

# The Macomb Daily

## Campaign seeks to reform funding of court-appointed attorneys

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By Jameson Cook, Macomb Daily Staff Writer

Defense attorney Mark Pellacchia often asks for favors from camera-carrying friends — meet him at a crime scene to take photographs.

Defense attorney Randy Rodnick dreams of having multiple experts help him probe a case, but must settle for reality — maybe two.

Defense attorney Daniel Garon visits many of his court-assigned clients at the Macomb County Jail multiple times even though he doesn't get paid for them.

Those are some routine scenarios faced by lawyers who defend indigent criminal defendants in Macomb County. They work for a wage that for the most part is stuck in the 1970s, as most jobs' pay scales have more than doubled since then, defying lawyers four years of undergraduate school, three years of law school and continuing training.

While unfortunate for the lawyers, the situation can be devastating for poor criminal defendants, according to advocates of improving the pay of public defenders. They say poor defendants receive worse representation than those who can hire an attorney because public defenders must cut corners to probe their client's case. Public defenders have a limited budget for experts and private investigators, and limited time for leg work and research.

That may change in the next couple years as the Michigan Campaign for Justice seeks to revamp the indigent defense system and force the state to put up funds. The state House Judiciary Committee in March established a subcommittee on the issue,

chaired by Bob Constan, D-Dearborn Heights. The state Legislature had asked for the study.

MCJ Director Sager said she hopes to see legislation by the end of the current legislative term that ends in December 2010.

"What we want is a state-funded system; exactly how that would work has not been decided," Sager said.

Wages hurt cases

Defense attorney Timothy Kohler said low fees for court-appointed defense attorneys systematically discourage the lawyers from "developing a file through reading and research."

The compensation "severely and unconstitutionally hampers our ability to investigate cases," added defense attorney Raymond Ruemenapp. "Many criminal defense attorneys have had to cut out expensive luxuries like secretaries, offices and even reliable transportation."

James Maceroni, who chairs a Macomb Bar Association committee on the topic, called the pay level of Macomb's court-appointed attorneys "a joke" in an MBA article last year. Maceroni said most of the damage occurs at the stages prior to trial.

"A trial is won or lost during the pretrial investigation and preparation," he said.

Some contend that low-paid defense attorneys are dissuaded from going to trial and encouraged to work out a plea deal, which in some cases usurps a defendant's basic right to confront accusations.

The numbers support that claim, although the actions and policies of Macomb prosecutors affect the outcome of cases.

In Macomb Circuit Court, the number of cases that result in a plea has increased from 2002 through 2007. In 2002, 38.7 percent of the 8,592 criminal cases resulted in a plea. In 2007, the last year figures are available, 41.9 percent of the 12,466 cases resulted in a plea.

Pay affects roster

Some attorneys concede low pay level keeps some high-quality attorneys away from representing indigent clients.

Many highly qualified criminal defense attorneys only accept work from clients who can afford one or more attorneys, along with multiple experts, potential witnesses and private investigators.

Attorneys say the hard work and time requirements discourage many highly qualified attorneys from seeking A-list cases.

While that implies court-appointed attorneys are less qualified, many in the legal field counter that contention. Chief Judge Richard Caretti of Macomb County Circuit Court praised public defenders.

"I think we have an incredibly talented pool of defense attorneys in Macomb County who are considerably underpaid," Caretti said. "They are a bargain for not only the defendant but Macomb County as well."

Wayne State University law professor Peter Henning said criminal defense attorneys have incentive to devote time and energy to a case, even if they are sometimes hampered by high case loads.

"I think they work hard because the risk of not working hard is too high," he said, adding a higher court can declare them ineffective or a client can end up going to prison for life if they are incompetent.

Public defenders in Macomb must be approved for a particular list for types of cases. For adult cases, A-list attorneys handle capital cases, B-list attorneys handle mid-level felonies and C-list attorneys handle low-level felonies. The list is OK'd by a panel of judges and attorneys, and those on the list must complete one full seminar or three mini-seminars per year.

Despite a rising number of criminal cases in Macomb County, the number of court-appointed attorneys in Macomb County decreased slightly in recent years.

There were 393 attorneys who took court-appointed adult and juvenile cases in 2005, earning \$4.3 million for an average of \$11,000 per year each. Last year, 378 attorneys gained court-appointed work, earning a total of \$4.8 million, for an average of \$12,800.

Rodnick, who earned \$59,500 last year in court-appointed work, said he generally is working on about 15 or so cases at a time, including retained work.

Rodnick had the highest income from court-appointed cases in 2008. The other top earners last year were Donald Aubrey, \$51,200; Edward Hill, \$43,700; Robert Vanhoutte, \$45,500; and Kohler, \$41,100.

Despite negatives, many public defenders say they're satisfied with their job and reap benefits beyond making money. Young criminal defense attorneys can gain much-needed experience, and veteran attorneys can keep their courtroom skills intact while making a contribution to society.

"Frankly, it's good experience," Garon said. "It keeps you on the ball for trial work."

Added benefit

Being on the A list also provides an added benefit of publicity potential. Rodnick, Garon and other attorneys say being mentioned in print and broadcast media sometimes draws clients to them for retained work.

Public defenders also do their work for philanthropic reasons.

Garon, a 20-year criminal defense attorney, said he began taking court-appointed assignments a few years ago as a way to give back to the community.

"I do it because it's something that needs to get done," he said. "It's a sense of duty."

Still, there is money to be made as well.

Attorney Tony Scotta pointed out that in current economic downturn, the court-appointed list

provides a financial security blanket for some attorneys.

"There's plenty of attorneys hanging around these days trying to find work," Scotta said.

The cost of representing indigent clients to county taxpayers has increased as the number of circuit court cases climbs.

Criminal case filings have increased nearly 40 percent from 2004 to 2008, according to circuit court records.

There has been a 63 percent increase in public defense costs from 2000 through 2008, from slightly more than \$3 million per year to nearly \$5 million.

The defendants are sought out by the county to repay the money if they can. The county will go to court if necessary to seek the reimbursement.

That has been slightly offset by a tiny increase in reimbursement from formerly indigent defendants who later can pay, from about \$980,000 to about \$1 million per year.

Recovering a high percentage of the money is difficult, county officials say, because a vast majority of felony defendants have limited or no income or assets.

The circuit court does not keep records on the number or percentage of indigent defendants. However, officials estimate that the percent of those classified as indigent ranges from two-thirds to three-quarters.

Attorney Mark Haddad said he believes the percentage of indigent defendants has risen in the past decade.

"It used to be a lot harder to be indigent," Haddad said. "Starting in the late 1990s, anyone who asked for a lawyer got one."

District court judges typically approve court-appointed counsel.

Haddad, who is on the A list, said he has had many so-called indigent clients with well-paid jobs being provided court-appointed attorneys.

Macomb among lowest

Frank Eamon is a Detroit-based criminal defense attorney who also represents the plaintiffs in a lawsuit accusing the state of underfunding public defense.

Eamon said Macomb County "is one of the lower-paying counties in the state."

The court-appointed attorney fee schedule has changed only slightly in 35 years. Many public defenders say they can't make a living working only on court-appointed cases; they must

complement it with retained criminal or civil work.

Complex capital cases — murder, rape and kidnapping, especially ones that go to trial — are the most burdensome, attorneys say. The lawyers often work more than 100 hours, some unpaid.

"If I have a capital case that goes to trial for two or three weeks, I'm losing money," said Garon, who is part of a four-lawyer firm. "I'm a burden on my firm. The fees are outrageous. It's really bad."

Criminal defense attorney Arthur Garton, president of the Macomb Bar Association, added: "An attorney shouldn't be put in the position of choosing between representing a client and going bankrupt."

Garon said public defenders in most cases are paid only one-fifth of what they would receive for the same work as a retained criminal attorney, who generally charge \$150 to \$300 per hour. He said for an intricate capital case, a public defender receives only 10 percent of what a retained attorney would collect. If Stephen Grant's two court-appointed defense attorneys — who were paid \$41,000, a record amount in Macomb County for

an indigent client — had been retained, the bill would have been more than double, attorneys say.

The Stephen Grant murder was an exception because two attorneys were appointed to the case, and they were chosen from the A list.

Maceroni said the Grant case actually is an example in which the indigent defendant received an adequately funded defense.

"The problem is that we don't provide every defendant charged with a capital crime at least two attorneys," he said.

Comparing county-by-county pay levels for public defenders can be difficult. The Oakland County schedule differs from Macomb's (see accompanying chart).

Public defenders in Macomb who handle the most serious capital cases frequently are awarded "extraordinary fees" on a defense attorney's request, at the rate of \$25 per hour, the same rate from the 1970s.

One noticeable difference is Macomb attorneys do not get paid for jail visits while Oakland attorneys are paid \$65 per visit.

Some fees are similar. In Oakland, a public defender receives \$460 per day for a capital trial and \$350 per day for a noncapital trial. In Macomb, the pay is \$500 per day for capital and \$350 for noncapital.

In Monroe County, court-appointed attorney fees were raised in 2007 from \$52 per hour to \$75

per hour. The rate before that was increased in the early 1990s, according to published reports.

#### Defense on a budget

Court-appointed defense attorneys have to beg a judge for a private investigator and experts — such as a medical doctor or forensic pathologist — to aid their case.

Rodnick said the experts' pay — often between \$500 and \$2,000, excluding pay for testifying — is below their normal pay scale, but they often agree to review the case for limited pay, excluding any trial testimony.

"To them (experts), it's almost pro bono," Rodnick said. "Sometimes you need two medical experts and they give you one."

For their part, Macomb circuit judges typically approve public defenders' requests but set limits for expenditures. Rodnick called the judges "reasonable."

Pay for capital cases is commonly higher than for lower-level felony cases, generally ranging from about \$1,000 to several thousand dollars, occasionally exceeding \$10,000.

While a lack of resources hampers public defenders, they argue the prosecution is armed with government-backed resources — a police department, medical examiner and Michigan State Police labs.

But prosecutors point out that they need the institutional support because the "people" carry the heavy burden of proving a case beyond reasonable doubt. Prosecutors must meticulously set the foundation and prove all of the elements of a crime. And they serve crime victims.

#### Macomb not alone

The situation of overworked, underpaid public defenders is not unique to Macomb County; it is common throughout Michigan and the nation, according to public defender advocates.

Still, the Michigan system ranks among the worst in the nation.

Michigan ranks 44th in public defense spending, according to a study released last June by the National Legal Aid & Defenders Association.

Michigan is only one of seven states that passes off the burden onto the counties.

Michigan's 83 counties spend about \$74 million, while the national per-state average is about \$120 million, according to the NLADA. Michigan spends \$7.35 per capita, while the national average is \$11.86, according to the NLADA.

The study was based on evaluations of 10 counties, excluding Macomb.

The study results and rising tide of complaints are helping fuel the efforts of the Lansing-based Campaign for Justice, which was formed in January 2008 to lobby state lawmakers to establish a statewide, state-funded system.

MCJ Director Sager argues the campaign is about more than public defenders' wages; it's about changing a defective system.

"We're not putting prosecutors' cases to a rigorous test," Sager said. "This isn't just about getting more money for defense attorneys. This is about constitutional rights (Sixth Amendment). This is about public safety. This is about efficiency."

Sager says the changes would save money. The existing system costs more because an insufficient defense results in more convictions and more wrongful convictions, thereby spiking corrections costs, according to the MCJ.

Many local attorneys agree.

"The state doesn't understand that when you don't pay on the front end, you end up paying on the back end," Garton said.

The state Corrections Department has bloated to \$2 billion per year in recent years. There are a record number of prisoners, although Gov. Jennifer Granholm has taken steps to reduce the population.

Advocates said the safety issue is that for every wrongful conviction, public safety is endangered because the real criminal has not been caught.

"The real perpetrator is out there," Sager said.

Currently, each county operates and funds an independent system and pays attorneys at different rates.

Reform advocates admit that convincing the public to support change will be a challenge because of the perception of defense attorneys and their clients.

"Unlike building a road or a new building, it's hard to point to it and say, 'Look at the benefits this has brought,'" Henning said. "You have defendants, most of whom have been guilty of a crime. It's not a constituency you get a warm and fuzzy feeling about. You're putting up money for people who are guilty of a crime."

Maceroni has encouraged his fellow barristers to inform people about the important role of defense attorneys in ensuring zealous prosecutors and police officers adhere to constitutional rights. Criminal defense attorney Stephen Rabaut has called himself a "law enforcement officer."

"I enforce the Constitution of the United States," he has said.