



Ingham County Legal News

"A Public Defense System for Michigan's 21st Century" --Norman Lefstein opens the Michigan Public Defense Task Force Conference

By Roberta M. Gubbins

Legal News

"According to your program," said Professor Norman Lefstein, keynote speaker at the Second Annual Michigan Public Defense Task Force Conference held in Lansing on May 21st, "my remarks are titled 'A Public Defense System for Michigan's 21st Century,' but I want to start with a few words that do not relate to the 21st century as such. The right to counsel in the United States derived from the Sixth Amendment to the United States Constitution, which was adopted in 1791. However, the right to counsel itself is really only 46 years old if you measure from Gideon v Wainwright and some of the other cases even more youthful than that."

"One point is that it puts all of this in some sort of historical perspective and there is time for change, while at the same time we need to be impatient, and there are times when we need to be genuinely outraged."

"There is another point--because this right comes from decisions of the United States Supreme Court--it is truly an unfunded mandate imposed, not from legislation, but comes to the States without an appropriation, or directions of any kind. And it comes, despite the fact that it is all about a federal constitutional right, without any real assistance of the federal government."

"The result," he continued, "is that states throughout the country have struggled with this right to counsel from the beginning and they have not done very well. Michigan's legislature, like that of many states, has washed their hands of the duty to make certain that people are effectively represented. They have passed that responsibility onto the counties and local governments."

"Except when it comes to appeals, Michigan has said we will make certain that we will provide some money to help the accused in the event an appeal is taken either from a trial or a conviction following a guilty plea. It is a little bit, it seems to me, like saying that after the bank has been robbed and debris is scattered everywhere, 'we will have one good cleanup crew,' which Michigan has through the State Appellate Defender Office (SADO).

"Frankly," he said, "that is not enough and it is after the individual has been through the trial process."

Why it matters how people are defended in the United States.

"The United States took from the United Kingdom an adversary system of justice that is designed to ensure that the guilty are convicted and the innocent are not, that people are treated fairly, that

persons of similar circumstances are treated the same, and that when the court is properly constituted, there is a prosecutor, a defense attorney, and a judge. And the judge is impartial and does not control the prosecutor or the defense attorney."

"When the power of government is unchecked, sometimes inadvertently, unless there is a countervailing force, which in the justice system is the defense counsel, there will be instances of over reaching. The American Bar Association noted that defense counsel may resist the wishes of the judge on some matters, and may appear unyielding and uncooperative at times, and, indeed, that is the function of defense counsel. In so doing the defense counsel is fulfilling a necessary important function within the adversary system--they should be viewed as an indispensable part of its fulfillment."

Why having adequate representation makes a difference in Michigan.

"Sometimes you can best understand why defense lawyers are so important in the justice system by examining situations in which lawyers have failed to perform effectively and have failed their clients. During the years I have studied defense systems in the US, I have never seen a more compelling statement than the one that was prepared by Dawn Van Hoek of SADO that was submitted to the U. S. House of Representatives Committee on the Judiciary House Subcommittee on Crime, Terrorism and Homeland Security."

"It contains some vital information about why counsel is important as well as the costs involved when a system functions deficiently."

"It emphasizes that defendants in this state are frequently sentenced on the basis of inaccurate information and scoring of the sentencing guidelines. It points out that during the calendar years of 2003 and 2007, a special unit of SADO that reviews sentences and takes appeals of guilty pleas, accomplished a reduction in minimum prison terms of 122 years and a cumulative reduction of maximum prison terms of 309 years. In 2007, the special unit obtained sentencing relief in an average of 85% of its cases."

"The cumulative total of prison costs through error correction was estimated to be \$3,675,000. The cost savings for the entire statewide system could be in the millions of dollars. The mistakes are mounting up at the sentencing range and it tells you volumes about the quality of defense in the state of Michigan."

"There is no public defense system in Michigan. What you have in Michigan are 83 counties determining how they want to handle the problem, which, for them, is a funding problem. They do it thru low-bid contracts, thru very low fee structures, fees for events in the trial process, which is a disincentive to do anything more than simply show up."

Then there is the issue of independence. In Michigan where Judges are responsible for the selection of indigent defense counsel, how can those lawyers be independent "when they know that they are beholden to the judge for their livelihood?"

What should reform look like in Michigan?

"What is needed is a statewide program that is independent to oversee the defense function."

"Nationally, one trend is toward greater state funding of indigent services. There are now 28 states

that provide full funding, four more than 50 percent, and 16 states that have counties that provide more than 50%, but in Michigan the counties provide most of the funding."

"The second trend is to create state commissions to oversee indigent defense. There are now 19 states with a commission headed by a state public defender or director, 8 states with a public defender with no commission and 9 states with partial authority state commissions. Since 2000, 11 states have passed legislation to reform indigent defense and 8 of the 11 have a full authority commission."

How did the reform occur in those states?

"Certain ingredients are necessary. You've got to have critical media coverage, you need a study of some kind that details the problems and we have those in Michigan. You need to galvanize public support, which is occurring with this taskforce. The ingredients are in place of the kind mentioned here along with a terrible system of indigent defense. My message is to keep on working for change, justice demands it, and I know that when it happens, it will happen because of the concerns and efforts of all of you in this room today."

Professor Norman Lefstein was dean of Indian University School of Law in Indianapolis from January 1, 1988 until June 30, 2002. He was a faculty member of the University of North Carolina School of Law in Chapel Hill. Lefstein was director of the Public Defender Service for the District of Columbia. In 1982, the American Bar Association published his study titled, "Criminal Defense Services for the Poor" and in 2004 he co-authored "Gideon's Broken Promise: America's Continuing Quest for Equal Justice." His most recent work dealing with indigent defense is "Justice Denied, America's Continuing Neglect of Our Constitutional Right to Counsel."

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