

fiscal forum

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Indigent Defense Review

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Executive Summary

- According to the Michigan Constitution, as well as rulings by the United States Supreme Court (*Gideon v. Wainwright*), the state is responsible for guaranteeing that those accused of crimes are provided with legal representation. If a person is unable to pay for their own representation, it is the state's responsibility to provide them with an attorney.
- In Michigan, indigent defense is funded by each individual trial court. The state does not provide any funds directly for use in indigent defense at the trial court level. The state does provide funding for 25% of indigent appellate cases through the State Appellate Defender's Office.
- A report by the National Legal Aid & Defender Association (NLADA) ranked Michigan as 44th in the nation in terms of per-capita spending on indigent defense. The report estimates Michigan's spending on indigent defense to be \$74.4 million, or \$7.35 per capita. This is 38 percent less than the national average of \$11.86 per capita.
- In October 2011, Governor Snyder established the Indigent Defense Advisory Commission by executive order, in order to research the status of indigent defense in Michigan and provide recommendations for the Executive branch and Legislature. The commission released its report in June 2012, recommending the establishment of a permanent commission to evaluate and audit indigent defense services. This report recommended that any additional funding for indigent defense be paid by the state, with a required baseline funding level to be provided by counties.
- The full fiscal impact of the Commission's recommendations is indeterminate. The Commission does not recommend any specific funding level, aside from a minimum level of \$7.25 per capita in each county. As less than half of counties are currently above the minimum funding level, many counties would be required to increase their spending to match this funding level. State spending would depend on decisions made by the Commission and appropriations made by the legislature, but total indigent defense spending in the state would have to increase by \$40 to \$50 million for Michigan to reach the national per capita spending average.

Background

Section 20, Article I of the Michigan Constitution states, "In every criminal prosecution, the accused shall... have the assistance of counsel for his or her defense." This requirement has been upheld and further elaborated on by Supreme Court cases such as *Gideon v. Wainwright*. If a defendant is indigent (meaning he or she has no ability to pay for his or her own defense), it is a responsibility of the trial court to ensure that the defendant is provided with proper legal defense, at either no charge or at a reasonable rate.

The responsibility for funding this indigent defense system varies by state. Some programs are funded entirely by the state, some at the local level, and others are funded partially by both. In Michigan, funding is entirely provided at the local level, with the exception of appellate defense. Trial courts are responsible for providing their own indigent defense services through a public defender office, assigned counsel, or contracts with attorneys' offices.

In Michigan, most indigent defense is done through assigned counsel and contracting, with only five staffed public defender offices in the state. This means that few indigent defenders are fully autonomous from the judiciary, either relying on negotiated contracts or being assigned to cases by judges or court administrators. Courts establish their own fee rates and schedules for assigned counsel and contracts, usually at either an hourly rate or on a per-case basis.

Definitions of indigent defense systems:

Public defender's offices are autonomous organizations which provide defense through a full-time or part-time salaried staff.

Assigned counsel systems use a list of available attorneys from which a court can appoint a public defender. This may be controlled by the judiciary itself or by an autonomous board.

Contract systems involve agreements between private attorneys or firms and the court to provide services for a specific dollar amount.

As these indigent defense systems have to provide defense to a wide variety of clients whose needs vary significantly between regions and courts, comparing the quality of service between districts or between states can be challenging. In an attempt to create a national standard for indigent defense, the American Bar Association (ABA) has established ten principles for public defense delivery systems.¹ These principles are:

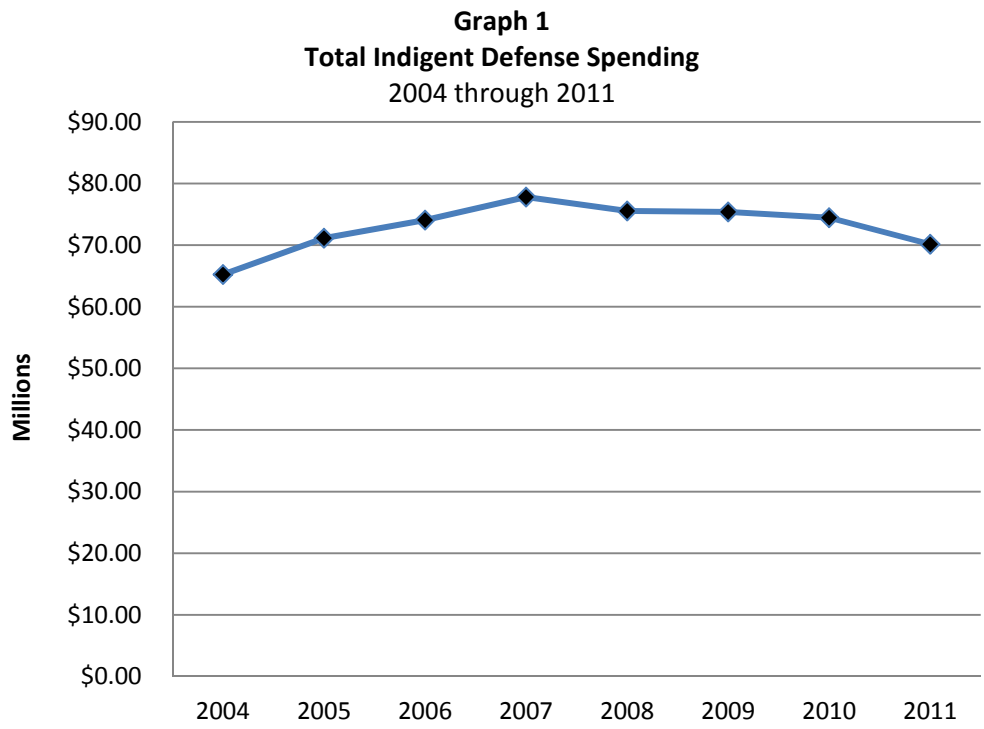
1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. 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.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

¹ A copy of these principles is available at:

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

While these principles are not a precise tool, they can be used as a broad standard against which to evaluate whether or not a given public defense system is providing the tools necessary to provide those accused of crimes with adequate representation.

Michigan's overall spending on indigent defense peaked in 2007, as shown on **Graph 1**, and has declined in recent years. In 2007, Michigan spent an estimated \$77.8 million, or \$7.75 per capita. In 2011, funding was approximately \$70.1 million, or \$7.10 per capita².



Source: HFA analysis of data provided by State Court Administrative Office

Appellate Defense

While appellate defense is still primarily funded by local governments, the state provides some funding to support indigent appellate caseloads. Court of Appeals operations are funded entirely by the state, but the primary responsibility for funding defense remains with the counties. The state provides a total of \$6.2 million (\$5.4 million GF/GP) for indigent appellate defense, primarily for the State Appellate Defender's Office.

The State Appellate Defender's Office (SADO) provides appellate services for indigent defense, and is required by statute (P.A. 620 of 1978, MCL 780.716) to handle at least 25% of the indigent appellate caseload. In the FY 2011-12 budget, SADO received \$5.3 million gross (\$4.6 million GF/GP) to fund its share of indigent appellate defense. However, SADO has reported that its staffing level is currently insufficient to fully handle 25% of indigent appellate cases. SADO received an additional \$225,000 GF/GP in the FY 2012-13 budget for the purpose of hiring additional attorneys to meet this statutory requirement.

² Spending figures are calculated based on reports from trial courts on spending on court-appointed attorneys. Court appointed attorneys for indigent defendants in criminal cases, as well as child protective, mental competency, guardianship, and conservatorship proceedings. The estimate used when calculating indigent defense spending is the entirety of spending in district and circuit courts, as well as 2/3rds of spending at probate courts. As this number would include many civil and family court cases, it is likely that this estimate is higher than the actual amount spent on indigent criminal defense. This is the same methodology used in the NLADA report, as well as in **Appendix 1**.

The Michigan Appellate Assigned Counsel System (MAACS) maintains a statewide roster of attorneys eligible to act as criminal appellate defense counsel for indigent defendants. Additionally, MAACS provides legal education for attorneys on the statewide roster and monitors for compliance with the standards set for indigent criminal appellate defense. MAACS received \$906,300 gross (\$789,800 GF/GP) in the FY 2011-12 and FY 2012-13 budgets.

Evaluation of Michigan's Indigent Defense System

In 2008, the National Legal Aid & Defender Association (NLADA) released a report titled "Evaluation of Trial-Level Indigent Defense Systems in Michigan; A Race to the Bottom."³ The report evaluated several sample counties across Michigan and compared the quality of indigent defense in Michigan to other states. The report ranked Michigan at 44th in the nation in terms of per-capita spending on indigent defense systems. The report estimated Michigan spent \$7.35 per-capita on indigent defense between 2004 and 2006, compared to a national average of \$11.86.

The report cited a variety of problems that arise from local-level funding and a lack of statewide defense standards. Because funding is provided at the trial court level, the amount of funding in different Michigan trial courts varies significantly.

The report notes that counties or cities with lower overall revenue are often those who have higher crime rates and poverty, making them more likely to have a higher indigent population. However, this lower revenue makes it difficult for these courts to be able to invest in their indigent defense systems. In state level or hybrid county/state funding systems, this conflict can be partially offset through funding by the state. However, Michigan's indigent defense system does not currently have any funding or policies in place to resolve such issues, and counties are dependent on revenue they can collect locally to fund indigent defense.

Beyond issues with funding for indigent defense, the NLADA report is also critical of the structure of assignment of defense in most trial courts. The nature of the assigned counsel system can create incentives that conflict with the interests of clients. For example, some courts pay assigned counsel on a per-case basis, with more severe crimes coming with higher flat fees. This discourages assigned counsel from spending an extended amount of time with cases that may require more thorough investigation, and to instead take more cases that can be resolved quickly as possible. The NLADA report finds that, in these situations, financial incentives are at odds with the interests of their clients, and may result in improper handling of complex cases.

The NLADA report uses the presence or absence of the ABA's ten principles as a metric of a public defense system's adequacy. The report evaluated a series of sample courts and highlighted situations where courts did not meet the ten principles. NLADA cited situations where there were significant disparity between resources provided to prosecution and to defense, improper management of caseloads, and a lack of preparation time and training. Failure to adhere to these principles increases the risk that that indigent defendants will receive poor representation, not have issues properly explained to them (and thus accept or reject deals based on incomplete information) and, in more serious cases, be wrongfully convicted.

Indigent Defense Advisory Commission

On October 13th, 2011, Governor Snyder announced the creation of the Indigent Defense Advisory Commission. The purpose of this commission was to evaluate the current state of Michigan's indigent defense system, evaluate alternatives from across the country, and provide recommendations for the Michigan legislature and other policymakers. The commission included representatives of the judiciary, prosecuting and defense attorneys, the

³ http://www.michbar.org/publicpolicy/pdfs/indigentdefense_report.pdf

State Bar of Michigan, local government, the general public, and members of both parties in the House and Senate. The commission met monthly from December through June, with its final meeting held on June 22nd, 2012.

The commission invited a variety of speakers to present and offer suggestions on proper management of Michigan's indigent defense system. After several meetings, the commission presented a series of findings and recommendations to the legislature. The commission's full report is available online⁴. The recommendations provided include the following:

- Create a permanent Commission on Indigent Defense with the authority to establish and enforce minimum statewide standards. The commission would establish metrics for determining the resources needed by local governments to meet the minimum standards, and provide a timeline for compliance. The legislature would be directed to appropriate sufficient funds for the operation of this commission. The commission would audit and review local indigent defense delivery systems to ensure compliance, and provide annual reports and recommendations to the Legislature, Governor, and the Supreme Court.
- Adopt a series of policies similar to the ABA's Ten Principles of a Public Defense System.
- Provide direct indigent defense services with state resources if a local system fails to meet minimum standards, while allowing the State Treasurer to withhold an amount equal to the cost of providing these services from any and all state payments to the local unit of government.
- Require new funding be provided by the state, while requiring that local governments maintain their expenditures at the inflation-adjusted average of their previous three years of spending, or \$7.25 per capita, whichever is greater.

These suggestions are not legally binding, but may be used as a basis for future legislation.

Estimated Cost and Savings

There are potential costs related to Michigan's current indigent defense system, which may be mitigated or eliminated through indigent defense reform. Primarily, costs of an inadequate public defense system are paid by the corrections system, which either has to pay for housing additional inmates or pay to house inmates for a longer period of time. A report by the Justice Policy Institute cites five possible ways that an inadequate public defense system may increase costs to the corrections system:⁵

1. More pretrial detention.
2. Increased pressure to plead guilty.
3. Wrongful and erroneous convictions.
4. Excessive and inappropriate sentences that do not take into account the unique circumstances of a case.
5. Increased barriers to successful re-entry into the community.

These issues potentially increase corrections costs for both the state and local governments. However, some of these measures may also be keeping costs low for local courts and prosecutor's offices. Defendants who are put under pressure to plead guilty or who receive excessive sentences typically also have shorter trials. Longer trials create costs for courts due to an increase in caseload, and slow the judicial process for both the current case and other cases awaiting trial. If more cases are tried instead of pled, or cases take longer to resolve due to taking into account

⁴ <http://www.michigancampaignforjustice.org/docs/IDAC%20Final%20Report.pdf>

⁵ "System Overload: The Costs of Under-Resourcing Public Defense," Justice Policy Institute, July 2011. Available at <http://www1.spa.american.edu/justice/documents/3425.pdf>

a case's unique circumstances, the costs of these trials would be borne by the courts and prosecutors, as well as any reformed indigent defense systems.

Enacting the measures recommended by the Indigent Defense Advisory Commission would have an indeterminate cost. Implementing the reforms proposed by the commission would have both up front and ongoing costs, which the state would have a responsibility to maintain. The long-term operation and management of an Indigent Defense Advisory Commission would result in some administrative cost to the state, as would any audits or evaluations that the commission would choose to conduct. Resources would be needed in order to evaluate whether or not its proposals are adopted by local courts, and to evaluate the impact of such reform.

The recommendations would also likely require additional spending at the county level, in order to carry out the commission's recommendations. Language in the recommendations states that the state should be responsible for any burden imposed above either the local government's three year average funding for indigent defense systems, or a minimum of \$7.25 per capita. However, using NLADA's method of estimating county spending per capita, 45 of 84 counties currently spend less than \$7.25 per capita. Under the current recommended language, these counties would be obligated to increase their funding, with the total liability equaling about \$9.5 million.

The commission's recommendations do not set a specific level of funding as a goal, but the current national average is approximately \$11.86 per capita. According to NLADA's estimates, Michigan spends about \$7.33 per capita. To bring Michigan to the national per capita average, total spending in the state would have to increase by approximately \$40 to \$50 million annually. Indigent defense spending in Michigan counties ranges from \$2.56 per capita to \$17.01 per capita, which reflects differences in funding methods, attorney compensation, crime rates, poverty levels, and court caseloads. **Appendix 1** provides a three year average of 2009-2011 indigent defense spending, using the method for estimating indigent defense spending used in the NLADA report.

However, this estimate may not precisely reflect current levels of indigent defense spending. The estimation method used by the NLADA report to assess how much counties spend on indigent criminal defense relies on estimates based on the cost to counties of all court-appointed attorneys, which would include cases such as guardianships, conservatorships, child custody, and other cases that would not qualify as criminal defense. Michigan currently collects no data that specifically identifies how much each county spends exclusively on indigent criminal defense, and thus creates imprecision when setting specific spending requirements based on currently available data.

Differences in structure between Michigan's indigent defense system and the structures of other states make cross-state comparisons difficult. Spending of \$11.86 per capita may be necessary in order to achieve parity with the national average of indigent defense systems, or spending levels to achieve similar results may be higher or lower. Each county's ideal level of spending on indigent defense will also be dependent on that county's crime rates, as similarly-sized counties with differing crime rates would also reasonably have different levels of indigent defense spending.

Fully satisfying the ABA's ten principles would require financial investment to be satisfied. Criteria such as ongoing education for indigent defenders would require either the state or local governments to fund such education where it is not currently offered. Restrictions on defense attorney caseloads may require counties to hire or contract with additional attorneys. Similarly, the ABA's principles may not allow counties to contract indigent defense at fixed per-case rates, as it does not provide sufficient resources to handle more complex cases. As such, counties currently operating under this model may have to replace their current funding system with a per-hour funding model, which may result in increased costs per case. The Indigent Defense Advisory Commission's recommendations state that any additional costs would be paid by the state, but as many of the counties which would require resources to meet these requirements already spend less than \$7.25 per capita, counties would be at least partially responsible for funding these new criteria.

The savings that would arise from enacting these or similar reforms are also indeterminate. The financial savings would result from fewer appeals or fewer resources spent on incarceration or probation. HFA analysis suggests that the costs of adding, for instance, 100 new prisoners to the corrections system could range from between \$2.0 million

to around \$4.0 million per year, depending upon the security level at which these prisoners are housed. However, it is not possible to properly estimate the change in prisoner population that would result from enacting these proposals. The reduction in costs for the Court of Appeals, the Department of Corrections, and county jails may partially or fully offset the costs of implementing these reforms, or result in a net savings for the state or local governments. Additional analysis would be needed after reforms are enacted to properly identify the costs or savings resulting from reforms to the indigent defense system.

Many of the commission's recommendations are designed to address issues beyond those captured by a fiscal evaluation of the legislation. If enacted, reforms might provide better parity between prosecution and defense, which may result in less uncertainty in the veracity of a case's ultimate verdict. Legal representation and adequate defense are rights guaranteed by both the U.S. and Michigan constitutions, so reforms may have added value in contributing towards fulfilling those guarantees. Such considerations are at least partially subjective and cannot be reflected in any fiscal analysis.

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NOTE: This report was written by Erik Jonasson, Fiscal Analyst. Kathryn Bateson, Administrative Assistant, prepared the report for publication.

Appendix 1
Three Year Average of Indigent Defense Spending in Michigan Counties
(CY 2008-2010)

County	Population	Three Year Average of Indigent Defense Spending	Three-Year Average Spending per Capita
Alcona	10,942	\$85,270	\$7.79
Alger	9,601	\$54,883	\$5.72
Allegan	111,408	\$404,965	\$3.63
Alpena	29,598	\$248,072	\$8.38
Antrim	23,580	\$169,314	\$7.18
Arenac	15,899	\$130,631	\$8.22
Baraga	8,860	\$55,109	\$6.22
Barry	59,173	\$369,610	\$6.25
Bay	107,771	\$566,066	\$5.25
Benzie	17,525	\$153,529	\$8.76
Berrien	156,813	\$1,258,755	\$8.03
Branch	45,248	\$325,283	\$7.19
Calhoun	136,146	\$1,381,201	\$10.14
Cass	52,293	\$621,943	\$11.89
Charlevoix	25,949	\$288,736	\$11.13
Cheboygan	26,152	\$277,801	\$10.62
Chippewa	38,520	\$384,814	\$9.99
Clare	30,926	\$318,284	\$10.29
Clinton	75,382	\$331,102	\$4.39
Crawford	14,074	\$101,211	\$7.19
Delta	37,069	\$226,157	\$6.10
Dickinson	26,168	\$220,325	\$8.42
Eaton	107,759	\$664,838	\$6.17
Emmet	32,694	\$352,379	\$10.78
Genesee	425,790	\$2,385,816	\$5.60
Gladwin	25,692	\$230,453	\$8.97
Gogebic	16,427	\$146,841	\$8.94
Grand Traverse	86,986	\$540,120	\$6.21
Gratiot	42,476	\$211,889	\$4.99
Hillsdale	46,688	\$252,053	\$5.40
Houghton	36,628	\$133,202	\$3.64
Huron	33,118	\$204,351	\$6.17
Ingham	280,895	\$1,454,227	\$5.18
Ionia	63,905	\$352,682	\$5.52
Iosco	25,887	\$207,962	\$8.03
Iron	11,817	\$83,223	\$7.04
Isabella	70,311	\$385,335	\$5.48
Jackson	160,248	\$1,005,688	\$6.28
Kalamazoo	250,331	\$2,172,208	\$8.68
Kalkaska	17,153	\$148,000	\$8.63
Kent	602,622	\$5,860,968	\$9.73

County	Population	Three Year Average of Indigent Defense Spending	Three-Year Average Spending per Capita
Keweenaw	2,156	\$9,975	\$4.63
Lake	11,539	\$111,782	\$9.69
Lapeer	88,319	\$387,687	\$4.39
Leelanau	21,708	\$93,399	\$4.30
Lenawee	99,892	\$375,151	\$3.76
Livingston	180,967	\$1,323,864	\$7.32
Luce	6,631	\$52,076	\$7.85
Mackinac	11,113	\$128,285	\$11.54
Macomb	840,978	\$6,117,393	\$7.27
Manistee	24,733	\$307,158	\$12.42
Marquette	67,077	\$375,108	\$5.59
Mason	28,705	\$207,245	\$7.22
Mecosta	42,798	\$414,529	\$9.69
Menominee	24,029	\$161,132	\$6.71
Midland	83,629	\$485,995	\$5.81
Missaukee	14,849	\$91,543	\$6.16
Monroe	152,021	\$700,445	\$4.61
Montcalm	63,342	\$412,289	\$6.51
Montmorency	9,765	\$47,886	\$4.90
Muskegon	172,188	\$625,157	\$3.63
Newaygo	48,460	\$278,221	\$5.74
Oakland	1,202,362	\$5,526,459	\$4.60
Oceana	26,570	\$137,766	\$5.19
Ogemaw	21,699	\$369,016	\$17.01
Ontonagon	6,780	\$51,075	\$7.53
Osceola	23,528	\$178,233	\$7.58
Oscoda	8,640	\$77,979	\$9.03
Otsego	24,164	\$126,666	\$5.24
Ottawa	263,801	\$1,439,548	\$5.46
Presque Isle	13,376	\$134,906	\$10.09
Roscommon	24,449	\$248,721	\$10.17
Saginaw	200,169	\$1,342,404	\$6.71
Sanilac	43,114	\$110,297	\$2.56
Schoolcraft	8,485	\$60,646	\$7.15
Shiawassee	70,648	\$373,326	\$5.28
St. Clair	163,040	\$1,439,953	\$8.83
St. Joseph	61,295	\$658,207	\$10.74
Tuscola	55,729	\$586,951	\$10.53
Van Buren	76,258	\$570,677	\$7.48
Washtenaw	344,791	\$3,619,838	\$10.50
Wayne	1,820,584	\$18,606,596	\$10.22
Wexford	32,735	\$215,756	\$6.59
Total/Average	9,883,640	\$73,346,636	\$7.38

Source: HFA analysis of data provided by State Court Administrative Office.



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