

Q & A

Q: Does a Public Defender Model Provide More Efficient & Effective Services?

A: Maybe. ABA *Principle 2* states that jurisdictions with a sufficiently high caseload should deliver services through a public defender office, while leaving enough conflict and overflow cases to allow for the continued active participation of the private bar. Several reports support this recommendation,³ concluding that full-time staffed public defender offices do provide the most efficient and cost-effective representation, due to a number of factors (familiarity with criminal law; specialization for certain types of cases; and centralization of administrative costs). Given this, it is important to note that Wayne and Oakland Counties are two of only six of the United States' 50 most populous counties not to have a full-time public defender office as its primary trial-level service provider. And, the four other largest counties without a staffed public defender office are all in Texas, where indigent defense services have been universally decried as not meeting constitutional muster. Even there, Travis County (Austin) has a public defender office for juvenile and mental health cases.

However, a public defender office does not guarantee efficient & effective services. That phenomenon only holds true if the public defender office is appropriately funded and meets nationally-recognized standards – such as the ABA *Ten Principles*. The efficiencies and effectiveness inherent in the public defender model are premised on being able to bring together a team of attorneys, investigators, and social workers with a variety of complementary skills that no individual alone can possess, allowing greater flexibility and a more rapid response than individuals can achieve alone. Public defender offices that are under-funded and fail to meet standards are just as problematic as poorly funded assigned counsel systems with no institutionalized standards – perhaps worse, since an under-funded public defender office tends to have to contend with crushing caseloads as well.

³ See for example: West Virginia Office of Legislative Auditor, *Preliminary Performance Review of Public Defender Services* (1998) - available at www.wvpds.org; West Virginia Public Defender Services, *Report of the Indigent Defense Task Force*, January 2000 – also available at www.wvpds.org; The Spangenberg Group, *Final Report to the West Virginia Indigent Defense Task Force*, January 2000; North Carolina Indigent Defense Services, *FY02 North Carolina Public Defender & Private Assigned Counsel Cost Benefit Analysis*, 2003 – available at www.ncids.org.

Most Populous U.S. Counties

1	Los Angeles County	CA	Los Angeles	9,945,081	County Public Defender Office
2	Cook County	IL	Chicago	5,288,655	County Public Defender Office
3	Harris County	TX	Houston	3,866,207	Assigned Counsel System
4	Maricopa County	AZ	Phoenix	3,768,123	County Public Defender Office
5	Orange County	CA	Santa Ana	3,002,048	County Public Defender Office
6	San Diego County	CA	San Diego	2,941,454	County Public Defender Office
7	Kings County	NY	Brooklyn	2,508,820	County Public Defender Office
8	Miami-Dade County	FL	Miami	2,402,208	County Public Defender Office
9	Dallas County	TX	Dallas	2,345,815	County Public Defender Office
10	Queens County	NY	Jamaica	2,255,175	County Public Defender Office
11	Riverside County	CA	Riverside	2,026,803	County Public Defender Office
12	San Bernardino County	CA	San Bernardino	9,948,081	County Public Defender Office
13	Wayne County	MI	Detroit	1,971,853	Assigned Counsel System
14	King County	WA	Seattle	1,826,732	4 - 501c3 Independent PD Offices
15	Broward County	FL	Fort Lauderdale	1,787,636	County Public Defender Office
16	Clark County	NV	Las Vegas	1,777,539	County Public Defender Office
17	Santa Clara County	CA	San Jose	1,731,281	County Public Defender Office
18	Tarrant County	TX	Fort Worth	1,671,295	Assigned Counsel System
19	New York County	NY	Manhattan	1,611,581	County Public Defender Office
20	Bexar County	TX	San Antonio	1,555,592	Limited Public Defender Office
21	Suffolk County	CA	Riverhead	1,469,715	County Public Defender Office
22	Middlesex County	MA	Cambridge	1,467,016	Statewide Oversight/Felony PD Office
23	Alameda County	CA	Oakland	1,457,426	County Public Defender Office
24	Philadelphia County	PA	Philadelphia	1,448,394	County Public Defender Office
25	Sacramento County	CA	Sacramento	1,374,724	County Public Defender Office
26	Bronx County	NY	The Bronx	1,361,473	County Public Defender Office
27	Nassau County	NY	Mineola	1,325,662	County Public Defender Office
28	Cuyahoga County	OH	Cleveland	1,314,241	County Public Defender Office
29	Palm Beach County	FL	West Palm Beach	1,274,013	County Public Defender Office
30	Allegheny County	PA	Pittsburgh	1,223,411	County Public Defender Office
31	Oakland County	MI	Pontiac	1,214,255	Assigned Counsel System
32	Hillsborough County	FL	Tampa	1,157,738	County Public Defender Office
33	Hennepin County	MN	Minneapolis	1,122,093	Statewide Public Defender
34	Franklin County	OH	Columbus	1,095,662	County Public Defender Office
35	Orange County	FL	Orlando	1,043,500	County Public Defender Office
36	Contra Costa County	CA	Martinez	1,024,319	County Public Defender Office
37	Fairfax County	VA	Fairfax	1,010,443	County Public Defender Office
38	Saint Louis County	MO	Clayton	1,000,510	Statewide Public Defender
39	Salt Lake County	UT	Salt Lake City	978,701	County Public Defender Office
40	Fulton County	GA	Atlanta	960,009	County Public Defender Office

Breaking News!

HOUSTON, TX, April 2008 — Under the leadership of State Senator Rodney Ellis and at the request of local community groups, the Harris County Commissioners have voted to undergo a feasibility study to create the county's first staffed public defender office.

Creating a Level Playing Field: The Failure to Ensure Prosecutor & Defender Parity

ABA *Principle 8* requires parity between the resources of the public defender and those of the prosecutor, including “parity of workload, salaries and other resources.”¹³² One of the reasons why *Gideon* determined that defense lawyers were “necessities” rather than “luxuries” was the simple acknowledgement that states “quite properly spend vast sums of money” to establish a “machinery” to prosecute offenders. This “machinery” – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without such resources, the defense is unable to play its appropriate roles of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching.

In 1972, Chief Justice Warren Burger in his concurring opinion in *Argersinger* even went so far as to state that “society’s goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution.”¹³³ Michigan counties are ill-equipped to make up for the imbalance in resources created by state and federal contributions to local law enforcement.

At its most basic, the concept of parity requires salary parity between public defenders and prosecutors. The Justice Department’s 1999 report, *Improving Criminal Justice*, concludes that “[s]alary parity between prosecutors and defenders at all experience levels is an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing. Concomitant with salary parity is the need to maintain comparable staffing and workloads – the innately linked notions of ‘equal pay’ for ‘equal work.’ The concept of parity includes all related resource allocations, including support, investigative and expert services, physical facilities such as a law library, computers and proximity to the courthouse, as well as institutional issues such as access to federal grant programs and student loan forgiveness options.”

Jackson County is one of the few counties we have studied anywhere in the country in which the budget of the indigent defense program is essentially the same as the prosecution (at least it was before the recent advent of flat-fee contracts).¹³⁴ In 2006, Jackson County spent approximately \$1,241,212 on right to counsel services (or a per capita expenditure of \$7.58)¹³⁵ – approximately \$200,000 more than the Prosecuting Attorney’s budget. Though Jackson County should be commended for meeting the standard of parity, there is one caveat. *ABA Principle 8* presumes that the

prosecution is adequately funded. An NLADA representative had the pleasure and privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in March 2008 in Traverse City. Though NLADA is not an expert on the prosecution function, we were not surprised that our presentation on right to counsel systemic deficiencies and under funding was met by similar complaints on the prosecution side of the aisle. It is our general observation that prosecuting attorneys in Michigan are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. We noted with interest as the PAAM representatives discussed strategies to reform the prosecution function that have been similarly employed by defense advocates: assessments against nationally-recognized standards of justice; litigation; and public education.

Though NLADA sympathizes with the plight of Michigan prosecutors, it must be said that there is no constitutional mandate to effective prosecution (perhaps there should be). Rather, the deficiencies of the prosecution function serve to highlight the fact that dollar for dollar parity in Jackson County does not mean much when the prosecution is under funded as well. The situation is therefore exponentially worse in those Michigan counties that do even approximate Jackson County's parity level.

Grand Traverse County:

There is no parity between the prosecution and the defense in Grand Traverse County with regard to resources or compensation, and the structure does not provide the defense an equal role in the justice system. Whereas prosecutors are full-time county employees with salaries, benefits, office space, and support staffs, assigned counsel attorneys are paid either a flat fee per case in the district court (\$350) or are paid in accordance with an event-based fee schedule in the circuit court. The felony attorneys in 2005 were paid between \$21,580 and \$38,356 for their 62 or 63 cases. This amounts to an average of \$608.83 per case. Given the national experience in law practice in which approximately half of attorneys' gross income is available for compensation, after deducting overhead costs, the real salary for these lawyers is less than \$46,000 per year.

ABA 8th Principle

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

The 2006 starting salary for the prosecutors was \$36,400, and with five years experience the prosecutors earn \$67,500. The chief assistant prosecutor can earn up to \$86,000. One of the defense attorneys with 25 years of experience said that, of the eight attorneys on the felony panel, only four or five are financially secure. He said the \$60 per hour fee paid for capital cases barely covers overhead and that it would be hard to live on that pay. Another attorney said he used to take felony appointments but they are no longer cost effective. One of the circuit court judges, when asked why the defenders should not make \$67,500 per year as do the prosecutors, responded: that is “a fair question, but it is more than the market [requires].” This judge said a lot of full-time lawyers in the county earn only about \$40,000 a year. He said he is willing to discuss increasing the rate schedule. The circuit court administrator said there has been no complaint about the fee schedule, and “we're under our budget.”

One attorney with both prosecution and defense experience said the current circuit court fee schedule is poor. The fee schedule is event-based and pays \$600 in any guilty plea case (preliminary hearing waived). In the past, when public defenders were under contract in circuit court, they were paid \$750 for the same disposition. Privately this attorney said she would charge \$3000 for a circuit court plea case; and for a trial case, she would charge an additional \$150 per hour and obtain an advance deposit. Her court appointed work is 20-30 percent of her practice, and she does a heavy concentration of divorce mediation. She wishes the judges in both courts would understand that attorneys have more than court-appointed cases, because the attorneys are put under time pressures. One misdemeanor attorney said “the fear factor prevents us from having real negotiations,” implying the attorneys fear losing appointments if they complain about how little they are paid. The misdemeanor attorneys are paid \$350 per case, but out of that they have to pay for overhead and all case-related out-of-pocket expenses.

If there is a conflict with all of the contract attorneys, the attorneys must provide for other counsel at the expense of the contract attorneys. One of the attorneys told us that the way to “make it economical” is to have four or five hearings set for the same day and that the panel coordinator's legal assistant tries to arrange the assignments that way. The panel coordinator said that \$350 is inadequate and that a number of the attorneys “use it to pay overhead.” One younger lawyer said he is happy to get the experience at this point in his career, but that the payment is not adequate. Although he wants to make his career in criminal defense, he is considering not continuing depending on “what happens at the end of this contract.” One lawyer told us that district court “is more of a cattle call You get in, do your job, and get out of there.”

Prosecutors have access to law enforcement personnel for investigation of every case. Assigned counsel attorneys in Grand Traverse County have virtually no access to investigative services in the representation of their clients. One veteran attorney said that he has never been granted funds for an expert toxicologist or an investigator. Another attorney said that, while under *Ake v. Oklahoma* he should be able to get investigation and experts, “I need to work with my judges,” implying that the judges don't appreciate such motions. “It is up to me to investigate.” He added, “I need to have rapport with the judges.” Although judges indicated that funding is available for investigation if necessary and appropriate, very few requests are made in either court – only a de minimis amount is expended on defense investigation annually. The circuit court administrator said that generally the lawyers do their own investigation.¹³⁶ One told us that he had only needed

an investigator once or twice years ago and he has never needed an expert witness. The prosecutor said that defense investigation is done on “those cases where it should be.” Noting that there are a lot of property crimes, he asked, “Where do you go with those?” The prosecution has access to experts from the Center for Psychiatry, paid for by the state. Defense attorneys have extremely limited access to independent defense experts. Any expenditure must be approved by the court and Michigan law requires a threshold showing that the expert’s testimony will be helpful to the defense before it can be approved.¹³⁷

Oakland County:

There is no parity between the prosecution and the defense in the 50th District Court in Oakland County with regard to resources, compensation, or anything else. Most misdemeanor cases in the district court are prosecuted by the city attorney or an assistant city attorney for the City of Pontiac as violations of a city ordinance. State law violations are prosecuted by a county prosecutor. In either case, the prosecuting attorney is a government employee who receives a salary, benefits, and payment of all overhead expenses. Oakland County is yet another example of an indigent defense system in which judges or court personnel could not recall a single instance where funding was provided to a court appointed defense attorney for investigative services in a misdemeanor case. Similarly, assigned counsel in 50th District Court do not request funding to engage the services of expert witnesses in the representation of their clients in misdemeanor cases. Defense attorneys stated that it is futile to ask the court for experts and investigators because such requests will be routinely denied. Thus, they don’t bother to make such requests. The county prosecutor’s office has a very extensive training program for prosecutors, which is funded by the county in the budget. There is no funding for training for assigned counsel.

Defense attorneys in Oakland County pointed out that not only was there a lack of parity in pay, but also in resources, and, as one defense attorney put it, “[t]here is also a psychological lack of parity.” She stated: “When your client sees the deputy put his hands on you and push you away from your client while you’re trying to talk with him – in the courtroom, in front of the judge – it tells that client you’re not respected by the system. And when that same client sees that same deputy paying deference to the prosecutor, it tells that client the system is stacked against him.” Similar stories were conveyed by the other defense attorneys. Prosecutors have “pass-cards” to the judges’ private hallways, while defense attorneys do not. Prosecutors do not have to go through security, while defense attorneys do. Prosecutors have impressive offices, complete libraries, video and computer equipment, automated research capabilities, power-point equipment, meeting and training rooms, and abundant support staff. Defense counsel are not provided with a single office (or space within an office) at the circuit courthouse, even though the defense function is part of the court.

This disparity of respect extends to the view of local county officials. The county executive and his deputy took pride in pointing out that they were former Oakland County prosecutors and talked extensively (as did judges and other court personal) about what a fine office it is – the excellent training, mentoring, and support it provides to its prosecutors; and the importance of the high pay and status to attract and retain the very best talent. When it came to the defense function, we were told “they do a good job they probably should get more pay, but they make do.” By no stretch of the imagination is de-

EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

fense counsel an equal partner in the justice system; no one thinks she is; and no one – except defense counsel – thinks she should be.

Shiawassee County:

Such a lack of respect was not evident in Shiawassee County. However, all of the judges felt that appointed lawyers are clearly underpaid for their work in comparison with the prosecutors. All indicated that a raise in the hourly rate is overdue. Most of the lawyers to whom we spoke described the \$50 hourly rate as small but “fair.” One lawyer, who had been on the court-appointed list for five years but who no longer accepts appointments, cited the low pay as a reason for “moving on” from court-appointed work to concentrate on his vastly more lucrative private practice. He indicated that the \$50 per hour rate was so far beneath his \$200 per hour private rate that he could simply no longer afford to accept appointments. He said he had very much enjoyed his five years of representing indigent clients, noting that he was delighted to have been appointed to represent a client in a murder case. He felt that the current hourly rate is the principal reason that some very talented lawyers no longer accept court appointments.

The lack of anything approaching parity of investigatory services seen in other counties is also true of Shiawassee County. One lawyer, who had been accepting court-appointed cases in Shiawassee County for eight years, told us that not only had he never asked the court for funds for an investigator or an expert, he did not even know of another lawyer who had been granted such funds. He, and other lawyers to whom NLADA site team members spoke, indicated that when they want to interview a defense witness or to investigate details about an alleged crime, they either: a) call the witnesses on the phone to interview them themselves, or – like in Ottawa County – b) ask the prosecutor’s office to send the police out to interview the witnesses again.

When NLADA representatives asked why defense attorneys would proceed to defend their cases in this fashion, we were told that the judge would never grant them money for such a request and “this is the way we’ve always done it.” When an NLADA representative asked one lawyer in Shiawassee what he would do if a witness “went sideways” on the stand during trial from what he had told the lawyer before trial, he said he would probably have to become a witness himself, taking the stand and asking another lawyer to step in to elicit the impeachment material from him at the trial.

When we asked the circuit court judge about the availability of funds for investigators and/or experts, he indicated he would grant (and had in the past) such requests on occasion, but would do so only where the lawyer clearly demonstrates a need for such ancillary services and after he makes certain the defense lawyer has secured the best possible price from the investigator or expert (as he feels compelled to do by statute, which requires him to pay only a reasonable amount for such services at public expense). It is clear that there is to some degree a disconnect between the circuit court judge and appointed counsel on this subject. The court-appointed lawyers feel that asking for funds for investigation or expert assistance is a futile act. They also appear to be disturbingly comfortable with the idea that the arresting police agencies will gather information that will assist the defense.

Wayne County:

Significantly, the Third Circuit in Wayne County does not come close to complying with

the parity principle. According to the chief judge, the Wayne County indigent defense budget is \$18 million, compared to \$39 million for the Prosecuting Attorney. Furthermore, this parity comparison must recognize that the Prosecuting Attorney claims the entire prosecution system is under-resourced and salaries in her office are too low. Assigned counsel fees have not been increased in 20 years, and the salaries paid to attorneys in LADA are significantly lower than what attorneys in the Prosecuting Attorney's office are paid.

Virtually everyone interviewed by the NLADA site team characterized the assigned counsel fee structure in Wayne County as archaic. Because the fees are so low, some attorneys seek to generate a high volume of appointments to increase their income. Payment is event-based (as opposed to hourly), with the payment based on the seriousness of the case (potential sentence of five years/10 years/20 years/life in prison). As an example, the fee for preparation and investigation of a case carrying a potential maximum sentence of up to 20 years is \$170; for preparation and investigation of a life maximum sentence is \$210; and for preparation and investigation of a murder one case is \$270. Attorneys receive payment for one jail visit to in-custody clients (a flat \$50) facing a potential sentence less than life and two jail visits for clients charged with capital offenses. Attorneys report that many of them make more visits, even though they are not paid for them. The prosecutor said it has been calculated that assigned counsel earn an effective hourly rate of \$10 when the fees they receive are divided by the hours spent on cases.¹³⁸

Fees for investigators and expert witnesses for indigent defense cases are very low and even then require a judge's approval.¹³⁹ For example, the fee schedule for a psychiatric expert in a case where the potential sentence is life in prison is a flat \$500 for the interview and written evaluation and \$300 for attendance in court. Attorneys report that the low fees make it extremely difficult to establish a pool of expert witnesses who will work on their cases. Moreover, the lack of adequate funding for expert witnesses, combined with the 91-day case adjudication rule, has resulted in cases where defense counsel say they have been forced to trial without an independent DNA analysis. In more than one case, attorneys reported they were told to use the Michigan State Police to conduct an analysis of DNA evidence. In comparison, the Prosecuting Attorney reported that her office has 11 staff investigators (down from a high of 19) and four or five paralegals. As with prosecutorial offices around the country, the Wayne County DA's office receives grant money, including federal funds for victim projects and state funds for juvenile projects, in addition to its county funding. Attorneys in the DA's office receive medical benefits and participate in the county retirement plan; attorneys in LADA (which is not a county agency) have neither.

Chippewa & Marquette

In Marquette County, the prosecutor has a staff of approximately eight attorneys, which seems almost luxurious for the business at hand in a rural and peaceful county. Assistant prosecutors receive ample free continuing training, which assigned defense counsel attorneys do not. In addition, as a long-term (since 1973) elected county official, longest-serving state prosecutor, and head of the state prosecutor's training committee, the prosecution in Marquette County has a strong policy voice, which the leaderless defense bar lacks completely. As to the availability of investigators and experts, reports were anecdotal and mixed: Judge Weber said he routinely allows such motions, despite their drain on the

limited county coffers; but the lawyers said they would file such motions only in serious cases with demonstrated need. For example, most lawyers routinely do their own investigations, despite the ever present danger that doing so may make them witnesses, which would require them to withdraw and thereby deprive their client of their services. Marquette County offers no training to defense lawyers and very few, if any, attorneys subscribe to the Michigan SADO on-line case updates. Lawyers and judges alike pointed to the absence of trial practice and legal developments training as a significant flaw in the current assigned counsel system.

The county prosecutor in Chippewa has seven staff attorneys – one assigned to family court, one to juvenile court, and the other five to adult criminal court – and three support staff. The public defender has two attorneys and one support staffer. The difference in budget is approximately 2:1 in favor of the prosecutor. Each year, the county prosecutor has funds to send one attorney to the Michigan Association of Prosecutors' trial skills training, whereas the defenders have no such funds in their budget. While there are 11 police agencies with jurisdiction within Chippewa County,¹⁴⁰ each charged with investigating crimes on behalf of the county prosecutor including in some circumstances access to federal crime labs, the public defender has no funds for investigators or special expertise of any kind.

