



To: The Michigan Supreme Court

Fr: David J. Carroll, Director
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National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036

Re: Proposed Amendment of Rule 8.123 of the Michigan Court Rules

Dt: September 27, 2005

Please excuse the delay in forwarding my comments on the proposed amendments of Rule 8.123 of the Michigan Court Rules. I planned on attending the public administrative hearing on Thursday, September 29th, but will now be unavailable to speak because of pending criminal justice problems in Louisiana precipitated by Hurricanes Katrina and Rita that are demanding my immediate attention.

Introduction

The National Legal Aid and Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years.

In 2002, NLADA launched the Justice Standards, Evaluation & Research Initiative (JSERI), a research project with a discrete national capacity for public defense data collection, research, standards-based evaluation, and technical assistance. JSERI aims to detail systemic deficiencies in the delivery of indigent defense services across the country and to provide technical assistance to implement recommended improvements. During its brief existence, JSERI has become the standard bearer in helping assure local compliance with national indigent defense norms of quality in areas where government policy-makers themselves may lack expertise.¹

¹ For instance, see: NLADA, *An Assessment of Indigent Defense Services in the State of Montana* (2004); NLADA, *In Defense of Public Access to Justice: An Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon* (2004); NLADA, *Pilot Assessment in Santa Clara County, California* (2004); NLADA, *Evaluation in Clark County, Nevada* (2003); NLADA, *Indigent Defense in Venango County, Pennsylvania* (2002).

David Carroll, JSERI Director, authored each of these reports. Mr. Carroll has also provided consultation services for the Maryland State Public Defender, and co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards. Before joining JSERI, Mr. Carroll worked as a Senior Research Associate & Business Manager for The Spangenberg Group (TSG). TSG is a national and international

Recognizing that effective public policy depends upon the effective implementation and enforcement of said policy, NLADA has long played a leadership role in the development of national standards for public defense systems.² With the advent of JSERI, NLADA has also become the leader in creating processes for evaluating a jurisdiction's compliance with said standards.³

Commentary on Proposed Rule Change

One of the lessons learned by the national indigent defense community over the years is the importance of quantitative, statistical data to inform policy-makers about the quality and cost-effectiveness of the services provided at taxpayers' expense. Without independently verifiable data, policy makers (many of whom are not necessarily versed in the constitutional, ethical and practical requirements of indigent defense representation) are left to make critical funding decisions based on speculation, unverifiable assertions, "gut feel," or the competing budget demands of other agencies within their jurisdiction.

Though all policy-makers owe the electorate a higher standard of accountability than that, the need for uniform data grows exponentially when, as in Michigan, local government is burdened with a significant portion of the state's constitutional duty to provide counsel to

research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues.

Mr. Carroll directed numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties, Kentucky (Louisville and Lexington); a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court and prosecutor case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Mr. Carroll was also chosen to provide on-site technical assistance to statewide Task Forces in Alabama, Illinois, Nevada, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

² Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976); The Ten Principles of a Public Defense Delivery System (adopted by the ABA, 2002) Standard for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989), Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994). NLADA's leadership in promoting consistent, quality representation through indigent defense standards was most recently recognized by the United States Supreme Court in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In that case, the Court recognized that national standards, including the American Bar Association's (ABA) *Standard for the Appointment and Performance of Counsel in Death Penalty Cases* (written by NLADA), should serve as guideposts for assessing ineffective assistance of counsel claims.

³ JSERI's standards-based assessments utilize a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 leading criminal justice organizations, such as the National Defender Institute and the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The JSERI protocol combines a review of a jurisdiction's budgetary, caseload and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives are solicited and enables NLADA to form as complete and accurate a picture of an indigent defense system as possible.

those facing a potential loss of liberty in criminal proceedings.⁴ Because local funding is primarily derived from property taxes, the amount available for defender services tends to constrict in inverse proportion to the demand for such services (i.e., a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime). As a result, the quality of public defender representation in a state that relies upon local funding generally fluctuates widely from locality to locality. A system that metes out justice in proportion to the availability of limited local resources cannot assure victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.⁵

Though to date I have not formally studied the quality of representation afforded the poor in Michigan's courts, and therefore cannot comment specifically on the extent to which or even if this national phenomena holds true in Michigan's counties, I can report that Michigan is the *only* state in the entire country that cannot accurately account for the total amount of state and local funding dedicated to ensuring people's constitutional right to counsel. In 2003, The American Bar Association (ABA) published *State & County Expenditures for Indigent Defense Services in Fiscal Year 2002*. The report is the most comprehensive national study detailing the amount of money state and local governments spend on defender services in each of the 50 states. Though the lack of reliable data in seven states led the ABA to estimate total expenditures in those jurisdictions (Illinois, Kansas, Pennsylvania, Mississippi, Montana, Nevada, and Utah), the dearth and unreliability of data in Michigan prevented a fair and accurate estimation.⁶

The failure of Michigan and its counties to keep accurate information on such basic indigent defense funding data suggests, at best, that the constitutional right of defendants to adequate counsel is simply a low priority to local policy-makers. At worst, the failure to account for spending decisions may be resulting in an enormous waste of money that is borne by taxpayers and community businesses (i.e., the failure to invest in adequate defense counsel may in fact raise the ultimate cost of criminal justice because of unnecessarily detaining people pre-trial, endless appeals, re-trials, settlements with

⁴ In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty. [*Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals - *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation - *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement - *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings - *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment - *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence - *Shelton v. Alabama*, 535 U.S. 654 (2002).]

⁵ Notably, a relatively recent report concludes that not only does a statewide, state-funded indigent defense system improve the quality of defense services provided, but it also results in significant economic savings for the state. NAACP Legal Defense and Education Fund, Inc. (LDF), *Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior from Mississippi*, June 2003.

⁶ The Spangenberg Group, *State & County Expenditures for Indigent Defense Services in Fiscal Year 2002*, prepared on behalf of the American Bar Association, Bar Information Program. September 2003. Available at: <http://www.abanet.org/legalservices/sclaid/defender/research.html>.

innocent people who have been unfairly convicted and incarcerated, and defending the state against systemic litigation). Moreover, when a young person comes to court and is given a public defender that has no access to the needed resources to present a fair defense, a message is sent to our youth – and especially our young men of color -- that they do not matter. When states institutionalize this hopelessness and neglect they are asking for an escalation in bad behavior and ultimately more expenditures of resources down the line.

Thus, I urge this court to reject the proposed amendment for the simple reason that it is a step in the wrong direction. The State of Michigan and its counties need to be collecting more data on the delivery of defender services – not less.

I encourage the court to amend court rule 8.123 in the future to expand the types of data required to ensure equal access to justice for the poor *and* accountability to the citizenry of Michigan that their limited tax resources are delivering those services in the most efficient and effective way. Among the basic categories of information that should be required of any jurisdiction to report are:

- 1) Number of “assigned” or “opened” cases per year per attorney by case type: “Case Type” choices would include: capital murder, felony, misdemeanor, juvenile delinquency, traffic, dependency, etc. and always reflect the top charge.
- 2) Number of “disposed” or “closed” cases per year per attorney by case type. Uniform assignment and disposition numbers can only be reported if there is a common, statewide definition of a “case.” One county may report “indictments,” another “clients” and another “charges.” It is critical to adopt (either statutorily or by court rule) a uniform definition of a “case.” The Conference of State Court Administrators and the National Center for State Courts’ publication *State Court Model Statistical Dictionary, 1989*, instructs administrators to “[c]ount each defendant and all charges involved in a single incident as a single case (page 19).”⁷
- 3) Length of time from Assignment to Disposition: this information can be had with relative ease if courts have the “date opened” and “date disposed” fields set up properly. More sophisticated systems have “date fields” for every major event in the life of a case: Arrest, first appearance, arraignment, first client contact/interview, pre-trial motion hearings, trial, sentencing, et
- 4) Dispositions: Court case-tracking systems should have a field that captures basic disposition information: “pled guilty as charged”, “pled guilty to lesser charges”, “no lo contendere”, “trial - acquitted”, “trial - found guilty as charged”, “trial - hung jury”, “trial - found guilty of lesser charge”, “Not guilty - Insane”, etc.
- 5) Expert Witness: A check box for “requested” and one for “approved/not approved.” Additionally, costs associated with the use of expert witnesses should be tracked as a separate line item in the funding reporting.
- 6) Indigent Expenditure.

Conclusion

The constituency most directly impacted by the failure of governments to ensure equal access to justice is the one most limited to affect public discourse. By definition, people

⁷ Therefore, a defendant who is charged with reckless driving who subsequently assaults the arresting officer would be counted as one case for reporting purposes. On the other hand, a defendant who is charged with shoplifting from one store on one day and another store on another day should have the cases treated as two cases for workload purposes since the public defender would have to interview two sets of witnesses, visit two different crime scenes, etc. This holds true even if the two shopliftings were filed on a single bill of information.

of insufficient means have limited resources to gain access to forums that promote public awareness of their concerns. On top of this, people in need of public defender services oftentimes are undereducated, inarticulate, mentally ill, developmentally delayed, under-aged, and/or suffering from substance abuse. It can be easy for state policy-makers to paint the funding of indigent defense services as “giving money to criminals” without the people most affected by their actions being able to effectively respond.

The way around this dynamic is simply for the Court to require uniform data reporting upon which objective analysis can be conducted. The National Legal Aid & Defender Association stands ready to work with the Court to devise a data collection survey instrument, collect and analyze that data, and/or objectively assess the quality of indigent defense services throughout Michigan.

Thank you.