

Legislative Analysis



MICHIGAN PUBLIC DEFENSE ACT

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House Bill 5676

Sponsor: Rep. Bob Constan

Committee: Judiciary

Complete to 12-13-09

A SUMMARY OF HOUSE BILL 5676 AS INTRODUCED 12-9-09

In brief, the bill would do the following:

- Create a statewide public defense system to provide appointed counsel to eligible individuals.
- Establish the Public Defense Commission and prescribe its membership, powers, duties, and function.
- Create the State Office of Public Defense and Appellate Defense Bureau.
- Establish regional offices to appoint attorneys to provide public defense services within each region.
- Require the assignment of attorneys to a case to be based on the attorney's experience and training.
- Prohibit excessive case workloads by attorneys providing public defense services.
- Provide for continual representation of a client from the initial assignment to sentencing (adult) or the dismissal or closure of a case (juvenile).
- Base compensation for public defense services on services provided by prosecutors' offices.
- Establish eligibility requirements for public defense services.
- Require that certain information relating to the provision of public defense services to be posted on the Internet.
- Allow a court to order a person who receives public defense services to pay a portion of the cost of those services.
- Repeal the existing Appellate Defender Act.

States are constitutionally charged with providing effective legal counsel to defendants who lack the means to retain counsel. A recent study by the National Legal Aid and Defender Association (NLADA), in partnership with the Michigan State Bar Association, found Michigan to be providing less than adequate indigent defense services by forcing counties to fully fund the public defender system and failing to implement a statewide oversight and supervisory system. The counties' various funding mechanisms coupled with the lack of oversight often leads to similarly situated defendants in different counties receiving disparate levels of justice. Often, the counties that are most in need of indigent defense services are the ones that can least afford to pay for it.

In an effort to address the numerous problems in the Michigan public defender system, the bill would create the Michigan Public Defense Act ("Act"). The goal of the Act is to create a consistently delivered, efficient, statewide public defense system. Through a central Office of Public Defense accompanied by regional public defense offices, the bill seeks to provide "effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."

The following is a section-by-section summary of the bill.

Section 2 (Purpose)

The purpose of the Act is to:

- Establish a state public defense system to provide appointed counsel for those eligible and entitled by law to assistance of counsel at public expense.
- Ensure the system is free from undue political interference and conflicts of interests.
- Provide that the services are delivered by qualified and competent counsel in a fair and consistent manner statewide.
- Establish a system that, in the manner it uses state employees, contracted services, and members of the state bar, is responsive to and respectful of community needs and interests.
- Ensure that adequate state funding of the system is provided and managed in a fiscally responsible manner.

Section 3 (Definitions)

The bill includes numerous definitions, including "adult" (an individual 17 years of age or older) and "juvenile" (an individual under the age of 17 years of age charged in the family division of circuit court or in the general division of circuit court with violating a criminal law or under provisions of the Probate Code (Section 2(a)(2) of MCL 712A.2).

Other defined terms include "conflict counsel," "contract defense council," "county office of public defense," "nonprofit office of public defense," and "professional."

Section 4 (Cases eligible for appointment of counsel)

The cases for which a court could appoint counsel would include cases in which an individual is entitled by law to assistance of counsel at public expense because of his or her financial inability to retain private counsel, cases in which an individual is entitled by law to appointed counsel regardless of the ability to retain private counsel, and in other matters as directed by the court or approved by the Public Defense Commission.

"Assigned counsel" would mean an attorney in private practice who is not employed by the State Office of Public Defense, a nonprofit office of public defense, or a county office of public defense and who is appointed by the office to represent eligible individuals.

"Case" is defined to mean a legal proceeding that charges an individual with the commission of a crime or a delinquency or status offense in a state court, a post-conviction or post-adjudication proceeding, or another matter designated by the court or the commission as a case under the Act. "Case" could involve multiple charges arising out of the same transaction or occurrence or out of a related series of transactions or occurrences.

Section 5 (Creation of the public defense system, commission, and office)

The Act would create the State Public Defense System ("system") to provide public defense services throughout the state.

The Public Defense Commission ("commission") would be created to head the state system, supervise the office, and establish policies to implement the Act.

The State Office of Public Defense ("office") would be an autonomous entity having all statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other funds, including the functions of budgeting, personnel, locating offices, and other management functions.

Section 6 (The commission)

The Act would establish a 9-member commission, appointed by the Governor, selected from persons recommended by the Michigan Supreme Court, Michigan Judges' Association, Michigan District Judges' Association, State Bar of Michigan, the state Criminal Defense Attorneys Association, and a non-attorney selected from the general public who would serve 3-year terms. The Act includes provisions regarding the qualifications of commission members, the staggering of initial terms, and filling of vacancies. The commission would have to promulgate policies necessary to carry out its powers and duties, but would have to convene a public hearing before a proposed policy became effective. Commission policies would have to be placed in a manual, made available to the public on the Internet, and made available to all attorneys and professionals who provide public defense services, the state Supreme Court, the Senate and House Appropriations Committees, and the Senate and House Fiscal Agencies.

Section 7 (Commission plan)

The commission, with the assistance of the office, would have to develop a plan that would provide public defense services that divided the state into defense regions sufficient to provide efficient provision of defense services throughout the state while addressing local needs. Elements required to be in the plan are listed in the Act and include, among other things, policies to receive and resolve complaints; avoiding conflicts of interest in the administration of public defense services and appointment of counsel; and establishing an office in each region to oversee the provision of public defense services under the supervision of a regional public defender.

At least three public hearings on the proposed plan would have to be held in separate geographical regions before adoption. The commission would also have to ensure that client-related data remained secure and that policies and procedures regarding access be established to ensure confidentiality. Further, the commission would be required to assist in the implementation of programs to improve the criminal justice system and reduce recidivism.

Section 8 (State Public Defender and State Appellate Defender)

The commission would establish the qualifications, duties, and compensation of the State Public Defender (head of the State Office of Public Defense) and State Appellate Defender (head of the Appellate Defense Bureau); evaluate their performances; establish policies for the operation of the office; set the criteria that attorneys employed by the office must meet; adopt personnel policies and procedures; and review and approve budget proposals.

Appointees and employees of the office (which would encompass the Appellate Defense Bureau) would be employees of the judicial branch of state government and exempt from civil service. Compensation for full-time public defenders and staff of the office could not be less than that paid to assistant prosecuting attorneys and prosecuting attorney staff having comparable duties and responsibilities in their respective regions.

Section 9 (Duties of State Public Defender)

The State Public Defender would be the chief administrative officer of the office and would manage and oversee the office while yet maintaining and honoring the independence of the Appellate Defender Bureau in matters relating to the representation of clients and supervision of bureau personnel. The State Public Defender would hire or contract for and supervise personnel necessary to perform the functions of the office and to implement commission policies, the plan, and the act. Duties would include:

- Acting as secretary to the commission and providing administrative staff to support the commission.
- Assisting the commission in establishing and maintaining the state system and establishing and enforcing policies required under the Act.
- Assisting the commission in developing the initial plan described above.
- Establishing procedures to approve, pay, record, report, and manage defense expenses.
- Establishing an information technology system.
- Establishing procedures for managing workloads and assigning cases so that public defense attorneys are assigned cases according to experience, training, and manageable workloads.
- Establishing procedures to prevent conflicts of interests and, if they occur, to handle them according to professional ethical standards.
- Establishing and supervising a training, performance monitoring, and evaluation program for all attorneys, professionals, and administrative support staff.

- Establishing procedures to handle complaints from clients, judges, the public, and others.
- Serving as a liaison between the commission and the court.
- Seeking gifts, grants, and donations available through governmental, corporate, or private sources to help fund the system.

Section 10 (Appellate Defense Bureau)

The bureau would be created within the State Office of Public Defense as an independent entity. The State Appellate Defender's duties would include:

- Assisting the commission in developing the initial plan.
- Managing the Appellate Defense Bureau and overseeing the provision of appellate, post-conviction, and post-adjudication public defense services.
- Hiring or contracting for and supervising personnel to perform the functions of the bureau.
- Collecting data and keeping detailed records of bureau expenses and services.
- Maintaining a repository of pleadings, databases, and legal resources available to all attorneys providing public defense services.
- Recommending appellate policies and procedures and assisting the State Public Defender in implementing commission policies, office procedures, and the Act.

Section 11 (Regional offices)

The State Public Defender would have to establish regional offices and appoint regional public defenders to oversee the provision and oversight of nonappellate public defense services within each region. The Act details the duties of the regional public defenders, which include maintaining rosters of qualified assigned counsel, appointing attorneys in a timely manner, ensuring case assignments are fairly distributed, monitoring workloads, collecting data and preparing reports as required by the office and commission, and implementing training and performance monitoring and evaluation programs for attorneys providing public defense services in the region.

Section 12 (Standards for attorneys providing public defense services)

All attorneys providing public defense services would have to be licensed by the state and be members in good standing of the State Bar of Michigan. The commission would be charged with establishing standards for public defense services to ensure services are provided by competent counsel and in a manner that is fair and consistent throughout the state. The elements to be addressed by the standards are listed in the Act and include the level of education and experience required to provide effective representation; practice standards; performance criteria; acceptable workloads – which take into account case complexity, severity of charges, client factors such as mental illness, and potential punishments in a case; availability of, access to, and use of professional services required by a case, such as paralegals, investigators, and expert witnesses; and the availability of, access to, and completion of training and continuing education requirements.

The commission would have to establish procedures to prevent workload excesses and policies to ensure that criteria listed in the bill that include the following were met:

- Cases were assigned to attorneys with the skills, training, and experience to handle them and whose workloads are within limits established by commission policies.
- In appropriate cases, clients were assessed for mental illness, addiction, and other underlying issues and a client rehabilitation plan presented to the judge. The plan would have to use available community resources, rather than incarceration, where appropriate.

Section 13 (Court-ordered services)

The office would have to immediately appoint counsel when ordered by a court to do so, even if the individual's eligibility for public defense services had not yet been determined. Services would have to be provided until the individual was determined to be ineligible or the individual wished (and the court permitted it) to represent himself or herself.

A qualified attorney would have to meet with any juvenile wishing to waive the right to counsel to ensure the juvenile understood the consequences of the waiver.

The attorney providing the public defense services would have to continually represent the adult client from the initial assignment through sentencing and represent the juvenile continually until the case were dismissed or closed. This would apply unless otherwise provided by commission policies or the attorney was relieved of his or her duties.

Section 14 (Contracting for public defense services)

The commission would have to establish policies to ensure that contracting for public defense services was done fairly and consistently statewide and within each region. The Act would list the elements required to be included in the policies and would include such things as attorney qualifications, workload standards, supervision, and training and continuing education.

Contract oversight and enforcement would be provided by the State Public Defender. The contracts could not be based solely on a fixed fee paid regardless of the number of cases assigned. Reasonable compensation for contracted services would be established by the commission, and the office would have to ensure that payments to contractors be made in a timely fashion.

Section 15 (Intra-governmental contracts)

The Act would permit the office to enter into agreements and contracts with state departments and agencies of the judiciary, as well as local units of government, including counties and municipalities, to carry out its duties.

Section 16 (Allocation of cases and compensation schedule)

The commission would have to establish policies governing the manner in which cases were allocated to assigned counsel to ensure it carried out in a fair and equitable manner. Assigned counsel would be required to comply with all commission policies, office procedures, and the Act. The commission would have to establish a reasonable compensation schedule for assigned counsel and review those rates every two years and the office would have to ensure payments be made in a timely fashion.

Section 17 (Public Defense Fund)

The state would be responsible for all costs of the public defense system and services in order to ensure the right to counsel under the federal and state constitutions.

The Public Defense Fund would be created as a separate account in the Department of Treasury and administered by the commission. Money in the fund could only be used for the operation of the system. Any unencumbered balance and all interest earnings in the fund at the end of a fiscal year would remain in the fund and not lapse to the general fund.

All contribution fees collected by the courts under provisions of the Code of Criminal Procedure would have to be deposited into the fund, as well as any funding solicited by the commission from various private and public sources. In addition, the Legislature would have to make annual appropriations to implement the Act and ensure that the right to counsel was adequately funded.

Section 18 (Internet Website)

The commission would have to establish and maintain an Internet website containing specific information listed in the Act, including such things as the policies and procedures for the operation of the State Public Defense System; the number of assigned counsel and attorneys providing public defense services; training programs conducted by the office; detailed expenditure data by region, court, and case type; and all other financial, client demographic, and workload data needed to assist in determining the appropriate amount of funding needed to ensure the delivery of effective representation and to assist in planning.

Section 19 (Eligibility criteria)

An individual would be eligible for appointed counsel if one or more of the following applied:

- The applicant's income was not over 133 percent of the current poverty level.
- The applicant qualified for and received public assistance.
- The applicant, when representation is requested, does not have readily available or unencumbered assets, credit, or other means to retain counsel without

subjecting himself or herself or his or her dependents to substantial financial hardship.

- The applicant is a juvenile whose parents would otherwise be eligible for public defense services or who are unwilling to retain counsel to represent the juvenile.

Eligibility could not be denied solely because of an applicant's ability to post bail or solely because he or she is employed. Eligibility screenings would have to be conducted under policies established by the commission and could not be conducted by the presiding judge, prosecuting attorney or his or her employee, or attorney providing public defense services.

An applicant could appeal the determination of ineligibility and would have to receive public defense services while the appeal is pending. Further, the Act provides how a court would determine an applicant's income, among other things relating to eligibility.

Section 20 (Partial payment of services by recipient)

The Act would provide that a court could order an adult, or the parents of a juvenile, who received public defense services to pay a portion of the costs associated with receiving those services. An applicant for public defense services would have to be notified at the time of screening for eligibility – orally and in writing – that assessment of a portion of the costs could be made if it would not cause substantial financial hardship. Payment of a portion of the costs of services would not apply to cases ending in acquittal or dismissal of all charges.

The Act would also include provisions allowing an individual ordered to pay a portion of the services to waive the services under certain circumstances; prohibit an attorney providing public defense services from pursuing payment from the client; and provide protections from imprisonment, bond denial, denied counsel, or probation or parole revocation for failure to repay unless the failure to repay was willful or could be made without substantial financial hardship. A court could enforce repayment in the same manner as a judgment in a civil action. An order for payment of costs for public defense services would be the exclusive means by which the cost of public defense services would be recouped.

Section 21 (Repealer)

The existing Appellate Defender Act (MCL 780.711-780.719) would be repealed.

FISCAL IMPACT:

(Note: The information in this section is based on an earlier draft version of this legislation, and will be updated in the future to reflect the current version. See also the full HFA memorandum, from which this is excerpted at the Michigan Legislature website.)

Under the proposed Michigan Public Defense Act, the State of Michigan would be responsible for all costs of public defense services through the creation of a "Public Defense Fund" in the Department of Treasury. The Office of Public Defense would annually submit a budget proposal and the legislature would annually make an appropriation to ensure that the public defense delivery system is adequately funded.

As noted above, Michigan counties are currently charged with the state's responsibilities under *Gideon v. Wainwright* to provide constitutionally-adequate legal representation at the trial level. Furthermore, there is no statewide administration to ensure that effective and adequate representation is rendered on the part of the defendant. Most recent numbers show that Michigan counties collectively spend \$74.4 million on indigent defense services. This amounts to approximately \$7.35 per capita, which is 38 percent below the national average of \$11.86, and ranks Michigan 44th out of the 50 states in indigent defense cost per capita. Under Michigan's current system, counties would have to collectively spend \$120.1 million in order to match the national average indigent defense cost per capita. This would represent an increase of \$45.7 million from current expenditures. It is unknown what kind of funding structure the new Michigan Public Defense Act would create, therefore, the amount of funding needed to provide "adequate" indigent defense services under a new system cannot be estimated with any accuracy.

Under the Act, all costs associated with public defense would shift to the state. Because of ongoing budget constraints and lack of oversight from the state, the amount counties currently pay for public defense is more a function of what their budgets will allow rather than what would truly be considered "reasonable." Implementing the provisions of the Act would presumably increase the operational costs of the state's public defender system. Total funding needed to implement the Act would be a function of the Act's following prescriptions:

Prescription #1 Creation of a Public Defense Commission

Fiscal Impact: Costs would likely be minimal due to commission members only receiving per diem compensation coupled with reasonable and necessary expenses.

Prescription #2 Creation of the Office of Public Defense and Appellate Defense Bureau

Fiscal Impact: Associated costs would consist of salaries and benefits of the State Public Defender, chief deputy defenders, and associated staff. In addition, there would be administrative costs associated with implementing the duties of the office and enforcing the rules promulgated under the Act. Finally, the state would have to cover facility costs for the Office of Public Defense.

Prescription #3 Creation of regional public defense offices throughout the state

Fiscal Impact: Associated costs would consist of salaries and benefits of regional director, local appointing authority/authorities, and accompanying staff. In addition,

there would be administrative costs associated with implementing the duties of the office and enforcing the rules promulgated under the Act. Finally, the state would have to cover facility costs for the regional offices. NOTE: The number of regional offices is unknown.

Prescription #4 Access to training, professionals, legal resources, and technology for all indigent defense attorneys

Fiscal Impact: Associated costs would consist of training programs for all attorneys and professionals providing indigent defense services. In addition, attorneys deemed to have insufficient legal resources, facilities, or technology to provide adequate and effective legal counsel to indigent defendants would have to be provided access to those resources by the Office of Public Defender under the Act. These costs have the potential to be quite substantial. The American Bar Association (ABA) recommends parity between defense counsel and the prosecution with respect to resources available.

Prescription #5 Oversight and performance reviews of attorneys, experts, and other professionals

Fiscal Impact: The Office of Public Defender would be charged with supervision and performance reviews of individual attorneys. The increased supervision and review of attorney performance would increase administrative costs associated with the delivery of indigent defense.

Prescription #6 Decreasing workload limits using an empirical case-weighted system

Fiscal Impact: Implementation of workload limits would increase the number of required attorneys needed to provide services and therefore lead to an increase in attorney costs. Implementing more manageable workload limits would eliminate the low-bid, flat-fee contract systems that are often implemented in Michigan counties as a cost saving measure. As an example, it was reported that five part-time public defenders in Detroit handle approximately 2,400 to 2,800 cases each per year. The national standard for a full-time public defender is only 400 cases per year. Increased costs associated with workload limits will be a function of the workload standard implemented by Michigan and the compensation received by the attorneys.

Prescription #7 Authorized use of contracts for the delivery of public defense services

Fiscal Impact: The Act would create a competitive bidding process designed to eliminate both conflicts of interest and the awarding of contracts solely on the basis of the amount of the bid. This provision would also help eliminate the low-bid, flat fee contracts that Michigan counties have increasingly implemented by requiring all contracts to take into account workload limits and attorney qualifications.

Prescription #8 Promulgate formula to provide reasonable compensation for indigent defense services

Fiscal Impact: Compared to the current mixture of hourly rate and fee schedule payment schedules, instituting a formula to provide reasonable compensation to assigned counsel would increase compensation costs statewide. Michigan currently uses a mixture of hourly rates (ranging from \$40 in Eaton County to \$88.82 in Ottawa County), fee (or event) schedules, and low-bid flat-fee contracts. In almost all instances, attorneys are paid well below national recommendations. National recommendations indicate that compensation levels for public defense attorneys should be more on par with those of the prosecution.

Potential Cost Savings from Michigan Public Defense Act

Despite the substantial increase in indigent defense delivery system costs, there is the potential for both short- and long-term savings to the state with the implementation of the Michigan Public Defense Act. Providing adequate and efficient indigent defense services would save state and local resources by reducing wrongful convictions and accompanying lawsuits, ensuring proper sentencing, keeping innocent people out of prison, and identifying problems on the front end of the legal process, among other things. It would not be unreasonable to assume that the short- and long-term savings would underwrite a significant portion of a state-funded system.

From an appellate perspective, the State Appellate Defender Office (SADO) has reported that sentencing errors are one of the most notable examples of wasted resources. Sentencing errors are often caused by a rush to sentencing, lack of defense counsel training, and the complex and specialized sentencing process in Michigan. SADO reported that between the calendar years 2003 and 2007, they achieved a cumulative reduction in minimum prison terms of 122 1/2 years, and a cumulative reduction of maximum prison terms of 309 years. Assuming an average incarceration cost of \$30,000/annually, SADO estimated that the cumulative total of prison costs saved was \$3,675,000 over the five year period. *NOTE: SADO created a special unit of attorneys to handle appeals from guilty pleas (guilty pleas most likely to have appellate claims related to sentencing). The number of attorneys ranged between two and four in any given year and each attorney was assigned approximately 80 cases per year.*

If these numbers were extrapolated to statewide appellate assignments using the same sentencing error rate for trials and guilty pleas, SADO projected statewide savings of nearly \$70 million in prison costs. It should be noted that appellate process costs are not included in the prison cost savings so total cost savings may be higher. Competent, effective, and efficient counsel from the outset would presumably have mitigated many of the sentencing errors at the trial level, saving the state, counties, and cities much needed resources.

Savings would also be realized through a reduction in the number of wrongfully convicted criminal defendants. However, cost savings are hard to estimate because of the individual nature of each exoneration. In addition to the cost of appeals and years in prison, civil judgments can greatly increase the cost to taxpayers. It is not uncommon for civil judgments to reach into the millions and can be borne by the state, county, or city.

Although the number of wrongful convictions yet to be uncovered is unknown, we can surmise that wrongful convictions will continue to surface. For example, the effects of the unreliable testing at the Detroit Police Crime Lab (10% ballistics error rate) are yet to be known. Inadequate funding of defense services can be partly to blame because the Lab's results were often taken at face value. Lack of resources made requesting independent forensic tests a rarity. Public safety is also put at risk when the wrong person is imprisoned and the guilty party remains free. As evidenced above, the mitigation of wrongful convictions has the potential to save the state and its localities much needed resources.

Finally, by having competent, trained defense counsel issues like mental health and drug abuse can be identified at the front end of the legal process. By identifying these issues at the front end, defendants suffering from these problems can be diverted from jail and into necessary treatment programs at a lower cost. For criminal defendants with mental illness or drug addiction, treatment programs can provide a path to recovery, which can lead to savings in incarceration costs through reduced recidivism.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.