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**SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND
SECURITY**

COMMITTEE ON THE JUDICIARY
of the
U.S. HOUSE OF REPRESENTATIVES

**Hearing on Representation of Indigent Defendants in Criminal Cases:
A Constitutional Crisis in Michigan and Other States?**

March 26, 2009



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What if You Can't Afford Perry Mason? A Prosecutor's Role in Ensuring Justice

I want to start by expressing my gratitude to the Chairman of the Judiciary Committee, Representative John J. Conyers, Jr.; the Subcommittee Chair, Representative Robert C. Scott; the Ranking Member, Representative Louie Gohmert; and the Members of the Subcommittee for convening the very important hearing today on the Representation of Indigent Defendants in Criminal Cases. I am Nancy Diehl and am honored to appear before you today on behalf of the Office of the Prosecuting Attorney in the County of Wayne, Michigan. I also appear today as a past President of the State Bar of Michigan.

You could say that the reason I am a prosecutor is because of Perry Mason. I grew up on Perry Mason, who for years defined the role of defense attorneys. Each show ended with justice being served. In high school when I decided I was going to be a lawyer, I knew that I would be a defense attorney. Perry Mason had inspired me to right the wrongs by defending the accused. I started at the Misdemeanor Defenders Office while still in Law School and continued there as a lawyer after graduation in 1978. I learned defense strategy in the depths of the Detroit criminal court building—the Frank Murphy Hall of Justice. But I also learned that the prosecuting attorney seemed to wield a lot of power in the courtroom. My dream of righting wrongs seemed to be better carried out on the other side! Long story short, I was appointed an Assistant Wayne County Prosecutor in 1981.

Because American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers' tactics, the police investigation, the lawfulness of any searches and seizures, the credibility of the evidence, and the district attorney's theory of the case to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process that the United States is in the forefront of cutting edge public safety technologies – like DNA evidence – that help to exonerate the innocent while convicting the guilty. In many jurisdictions in this country, we have lost such checks and balances.

The present Wayne County fee schedule does not appropriately compensate defense attorneys. The common lament is that the plan does not reimburse adequately for the time necessary to prepare, interview witnesses, and handle the trial. The present fee schedule for time spent on defending capital cases (penalty is life) works out to be somewhere around \$10.00 an hour! This unfair compensation has resulted in Wayne County experienced defense lawyers no longer willing to accept any assigned cases



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or severely limiting the number of cases they are willing to take on. The present schedule also encourages abuse. It forces lawyers to take too many cases in order to earn enough money to support themselves, and they are not able to effectively represent all of their clients.

When there is an inadequate defense, bad things can happen. If the defense is ineffective, evidence may be admitted that should not have been. If proper preparation and cross-examination are lacking, an innocent person may be convicted. If the wrong person is convicted, a guilty person remains free to continue to commit crimes. An unskilled defense attorney puts an additional burden on an already too burdened prosecutor. It means that the prosecutor must try to watch out for the rights of an accused. Ineffective representation also burdens the appellate process. Cases are drawn out over long periods of time. Cases are reversed based on ineffective assistance of counsel. Prisoners remain incarcerated for crimes they did not commit. New trials are granted. There is no closure for victims and their families. Their wounds are reopened. Memories fade and justice is less likely to be served.

In closing, let me state that our criminal justice system works best with both a strong prosecution and a strong defense. This insures that the rights of all citizens are protected. In these most challenging economic times, prosecutors themselves are increasingly strapped for the resources required to be effective.

As stated in the National Legal Aid & Defenders Association (NLADA) June 2008 report, ***A Race to the Bottom:***

It is our general observation that prosecuting attorneys in Michigan are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult.

Prosecutors and defenders both need additional resources to ensure that the criminal justice system operates fairly and appropriately. To uphold our nation's principles of law and to promote public safety, we must come together and find a remedy that adequately funds both. Justice demands no less.