COUNTY OF ST. CLAIR

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Michigan Indigent Defense Commission
200 North Washington Sq.
Lansing MI 48913

Re: Public Comment Proposed Indigency Standard

To begin, I'm grateful for the noble work of the commission. For nearly 30 years, I practiced criminal defense and observed firsthand the shortcomings in a system where defense counsel rarely if ever had a "seat at the table". In the past several years, there have been notable changes that will benefit the indigent and undoubtedly transform the delivery of criminal defense. I'm mindful however that Rome was not built in a day and it seems clear that course corrections and refinements to our services will be required in the days, months and years ahead. We must start somewhere, the Commission has done precisely that and while I appreciate the work done to date, I submit the following comment as to the Proposed Standard on Indigency:

Judicial Review of Appointment Decision

In my humble opinion, the proposed ***Judicial Review*** Process is fraught with potential problems. In the proposed standard, it is suggested that the Judge assigned the case be the final arbiter of whether counsel is appointed.

Our position is that Judges (many of them former prosecutors) though they may possess extensive trial experience, lack appreciation for the subtleties of defending a case. Moreover, those Judges have a limited understanding of local private counsel rates. Even in those cases where the Judge operated a defense practice, any appreciable time on the bench- and away from private practice likely impairs that jurist's ability to make a reasonable assessment about prevailing market retainers for private counsel.

To compound matters, all members of the bench share a common trait inasmuch as they want their dockets to move swiftly. For that reason they tend to prefer that all Defendant's appear in court with counsel if only to expedite their dockets inasmuch as a Pro Per Defendant delays many courtroom proceedings.

It is my concern that for those reasons, Judge's will simply err on the side of appointing attorneys.

In the past, rightfully or wrongly, there existed a bulwark against the wholesale appointment of indigent counsel. Judge's, elected by taxpayers of a County and thus mindful of limitations on County/Funding Unit Finances, would scrutinize applications and in many instances deny such appointments-justifying their decisions on the grounds of fiscal restraint.

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In the systems where I've served as Public Defender, I've witnessed firsthand, a paradigm shift where local courts seem to take for granted the fact that almost unlimited State resources exist for indigent defense. In my current system, Courts have abandoned attempts to assess attorney fees any longer as they assume that all funding for indigent counsel is being provided thanks to the largesse of State taxpayer dollars.

Such an approach will almost certainly inure to the detriment of those most deserving of the appointment of indigent counsel, while providing counsel to some Defendants who might otherwise have resources to retain members of the private bar.

Finally, I believe that such a provision conflicts with the spirit of Proposed Standard 5. The pertinent statute plainly states:

"*The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.*" *MCL 780.991 (1)(a).*

Standard 5 provides in part:

The indigent criminal defense system ("the system") should be designed to guarantee the integrity of the relationship between lawyer and client. The system and the lawyers serving under it should be free from political and undue budgetary influence. Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution. The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary.

It appears that under section B. of the proposed Standard 5, the language contained in same conflicts with the underlined language above as it provides as follows:

B. *The court's role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; and, if deemed eligible for counsel and absent a valid waiver, referring the defendant to the appropriate agency.*

When the Commission considers Standard 5, we will object to the adoption of subsection B of the Standard for the reasons set forth herein as we believe "*independence*" means precisely that.

The statute provides that a trial court ***may*** play a role in determinations of indigency. The final sentence of subsection (3) acknowledges that a court has the ability to make a determination of indigency consistent with Article VI of the State Constitution, however, we urge the commission "build" a mechanism to insure independence from the Judiciary to whatever extent practical.

The Court's before whom we appear should not be permitted to make decisions that impact the budget of a Public Defender or Managed Assigned Counsel system. The standard reflects the fact that a Court can't mandate that retained counsel accept a case (invariably impacting the private attorney's budget) and thus should not make comparable decisions regarding indigent defense system's budget. The proposed Judicial Review provisions would do exactly that.

If there is to be independence from the Judiciary, now or at any time in the future, this is a prime example of a circumstance where the Public Defender or Assigned Counsel Administrator should make these decisions.

At present, our appeal process occurs when our compliance analyst reviews the form. If an assessment is made by the analyst that the Defendant is not indigent, the form setting forth income and expenses is presented to the Chief Public Defender or the Chief Assistant Public Defender who makes a final determination.

It is important to note here that rejection of cases based on the information we screen is rare.

In fact, the number of cases rejected thus far of all the applications submitted to this office are so few as to be statistically insignificant.

The philosophy that this system (and I'll presume other systems) adopts is that where there is a close call, an attorney should be appointed.

Income/Asset Review and Qualifying Clients and the Potential Strain on Finite Resources

The indigency standard further raises questions regarding confirmation of client finances, asset value and the like. At arraignment, the client won't have documentation to confirm bank account value, they won't be in a position to provide deeds to real property, State Equalized Value Statements, or paystubs or tax information to provide confirmation as to income or value or ownership interest in real estate, bank accounts or other assets.

In those instances that analysis will have to occur at some later date.

At the moment, our process at arraignment requires that our attorneys complete a detailed form.

In July 2020, we began to conduct a time study with our staff attorneys to better assess the time resources expended with each arraignment.

The completion of the form, interview of the client regarding pending charges, reviewing the advice of rights form with the client and conducting the actual hearing is averaging 29.07 minutes per arraignment. The initial income/expense /asset screening process is a tool we utilize in order to make an expeditious assessment as to whether the client meets minimum requirements to qualify for our services.

As we are required to conduct a more formalized "audit" of the client's finances, the manpower and resources required to conduct this screening will undoubtedly increase substantially. Representing persons who lack resources to retain counsel is an honor and privilege. However, fewer of those persons who demonstrably require our help will receive that assistance if our resources are further depleted if we are required to demand the client produce those critical financial documents. Moreover, we will be unable to make a final determination as to whether appointment of indigent counsel is appropriate unless and until the client produces supporting data as to income, expenses and assets. Again, a situation that will inure to the detriment of the client.

In our system, we do the appointments for both the Public Defender's office and for roster attorney's that take our overflow and conflict work. In many instances a case can

be arraigned one week and the client is due in Court the following week for a Probable Cause Conference (PCC).

Time is of the essence in making an appointment.

It's noteworthy to observe here that pursuant to Court Rule, the Prosecution may, in some cases proceed to Preliminary Examination at the PCC. If the client is dilatory in producing supporting income documentation, and Public Defenders or Managed Assigned Counsel Administrators are unable (based on that delay) to make an appointment, assign an attorney, give said attorney time to meet with the client, the result seems obvious. The client faces a very real risk of appearing at a critical stage in the proceedings without representation. Thus creating a circumstance that will frustrate Judge's, many of whom are dubious about the change in the delivery of indigent services.

If, on the other hand, we appoint an attorney without scrutinizing the income of a Defendant who possessed resources to retain an attorney, we do harm to those we are intended to serve. Either by depleting resources intended for the truly indigent, or spreading staff counsel too thin to the point that quality representation is sacrificed. Of course, once we've filed an appearance, we can't back out at that point.

Our position is that significant refinements need to be considered as to the examination of income, expenses, assets for purposes of assessing whether the appointment of counsel is appropriate.

Instead, the office should either appoint a screening analyst to implement procedures designed to take the proposed standards into consideration for purposes of appointing counsel.

In the event that there's a rejection and it's appealed, the Office can designate a person or persons to consider the appeal and make the final determination quickly, cost effectively and without the need to schedule a hearing before the Court.

Reimbursement Issues

As with income review issues, reimbursement poses a host of potential problems that will require refinement.

As indicated herein, Courts aren't making any effort to collect costs from Defendants with the advent of State Funding. For Courts to make assessments at the conclusion of criminal litigation will require another assessment inasmuch as such litigation can take many months before resolution.

The proposed standard discusses a proposal by the funding unit as to what a Defendant could reasonably afford to pay. This would appear to require yet another financial assessment based on the clients financial circumstances at the time of case resolution. Such an assessment will require the dedication of Public Defender office time and resources.

To further compound those perceived difficulties, the reimbursement provisions would suggest that the amount or timing of repayment should be adjusted "as necessary" to avoid "substantial financial hardship" to the Defendant.

Based on the proposed standard, it is conceivable that periodic adjustments could be required over a five year period on felonies and a two year period for misdemeanors.

Certainly such a proposal, assuring that payments to our clients remain manageable over the term of the repayment period, is a noble one. Nonetheless, it will require substantial resources to field inquiries from clients seeking to reduce said payments, review by additional staff (will an internal finance department be required) and time expended by staff attorneys drafting motions to modify those repayment terms.

It is my sincerest hope that these observations are received in the spirit in which they were intended, that is, to assure representation to those in need while conserving resources for the defenders in all funding units.

Kind Regards

/s/ Michael G. Boucher

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