the attorney earns only $275 (the standard fee for a felony dismissal in district court).

Because attorneys are paid exactly the same amount for an event, no matter how few or how many hours they devote to carrying out that event, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case. Furthermore, because attorneys are paid almost exclusively for events that occur inside the courtroom, attorneys are not compensated at all for much of the work that is necessary to provide effective representation. For example, aside from the initial client interview (a fee of $100), an attorney is not compensated for meeting with a defendant in the office or at the courthouse, or anywhere outside of the jail. The attorney is not compensated for speaking to the defendant’s family to inform them about the case. Attorneys receive no pay for any investigation, reviewing discovery produced by the prosecution, interviewing witnesses, conducting legal research, seeking out sentencing alternatives and social services, or for any time spent in trial preparation, no matter the number of hours spent preparing for trial.
Compensating attorneys with a fixed rate for mostly in-court lawyer activities creates economic disincentives that impair defense counsel’s ability to provide effective representation. Being paid the same amount whether an attorney does an effective job or not incentivizes the attorney to dispose of cases with as little work as possible. Although MIDC has promulgated a standard that will rectify this, it has not yet been adopted or funded. The absence of a statewide standard does not relieve local governments from the constitutional obligation to provide representation free from financial conflicts of interest.

**FINDING 2: Oakland County indigent defense attorneys’ workloads are not controlled to permit effective representation.**

Oakland County has taken no steps to limit the number of cases that an attorney representing indigent clients may handle in a year. From October 1, 2021 through June 30, 2022, Oakland County’s indigent defense services office appointed 190 different private attorneys to represent indigent defendants in the Sixth Judicial Circuit Court and 52nd District Court. A significant portion of those appointed attorneys have caseloads far above the proposed Michigan-specific caseload standards and many attorney caseloads also exceed the national caseload limits. Of the 50 attorneys with the largest caseloads, 39 of them have caseloads in excess of the proposed MIDC annual caseload maximums. In fact, those 39 attorneys are handling a caseload requiring more than 52 full time attorneys under the proposed MIDC standard.

For example, one attorney’s total annual caseload is 211% of the recommended, but not yet approved, MIDC caseload maximums even before factoring in cases handled as “house counsel” (Oakland County schedules attorneys as “house counsel” for arraignment dockets and pretrial conference dockets in district court, where the house counsel attorney represents all defendants who are scheduled for their initial appearance or pretrial conferences during that house counsel shift). That is, the attorney is handling the work of more than two full time attorneys from cases assigned by the Oakland County indigent defense services office alone, before considering that attorney’s other appointed and retained work. Oakland County has no way of knowing the full caseload of an attorney who represents indigent clients because those attorneys can also handle cases outside of Oakland County’s purview (i.e., privately retained clients, indigent clients with cases in other district courts in Oakland County, indigent clients with cases in courts outside of Oakland County) or may have other jobs in the criminal justice system (i.e., managed assigned counsel coordinator, magistrate, municipal prosecutor).

Additionally, indigent defense system attorneys in Oakland County do not have adequate support staff, such as secretaries, paralegals, and social workers. When an attorney lacks support resources, the attorney must personally perform work that is not only outside the attorney’s expertise, but also takes up valuable time that should be devoted to developing legal arguments and preparing the client’s case.
FINDING 3: Oakland County indigent defense attorneys do not continuously represent and personally appear at every court appearance throughout the pendency of the case.

In all case types, Oakland County uses “horizontal representation,” whereby appointed clients are represented by a series of attorneys, rather than a single attorney representing a client from appointment through disposition of the case. In felony cases, many defendants are represented at their arraignment by an attorney appointed by some other indigent defense system within the county and then by a different attorney who is assigned by the Oakland County government for preliminary stages in district court and the trial stage in circuit court. Indigent defense attorneys in Oakland County seem to operate from the belief that, because they are not individually appointed as trial counsel when staffing arraignment hearings, no confidential attorney-client relationship exists between the scheduled arraignment attorney and defendants at their initial court appearances, creating a systemwide constructive denial of the right to effective assistance of counsel at critical stages of the criminal case.

In systems that rely on horizontal representation, the delay in appointing the actual trial lawyer has negative consequences for the client as promising investigative leads can go cold, critical evidence can be destroyed if not timely preserved, witnesses can become harder and harder to track down, and memories can fade.

Two further findings are just as troubling.

FINDING 4: Oakland County’s indigent defense services office is not appropriately staffed and resourced to provide qualitative oversight of indigent defense services.

The Oakland County indigent defense services office is responsible for the oversight of the indigent defense system in the Sixth Judicial Circuit Court and the 52nd District Court. Yet, the indigent defense services office lacks sufficient staff members qualified to ensure proper oversight of indigent defense services. For example, the indigent defense services office currently has ten full-time staff members, of which the chief attorney is the only attorney position on staff. The majority of non-attorney staff time is devoted to coordinating coverage by panel attorneys at court hearings and reviewing attorney vouchers submitted for payment. These are important functions, but non-lawyers are ill-equipped to provide qualitative reviews of criminal defense lawyers.

Proper oversight also requires access to timely, comprehensive, and relevant information. Not only does Oakland County government lack access to centralized information regarding all indigent defense systems within Oakland County and the services provided by the attorneys handling cases in each system, but what data Oakland County currently collects does not permit county policymakers to make informed policy decisions.

FINDING 5: Oakland County chills the right to counsel in the 52nd District Court by publicly announcing that all misdemeanor defendants will be required to contribute a monetary amount towards their representation without considering an individual
defendant’s ability to pay, and the practices of some 52nd District Court judges to deny some defendants’ requests for appointed counsel may violate the right to counsel.

Misdemeanors matter. For most people, misdemeanor courts are the place of initial contact with the Oakland County justice system. Much of a citizenry’s confidence in the courts as a whole – their faith in the county’s ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in a person’s loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers’ expense.

Collectively, these five findings lead to two principal recommendations.

RECOMMENDATION A: Oakland County should advocate for statutory changes to allow the county to create a unified indigent defense system serving all of the courts within its geographic boundaries. In the meantime, Oakland County should seek to negotiate with the municipalities responsible for the other indigent defense systems in Oakland County and come to an agreement where all indigent defense services in the county are provided by Oakland County.

The people who work and reside in Oakland County would be best served by a single indigent defense system that can provide uniform administration and oversight of attorneys representing indigent defendants in adult criminal cases throughout all trial courts within the county. After all, the level of justice one receives should not be dependent on which side of a municipal line a crime is alleged to have been committed. The promulgation of MIDC standards made binding on all indigent defense systems starting in fiscal year 2019 sparked a years-long effort to “change the culture” among attorneys providing indigent defense services within Oakland County. But the absence of a single indigent defense system means the culture change being sought must be addressed separately within each indigent defense system within the county, each occurring at its own pace, and with Oakland County lacking power and authority to guarantee to its citizenry the creation of a uniform standard of practice that complies with constitutional commands. Unfortunately, Oakland County currently lacks the statutory authority to create such a unified indigent defense system without obtaining the consent of the various local governments within Oakland County.

Moreover, there is no longer any reason that indigent defense should remain attached to each trial court jurisdiction. The local share of indigent defense funding in many jurisdictions within the boundaries of Oakland County is less than 5% of total annual spending. In one system, the local government’s share is less than 0.5% of total spending. Each year the State of Michigan comes closer and closer to providing 100% of all indigent defense funding, and yet the state gains no additional decision-making authority over each local system.
The policy choice to maintain local control of indigent defense services under the state’s general supervision, made at the time the MIDC Act of 2013 was passed into law, was a legitimate choice in the aggregate to maintain local control until such time as the state began putting money into indigent defense services. But with judges now removed from responsibilities for the indigent defense systems, and with the state funding the majority of indigent defense costs in the trial courts, that decision warrants revisiting. The philosophy of local control can be maintained by moving the administration and local share funding of indigent defense services to the county level of government.

Therefore, Oakland County officials should advocate for the Michigan legislature to enact the following statutory changes:

- The consolidation of responsibility for providing indigent defense services under the auspices of county government in each county, thereby eliminating the district court-level indigent defense systems;
- The reformation of criminal procedure to make all felony prosecutions commence in the circuit courts, and to abolish horizontal representation within and/or across different indigent defense systems;
- A resolution of the conflict caused by the separate statutory provisions authorizing indigent defense systems to collect contribution only from defendants determined to be partially indigent, while also permitting trial courts to assess attorney fees at conviction regardless of the defendant’s indigency status; and
- A requirement that court-generated revenue from attorneys fee assessments is counted as indigent defense system income that is reported annually to MIDC and that 100% of revenues collected locally from indigent defendants are disbursed to the State of Michigan in support of local indigent defense services through future MIDC grants.

While these statutory changes are being debated by state lawmakers, there is nothing that precludes Oakland County from pursuing a local memorandum of agreement with all the other local governments currently providing indigent defense services to create a unified countywide indigent defense system. Indeed, there is precedent already within Oakland County for such an effort. Since fiscal year 2019, the county and all district court funding units have agreed to share the administrative burden of providing training to indigent defense system attorneys through a coordinated method – a contract with the Oakland County Bar Association, funded by MIDC annual grants to the government of Oakland County – rather than each devising a training program of its own. Similarly, as permitted by Michigan law and MIDC policies, Oakland County should convene all necessary stakeholders to develop plans for creating a single indigent defense system providing the right to counsel in all criminal trial courts within Oakland County under a single annual compliance plan, with MIDC annual grant support to Oakland County directly.

RECOMMENDATION B: Oakland County should seek MIDC grant funding to redesign its indigent defense services office. Specifically:

- The county should create a new position of executive director of indigent defense services.
• The executive director should be appointed to a four-year term of office, removable only for just cause and eligible for reappointment.

• The executive director should oversee a central office staff to provide centralized services that produce economies of scale (e.g., training, finance, information technology, etc.).

• Representation in adult criminal cases should be provided by a combination of:
  o a public defender office staffed by government employees, funded at a level to provide for a sufficient number of attorneys, support staff, and supervisors to meet MIDC proposed workload standards; and
  o a managed assigned counsel system in which private attorneys are paid at least $100 per hour for misdemeanors, $110 per hour for non-life offense felonies, and $120 per hour for life offense felonies.

• The executive director should be authorized to explore offsetting the costs of these higher assigned counsel rates by creating an alternate defender office to provide representation in a portion of conflict cases.