

TWENTIETH JUDICIAL CIRCUIT COURT
OTTAWA COUNTY TRIAL DIVISION

September 18, 2012

Michigan Indigent Commission Act – HB 5804
20th Circuit Court Talking Points**Position of Ottawa County**

The talking points provided by County Administrator Vanderberg highlight several issues which are not adequately addressed by the draft legislation, including: the need to define minimum standards and metrics prior to approving the legislation; the need to avoid Headlee implications (or violations) by more fully analyzing the costs of indigent defense delivery; and the need to avoid penalizing well managed counties which are already providing quality indigent defense services.

The 20th Circuit Court in Ottawa County is supportive of this position and in agreement with the “Preferred Solution” offered, which includes prior definition of minimum standards and metrics (with Court input); ensures counties which meet reasonable standards are exempted from added costs; ensures there is a detailed fiscal analysis to determine precise financial impacts; and eliminates the arbitrary per capita assessment.

Position of the Ottawa County Judiciary

The judges of Ottawa County recently met for their annual review of court appointed counsel in the 20th Circuit and 58th District courts. In the process of evaluating all attorneys providing indigent representation during the past year, the judges reiterated their primary goals of

1. ensuring all indigent defendants are provided high quality representation (meeting constitutional requirements), and
2. ensuring this quality indigent defense is provided in the most efficient and cost effective manner.

Historically, these goals have been achieved by selecting experienced attorneys in a fair and transparent manner, paying a reasonable hourly rate that encourages the participation of competent attorneys, ensuring continuity in representation, and generally complying with most of the Michigan Principles of a Public Defense Delivery System. In fact, there is full or substantial compliance with 9 of the 11 principles adopted by the State Bar of Michigan (one principle is not applicable due to local caseload not requiring both a public defender office and private bar participation, and we do not require continuing education – but leave professional development to the discretion of the attorneys).

Chief Judge Edward R. Post specifically asked me to point out that the Ottawa County judges met with representatives of the Michigan Campaign for Justice and carefully listened to their presentation on effective public defender systems. At the conclusion of the presentation, the judges requested the Campaign staff to identify any Michigan County or other similarly situated jurisdiction which has an effective defender system that complies with all 11 Principles. This request was made so we could personally review such systems to determine how we may improve our delivery of services. Although the request was made and subsequently repeated, no response was ever provided. Consequently, the judges have chosen to continue with a proven solution to the provision of indigent defense services. They do not support legislation which purports to improve constitutionally effective assistance of counsel, but offers no specific standards, no implemented models of achievement, and no reliable estimates of actual costs.

Position of the Ottawa County Criminal Defense Bar

The general position of the Ottawa County attorneys who regularly handle court appointed cases is represented in the attached document entitled, "*FACT SHEET – The Eleven Principles of a Public Defense Delivery System as Applied to The Ottawa County Felony Public Defender Program.*" This analysis of Ottawa County's compliance with the State Bar association standards (i.e., the standards which presumably will guide the work of the proposed Michigan Indigent Defense Commission) demonstrates how most standards are currently followed. The author, Attorney Joseph Legatz (Ottawa County Public Defender since 1973) highlights in his summary comments that "by any objective standard (prison commitment rate, percentage of not guilty verdicts or dismissals, client satisfaction, reversals on appeal, cost per case, Bar grievance complaints, etc.), Ottawa County ranks with the very best public defender programs anywhere in the country." It is acknowledged mandatory training may improve the program, but otherwise there is grave concern that well intention efforts to solve problems affecting other counties will likely have a negative impact on an extremely effective defender program that is meeting the constitutional needs of indigent defendants in Ottawa County.

FACT SHEET

THE ELEVEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM AS APPLIED TO THE OTTAWA COUNTY FELONY PUBLIC DEFENDER PROGRAM

1. *The public defense function is independent.*

Judges in Michigan have both a constitutional and a statutory duty to provide attorneys to criminal defendants who cannot afford to hire an attorney. In Ottawa County, the judges discharge this duty by overseeing, in a very broad and properly detached way, the roster of attorneys who accept court appointed cases. But the judges do not interfere with or influence how those attorneys handle their cases. Thus, the public defenders in Ottawa County are completely independent, as they should be. The selection of defenders is a fair process, open to any attorney in Ottawa County. A separate agency to perform this function is completely unnecessary.

2. *High caseloads require both a defender office and participation by the private bar.*

This does not currently apply at all to Ottawa County.

3. *Defense attorneys are promptly appointed following arrest, detention, or request for counsel.*

This has always been done in Ottawa County. At the very first court appearance (arraignment) an attorney is appointed and promptly notified of the appointment. Further, in excess of this standard, all felony cases in Ottawa County are immediately set for a beneficial pre-preliminary examination conference (often called a "pre-pre"), which is held anywhere from 1 to 7 days after the arraignment (in the Grand Haven District Court, for example, the pre-pre is always held on the next Tuesday morning following the court appearance, whatever day that might be). This conference allows prompt action on many issues important to the defendant and to the defense of her/his case.

4. *Defense counsel has sufficient time, and a confidential space in which to meet the client.*

This is the case in Ottawa County. Both at the various courts and at the county jail, lawyers are able to meet confidentially with their clients. Because the lawyers are paid on an hourly basis, they have a strong incentive to take the time to properly meet their client, and get to know their case.

5. *Defense counsel's workload is controlled to permit quality representation.*

This is a highly questionable standard. Arbitrary caseload limitations for public defenders make no more sense than imposing such limitations on privately retained lawyers. Both retained and appointed lawyers alike should be trusted to use proper professional judgment in determining how much work they can handle. This has always been properly handled by the public defenders in Ottawa County.

6. *Defense counsel's ability and experience matches the complexity of the case.*

Ottawa County fully follows this standard. The judges of Ottawa County wisely require any attorney new to the program to prove, by gradual steps, that the attorney can properly handle the cases assigned. There are three levels of lawyers on the defender roster, based on experience and years of service. Ottawa County defenders have never been forced to take cases beyond their training and experience.

7. *The same attorney continuously represents the client until case completion.*

Ottawa County fully follows this standard.

8. *There is parity between defense counsel and the prosecution with respect to resources, and defense counsel is an equal partner in the justice system.*

Ottawa County fully follows this standard. When defense counsel needs an outside resource (investigator, expert witness, etc.) that resource is available. Importantly, the judges have designed, and the county commissioners have supported, a program that pays the defenders by the hour. The hourly rate is reasonable and encourages good lawyers to be a part of the program on a long term basis.

9. *Defense counsel is provided with and is required to attend continuing education.*

Ottawa County does not comply with this standard. A review of this situation would be appropriate.

10. *Defense counsel is supervised and systematically reviewed for quality and efficiency.*

Ottawa County fully complies with this standard, but in a way that the writers of national standards will never understand. The judges of Ottawa County see the public defenders in action on a daily basis. The judges would know of any performance problems long before any outsider could conduct a "review". Further, the public defenders themselves constantly watch the performance of each other, and they assist each other in solving new or unique problems. This standard, if it means a formal, outside review process, is unneeded in Ottawa County.

11. *When there is a defender office, one function of the office is to advocate for programs that improve the system and reduce recidivism.*

There is no defender office in Ottawa County, but interestingly enough Ottawa County fully complies with this standard. Indeed, this standard has been more than met for at least 35 years, long before any national standards were written. Ottawa County has always been way ahead of the curve on this standard.

Summary

Assuming that national standards are important (a debatable question), it is beyond doubt that Ottawa County complies with those standards, particularly those that are truly important to criminal justice outcomes. Indeed, by any objective measurement (prison commitment rate, percentage of not guilty verdicts or dismissals, client satisfaction, reversals on appeal, cost per case, Bar grievance complaints, etc.), Ottawa County ranks with the very best public defender programs anywhere in the country. The only true weakness appears to be the lack of provided, mandatory training. The writer has attended numerous state and national training events, and questions whether this standard would have much of an impact on case outcomes. Nonetheless, training might improve an already excellent program.

Respectfully submitted,



Joseph C. Legatz
Attorney at Law

Ottawa County Public Defender since 1973



County of Ottawa

Administrator's Office

Alan G. Vanderberg
County Administrator

Keith A. Van Beek
Assistant County Administrator

12220 Fillmore Street, Room 331, West Olive, Michigan 49460

West Olive (616) 738-4898

e-mail: avanderberg@miottawa.org

e-mail: kvanbeek@miottawa.org

www.miottawa.org

September 18, 2012

Indigent Defense (HB 5804) – Talking Points

DEFINE MINIMUM STANDARDS AND METRICS UP-FRONT

The legislation should define up-front the “minimum standards, rules, and procedures” that will be used to measure whether the delivery of criminal trial defense services is adequate in local courts. Additionally, the legislation should also define up-front the data that will be collected, and metrics that are used to investigate, audit, and review local court operations to ensure the minimum standards, rules, and procedures are being achieved. Without these definitions, it is not possible to calculate the true financial impacts to county or state budgets, or whether the new standards will improve outcomes.

There has been some discussion that the *Eleven Principles of a Public Defense Delivery System* listed on the Michigan Campaign for Justice website would serve as the basis for the minimum standards, rules, and procedures. However, there is not unanimous agreement among local judges and courts that these standards would result in adequate indigent defense services being provided. There is also doubt that Ottawa County would be able to meet all of these principles even though we have a well-managed indigent defense system (see **Attachment 1**).

Therefore, it is imperative that courts and counties be provided the opportunity to give input regarding these standards, rules, and procedures as well as the metrics that will be used to measure compliance with these standards prior to approving the legislation.

AVOID HEADLEE IMPLICATIONS

This legislation should be thoroughly analyzed before being approved to ensure that it will accomplish its intended purpose in the most cost-effective manner possible, and to ensure it will not cause budgetary harm to counties and violate the Headlee Amendment.

Many county government services are already mandated by the State. In essence, counties serve as grass roots deliverers of state services at the local level including such services as public health, mental health, jail, and courts to name just a few. A 2004 study conducted on behalf of the Michigan Association of County Administrative Officials showed that the State pays only 55% of the cost of services that they mandate counties to perform. For example, State law mandates that the State pay 50% of the cost of mandates that it requires through the public health code. The State pays Ottawa County only 33% of the cost of health code mandates, costing the County an extra \$750,000 in annual expense that legally should be borne by the State. Additionally, the Citizens Research Council completed an exhaustive report on unfunded mandates which concluded that all three branches of state government have willfully and frequently violated the Headlee Amendment where unfunded mandates to county government are concerned.

Ottawa County has provided effective indigent criminal defense services for approximately \$5.58 per capita. If minimum standards are not met, the legislation would require that counties spend \$7.25 per

capita. As proposed, this legislation would result in an unfunded mandate to Ottawa County in the amount of \$441,455 (see Attachment 2).

Further, for other counties that do not meet minimum standards, it is quite possible, that procedural, policy, and administrative changes could be utilized which may not require any additional cost to achieve the standards. However, if additional funding is required to meet the State's standards, counties should not be charged an automatic and arbitrary per capita rate - it should be the responsibility of the State to pay for courts to meet State standards.

WELL MANAGED COUNTIES SHOULD NOT BE FINANCIALLY PENALIZED

In addition to opposing unfunded mandates, Ottawa County opposes any mandates that would penalize well-managed counties that deliver indigent defense services effectively over time. And, well-managed counties shouldn't be treated the same as counties that have poorly provided these services over time.

Ottawa County has implemented a number of long-standing practices and procedures relating to indigent defense service delivery. By paying our indigent defense attorneys one of the highest reimbursement rates in the state for their services, and by implementing a methodical selection and evaluation process, Ottawa County has law practices that are almost solely dedicated to providing indigent defense services, with attorneys in these practices who are experienced and competent. As a result, Ottawa County's lawsuit ratio due to ineffective representation is very low.

Further, Ottawa County has historically maintained a strong commitment to fund law enforcement activities, develop collaborative partnerships with cities and townships to provide contractual law enforcement services, and invest in criminal justice programming in an effort to prevent recidivism. As a result of these efforts and other factors, Ottawa County has a significantly lower Index Uniform Crime rate as compared to the state average. If two equally sized counties, with differing crime rates are required to pay the same per capita rate based on their population, the counties will spend an equal amount of funding on indigent defense. However, the county with the higher crime rate will expend their funds on larger number of defendants, thus reducing the amount they spend per defendant. And, the County with the lower crime rate will pay a significantly higher rate per defendant since there are fewer defendants (see Attachment 3). This formula results in a funding inequality that penalizes well-managed counties with low crime rates.

PREFERRED SOLUTION

It is recognized and agreed that it is beneficial to establish minimum standards to ensure criminal trial defense services are adequate.

However, this legislation should not create arbitrary standards which fail to recognize exceptional indigent defense services and outcomes currently provided by counties, nor should it result in unfunded mandates to counties in order to accomplish the State's objectives.

The following provisions would provide a solution that avoids arbitrary standards and unfunded mandates:

- A. Define the minimum standards and metrics for measurement prior to passing the legislation.
- B. Provide an opportunity for counties and courts to give input regarding the adequacy and fairness of any proposed minimum standards and metrics.
- C. Maintain exemptions for those counties which meet standards that are fair and measurable.

- D. Conduct detailed analyses (House and Senate Fiscal Agencies) of the proposed legislation to determine the precise budgetary impacts to the state and each county.
- E. Ensure that the House and Senate Appropriations Committees are in agreement since there will be financial implications to the State.
- F. Eliminate the arbitrary spending rate of \$7.25 per capita for those counties that do not meet the state's minimum standards. Further, allow counties to propose and implement procedural, policy, and administrative improvements in an attempt to meet the minimum standards. If the minimum standards can still not be achieved, the State should pay for any other mandates that are required to achieve the State's minimum standards and in order to avoid Headlee Amendment violations.

Attachment 1
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**Attachment 2
Ottawa County Court Appointed Defense Counsel Cost**

Annual Cost (Current)

Fiscal Year	20th Circuit Court Cost	58th District Court Cost	Total Cost (20th Circuit Court and 58th District Court)
2009	\$638,312	\$947,760	\$1,586,072
2010	\$516,906	\$939,155	\$1,456,061
2011	\$531,530	\$851,085	\$1,382,615
Average (2009-2011)	\$562,249	\$912,667	\$1,474,916
Cost Per Capita			\$5.58

Annual Cost If Minimum Standards Are Not Met (Proposed Legislation)

	Proposed Cost Per Capita	Average Population (2009-2011)	Total Cost
Proposed Legislation	\$7.25	264,327	\$1,916,371

Unfunded Mandate Cost (If Minimum Standards Are Not Met)

	Current Cost (2009-2011 Average)	Cost with Proposed Legislation	Added Cost to County (from Proposed Legislation)
Annual Cost	\$1,474,916	\$1,916,371	\$441,455
Annual Cost Per Capita	\$5.58	\$7.25	\$1.67

Attachment 3

Funding per Defendant – Low Crime Rate vs. High Crime Rate

County with Low vs. High Crime Rate	Population	Cost Per Capita	Total Annual Cost	Index Crime Rate per 100,000 ¹	Amount Spent Per Defendant
Low Crime Rate County	264,000	\$7.25	\$1,914,000	2,059.7 (Ottawa County rate)	\$929.26
High Crime Rate County	264,000	\$7.25	\$1,914,000	2,951.4 (Statewide rate)	\$648.51

¹ Uniform Index Crime Rate

The Uniform Index Crime Rate for Ottawa County and Michigan for 2011 is provided below.

	Violent Crime Rate per 100,000	Property Crime Rate per 100,000	Total Index Crime Rate per 100,000
Ottawa County	136.7	1,923.0	2,059.7
Michigan	397.4	2,554.0	2,951.4

Source: Michigan Incident Crime Reporting; U.S. Census Bureau