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TO: Senate Committee on Judiciary
House Committee on Judiciary
Oakland County Legislators
Michigan Association of Counties
Oakland County Board of Commissioners

FROM: Robert J. Daddow
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SUBJECT: HB-5804 (H-2): Continued Fundamental Flaws of the Michigan Indigent Defense Commission

DATE: October 8, 2012

The Oakland County Administration has reviewed House Bill No. 5804, H-2 ("Substitute H-2") calling for the establishment of the Michigan Indigent Defense Commission (MIDC). The Substitute H-2 was passed by the House Committee on Judiciary. The County Administration had previously provided an analysis of the original bill dated September 19, 2012 that found that the original Bill, as drafted, had serious, fundamental flaws. The September 19, 2012 correspondence discussed the major flaws in HB-5804 and identified other lesser concerns, as well.

Even as the original bill was being "fast-tracked" to secure a full House vote the Oakland County Board of Commissioners, through a suspension of the Board rules the night before the full House was to take up HB-5804, took a formal, bi-partisan and unanimous opposition to the original HB-5804. The Board of Commissioners rarely takes up formal positions on Legislative bills without first going through the committee process, but because of the severity of the flaws in HB-5804, the Board was compelled to act.

Despite having been repeatedly assured by Rep. Thomas McMillin that the new, Substitute H-2 has resolved all of the issues cited in the September 19, 2012 correspondence, many of the "corrections" have actually worsened the situation. An analysis of the Substitute H-2 as passed by the House Committee on Judiciary and under consideration by the Senate is incorporated within this correspondence. This Oakland County Administration correspondence also suggested an alternative proposal by which the underlying purpose of the bill can be enabled, if the State sees that the goals are that important to secure.

Absent satisfactory resolution of the concerns identified as described herein, the Oakland County Administration cannot support passage of Substitute H-2.

Oakland County supports the goals of improving defense services to the indigent in order to ensure fair and consistent legal representation. However, it is the Administration's opinion that HB-5804- H2 as drafted creates more problems, at a great cost, than it fixes. Accordingly, the County Administration has proposed an alternative course of action to achieve the goals set forth by the State Legislature in the

creation of the Michigan Indigent Defense Commission and concurrently, provided the flaws in the Substitute H-2 bill within this correspondence.

ALTERNATIVE APPROACH TO SATISFY STATE GOALS

The Oakland County Administration has proposed a framework to satisfy the goals of the Indigent Defense Advisory Commission in the report dated June 22, 2012. This alternative framework addresses most, if not all, programmatic, budgetary and other conflicting constitutional issues facing the implementation of the Substitute H-2.

As drafted, Substitute H-2 places all of the financial and operating risks upon local courts and funding units as the Michigan Indigent Defense Commission (MIDC) has yet to be formed and the operating standards to be imposed on local courts created. These financial and operating risks can be mitigated by simply changing the approach presently recommended. In point of fact, much of these risks have been incorporated in Substitute H-2 (albeit *only* as an intention to appropriate, which has its own concerns to local units as discussed hereinafter) as follows:

Substitute H-2, Sec. 13 (2). "If additional funding is necessary in order to bring a local unit of government's delivery of criminal trial defense services into compliance with the standards established by the MIDC, that additional funding shall be paid by this state. The legislature shall appropriate the additional funds necessary to a local unit of government to allow that local unit of government to meet the demonstrated and quantified requirements of a local unit of government to meet those standards."

This section of Substitute H-2 seems to have arisen from Recommendation #10 from the Indigent Defense Advisory Commission, but leaves out critical financial recommendations in the proposed Substitute H-2 bill. In point of fact, the Commission's recommendation states:

Recommendation #10. "Since indigent defense is a **state obligation**, justice system funding is a shared responsibility for the State and local government, and the current trial level indigent defense is 100% locally funded, **any new funding requirements should be fulfilled by the state.**" Emphasis Added.

The Indigent Defense Advisory Commission is instructive as to the recommended financial goals for the cost increases paid for indigent defense. Page 6 of the Commission's report cites that an additional \$50 million would be required to be incurred in order that Michigan then incurs the national per capita average on indigent defense. Why is it that the 'per capita' amount spent is the all-inclusive metric that the State must adhere to, rather than the *cost per crime for indigent defense, clearly a more representative denominator?*

Since the crime and indigent defense needs are largely constant, infusing an additional \$50 million into the system will accomplish only one thing: raising rates on services currently provided. While certainly, the some currently deficient defense services could be improved it is more likely that it will result in rate increases for services performed. It should be noted that the Commission's report fails to provide any metrics in support of their recommendations even as they call for future metrics that could drive an additional \$50 million into the indigent defense system. Perhaps, the supporters of Substitute H-2 would consider limiting caps on defense attorney fees as a good faith effort towards the passage of this legislation?

The Oakland County Administration supports the Legislative intentions to fund the improvements and additional requirements in the State's court system, but has significant concerns about whether the appropriation will actually be made and at a level necessary to ensure that the goals set by the Indigent Defense Advisory Commission. The Substitute H-2 sets forth financial, budgetary and operating risks upon local units of government as currently drafted, yet through the above paragraph provides an avenue to resolve this matter.

The above State Legislative assertion of accepting the responsibility for enhancing this service is critical to the solution of most of the fundamental flaws cited subsequently in this correspondence. Instead of the existing funding formula identified in HB-5804 and revised in Substitute H-2, a simpler solution is in the offing: *the local funding units will pay the State the average of the last three years indigent defense costs (such information is included on the Supreme Court's website), adjusted for inflation going forward,* and all other risks and budgetary costs are solely borne by the State to ensure that its constitutionally-created court system meets the standards it has yet to develop.

The above approach has the following advantages:

- The risk to local funding unit of governments' of the State *failing to fund* standards and operations that the Michigan Indigent Defense Advisory Commission imposes is virtually eliminated. This alternative approach results in the State assuming the responsibility of funding the improvement to the indigent defense system, an obligation that Substitute H-2 indicates the State it has the intention to fund anyway. Not only would the State be directly fulfilling the commitment to fund, the failure to do so (e.g. accountability) would rest with the State, not the local units.

The proposed funding structure is not unlike that which the Legislature crafted for community mental health authorities. Upon the launch of these authorities, counties have the fixed financial responsibility of funding future services at the level of the average of the prior year's services. In doing so, the success of this funding approach enabled the community mental health authorities to have more latitude in providing services to the public. The same funding framework would do so for indigent defense as well.

Finally, the offensive language relating to self-help could then be removed as the dollar amounts involved are already appropriated at a level that is included in the local unit of governments' budgets. The nominal risk of the local unit of government not then paying the State for the current funding level of indigent defense is minimal.

- The local units of government would have certainty in the funding of its indigent defense system based on historical funding levels. Presently under Substitute H-2, the standards have yet to be developed and even as there may be an *intention* to fund and a provision that *might* permit the existing levels of funding to be appropriate, there is no certainty in these fiscally-troubled times.
- As described subsequently, the audit function simply will not work, is too costly an approach and will ensure that the goals of the Indigent Defense Advisory Commission will be inconsistently administered. As a former audit partner in a "Big 8" accounting firm, inspecting quality of services after the fact (against standards yet to be created) with the notion that the services will improve is nigh on impossible. It is better to restructure the service delivery system

ensuring that the quality of services is provided with or without an audit. The Substitute H-2 fails on all accounts: it is a labor-intensive, costly approach and an administrative nightmare. With several hundred courts in the state, one must ask, is it reasonable to expect, even with after-the-fact auditing, that a consistent indigent defense service could be provided by all courts scattered in the size of a state like Michigan? Unlikely.

- With the changes in the funding approach comes opportunity to minimize the financial impact on local units of government and State as well. If the State has the financial responsibility for this program (at levels above existing local expenditures), the State then can assume the operating responsibilities for the program, including those relating to functions such as: assessing the qualifications and training levels of the defense attorneys centrally, providing lists of qualified attorneys to the courts to be used in the defense system, and allows for a singular, consistent payment structure to be developed. Centrally controlling those factors at the State level that go into points of failure, should they exist, is a much more effective solution than the one proposed through Substitute H-2.
- Further, given that the introduction of this legislation essentially asserts that there is a substantial failing in current indigent defense services offered to defendants today, one must ask where are the provisions in Substitute H-2 to initiate actions against attorneys who have failed their professional standards to represent their clients. Shouldn't the next version of the bill incorporate a section that requires the defense attorney to face disciplinary actions when a criminal case is reversed by a court on a finding of ineffective assistance of counsel? Presently, there are no penalties on the defense attorneys in this bill for their failures to perform up to their professional standards; yet, there are penalties on local units of government when the attorneys fail to perform, albeit in the substantial expansion of the costs imposed via Substitute H-2 on these very local units of government.

The above alternative framework in satisfying the goals of the Indigent Defense Advisory Commission is a more creative, lower cost solution than the discord that will be created once the State has imposed the structure model offered in Substitute H-2. It satisfies all of the fundamental flaws in Substitute H-2 and goes a long way in solving many of the lesser flaws as well.

FLAWS OF SUBSTITUTE H-2

After reviewing the Substitute H-2 and related changes to the original bill incorporated into this version, **Oakland County continues to oppose** this bill as *currently* drafted. With as many fundamental flaws as were cited in the September 19, 2012 correspondence to the House Committee on Judiciary, many of which remain unresolved or have actually worsened the original objection, it is unlikely that future revisions to this bill can be accomplished in order that it can be salvaged. Despite having been assured by Rep. McMillin that the bill's flaws cited in the September 19, 2012 were resolved, only a few were and the core problems with the Substitute H-2 remain. The fundamental flaws and other issues are discussed in this section of the correspondence.

Unfunded Mandate

The State's creation of the MIDC and its delineation of that Commission's role, responsibilities, standards and other processes clearly constitute the establishment of an unfunded mandate. HB 5804 imposes new, additional financial obligations on local units of government without appropriate funding

being provided by the State. While some have argued that these new requirements are "Constitutional Mandates", the fact remains that they are unfunded. One is forced to ask that if these new obligations find their basis in the Constitution and thus must be met, unfunded or not, one must also ask why the State has refused to acknowledge the constitutional call for "one court of justice", a truly unified court system funded by the state? The Oakland County proposal to address one court function, indigent defense, would provide the State the avenue to begin to honor their responsibilities under the Constitution.

To award the powers to create *and enforce* new criminal defense standards to an *unelected State (not local)* board with a predisposition of an outcome to defend and then *enforce* the standards once developed not only increases taxpayer costs but also destroys the appropriation and oversight responsibilities of county boards of commissioners and city councils. Under proposed Substitute H-2, the 'first dollars' mandated by this unelected State in any fiscal year would involve a county setting aside no less than \$7.25 per capita and an undetermined amount (see subsequent discussions on funding flaws) of funds for indigent defense. All other operating needs of the local unit, including other public safety, public health and other services, become secondary. In fact, the revised House Fiscal Report issued after the House Committee on Judiciary approved Substitute H-2 is now citing 'some estimates have placed the state-wide three-year average of per capita spending at \$7.38.'

The award of such power to a far-reaching, unbridled appropriating authority to an unelected State board involving local unit of governments' finances is constitutionally suspect. In addition, the operating approach delegated by the Legislature to the Judiciary also constitutes the surrender of a significant portion of a local legislative bodies' budgetary and appropriation powers to the state-mandated indigent defense commission. It makes the elected legislative bodies' funding roles merely ministerial actions.

Clearly, if there is a state-wide interest in addressing indigent defense the State should accept the roles, responsibilities *and* funding obligations for those services as outlined earlier in this correspondence. That way elected State officials can be appropriately held responsible for determining and insuring an appropriate standard of service and funding consistent throughout the state for all courts. To do otherwise under the Substitute H-2 will ensure that the cost of services for many local units of government will increase with no appreciable improvement in the quality of services to the indigent.

Funding Formula Before MIDC Is Seated

Even before the Commission is seated and metrics developed and applied against existing operations, Substitute H-2 has established a minimum threshold of mandated appropriations on local units of government for indigent defense. How can a funding formula be developed and imposed on counties without first developing the metrics and then, assessing the effectiveness of those metrics on real world operations? The cart is before the horse.

While Substitute H-2 has incorporated a minor change in that the Supreme Court must approve the standards (or in the absence of formal approval wait 120 days). The approval process by the Supreme Court fails to alleviate the uncertainty of court funding and operating compliance issues created by Substitute H-2 (particularly coupled with other funding and operating uncertainties in this correspondence). The modest change in Substitute H-2 leaves the original question of why an entity could be created (yet to be seated), but then, once standards are subsequently created, *enforce* them upon local units of government.

No assessment of alternative service models for contracting for legal service, controlling service delivery and then funding indigent defense has been performed. Such a study would likely shed light on the more effective county service models such and enable a rational, objective funding level to be established for local taxpayer expenditures. The earlier alternative funding and operating model is just one example of an operating model that would serve to quickly improve local court funding compliance against standards yet to be developed and entrust the State with funding their imposed standards.

The House Fiscal Agency's September 14, 2012 report cites the following concerning the fiscal impacts of this legislation on State and local governments:

- "The bill would increase costs for state and local governments by an indeterminate amount."
- "Estimates of current indigent defense spending in Michigan vary ..." and "...the actual per-capita spending in Michigan is not known, and may be lower than typically estimated."

The revised House Fiscal Agency's September 26, 2012 report continues to leave the amount of the increased costs burdened on the State and local units of government unaddressed. Specifically, it states:

- "The bill would increase costs for state and local governments by an indeterminate amount. Some of these costs are directly associated with this legislation, while others would depend on future actions by the Michigan Indigent Defense Commission (MIDC).

Here the state concedes that they have not properly assessed the level of funding required of local unit of governments. No fiscal analysis has been developed by the State or Indigent Defense Advisory Commission despite having over a year to develop such an analysis. Yet, the Indigent Defense Advisory Commission report is instructive in the targeted dollar infusion into the indigent defense system (e.g. page 6) – an amount of approximately \$50 million in new appropriations required. Why has the House Fiscal Agency financial analysis failed to include this target in its September 26, 2012 report?

The above admissions, coupled with the fact that standards have yet to be developed by the MIDC, makes clear that a minimum funding requirement should not be contained in this bill. The House Fiscal Agency admits actual per-capita spending is not known and at best asserts that '*some estimates have placed the state-wide average of per capita spending at \$7.38.*' If the House Fiscal Agency or the Indigent Defense Advisory Commission cannot state emphatically what the cost of these new mandated burdens are on local units of government why is it appropriate that the sole burden for funding these requirements fall on local units? Frankly, it is far too easy to spend other people's money and this core concept was a central theme of past Legislative practices identified, but remaining unresolved, in the State Commission on Unfunded Mandates.

This means that if there are costs in line items outside of this bill and the minimum threshold is established at \$7.25 per capita, the fiscal impact will be for counties to appropriate amounts for indigent defense that may not be warranted. As described subsequently, Substitute H-2 is even more offensive than the original bill!, In such case, these additional mandated budgeted amounts will adversely impact other county programs by effectively sheltering dollars that could have been directed into more worthwhile programs but for this legislation.

Absent legislative adoption of the more appropriate approach of having the State assume complete fiscal responsibility for this program, the MIDC program should be established and the fiscal impacts on local units defined before a funding formula is developed and debated prior to the imposition on local units of government. To incorporate a minimum funding formula into the enabling legislation and then provide penalties involving seizing of funds unrelated to indigent defense before the standards are even created is simply poor public policy.

County Versus Non-County Courts

Pursuant to state statute Oakland County funds four district court divisions in its jurisdiction. Ten other district courts in Oakland County, (hereafter "non-county courts") are funded by other local units of government. Oakland County has no operating responsibility, control or funding obligations relating to the non-county district courts. In prior years, the funding relationship established by state law between the non-county courts and those courts funded by Oakland County has been the subject of some concern.

Substitute H-2's imposition of minimum funding requirement based on a state-wide per capita formula burdens the Oakland County's General Fund for indigent defense not only at the County level but also for ten district courts that the County has no fiscal responsibilities for today. Once general fund appropriations as required under Substitute H-2 are enacted by Oakland County's Board of Commissioners, it will re-open the entire funding debate in Oakland County and in those jurisdictions where county and non-county district courts are located.

The language added in Substitute H-2 in Section 13 does little more than continue to confuse this issue and ignores the history of legislation passed in funding provided to the courts in prior years.

Clearly, opening such funding debates is not in the interest of the collegiality that the State is espousing through the EVIP program. How on one hand can the State demand consolidation and cooperation between local units of government but at the same time inflict new burdens on the funding structure of non-county district courts only to open a debate over funding from fiscally-distressed funding units?

Further, once this legislation is passed it is highly likely that any indigent defense costs relating to Probate Court and juvenile justice will follow in short order. There is no mention of the unintended consequences or costs on local units of government relating to these next projects once Substitute H-2 is passed – nor, any acknowledgement that these operating costs will further burden local units of government's operating budgets.

Incremental Cost, Metrics and Funding

While the determination of the level of the funding formula has not been explained nor properly vetted (see references from the House Fiscal Agency), its estimated impact on Oakland County should be noted. Oakland County, through its Circuit and County and non-County District Courts (as reflected on the Supreme Court website), has effectively managed its indigent defense costs while providing fair, professional indigent defense services such that it's combined budgeted amounts as averaged over a three-year term ending in FY-2011 were \$5,167,856.

Unfortunately, the term 'criminal trial defense services' and the line items that are incorporated into the submitted data to the Supreme Court may not be the same; any errors in the inclusion of this data would alter the calculation of the County's operating shortfall that would have to be funded out of other County programs arising from Substitute H-2. The failure of the House Fiscal Agency and Indigent Defense Advisory Commission to vet these costs contributes to the flaws in the funding formula. The legislation assumes that the amounts currently submitted by local courts in a report prepared for the Supreme Court are one in the same. Who knows?

Using the state-wide three-year operating cost of \$71,765,512 arising from the combined costs from the Supreme Court report and applying it against the 2010 census, the new minimum funding required is \$7.26 per capita (even as the House Fiscal Agency is suggesting a state-wide average of \$7.38 per capita) – actually an *increase* over the recommended amount in the original House bill even as I was provided assurances to the contrary by Rep. McMillin. The new per capita formula for the minimum funding would be \$8,729,148 ($\$7.26 \times 1,202,362$ population in the 2010 census).

The impact should be obvious relating to the difference between the increased minimum funding standard of \$8,729,148 and the amounts in the Supreme Court report of indigent defense costs for County and non-County courts of \$5,167,856, or no less than \$3,561,292. With the additional funds mandated by the state on the County's Board of Commissioners, history tells us that rates and additional indigent defense service levels arising from standards yet developed will expand to meet the mandated appropriation. The affect would be to provide a 69% increase in rates and services to criminal defendants overnight, all to the detriment of other Oakland County taxpayer service programs. While some additional resources may be called for, absent an assessment by the State of the effectiveness of the services being delivered in Oakland County to determine that there is even a need for additional funding, such mandated increase is unconscionable.

In addition to the reduction of services to taxpayers not charged with crimes, Substitute H-2 also effectively imposes adverse impacts on County employees. Is there any doubt that County employees who have taken a pay reductions and freezes over the past several years and who have also seen reductions in fringe benefits would now face further cuts in the face of increases for criminal defendants?

The new funding formula proposed in Substitute H-2, actually provides an unfortunate unintended consequence: Because the per capita crime incidence is less in Oakland County than in other major populations areas, the County will be required to cover a higher level of cost in its service to indigent defense arising from crimes committed outside its borders because the funding of indigent defense will be based on statewide averages of costs. Even as the County's cost pressures to fund indigent defense will increase against a static crime level, it does nothing to solve the excessive costs in counties experiencing crime above the average. In simple truth, it will pay more for the same services the County provides today to the detriment of other County programs.

Using a per-capita funding formula related to the indigent defense costs assumes that crime is uniform, by county, throughout the State. Obviously, it is not. A county with a higher crime rate (particularly when the crimes are more severe) would necessarily experience a higher need for resources than other counties. And why is a county with a lower crime rate being penalized in a 'one size fits all' formula by being compelled to reduce county operation not related to indigent criminal defense? Perhaps a more appropriate base in calculating a standardized formula (after proper vetting by the MIDC) would be the cost per crime occurring in the county; such relationship is more causal than population.

Also of concern is the fact that the new state agency may impose standards and requirements costing more than \$7.25 per capita. In such case, the fact that Substitute H-2 cites an intention to appropriate is of little comfort, especially since the State does not provide fiscal notes, has performed no financial analysis relating to this legislation and does not actually appropriate funds in support of local units of government in this proposed legislation. Given the history of the state's failure to actually appropriate funds related to the "one court of justice" (despite legislative statements of intent to do so) and Headlee Amendment matters cited in the Statutory Commission on Unfunded Mandates (which remains unresolved even today) such assurances cannot be accepted before the funds are actually appropriated by the State Legislature. In addition, even if the funding was appropriated, it would be for one year only as current Legislatures cannot bind future Legislatures to any specific funding level for operations.

Substitute H-2 fails to even reference the reimbursement of indigent defense costs by those having received those services. Oakland County's Circuit Court and County District Courts projected reimbursements from those receiving these services for FY-2012 are estimated at \$1.82 million, or roughly 41% of actual costs incurred. The reimbursements for non-County district courts are unknown. Using the per-capita formula for FY-2012 less actual projected costs incurred for FY-2012, those receiving these services would be burdened by an additional \$1.5 million in fees withheld from their pay checks, State withholdings and similar manners of securing payment. Even assuming more costs could be captured (a wildly unlikely assumption in these troubling times), does it make sense to further fiscally burden those in need of court-appointed attorneys (those who are truly indigent with no means to pay do not reimburse the County)?

Clearly, the adverse impacts of the unsubstantiated funding formula must be eliminated. In an already uncertain budgetary world for local units of government, Substitute H-2 continues to increase the uncertainty on operating budgets. The funding formula (assuming that the State chooses not to fund this program as proposed and outlined previously in this correspondence) should be developed as part of the initial MIDC responsibilities and *after* having assessed the local units' effectiveness in providing services against metrics properly vetted. To do otherwise introduces many flaws, additional costs and adversely impacts programs other than indigent defense.

The present definition of criminal trial defense services will become obsolete upon adoption of Substitute H-2. Simply put, the definition in Sec. (3) (D) (d) is wrong. At present, the submission of indigent defense financial data to the Supreme Court has little or no financial implications whatsoever. Likely, the costs included in the financial data submitted to the Supreme Court is solely the amounts paid directly to the attorneys and likely expert and related witnesses.

Yet, upon the adoption of Substitute H-2 and imposition on local units, the following costs ancillary to the compliance with the new legislation will be required, even as they are *excluded* from consideration in determining the minimum threshold of funding among which are:

- Additional personnel associated with the administrative functions dictated through the minimum standards yet to be developed.
- Data captured almost certainly means additional technology modifications as well.
- There is reference to the local units of government providing some level of assurances that the attorneys practicing in front of the courts would be part of the new responsibilities of local units

of government. Leaving aside the troubling notion that the local units may become responsible for a vendor's training, there is no reasonable way that this cost can be quantified. The Substitute H-2 must make clear that training and related personal costs of practicing law must remain the responsibility of the individual and not local units of government.

- There is reference to the local unit of government being responsible for adequate facility needs (meaning capital costs yet to be determined). There is no way that this provision can be quantified.

It should be noted that the 13-member MIDC board has just one member to represent the local funding units, counties and cities having district courts. The remaining members of the MIDC would clearly have the programmatic needs of the indigent criminals in mind, but would have absolutely no accountability for their dictates on local units of government. The governance and operating model contemplated in Substitute H-2 is fundamentally flawed and will accomplish little more than creating further wedges between the State and local units of government at a time where it is critical that collegiality is critical to the mutual fiscal survival of State and local governments.

Finally, the additional section in Substitute H-2 that permits the *potential* for the County to avoid increased local costs does nothing to alleviate the anticipated fiscal burdens and uncertainties imposed by an unelected State entity, particularly when local units of government have only one voice out of thirteen on the board.

SEPARATION OF POWERS / CONSTITUTIONAL FLAWS

Separation of powers and Constitutional flaws continue to exist in Substitute H-2 of the MIDC legislation. Some of the more egregious examples follow:

- The MIDC is designed to be an 'autonomous' entity created in the judicial branch of state government. Yet, the executive branch has appointment and removal powers over this 'autonomous' judicial entity. Sec. 5 (2) and Sec. 7.
- The MIDC not only will establish but *enforce* the minimum standards for the local delivery of criminal trial defense services. In doing so, the Legislature has established a funding formula involving minimum per capita rates that compel county boards of commissioners to appropriate these amounts (minimizing the local units' legislators' appropriation function to a ministerial level). It is the judiciary that controls practice and procedure in Michigan. They established the State Bar of Michigan to monitor attorney performance, not the MIDC. Sec. 9 (1).
- If in the sole determination of the MIDC local units are not meeting the yet to be established minimum standards the MIDC can provide the services and direct State treasurer to withhold disbursements relating to non-indigent defense State expenditures. Sec. 13 (6). Of course, the objection was: what happened to the principle that statutes could not be amended by reference? If a statute grants a right of payment to a CVT how can the MIDC intercept that or abrogate the state's duty to pay it?
- Sec. 13 (6) now states: "If, after the time allowed under subsection (5), a local unit of government fails to comply, the MIDC shall provide indigent criminal trial defense services *at state cost* to that local unit of government." (Emphasis Added). The offensive language

concerning self-help remains in Section 13 (7). But, using the extreme example of a local unit of government failing to comply with the MIDC assuming the indigent services' costs, why would *any* government comply with any MIDC standards? Why would they simply not walk away from the services in the entirety and allow MIDC to operate the indigent defense services thereby avoiding all related costs? Why would Oakland County taxpayers ever pay the \$5.1 million in current level costs for indigent defense ever again where there is a means for the MIDC to fund these costs? This approach sounds similar to the approach proposed by Oakland County in earlier sections of this correspondence.

- In the event that a local unit objects to the MIDC actions, Substitute H-2 'affords the local unit an opportunity to be heard' *by the MIDC*. Since it is the MIDC's actions being objected to, just how realistic would it be that they will reverse their earlier position? What then would be the remedy afforded the aggrieved local unit to seek its day in court? Sec. 13 (3).
- The MIDC is to establish procedures for the receipt and resolution of complaints.' Sec. 9 (e). This function is accorded the Judiciary in the State's Constitution. To legislatively establish a second body "independent of the judiciary" and controlled by executive branch appointees to perform the same function invites a constitutional challenge.
- The MIDC is to 'establish procedures for annually reporting to the governor, legislature, and supreme court.' Sec. 9 (g). This function is accorded the Judiciary in the State's Constitution and not to an 'autonomous entity.'
- The MIDC has been afforded State appropriations powers over the Legislature, specifically "To the extent feasible, the MIDC shall establish metrics for *determining the resources necessary* for each local unit of government to comply with the minimum standards *established by the MIDC and for the MIDC to fulfill its role.*" Sec. 9 (2). Once the metrics are established by the MIDC both the local units and the State is compelled to find the resources necessary to satisfy MIDC's operations, as determined by the MIDC metrics. This section reduces the appropriation powers of the legislative branch to an unelected entity within the judicial branch.
- The MIDC has effectively indicated an equal role of indigent defense with that of other local public safety functions with a legislative fiat to the local units to 'adequately fund these functions (including indigent defense) in order to fulfill their role.' Sec. 9 (4). The sole determining entity, the MIDC, is comprised of an unelected board that permits virtually no appeal process once the MIDC determines required funding levels at a local level.
- The functions of '...selection, funding, and payment of defense counsel, shall be independent of the judiciary.' The selection function is currently under the control of the judiciary. The funding and payment functions are shared by the judiciary, legislative and executive officials in county government. They now appear to be functions of what now to be a fourth branch of government. Sec. 11 (1) (a). If these functions are of the MIDC and not the local units, then this section should be revised to clarify this point. However, since the autonomous MIDC board now has the ability to select, fund and pay defense counsel, why isn't the next logical step having the State assume the full funding responsibilities for court functions?

- Substitute H-2 indicates that the 'defense counsel's workload is controlled to permit high-quality representation.' Sec. 11 (2) (d). The 'controller' of the workload should be defined. Further, if that 'controller' is the MIDC this further demonstrates that local court functions and the funding relating thereto will become ministerial in nature.

Somewhat related to the above, if the standards yet to be developed create an environment that encourages defense attorneys, financially or through disciplinary standards, to delay proceedings by filing more motions as a means of "defensive practice" it is probable that what would occur is that dockets will become backlogged. It is conceivable that this will become a practice similar to "defensive medicine" where unnecessary tests are requested as a way to protect doctors against malpractice claims. Such practices are usually condemned as they ensure added medical fees and costs generally with little or no likely improvement of medical health to the patient. The similarities of this Substitute H-2 section to the medical profession's fee issues are startling.

- The 'defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.' Sec. 11 (2) (c). 'Defense counsel is systematically reviewed for quality....of representation according to MIDC standards' (presently unwritten). Sec. 11 (2) (f). The MIDC's apparent oversight of the professional standards established by the State Bar of Michigan is troubling. Apparently, by implication, the State Bar has members that consistently fail to perform up to their professional standards. Has the Bar taken action? Is it necessary to have a second body responsible for this function?

OTHER

Should you have questions concerning this correspondence, please contact Mr. Robert Daddow, Deputy County Executive at 248 / 858-1650.