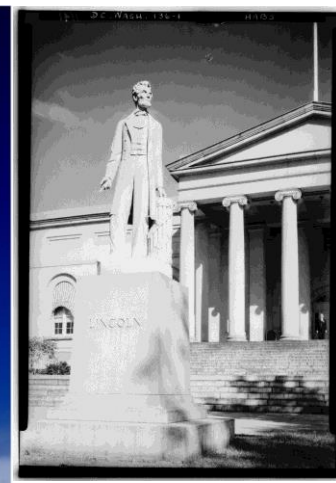




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Berrien County Indigent Defense Implementation Proposal

To: Bill Wolf, County Administrator
Berrien County Board of Commissioners

From: Carl Macpherson, Indigent Defense Administrator

Date: September 6, 2016

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I. PURPOSE

The purpose of this Report is to request formal Board approval of the Berrien County Indigent Defense Implementation Proposal (IDIP). I am requesting that the Board approve a Public Defender's Office in order to provide constitutionally-mandated, and ethically-obligated, high quality indigent criminal defense for our County. The IDIP is based upon several factors: (1) the status of the Michigan Indigent Defense Commission (MIDC) and proposed standards; (2) an overview of indigent defense delivery systems in Michigan and nationally; (3) best practices for indigent defense based upon ethical obligations and national standards; and (4) general conclusions about the current Indigent Defense System in Berrien County.

II. BACKGROUND

In March of 2016, I was hired by the Berrien County Board of Commissioners, part-time, as the County's first Indigent Defense Administrator (IDA). The overarching mandate for the IDA is to be "responsible for the development, implementation, oversight, and direction of the Berrien County Indigent Defense Administration Department." For the past six months, I have diligently worked to learn the Berrien County Indigent Defense (ID) system. This required a holistic approach designed to understand the role and effectiveness of the current ID contracts. Throughout this process, special attention was given to statewide and national standards, reports and trends, to craft the best possible plan for Berrien County going forward.

III. DATA AND METHODS

Data collection and overall survey of the system can be broken down into many categories. First, the following was done to understand the current Berrien County contract system and the attorneys, including:

- Review of administrative orders and resolutions
- Review of ID contracts since 2010
- Several meetings with contract attorneys as a group
- Many individual meetings with contract attorneys
- Visits to existing ID attorney offices

I have made efforts to meet individually with the majority of the Berrien County criminal justice key participants, including:

- The majority of present Berrien County criminal judges and several past criminal judges
- The Berrien County Prosecutor
- MDOC Probation Department supervisor
- Pre-trial services and probation staff
- Trial Court administrators
- Berrien County Sheriff and jail staff
- Court personnel

I have attempted to observe the key aspects of the criminal justice system, including:

- Complete jail tour, including: holding area, booking area, the Arraignment room, cell blocks, interview rooms, visiting area, jail classrooms
- Niles courthouse tour
- Informal tour of the St. Joseph courthouse
- Observation of several arraignment proceedings both from the jail and the courtroom
- Misdemeanor pre-trials and sentencings
- Felony pre-exam conferences and preliminary hearings in both courthouses
- Felony sentencings in both courthouses
- The majority of one ID felony trial (except for jury selection), and parts of several trials
- Probation violation proceedings in both courthouses
- ID attorney-client meetings at court
- Drug Court graduation

I have made efforts with community outreach and listening to community feedback, including:

- Individual meetings, frequent correspondence, and discussions with several members of the greater legal community
- Meeting with the Benton Harbor Pastoral Alliance
- Letters and phone calls with former ID clients and family members
- Meeting at local emergency shelter for women
- Participation at several Fresh Start meetings at the Berrien County Jail with incarcerated persons

- Conducted Berrien County criminal justice survey with sentenced persons at Berrien County Jail
- Frequent correspondence from incarcerated persons at the Jail

Our office has attempted to provide supervision and oversight for the current contracts and the ID attorneys, including:

- Attempted to provide feedback following court observation
- Offered to review police reports and discuss case and trial strategy
- File review
- Case discussions
- Assistance in connecting clients with their attorney, and vice versa
- Addressed pre-arraignment in-custody potential clients and answered general questions
- Provided a letter generally outlining the arraignment process and the ID attorney's office contact information in an effort to help potential clients understand the system better and how to reach their lawyer prior to court
- Provided file support for ID attorneys: sample client interview forms; bond recommendation forms; post-arraignment court docket entries; free State Appellate Defender Resources (SADO)
- Confidential client meeting space at the ID Building, which can also be used to review case discovery such as videos, documents, presentations
- Private room at ID Building to conduct attorney-client video visitation at the Jail
- Review of attorney-client jail visitation sign-in logs

Further I have conducted extensive research in statewide and national criminal justice issues related to indigent defense¹, such as:

- MIDC documents, surveys, and updates
- Berrien County trial court statistics
- Berrien County case load reports
- National reports, studies, and ethics opinions on case loads
- Berrien County pre-trial detention statistics
- National studies and reports regarding pre-trial detention and bail
- Michigan laws and cases regarding pre-trial release
- Berrien County incarceration statistics
- National studies and reports regarding incarceration, and mass incarceration
- Reports and data on the effect of early and adequate representation on pre-trial detention and post-conviction incarceration

¹ For specific documents please see the endnotes contained within this Report and "Other Sources" at the end of the Report.

- SCAO and MDOC statistics regarding case filings and sentencing practices across Michigan, with a particular focus on comparable counties
- Researched and/or corresponded with all 7 Public Defender Offices in Michigan
- Studied several models of indigent defense delivery systems nationwide to include county and/or state funded systems in the following states: CA, DC, ID, IL, MA, MO, NC, NY, OH, OR, TN, TX, WI, and VA .
- Reports and documents on having indigent defense counsel at arraignment
- Documentation regarding reasonable attorney fees
- Documentation regarding the determination of indigency
- Reports and guidelines regarding appropriate indigent defense delivery

IV. STATUS OF MIDC PROPOSED STANDARDS AND POSSIBLE FUTURE STANDARDS

By way of brief background, the MIDC was established in 2013. The MIDC was created in response to lawsuits and a series of reports indicating that the State of Michigan, and its counties, was failing in their obligation to provide adequate indigent defense. In fact, Michigan ranked 44th in the country in per capita expenditures for indigent defense. Through several mechanisms, the MIDC is responsible for improving indigent defense in the State.

The mandate that has the most immediate effect on our County is the process for creating and maintaining minimum standards. Under the MIDC Actⁱ, if the Supreme Court adopts proposed standards, then all 83 counties would have 180 days to provide a compliance plan explaining how the standard will be met and its cost analysis. If the MIDC determines that funding beyond the average county expenditures from 2010-12 is required to meet the adopted standards, then the State must provide the funding to reach and maintain compliance.

In December of 2015, the MIDC submitted the first four minimum standards to the Michigan Supreme Courtⁱⁱ:

1. Education and Training of Defense Counsel
 - a. Knowledge of the law
 - b. Knowledge of scientific evidence and applicable defenses
 - c. Knowledge of technology
 - d. Continuing education
 - i. 12 hours of CLE's annually

2. Initial Interview

- a. Timing and Purpose of the Interview
 - i. Within 3 business days of appointment
- b. Setting of the interview
 - i. Private, confidential setting
- c. Preparation
- d. Client Status

3. Investigation and Expertsⁱⁱⁱ

- a. “Counsel shall conduct an independent investigation...”
- b. Reasonable requests for an investigator and an expert “shall” be made and “must be funded”
- c. “Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.”

4. Counsel at First Appearance and other Critical Stages

On June 1, 2016, the Michigan Supreme Court *conditionally* approved all four Standards; therefore, the standards have not taken effect. The Court identified three aspects of the MIDC Act “that the Court deems to be of uncertain constitutionality.”^{iv} The Michigan legislature has approximately fifteen more sessions in 2016 to “fix” the MIDC Act. If the legislature does not act, then the “conditional approval of these standards will be automatically withdrawn on December 31, 2016.”^v

I do not have an indication of whether the standards will ultimately be approved in 2016. The Board should hesitate to make a decision on the IDIP based upon the funding mechanism of the MIDC Act. Rather, I feel strongly that the Board should make an independent decision on what our County needs, and what is constitutionally required, with little weight being given to the possibility of State reimbursement in the future.

If the MIDC Act is revised to the satisfaction of the Supreme Court, then we should be able to anticipate at least one of the next proposed standards. On July 19, 2016, the MIDC published a “position paper” regarding “reasonable’ attorney fees.”^{vi} The paper discusses how to determine if an attorney fee is reasonable, how to challenge a disputed amount, and arguably encourages counties to use an hourly rate system.

I also have reason to believe that an upcoming standard would involve individual attorney workloads. The MIDC Act defines ‘effective assistance of counsel’ as being

determined by State appellate court and U.S. Supreme Court case law^{vii} The Act further states that “[t]he MIDC may develop workload controls to enhance defense counsel’s ability to provide effective representation.”^{viii} In 1973, the American Bar Association (ABA) authored specific case load guidelines that are being commonly exceeded across the country: no more than 150 felonies and no more than 400 misdemeanors, per attorney, per year.^{ix} Nationally, there have been ethics opinions^x, reports^{xi}, and law suits^{xii} addressing this situation. Based on several factors, it is reasonable to conclude that two of the next proposed standards will involve reasonable attorney fees and workloads. I have considered this and incorporated these possibilities within my IDIP.

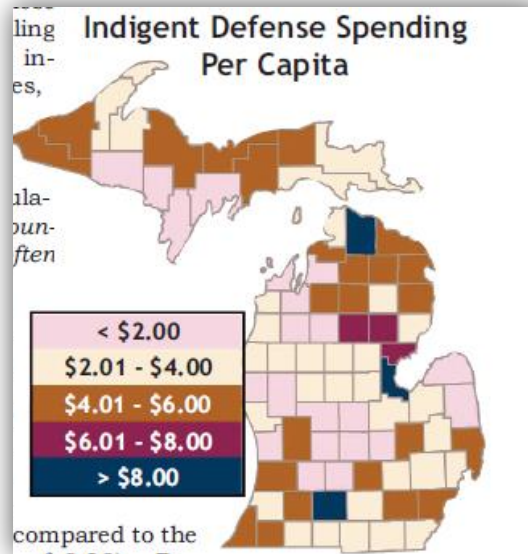
V. OVERVIEW OF INDIGENT DEFENSE DELIVERY SYSTEMS IN MICHIGAN

To provide context, it is important to review the status of ID in Michigan before the MIDC Act. Second, we must look at the overall landscape of ID in Michigan today. Finally, we must examine statewide trends and issues surrounding ID that effect this IDIP.

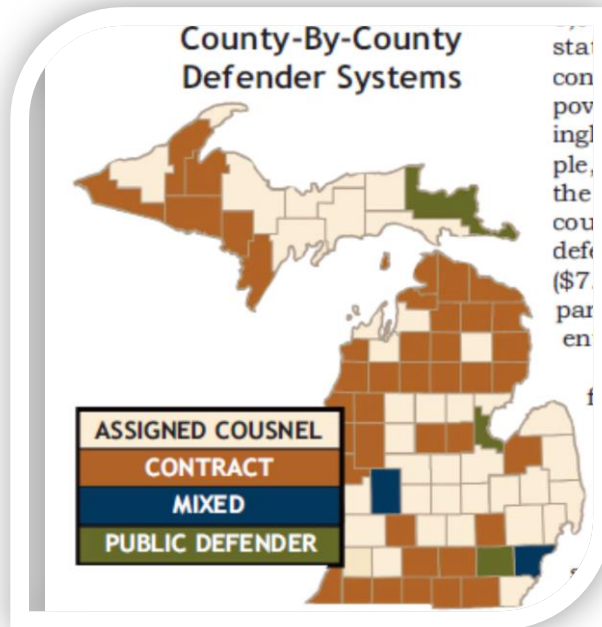
A. Michigan Indigent Defense in 2008: *A Race to the Bottom: Speed & Savings Over Due Process*

In June of 2008, the National Legal Aid & Defender Association (NLADA) published a scathing 115-page report substantiating that Michigan ID systems were in “A Constitutional Crisis.”^{xiii} The report outlined several systemic problems that were later addressed in the MIDC conditionally-approved standards of 2016. The NLADA performed a limited survey of ID across Michigan. The statewide portion focused on two main areas: per capita spending and type of ID delivery system by county.

In 2008, Michigan ranked 44th in the country for per-capita spending on indigent defense with a rate of \$7.35.^{xiv}



In stark contrast, Michigan has the 17th highest rate of incarceration per capita in the U.S.^{xv} The report also illustrated the four types of ID delivery systems across the State:



The NLADA found that 41 Michigan counties used flat-fee contracts, which are widely disfavored.

Narrowing in, NLADA focused on ten counties: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee, and Wayne. The ten

counties included at least one of the four types of delivery systems. For varying reasons, the NLADA found that “none of the public defender services in the sample counties are constitutionally adequate.”^{xvi}

Finally, the report outlined several systemic problems that are relevant to our decision on how to address ID today:

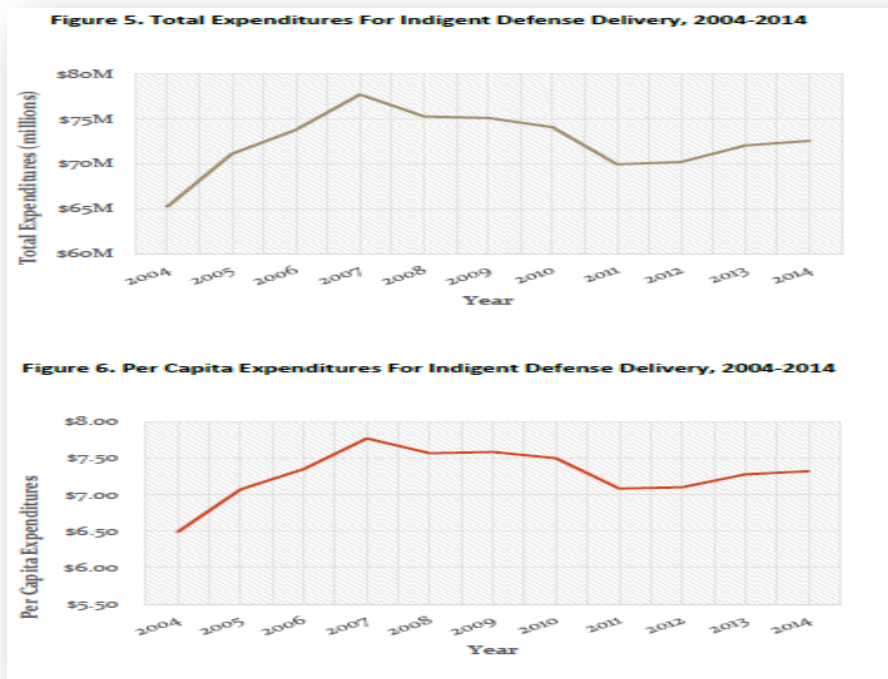
- “Flat fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985” pg. 8 (citations omitted)
- “Contracts for indigent services in Michigan are sometimes awarded primarily on the basis of cost, without regard to qualifications or any other considerations – an indictment of trial-level indigent defense services throughout the state.” pg. 9.
- “District courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution.” pg. 15 In Ottawa County, criminal justice key participants “colloquially refer to the district court arraignment dockets as ‘McJustice Day’ ... that it is ‘assembly line justice.’” pg. 15
- “Michigan, for example, would need to spend approximately \$104,366,050 to meet the state funding per capita spending of a state like Alabama – a state that is generally seen as not providing constitutionally adequate representation. Indeed, the state of Michigan would need to spend \$120,033,400 to match the national average indigent defense cost-per-capita.” pp. 6-7 (citations omitted)

B. 2016: A Survey of the Current Landscape

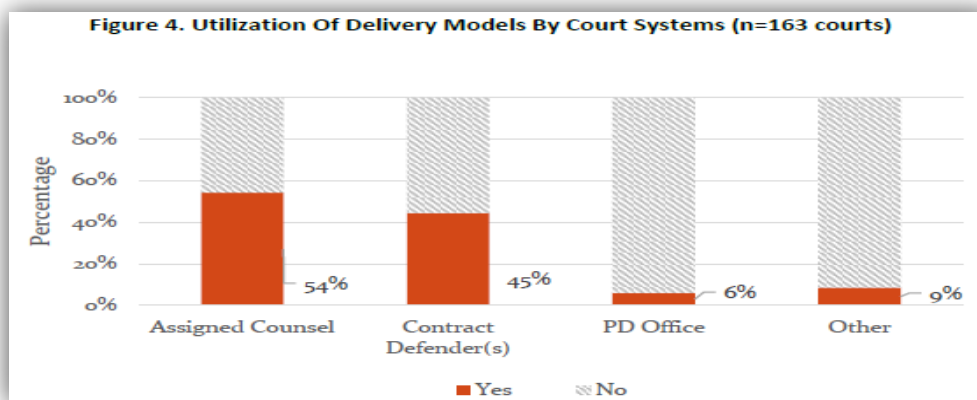
Tragically, many of the critical failings of statewide ID identified by NLADA still exist today. Outside of the creation of MIDC, and two additional public defender offices in Muskegon and Lenawee counties, the majority of crises outlined by the NLADA appear to be unchanged.

In 2016, the MIDC published a report outlining an initial survey of indigent delivery systems across the State.^{xvii} The key findings of the survey show that little

progress has been made since 2008.² First, there is evidence that ID spending in Michigan actually declined since *A Race to the Bottom* was published^{xviii}:



Second, the survey results, which do not include the seventh PD Office, indicate the same four types of ID delivery models dominate in virtually the same percentages, with contract counsel at roughly 45%:



² Based upon the MIDC Michigan Court survey report, and the extensive research necessary to create the IDIP, it appears that none of the 83 counties currently meet two or more of the four conditionally-approved MIDC standards.

Beyond the specific findings regarding per capita spending and delivery systems, MIDC found in 2016:

With no current statewide standards dictating best practices, the survey revealed wide variation in how courts deliver services to indigent defendants. Key findings include:

- Courts employ loose and varied guidelines in determining the eligibility of defendants for appointed counsel services.
- In the majority of courts, defendants whose requests for counsel have been denied have no recourse to further pursue assistance.
- With few exceptions, the vast majority of court systems rely on assigned counsel systems and/or contract defender systems to deliver representation to poor people. As of 2015, only six public defender offices were operational within the state, with a seventh starting operations in 2016.
- There is little consistency in attorney compensation for appointed cases, with hourly rates ranging from \$33 per hour to over \$100 per hour.
- Most appointed counsel systems do not operate independently from the judiciary. According to an informal scale, approximately one-quarter of assigned counsel systems can be considered independent, while 15% of contract defender and 40% of public defender office systems operate independently.
- Only 6% of district courts require attorneys to be present at both the bail hearing and at arraignment, despite the documented importance of legal guidance in these early stages.
- Sixty-three percent of court systems report the existence of confidential meeting space in both their courthouse and holding facility, though attorneys explain anecdotally that “private” meeting rooms are often filled to capacity, difficult to book, or composed of cubicle-type spaces that do not actually allow for confidential discussions.
- Only 15% of indigent defense systems currently report the existence of local guidelines requiring participation in Continuing Legal Education courses.

In combination with future surveys of court systems and attorneys, focus groups, and court observation, the findings from this survey will inform the development of both future standards and the creation of local compliance plans.

1. Michigan Public Defender Offices

There are currently seven PD Offices in Michigan. The majority of the offices are county-based; however, Kent County, in particular, is a non-profit. The following chart will provide a brief sketch of the offices³:

County	Year created	Size of County	Population	# of Attorneys	Avg. # of felony filings 2004-13	PD Budget	Prosecutor Budget
Bay	1973	Medium	107771	3	762	349627.3	
Chippewa	approx. 1996	Small	38520	2	243		
Kent		Big	602622	12	3657	\$1.6 mil. (2015)	\$4.7 mil. (2016 - adopted)
Lenawee	2016	Medium	99892	4	604		
Muskegon	2014	Large	172188	13	1480	\$1.41 mil. (2015)	\$1.92 mil. (2013)
Washtenaw	1971	Big	344791	15	2193	\$2.95 mil. (2017)	\$6 mil. (2017)
Wayne	1968 (criminal)	Big	1.8 mil.		14762		

It is important to note that the chart does not account for the number of actual appointments for each office. The statistics reveal total number of Circuit Court felony filings, which will not include reopened felony files, such as probation violations, and may not include felonies that are pled down to misdemeanors in District Court. Obtaining accurate case load numbers is an impediment to planning, and meaningful reform in Michigan, and nationally.^{xix}

Four of the counties are not appropriate for comparison purposes. Wayne County ID delivery was not studied due to large discrepancies in population and number of court cases. Although I spoke with the Chief Defender's at the Bay, Chippewa, and Lenawee offices, the offices were not further examined partly due to significant discrepancies in number of felony cases.

In 2015, Berrien County ID (FDC, Drug Court Defense, and Niles Defense) handled at least 5,536 total cases. Of the 5,536 cases, 2,573 were felonies and 2,963 were misdemeanors. Indigent Defense attorneys were assigned on 77% of the felony cases for

³ Please note that varying levels of information was available and attainable. The size category of each county is designated by the State Court Administrative Office (SCAO). The options from largest to smallest are: (1) Big, seven counties; (2) Large, which includes Berrien; (3) Medium (Multiple), which can include groups of several counties; (4) Medium; (5) Small (Multiple); and (6) Small. The data was gleaned from several resources including SCAO case statistics, individual county budgets, and interviews with a variety of individuals from the counties.

the County (2,573 of 3,378). From 2013-15, Indigent Defense were assigned on a total of 15,715 cases for an average of 5,238 cases per year. Caseloads, resources, and attorney qualifications are critical considerations for the County.

Despite having PD offices, with staff attorneys, the six offices (excluding Wayne County) appear to have a total support staff of 10.5, and NO staff investigators. For the two most comparable counties, Muskegon and Washtenaw, Muskegon has three support staff and Washtenaw has none. Washtenaw relies heavily on volunteers or temps, and undergraduate and law student interns. Having worked in the Washtenaw County Public Defender's Office, I am extremely familiar with the office, its structure, and how it functions. Muskegon was based on the Washtenaw Office, and appears to be quite similar.^{xx} Despite critical issues with resources, both offices employ full-time dedicated criminal defense attorneys, who are appointed on more than half of the felony cases in the county per year.

Regarding Kent County, the Office of Defender⁴ employs 4.5 support staff employees, but no investigator. The Office handles roughly half of the felony appointments while the private bar handles the other half. The county contracts with individual attorneys, who generally contract to handle forty or less cases per year. In 2015, the Office of Defender was assigned to 2,131.5 new felony cases, which is less than our County. Although Kent County has six District Courts, the Office of Defender represents misdemeanor clients only in one: 63rd District Court. The office employs one FT lawyer for the 63rd District Court, who was assigned 331.5 cases in 2015. In addition to the total number of 2,463 new criminal cases, the Office of Defender handled 920 probation violations in 2015, for a total number of 3,383 criminal cases. Finally, the Office of Defender represented clients in civil Friend of the Court proceedings, which generated income of \$42,733. In conclusion, the Office of Defender maintained an operating budget of \$1.6 million while handling 2,000 less criminal matters than Berrien County ID (2016 criminal budget of \$1.1 million).

⁴ The information regarding Kent County Defender was obtained during a telephone call with their Office Manager.

C. Statewide Trends and Developments Impacting IDIP

Generally, there are some statewide trends worth noting. First, according to MIDC regional consultants, several counties across the State have expressed interest in hiring IDA's to look at their system. In fact, Van Buren County recently hired a Federal Public Defender from Grand Rapids to survey their ID system and make recommendations for the future.^{xxi} Berrien County should be commended for being far ahead of the curve. The County should also take note that other counties are moving ahead without waiting for a final conclusion on the MIDC standards.

The County should also be aware of growing attention and scrutiny being given to ID across the State. The case of Davontae Sanford is the latest example of a failed ID system in our State.^{xxii} Davontae was fourteen years old, and mentally slow, when he was accused of committing a quadruple homicide that he did not commit. Davontae gave a false confession, which did not match the facts of the case. By all accounts, Davontae's court-appointed lawyer pressured him to plead guilty, during the trial, after the lawyer did not even make an opening statement. Davontae served almost nine years in prison before his exoneration. Davontae "was victimized by a legal system in Wayne County that values expediency over justice, and often tolerates – encourages – the inadequate representation of indigent defendants in the name of moving cases through quickly and cleanly."^{xxiii}

VI. OVERVIEW OF ETHICAL STANDARDS

The main ethical considerations for ID delivery systems are the Michigan Rules of Professional Conduct (MRPC), the American Bar Association (ABA) Standards, and Constitutional requirements. Many of these considerations overlap; therefore, I will explain them generally, and address more specific guidelines for ID.

Lawyers practicing in Michigan are bound by the MRPC. Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.6 (Confidentiality of Information), and 1.7-1.10 (conflicts of interest) are common considerations in ID. Further, three of these rules are clearly incorporated within the ABA standards and guidelines specifically addressing ID. Rule 1.1 (Competence) requires a lawyer to be qualified to handle and must adequately prepare their cases. Rule 1.3 (Diligence) states

that “a lawyer shall act with reasonable diligence and promptness in representing a client.” Rule 1.4 (Communication) requires lawyers to promptly notify their clients of developments in their cases and must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” In order to meet these ethical standards, lawyers must be mindful of their caseloads, must be diligent in their work, and must have adequate resources to provide effective representation.

In 1973, the ABA established caseload limits for criminal defense attorneys: 150 felony or 400 misdemeanor cases per lawyer, per year.^{xxiv} Many changes have occurred since those numerical limits were set, including DNA and other forensic evidence, which have led commentators to opine that the numbers should be lower.^{xxv} On May 13, 2006, the ABA issued Formal Opinion 06-441 that addressed the ethical obligations of lawyers and supervisors regarding indigent defense and workloads.^{xxvi} The Opinion centered upon “the obligations of competence, diligence, and communication...”^{xxvii} The Opinion established what a lawyer or supervisor must do if workloads become excessive: (1) not accept new clients; and (2) if necessary, withdraw in existing cases sufficient to bring the caseload to a “manageable level.”^{xxviii} The Opinion also requires supervisors to monitor caseloads and “ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers.”^{xxix}

In August of 2009, the ABA published “Eight Guidelines of Public Defense Related to Excessive Workloads.” The Eight Guidelines incorporate ethical considerations and focus on ensuring that public defenders monitor, supervise, and take action when workloads become excessive. The current contracts state that the attorneys cannot have more than 30 open felony files past preliminary examination; however, this does not provide for adequate monitoring. Given the current structure, it is not possible to properly monitor the contract attorney caseloads. Efforts have been made to gain information about the number of cases lawyers are assigned to; however, this requires full cooperation from all the attorneys, which has not happened. Furthermore, there is no uniform system for maintaining data and the actual files are not centrally located for review. In order to comply with the ABA Eight Guidelines, additional staff would be

required, within ID Administration, to properly track case assignments and outcomes of the actual representation.

In February of 2002, the ABA published “Ten Principles of a Public Defense Delivery System.” The following are a list of the standards and an *answer* as to whether the standard is currently being met in Berrien County:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent. *Mostly, but the attorneys are almost the same that worked the contracts when the Trial Court oversaw them.*
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. *No.*
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. *Yes, notification occurs within 48 hours of appointment.*
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client. *Yes, the attorneys have roughly five to seven days between appointment and the client’s second court appearance to meet and conduct an interview. The ID building has confidential meeting space. The courthouse also has two rooms for client discussions.*
5. Defense counsel’s workload is controlled to permit the rendering of quality representation. *No, there is a limit of no more than 30 felony cases after preliminary examination, but this is not sufficient.*
6. Defense counsel’s ability, training, and experience match the complexity of the case. *Unknown, the previous system of selecting attorneys did not require a qualification survey.*
7. The same attorney continuously represents the client until completion of the case. *Yes.*
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. *No.*
9. Defense counsel is provided with and required to attend continuing legal education. *Slightly, the attorneys are required to attend 1 CLE per year.*
10. Defense counsel is supervised and systemically reviewed for quality and efficiency according to national and locally adopted standards. *No, the current system does not allow for proper supervision.*

The County must take into account ethical standards when deciding the IDIP.^{xxx} The current system lacks structure, oversight, and cohesion. The current system lacks the ability to properly monitor representation. Establishing a Public Defender Office would be extremely helpful in alleviating many of the current deficiencies.

VII. NATIONAL ID DELIVERY SYSTEMS AND MODELS

As part of this IDIP, I have researched and studied national ID delivery systems and models. Most states ID is county-funded or a blend with the county providing the majority of funding.^{xxxi} States generally use one of three (or a mix of) ID delivery systems: (1) public defender offices; (2) assigned counsel programs; and (3) contract attorneys.^{xxxii} The federal system utilizes three ID delivery systems: (1) public defender offices; (2) community defender organizations; and (3) panel attorneys (attorneys on a list who take appointments and are paid by the hour per case).^{xxxiii}

For comparison purposes, I will explain the model public defender office in the United States, the Washington, D.C. Public Defender Service (PDS), and the Canyon County Public Defender in Idaho, which was a county similarly situated to our County that recently transitioned from a contract system to a PD Office. PDS is one of several “holistic defense” models, which also includes the Bronx Public Defender and the Knox County (TN) Public Defender. The model takes into account that clients need more than zealous advocacy in the courtroom. Holistic defense is designed to also help stabilize the client’s life to help reduce recidivism, thereby reducing human and economic costs for the community.^{xxxiv}

In 2016, PDS has an operating budget of just under \$41 million.^{xxxv} In 2015, PDS handled approximately 12,000 legal matters. The office is divided into seven divisions: (1) Trial Division; (2) Appellate Division; (3) Special Litigation; (4) Parole; (5) Mental Health; (6) Civil Legal Services; and (7) Community Defender. PDS employs 157 lawyers and professional staff providing direct client services. Additionally, the office has 32 staff investigators, 15 administrative assistants, 11 social workers, two paralegals, one forensic scientist, one interpreter, and one library technician. The purpose of this information is to provide a look at the best ID delivery system in the country. Further, it

is important to remember that Berrien County ID handled approximately 5,536 total cases, which is just short of half the caseload of PDS.

Canyon County, Idaho, has recently made the transition from contract system to PD Office. Historically, over 80% of Idaho's 44 counties used contract ID delivery systems. In April of 2014, the State legislature passed a law banning the use of contract ID systems and created a seven-person state indigent commission.^{xxxvi} Canyon County, population 207,478, had anticipated the problem and had just transitioned to a PD Office.

In 2009, the Canyon County Criminal Justice Planning Council (CCCJPC) was formed to provide input on projects and issues in the justice community.^{xxxvii} In July of 2012, the Board of Canyon County Commissioners sent a letter to the CCCJPC requesting that they 'explore the means by which the County might transition to an indigent representation delivery system whose framework reflects the *American Bar Association's "Ten Principles of a Public Defense Delivery System."*' The committee had seven members, including judges, who worked in collaboration with the County Clerk, the County Sheriff, defense counsel, and the Prosecutor. On February 26, 2013, the committee published a 49 page report (excluding attachments), which evaluated all possible ID delivery systems, and concluded:

“In summary, it is the recommendation of the committee that this Board establish and maintain an Office of the Public Defender and that such office be created in conformity with the ABA standards. It is recommended that the office be staffed commensurate to the staffing for the Office of the Prosecuting Attorney with 21 attorneys, including the head of the agency, a chief deputy, 19 trial attorneys and 13 support staff positions.”

The Board of Canyon County Commissioners mostly followed the recommendation of the CCCJPC: the Canyon County PD Office opened on October 1, 2014^{xxxviii}. In 2015, the Canyon County PD Office maintained 20 full-time attorneys, 11 support staff, and 3 staff investigators. The office handled 8,154 cases, which included: 5,626 misdemeanors, 1,340 felonies, 617 juvenile delinquency; and 248 civil commitments. The budget for the office was \$3.2 million.

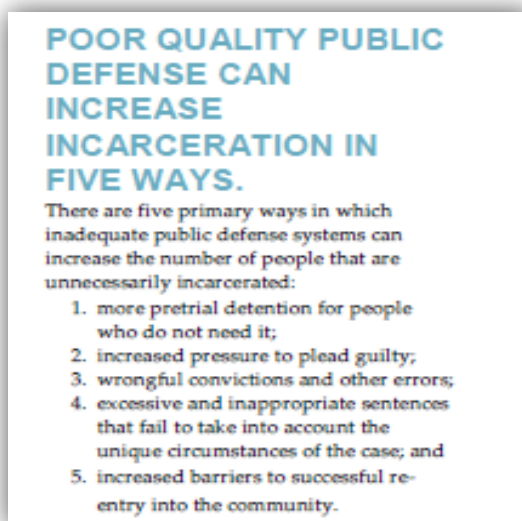
VIII. PUBLIC DEFENDER OFFICE V.S. CONTRACT SYSTEM

The following represent the key advantages of a Public Defender Office:

- Accountability, oversight, and supervision

- Dedicated, full-time, lawyers practicing criminal defense only
- Centralized administration
- Institutional knowledge and sharing of information to better serve clients
- Independence from the courts
- Resources for attorneys, if properly funded
- Continuity in legal practice
- Expectations for lawyers
- The leader and resource for the criminal defense community
- Voice for issues and/or reform in the local criminal justice system
- Community outreach
- Building community confidence in the system
- Reduction in unnecessary pre-trial incarceration
- Reduction in prison commitments

System Overload: The Costs of Under-Resourcing Public Defense, Justice Policy Institute (July 2011), pg. 18:



The most often-cited disadvantage of a PD Office is cost. However, research and data clearly show that the cost on the front end is often negated on the back end as a PD Office can reduce costs by providing quality legal representation.^{xxxix}

On the other hand, the often cited advantage of contract systems is cost and the ability to control costs. However, while the up-front cost may be lower, the back end cost, and the social and economic cost to the community is higher.^{x1} The most commonly cited disadvantages of a contract system are:

- ID is the second priority of the contract
- Maximizing profit is the main priority; therefore, spending the least possible time on ID cases is better for “business”
- Limited staff
- No central office
- High caseloads
- Lack of training
- Lack of oversight and supervision
- Difficult for counties to oversee
- Not properly identifying or resolving conflicts of interest
- Not meeting with clients timely (and a disincentive for more than the minimal number of meetings)
- Disincentive to file motions, investigate cases, and go to trial
- Not full-time work

System Overload: The Costs of Under-Resourcing Public Defense, Justice Policy Institute (July 2011), pg. 17:

Overburdened, underfunded, inefficient and inadequate public defense systems lead to more incarceration, in the form of unnecessary pretrial detention, excessive sentences and wrongful convictions.

IX. GENERAL CONCLUSIONS

The following is a list of general conclusions from the methods, data, and research contained and referenced within this Proposal:

- Michigan ID is severely underfunded
- There is a lack of consistency, and quality, of ID statewide

- It is unclear whether the State will provide funding to the counties
- The County has constitutional and ethical obligations to provide legally adequate ID
- Berrien County ID currently does not meet any of the MIDC conditionally approved standards, nor the two anticipated future proposed standards
- Contract systems are disfavored for many reasons
- Contract systems tend to fail in providing proper oversight, supervision, and accountability
- Contract systems are notorious for providing a financial disincentive to work hard
- Contract systems inherently encourage expediency at the sake of justice
- Contract systems of loosely affiliated individuals lack cohesion, leadership, and organization
- Contract systems fuel public perception that ID lawyers are working against the client, not for them, which undermines the administration of justice
- Contract systems can violate ethical standards
- Berrien County does not have enough qualified attorneys to effectively administer an assigned counsel delivery system given the high caseloads
- Criminal defense is a specialty, similar to the medical field, which requires specialized representation
- There is a lack of sufficient statewide and national data, which hinders the implementation of ID delivery systems
- The functionality of a criminal justice system relies upon all participants to do their respective jobs well

In 2016, the ABA published “A Report on the Future of Legal Services in the United States.” The ABA made several findings, but one in particular resonates with ID: “The criminal justice system is over-whelmed by mass incarceration and over-criminalization coupled with inadequate resources.”^{xli} The report further stated:

“Providing competent counsel is the best means of ensuring the proper operation of the constitutional safeguards designed to protect the innocent from unfair punishment including death. For most poor criminal defendants, ‘who are disproportionately members of communities of color,’ the only access to legal representation is through the public defender system and, where ‘public defender services are inadequate, the accused poor will likely be deprived of constitutional procedural protections.’”

Approximately one year ago, the Chief Judge of the Berrien County Trial Court

advocated for a Public Defender Office. I have conducted an independent survey of the ID delivery system, considering state and national resources, guidelines, and trends, and I wholeheartedly reach the same conclusion.

X. BERRIEN COUNTY IDIP FOR 2017 AND BEYOND

The most important consideration should be to provide the best possible representation for some of the most vulnerable people in our community. Critical consideration must be given to ABA guidelines, Rules of Professional Conduct, MIDC standards, and statewide and national models for indigent defense delivery systems, which include the concepts of: comparable resources to the prosecutor; manageable caseloads; and reasonable compensation.

A. Comparable Resources with the Prosecutor

“The defense receives less funding than the prosecution in many jurisdictions, leading to significant inequalities in resources and services to defend people who stand accused. The importance of parity in funding, salary, resources and workload has been articulated in national standards, by the Department of Justice, the Supreme Court and other experts. However, funding for public defense often fails to keep pace with that provided for prosecution.”^{xliii}

Understandably, the County will consider the Prosecutor’s budget and staffing. In 2015, the Prosecutor’s Office had a budget of \$2,666,835.00 and 37.5 positions (including 19 FT lawyers). Additionally, the Prosecutor has multiple police agencies in the County to operate as their “investigators.” A fair estimate is at least 100 patrol officers throughout the County. Currently, ID has no staff investigator at all.

In 2011, in the North Carolina legislature, a debate regarding funding comparisons for prosecutors and indigent criminal defense occurred. Based solely on the state budget numbers, Indigent Criminal Defenses’ \$90.6 million budget far exceeded the District Attorney budget for Indigent Criminal Cases, \$55 million. The North Carolina Office of Indigent Defense Services wrote the following to illustrate that the funding agency must look beyond the budget numbers^{xliiii}:

During that presentation, representatives of the Conference stated that the prosecution is “outspent and outfunded every day in court,” and urged Legislators to “compare apples to apples” when looking at the budgets for the prosecution and defense functions. Based on that comparison, the DAs urged Legislators to reduce IDS’ budget, rather than the budgets for prosecutors and the courts.

The IDS Commission and Office support adequate funding for the entire criminal justice system, including the courts themselves, the prosecution, and the defense. However, the DAs’ comparison of their budget to the IDS budget is inappropriate and misleading, and it does not compare apples to apples.

A more accurate comparison of DA and indigent defense resources is shown in the following chart:

Budget Comparison 2009-2010	
<u>District Attorneys:</u>	<u>Indigent Criminal Defense:</u>
* DA Budget for Indigent Criminal Cases: \$55M	* Appropriation for Indigent Criminal Cases: \$90.6M
* Additional SBI Resources: \$30M	* Budgeted Recoupment Receipts: \$12M
* Additional Police Resources: \$200M	
* Additional Unquantifiable Resources (e.g., local crime labs, State Highway Patrol)	
Total Resources: More than \$285 million	Total Resources: \$102.6 million

The debate in the North Carolina legislature illustrates a critical issue that is often not discussed: the Prosecutor’s resources go far beyond what is delineated in their specific budget. The Prosecutor also receives the benefit of a fully-funded, first on the scene, investigative force. Further, the prosecution has a fully-state funded forensic expert staff at the Michigan State Police Crime Lab.

I illustrate this to explain why the ID budget should be more than the Prosecutor’s, not less. Right now, the Prosecutor’s budget is 2.5 times the ID budget. The N.C. Office of Indigent Defense Services report provides a conclusion that is illustrative of this discrepancy:

“The North Carolina criminal court system impacts this state’s citizens to an extraordinary degree. In FY09, 1.03 million individuals (or 11% of the state’s population) had matters before the criminal courts. The citizens of North Carolina depend on a fair and just criminal justice system to keep our communities safe and to serve victims without violating defendants’ rights or convicting the innocent. Well-functioning and appropriately funded prosecution and defense systems are both

integral to maintaining a court system that will best serve all North Carolinians.”

The same logic, and possibly statistical proportion, should apply to Berrien County.

B. Manageable Caseloads

In 2015, Indigent Defense (FDC, Drug Court Defense, and Niles Defense) handled approximately 5,536 total cases. Of the 5,536 cases, 2,573 were felonies and 2,963 were misdemeanors. Indigent Defense attorneys were assigned on 77% of the felony cases for the County (2,573 of 3,378). From 2013-15, Indigent Defense were assigned on a total of 15,715 cases for an average of 5,238 cases per year. Caseloads, resources, and attorney qualifications are critical considerations for the County.^{xliv}

In 2013, a collaborative effort of the ABA, RubinBrown (“one of the nation’s leading accounting and professional consulting firms”), and the Missouri State Public Defender (MSPD), conducted a 25-week workload study called “The Missouri Project.”^{xlv} Based upon ABA standards and principles, and ethics, the purpose of the Project was “to develop data-supported workload standards.”^{xlvi} The Project reached the “Concluded Workload Standards by Case Type and Case Task Group,” which established the expected hours per case ID lawyers should work based upon professional standards^{xlvii}:

	Client Communication	Discovery / Investigation	Case Preparation	Total Hours
Homicide	34.6	33.5	38.5	106.6
AB Felony	13.1	18.3	16.2	47.6
CD Felony	6.3	8.4	10.3	25
Sex Felony	22.5	17.8	23.6	63.8
Misdemeanor	3.5	4.1	4.1	11.7
Juvenile	5.4	6.8	7.3	19.5
Appellate/PCR	20.3	31.5	44.7	96.5
Probation Violation	2.9	2.6	4.2	9.8

Given the current case statistics, the County would need 17 full-time attorneys to handle the ID felony cases and 7.5 full-time attorneys to handle ID misdemeanors to comply with the 1973 ABA standards without consideration of the Missouri Project

findings. Currently, there are only fifteen lawyers on the criminal contracts, and only eleven of them actually appear on ID cases. Furthermore, there are only a handful of private attorneys in Berrien County that specialize in criminal defense, and it is unclear how many, if any, would be willing to assist with ID. In conclusion, far and away the best way to provide quality representation for ID clients in Berrien County is the establishment of a Public Defender Office because of full-time, dedicated criminal defense attorneys, who will be trained, supervised, and resourced.

C. The Four Possible Options

Given the current status of the contracts and their performance, I believe a Public Defender's Office is the best of few viable options. The County has four possible options to consider in moving forward with Indigent Defense:

OPTION 1: Contract System: the status quo with additions:

- a. FT Indigent Defense Administrator with a salary comparable to the Prosecuting Attorney;
- b. FT administrative assistant;
- c. Replace the expert/private investigator budget of \$79,900.00 with a pool of \$60,000.00 for expert fees, and hire one PT investigator for 20 hours/week, \$35 per hour, for a total of \$35,000.00 per year;
- d. Increase the contract total by \$60,000.00 to require the contract attorneys to cover in-custody, and out-of-custody, arraignments; and,
- e. Provide WestLaw, which has been priced at \$590.00 per month for 7 attorneys and \$787 per month for 14 attorneys.

I STRONGLY RECOMMEND AGAINST THIS OPTION. I feel obligated to provide it; however, I cannot and would not support it for a host of reasons.

OPTION 2: Hybrid System⁵:

- a. FT Chief Public Defender with a salary comparable to the Prosecuting Attorney;
- b. 5 FT attorneys (primarily St. Joseph felonies and drug court)⁶
 1. 1 Chief Assistant Public Defender (APA Chief Trial, range of \$74,584.00 – \$99,950.00), who will also provide additional supervision
 2. 4 Assistant Public Defenders (APA II and/or III level, range of \$56,036 - \$75,094 and \$67,804 - \$90,864, respectively)
- c. 1 FT attorney for in-custody Arraignments, and legal research, writing, and trial support, only (APA I, **\$50,943** - \$68,268);
- d. 2 FT administrative assistant(s);
- e. Replace the expert/private investigator budget of \$79,900.00 with a pool of \$60,000.00 for expert fees, and hire one PT investigator for 20 hours/week, \$35 per hour, for a total of \$35,000.00 per year;
- f. Contact(s) for St. Joseph misdemeanors, some low felonies, and other matters (range of \$160,000 - \$240,000);
- g. Contract(s) for Niles felonies and misdemeanors (range of \$150,000 - \$200,000);
- h. Provide WestLaw, which has been priced at \$590.00 per month for 7 attorneys and \$787 per month for 14 attorneys; and,
- i. Rough estimate of \$200,000 for conflict and “overflow” counsel (list of private attorneys paid an hourly rate: \$50 – \$70 per hour for misdemeanors; \$70 - \$100 for felonies; and \$100 - \$125 per hour for capital felonies [i.e., homicide and CSC – 1st degree]).

Note: This option will require purchasing of additional computers, office equipment, and may require design changes to ID Office Building, unless the upstairs loft area is zoned for individual office space (open floor layout/some cubicle type walls to reduce desk noise)

This option provides a minimal upgrade from the current system. The option adds oversight and supervision. This should be seen as a transitional model with the expectation that the Hybrid PD Office can create a foundation and allow time to research and plan for a complete Public Defender Office starting in 2018, or earlier.

⁵ This option is similar to “Option 4 – Interim” from the August 27, 2015 Berrien County Indigent Defense System presentation.

⁶ The current FDC and Drug Court contracts are \$499,800 and \$122,400 = \$622,200. This includes St. Joseph misdemeanor representation, and probation violations and show causes. Accurate numbers for appointments are difficult to acquire because the contacts currently handle conflicts internally (which clearly reduces the number of reported conflicts outside of co-defendant cases), and appointments include probation violations and other matters. The best annual estimate for appointments are: FDC (1703 felonies, 2385 misdemeanors); Drug Court Defense (508 felonies, 12 misdemeanors); and Niles Defense (362 felonies, 566 misdemeanors). ABA guidelines, from 1973, dictate that attorneys should not handle more than 150 felonies or 400 misdemeanors per year.

OPTION 3: Public Defender Office⁷:

- a. FT Chief Public Defender with a salary comparable to the Prosecuting Attorney;
- b. 16 FT attorneys:
 1. 2 Chief Assistant Public Defenders (APA Chief Trial, range of \$74,584.00 – \$99,950.00), who will also provide additional supervision
 2. 8 Assistant Public Defenders (APA II and/or III level, range of \$56,036 - \$75,094 and \$67,804 - \$90,864, respectively)
 3. 5 Asst. PD's for all misdemeanors, show causes, out-of-custody arraignments, (APA I, \$50,943 - \$68,268);
 4. 1 Asst. PD for in-custody Arraignments, and legal research, writing, and trial support, only (APA I, **\$50,943** - \$68,268);
- c. 3 FT administrative assistants;
- d. 1 FT paralegal⁸;
- e. 3 FT investigator(s)⁹;
- f. 2 FT social workers;
- g. \$75,000 - \$100,000 budget for expert fees;
- h. Provide WestLaw, which has been priced at \$590.00 per month for 7 attorneys and \$787 per month for 14 attorneys; and,
- i. Rough estimate of \$200,000 for conflict and “overflow” counsel (list of private attorneys paid an hourly rate: \$50 – \$70 per hour for misdemeanors; \$70 - \$100 for felonies; and \$100 - \$125 per hour for capital felonies [i.e., homicide and CSC- 1st degree]).

Note: This option will require purchasing of additional computers, office equipment, and may require design changes to ID Office Building, unless the upstairs loft area is zoned for individual office space (open floor layout/some cubicle type walls to reduce desk noise). This will also require using existing, vacant office space at the Niles Courthouse.

This option is similar to the Muskegon and Washtenaw Public Defender Offices with additional, minimally required resources. Please understand that this option would need additional resources going forward, but it would provide an adequate starting point.

⁷ Similar to “Option 4A” from the August 27, 2015 Berrien County Indigent Defense System presentation.

⁸ Paralegals can assist with legal research, writing, and trial support.

⁹ With a PD office, an investigator will be utilized for multiple investigative tasks including client and witness interviews, serving subpoenas, trial testimony etc.

OPTION 4: Model Public Defender Office¹⁰;

- a. FT Chief Public Defender with a salary comparable to the Prosecuting Attorney;
- b. 23 FT attorneys:
 1. 3 Chief Assistant Public Defenders (APA Chief Trial, range of \$74,584.00 – \$99,950.00), who will also provide additional supervision
 2. 12 Assistant Public Defenders (APA II and/or III level, range of \$56,036 - \$75,094 and \$67,804 - \$90,864, respectively)
 3. 6 Assistant Public Defender’s for all misdemeanors, show causes, out-of-custody arraignments, and support on felonies (APA I, \$50,943 - \$68,268);
 4. 1 Asst. PD for in-custody Arraignments, and legal research, writing, and trial support, only (APA I, **\$50,943** - \$68,268);
- c. 4 FT administrative assistants;
- d. 1 FT paralegal;
- e. 4 FT investigator(s);
- f. 3 FT social workers¹¹;
- g. \$100,000 budget for expert fees;
- h. Provide WestLaw, which has been priced at \$590.00 per month for 7 attorneys and \$787 per month for 14 attorneys; and,
- i. Rough estimate of \$100,000 - \$150,000 for conflict counsel (list of private attorneys paid an hourly rate: \$50 – \$70 per hour for misdemeanors; \$70 - \$100 for felonies; and \$100 - \$125 per hour for capital felonies [i.e., homicide and CSC- 1st degree]).

This option would meet ABA, national, and ethical standards. It is based upon “Holistic” Public Defender Offices in the country, including the Public Defender Service for the District of Columbia (PDS), the Bronx Public Defender, and the Knox County (TN) Public Defender. Of all the options, this is the only one that would put Indigent Defense on comparable footing with the Prosecutor’s Office. Finally, this option would be the model PD Office for the State of Michigan and would provide our community with high quality indigent representation.

After consideration of all options, including budgetary constraints, I strongly recommend Option 3. In relation to the four options, I recommend Option 3 in order to

¹⁰ Similar to “Option 4A” from the August 27, 2015 Berrien County Indigent Defense System presentation.

¹¹ Several well-respected PD offices employ social workers to help clients in several ways: to help incarcerated clients address their community needs; bridge the gap for those in need of mental health services both in and out of custody; employment; educational needs; custodial/child support needs; and to provide social histories for sentencing and plea negotiations.

create infrastructure and oversight that will allow the County to move toward a “holistic” public defender once more information and data can be established.

ⁱ Michigan Indigent Defense Commission Act, MCL 780.981 *et seq.*

ⁱⁱ Administrative Order No. 2016-2, Michigan Supreme Court, Regulations Governing a System for Appointment of Counsel for Indigent Defendants in Criminal Cases and Minimum Standards for Indigent Criminal Defense Services, (June 1, 2016)

ⁱⁱⁱ Administrative Order No. 2016-2, *supra ii*, pg. 7.

^{iv} Administrative Order No. 2016-2, *supra ii*, pg. 1.

^v Administrative Order No. 2016-2, *supra ii*, pg. 2.

^{vi} MIDC, *Position Paper on Attorney Fees after the Passage of the MIDC Act* (Summer 2016).

^{vii} MCL 780.983(b), *supra i*.

^{viii} MCL 780.991(2)(b), *supra i*.

^{ix} National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standard 13.12.

^x American Bar Association, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, May 13, 2006.

^{xi} Missouri State Public Defender Commission, *Caseload Crisis Protocol*, Adopted: November 2, 2007; As amended: April 30, 2010. *System Overload: The Costs of Under-Resourcing Public Defense*, Justice Policy Institute (July 2011). RubinBrown, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards*, On Behalf of the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants (June 2014).

^{xii} Henry Gass, *The Christian Science Monitor*, *Why embattled public defenders ‘welcome’ lawsuits against them*, January 21, 2016, <http://m.csmonitor.com/USA/Justice/2016/0121/Why-embattled-public-defenders-welcome-lawsuits-against-them> (highlighting the lawsuit against the New Orleans PD, and mentioning similar law suits in New York, Florida, Missouri, Connecticut, and Pennsylvania).

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^{xxv} See *supra* note xi.

^{xxvi} American Bar Association, Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation*, May 13, 2006.

^{xxvii} ABA Op 06-441, pg. 9, *supra* note xxvi.

^{xxviii} ABA Op 06-441, pg. 9, *supra* note xxvi.

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