

HOW SOCIAL WORKER DEFENDER PROGRAMS CAN IMPROVE INDIGENT DEFENSE IN MICHIGAN DESPITE CHALLENGES TO IMPLEMENTATION

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I. INTRODUCTION

Michigan has a higher incarceration rate than almost any other democracy in the world.¹ Yet up to ninety percent of the people prosecuted in Michigan cannot afford an attorney.² Michigan is one of the nineteen states that administers indigent trial-level defense locally, leaving eighty-

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1. *Michigan Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MI.html> [https://perma.cc/U8QY-BZE5] (last visited Apr. 17, 2022).

2. ANDREEA MATEI ET AL., URB. INST., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE: FINDINGS AND LESSONS LEARNED FROM GENESSEE COUNTY, MICHIGAN 4 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf [https://perma.cc/5KUW-BC8J].

three counties to decide for themselves how indigent defendants will be given access to their constitutionally protected right to an attorney.³

While a 2008 report unveiled the dire state of indigent defense across the state, the 2013 creation of the Michigan Indigent Defense Commission (MIDC) has shown promise.⁴ There are now state-wide standards that all indigent defense systems must meet, areas of improvement are continually explored, and pilot programs are receiving funding to explore new and exciting ways to improve the state of indigent defense in Michigan.⁵

In 2018, the MIDC piloted the Social Worker Defender Program (SWDP) in Genesee County.⁶ This program connected attorneys from an assigned counsel list with a social worker for eligible cases where the client was charged with a lower-level felony and could face a possible sentence of either community sanctions or prison time.⁷ Despite several challenges, participants agreed that adding a social worker to the team benefited the client, the defense team, and the legal community as a whole.⁸

The benefits of programs like SWDP included decreased sentence lengths, diversion from incarceration, education of the judiciary on available community resources, and improvements in the attorney-client relationship.⁹ However, decentralizing assigned-counsel systems can cause rifts in the culture and practice methods among participating attorneys along with logistical challenges to communication and coordination between attorneys and social workers.¹⁰ The benefits to individual participants, as well as the overall judicial process, should be weighed heavily against these challenges to implementation.

This Article first explores the benefits and limitations of holistic defense and bringing social workers to an indigent client's defense team.¹¹ Section II.B comments on the unique challenges of implementing an

3. David Carroll, *Right to Counsel Services in the 50 States*, SIXTH AMEND. CENTER 96, 103 (Mar. 2017), <https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf> [<https://perma.cc/2BVP-TL5B>].

4. See Emell Derra Adolphus, *MIDC Brings Hope to Michigan's Indigent Defense System*, ACLU MICH. (Dec. 7, 2015, 3:00 AM), <https://www.aclumich.org/en/news/midc-brings-hope-michigans-indigent-defense-system> [<https://perma.cc/3B3H-VGSP>].

5. See *generally* MICH. INDIGENT DEF. COMM'N, 2021 OVERVIEW (2021), <https://michiganidc.gov/wp-content/uploads/2022/01/MIDC-2021-Highlights.pdf> [<https://perma.cc/B9CK-AHK2>].

6. MATEI ET AL., *supra* note 2, at 7.

7. *Id.*

8. *See id.* at 1.

9. *Id.* at 11.

10. *Id.* at 15; KATIE KRAMER ET AL., MICH. INDIGENT DEF. COMM'N, SOCIAL WORKER DEFENDER PROJECT: PROGRAM MANUAL 15 (2020).

11. *See infra*, Section II.A.

indigent defense system in rural and urban areas.¹² Next, Section II.C introduces the indigent defense systems in Michigan,¹³ and Section II.D details the 2018 pilot SWDP program in Genesee County.¹⁴ This Article concludes with an analysis of the recommendation¹⁵ to require participation in an SWDP program for attorneys to be added to an assigned counsel list.¹⁶

II. BACKGROUND

A. Holistic Defense and Adding Social Workers to the Defense Team

Holistic defense recognizes that “an indigent client may be best served by a team of professionals that addresses a range of the client’s needs rather than simply a heroic solitary lawyer who represents a defendant solely at criminal trial.”¹⁷ The Center for Holistic Defense provides a definition for holistic defense:

an innovative, client-centered, and interdisciplinary model of public defense that addresses both the circumstances driving people into the justice systems as well as the devastating consequences of that court involvement. Based on individual needs, this model connects clients with criminal defense, family defense, and related civil legal representation, as well as social work support and advocacy beyond the courtroom.¹⁸

Holistic defense aims to address collateral consequences of involvement in the criminal justice system¹⁹ and seeks to mitigate sentencing, reduce recidivism, and improve client outcomes.²⁰ This is achieved by addressing the underlying issues that cause clients to become involved in the criminal legal system in the first place and by connecting clients with community resources.²¹

12. *See infra*, Section II.B.

13. *See infra*, Section II.C.

14. *See infra*, Section II.D.

15. *See infra*, Section II.E.

16. *See infra*, Section III.

17. James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 123 HARV. L. REV. 819, 821 (2019).

18. Sarah Buchanan & Roger M. Nooe, *Defining Social Work within Holistic Public Defense: Challenges and Implications for Practice*, 62 SOC. WORK 333, 335 (2017).

19. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013) (examining informal collateral consequences such as social stigma, loss of housing, and loss of employment, in addition to legal consequences such as restrictions on liberty or impact on immigration status).

20. Anderson et al., *supra* note 17, at 821–22.

21. *Id.*; KRAMER ET AL., *supra* note 10, at 3.

Social workers are vital for holistic defense teams.²² The National Association of Public Defenders states in their guiding principles that “effective public defense depends on social workers being part of the defense team.”²³ Some public defender offices have reported that relying more heavily on non-lawyer team members such as social workers allows more time for lawyers to “prepare cases and expand their legal strategies in preparing for trial, plea negotiations, or a sentencing hearing.”²⁴ Further research needs to be done to evidence the importance of social workers in holistic defense and their impact on client outcomes.²⁵ However, current research, along with client testimonials, suggests social workers improve the process of defense for clients, attorneys, and even court officers such as judges.²⁶

Skeptics of holistic defense are concerned about diverting resources away from the criminal advocacy role of defense teams.²⁷ They worry that this diversion of resources could lead to worse case outcomes for clients and point to the lack of empirical evidence that holistic defense consistently lives up to its reputation.²⁸

Recent research undercuts some of these skeptics’ fears. For instance, one study found that clients of a holistic model were more likely to receive a shorter or non-carceral sentence, even though overall conviction rates were not reduced.²⁹ The study found that for the cases reviewed, the clients in a holistic model were more likely to be granted pretrial release and concluded that holistic defense has the potential to “reduce incarceration without adversely impacting public safety.”³⁰ Criminal defendants avoided over 1.1 million custodial days in this study, and municipal and state authorities saved over \$160 million on carceral housing.³¹

B. Unique Issues of Rural and Urban Indigent Defense Systems

While indigent defense systems across the nation face issues of mass incarceration and low public-defense budgets, these issues manifest differently in rural and urban systems—each system faces unique

22. Buchanan & Nooe, *supra* note 18, at 335.

23. *Id.*

24. Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 78 (2004).

25. Anderson et al., *supra* note 17, at 883; *see generally* MATEI ET AL., *supra* note 2, at 15.

26. MATEI ET AL., *supra* note 2, at 13–14.

27. Anderson et al., *supra* note 17, at 822.

28. *Id.*

29. *Id.* at 879.

30. *Id.* at 823.

31. *Id.* at 866–67.

challenges.³² Rural jail populations are stagnate, not dropping like urban jail populations. Moreover, many rural areas have higher caseloads compared to urban areas.³³ These rural areas are sometimes called “legal deserts.”³⁴ Michigan is no exception.³⁵

Rural counties in Michigan have higher incarceration rates than their urban counterparts.³⁶ Yet, rural counties are less likely to have a public defender’s office. In Michigan, jurisdictions without an office rely on a base of private attorneys to take cases by assignment or contract systems.³⁷ Further, rural counties with only a few attorneys available for appointment run the risk that for some cases, conflicts of interest could bring the number of available attorneys to zero.³⁸

Finally, in general “rural counties also incarcerate a disproportionate number of people—and for longer periods of time—compared to metropolitan areas, despite lower crime rates.”³⁹ In the Midwest, rural communities of color have even less access to public services and are more vulnerable to poverty.⁴⁰ With few lawyers available to take on case assignments, indigent defendants in rural areas may spend more time incarcerated waiting to be appointed an attorney.⁴¹

32. Jessica Pishko, *The Shocking Lack of Lawyers in Rural America*, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/politics/archive/2019/07/man-who-had-no-lawyer/593470/> [<https://perma.cc/33MC-U2B4>].

33. *Id.*

34. *Id.*

35. *See id.* Nationally, only 2% of attorneys live in rural areas. Zachery Newton, *Legal Deserts: Race & Rural America*, 26 MICH. J. RACE & L. (Mar. 22, 2021), <https://mjrl.org/2021/03/22/legal-deserts-race-rural-america/> [<https://perma.cc/K993-6GHF>]. In Michigan, many counties only have a small handful of attorneys covering the indigent criminal defense docket. For example, Ottawa County has a population of almost 300,000 people yet listed less than twenty attorneys on their assigned counsel list. *Quick Facts: Ottawa County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ottawacountymichigan> [<https://perma.cc/9CVB-M6SL>] (last visited Oct. 17, 2022); *see also* MICH. INDIGENT DEF. COMM’N, COMPLIANCE PLAN FOR INDIGENT DEFENSE STANDARDS 1–4 (2018), <https://www.miottawa.org/Departments/PublicDefender/pdfs/MIDC-Compliance-Plan.pdf> [<https://perma.cc/P967-AEBR>].

36. VERA INST. JUST., INCARCERATION TRENDS IN MICHIGAN (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-michigan.pdf> [<https://perma.cc/2USR-J5PE>].

37. *See infra* Section II.C.

38. *See* Newton, *supra* note 35.

39. *Id.*; *see also* VERA INST. JUST., *supra* note 36.

40. *See* Newton, *supra* note 35.

41. *Id.*; *see generally* NEV. JUDICIARY, 2017 STATE OF THE JUDICIARY MESSAGE (2017), [<https://perma.cc/Z2KQ-WFEB>] (explaining that “in the rural parts of our state, indigent defendants may sit in jail for an extended period of time waiting to speak to an attorney”).

On the other hand, urban areas face high caseloads and low financial incentives for becoming assigned defense counsel.⁴² According to a 2008 National Legal Aid and Defender Association (NLADA) report, high caseloads and relatively little pay pressures appointed lawyers to prioritize speed over their clients' constitutional rights to effective representation.⁴³ While there may not be a shortage of qualified attorneys in Michigan's urban counties, exceedingly high caseloads may limit the effectiveness of appointed counsel.⁴⁴

C. Public Defense in Michigan and the Michigan Indigent Defense Commission

Between sixty and ninety percent of those prosecuted in the state of Michigan cannot afford an attorney.⁴⁵ There are 165 independent court systems in the state, each with its own method of assigning counsel to indigent defendants.⁴⁶ These systems can be sorted generally into three main categories of defense methods: 1) assigned counsel lists, 2) contract defenders, and 3) public defense offices.⁴⁷ Over half of the justice systems in Michigan use an assigned counsel list, with private attorneys paid per hour, per case, or per case event.⁴⁸ Just under half of the systems use a contract defender system, where private attorneys are paid a specific amount of money to take a certain number or percentage of cases.⁴⁹ When this initial report was published in 2016, only six percent of the systems in Michigan were utilizing a public defender office when assigning indigent defendants an attorney.⁵⁰ In 2021, there were thirty-two public defender offices in Michigan covering thirty-eight counties.⁵¹

In 2008, the NLADA found that “the state of Michigan fail[ed] to provide competent representation to those who cannot afford counsel in its

42. NAT'L LEGAL AID & DEF. ASS'N, EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM (2008).

43. *Id.* at 9.

44. *See id.*

45. MATEI ET AL., *supra* note 2, at 4.

46. JONAH A. SIEGEL, MICH. INDIGENT DEF. COMM'N, SNAPSHOT OF INDIGENT DEFENSE REPRESENTATION IN MICHIGAN'S ADULT CRIMINAL COURTS: THE MIDC'S FIRST SURVEY OF LOCAL COURT SYSTEMS 9 (2016), <https://michiganidc.gov/wp-content/uploads/2015/04/MIDC-Court-Survey-Report-Feb-16.pdf> [<https://perma.cc/TY69-MVD4>].

47. *Id.* at 10 (noting that nine percent fall into a self-identified “other” category, which typically includes some sort of combination of the assigned counsel lists and contract defenders).

48. *Id.* at 9–10.

49. *Id.*

50. *Id.*

51. *See* MICH. INDIGENT DEF. COMM'N, OVERVIEW, *supra* note 5, at 2.

criminal courts.”⁵² Five years later, in 2013, the Michigan Indigent Defense Commission was created.⁵³

The MIDC is statutorily required to develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and with the Michigan Indigent Defense Commission Act. The MIDC will identify and encourage best practices for delivering the effective assistance of counsel to indigent defendants charged with crimes. The MIDC will collect data, support compliance and administer grants to achieve these goals.⁵⁴

In 2021 the MIDC reported that all 120 funding units of Michigan’s court systems had approved compliance plans, requiring \$167,613,562 in funding.⁵⁵ The MIDC has introduced five standards approved by the Department of Licensing and Regulatory Affairs.⁵⁶ These standards cover: 1) education and training of defense counsel, 2) the initial interview between appointed defense counsel and the indigent client, 3) investigation and experts, 4) at which critical stages appointed counsel is necessary, including the first appearance, and 5) independence of assignment systems from the judiciary.⁵⁷

D. The Social Worker Defender Program

The MIDC received a federal grant in 2017 to establish the Social Worker Defender Program (SWDP) in Genesee County.⁵⁸ The SWDP had three main objectives: to 1) “embed one social worker within the assigned counsel system to act as an advocate for people charged with a felony criminal offense”; 2) evaluate and assess SWDP implementation and effectiveness; and 3) create a program manual aimed at increasing practitioners’ understanding of social workers as a public defense resource, guiding future replication of the program, and “enhanc[ing] sustainability.”⁵⁹ In 2018, the Urban Institute in partnership with the

52. NAT’L LEGAL AID & DEF. ASS’N, *supra* note 42, at i.

53. Adolphus, *supra* note 4.

54. *FAQ*, MICH. INDIGENT DEF. COMMISSION, <https://michiganidc.gov/faq/#toggle-id-18> [<https://perma.cc/P7GJ-9YQD>] (last visited Apr. 17, 2022).

55. *See* MICH. INDIGENT DEF. COMM’N, OVERVIEW, *supra* note 5, at 1.

56. MICH. INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES (Oct. 2021).

57. *Id.*

58. MATEI ET AL., *supra* note 2, at 4.

59. *Id.*

MIDC began assessing and evaluating the program and its effect on client outcomes.⁶⁰

1. Indigent Defense in Genesee County

The MIDC selected Genesee County—home to Flint, Michigan—as the location for the SWDP pilot program in 2018.⁶¹ Around twenty percent of Genesee County lives at or below the poverty level.⁶² While the county is approximately twenty percent Black or African American, over forty percent of the people with criminal cases between 2018 to early 2020 were Black.⁶³ Genesee County uses an assigned counsel system including approximately eighty private attorneys.⁶⁴ Between 2018 to early 2020, these eighty assigned attorneys handled more than eighty percent of all criminal cases in Genesee County Circuit Court.⁶⁵

2. SWDP Structure, Goals, and Methodology

The initial pilot ran from September 2018 to January 2020.⁶⁶ Clients in the program were assigned one of seven attorneys on the assigned counsel list.⁶⁷ Of the seventy-eight adult clients referred to the program, thirty-nine completed the program (meaning their sentencing plans were submitted to the court).⁶⁸ Clients were eligible for referral if theirs was a “straddle-cell” case, straddling community and jail sanctions on the Michigan sentencing grid.⁶⁹

Participating attorneys completed a six-hour course on how to collaborate with social workers.⁷⁰ They received hourly compensation and an additional stipend for cases where the social worker was involved.⁷¹ Attorneys were required to refer clients to the social worker, confer with the social worker throughout the case, supply updates on upcoming dates and outcomes, and present the sentencing plan to the court before the sentencing hearing.⁷²

60. *Id.* at 1.

61. *Id.* at 7.

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 7.

67. *Id.*

68. *Id.*

69. *Id.* at 6.

70. *Id.* at 7.

71. *Id.*

72. *Id.*

One of the main goals of the program was “sentence mitigation, or to increase use of community sentences for people charged with lower-level felony offenses.”⁷³ Judges have the most discretion in “straddle-cell” cases and may impose intermediate sanctions⁷⁴ rather than prison sentences.⁷⁵ Social workers add vital information for judges to consider, particularly mitigating evidence and the “broader circumstances surrounding clients’ lives.”⁷⁶

The social worker developed alternative sentencing plans to accomplish this goal.⁷⁷ These plans gave the court pertinent information pertaining to the client:

a comprehensive image of the client, including background information, any past or present circumstances that may account for why the person has been and/or is currently involved with the criminal legal system, personal references, and recommendations for addressing their individual needs and ensuring success in the community (i.e., substance use treatment, educational or job placement services, counseling, etc.).⁷⁸

Finally, the sentencing plans included updates on the client’s progression toward enrolling in treatment or other support services.⁷⁹

The SWDP social worker also acted as a bridge between community resources and the defense team.⁸⁰ Because of the high caseloads and “lack of funding,” attorneys do not always have the time or expertise to connect clients to the valuable community resources available.⁸¹ This is when the social worker stepped in and helped “strengthen the connection between their client and the community.”⁸²

3. SWDP Outcomes and Observations

The Urban Institute and the MIDC conducted five main data-collecting activities to evaluate the success of the SWDP.⁸³ These included 1) reviewing the case files of the eighty-three SWDP program participants; 2) conducting monthly interviews with the social worker for the program’s eighteen-month duration; 3) conducting semi-structured interviews with

73. *Id.* at 6.

74. *Id.* Intermediate sanctions can include “treatment, community service, supervision, or restitution.” *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 6–7.

81. *Id.* at 7.

82. *Id.*

83. *Id.*

five of the attorneys both pre- and post-implementation; 4) conducting semi-structured interviews with two judges post-implementation; and 5) conducting semi-structured, post-implementation interviews with ten clients.⁸⁴

Of the seventy-eight clients who were referred to the program, thirteen were ineligible or declined to participate.⁸⁵ Over half of those enrolled in the program were charged with a violent or drug offense, and around ninety percent had previous criminal-legal system involvement.⁸⁶

After an initial interview with the attorney, the social worker interviewed each client and conducted a psychosocial assessment.⁸⁷ These assessments uncovered information such as “demographic information, education and employment history, physical and mental health, substance use history, living situation, and relationship and family dynamics, including any history of trauma.”⁸⁸ The social worker described how “completing the assessment was a tool for change with many clients because they had never done a review of their lives and saw how past encounters and experiences had bearing on their current conditions and behaviors.”⁸⁹

Interviews conducted with court actors revealed that the program was perceived as having positive impacts on “judges’ knowledge of community treatments and supports, sentencing decisionmaking [sic] and outcomes, attorney-client relationships, and defendant experiences within the court system.”⁹⁰ All the attorneys and judges interviewed during the SWDP found they had increased knowledge of community resources available for clients.⁹¹ Attorneys were especially appreciative of the social worker identifying lesser-known community resources for their clients—something they felt they would not have time to do themselves.⁹²

“When asked whether SWDP had any impact on case outcomes, court actors and program participants believed the program positively affected judges’ impressions of their clients and the sentences administered.”⁹³ Six out of ten program participants interviewed said the sentencing plan

84. *Id.*

85. *Id.*

86. *Id.* at 7–8.

87. *Id.* at 8.

88. *Id.* at 9.

89. *Id.*

90. *Id.* at 11.

91. *Id.*

92. *Id.*

93. *Id.* at 11–12.

impacted the outcome of their case.⁹⁴ One judge found the sentencing plans so vital, they “would have loved to received [sic] more of them.”⁹⁵

Finally, the positive outcomes on the attorney-client relationship cannot be overstated. In fact, “all attorneys interviewed indicated they felt as if the social worker’s role had a positive impact on their interactions with clients and their ability to advocate for clients in court.”⁹⁶ As a result of SWDP, attorneys reported spending more time with their clients throughout the case and thought clients had a better understanding of their charges and potential outcomes.⁹⁷

4. Challenges to Implementing the Social Worker Defender Program

There were three main challenges the pilot SWDP struggled with: “1) competing professional standards regarding confidentiality; 2) determining eligibility; and 3) implementing a social worker program within an assigned counsel system.”⁹⁸

Social workers in Michigan are considered mandatory reporters and must report any findings of child abuse, abuse of vulnerable adults, or imminent harm to a third party.⁹⁹ Social workers risk losing their licenses for not complying with these ethical standards.¹⁰⁰ Attorneys, on the other hand, risk losing their licenses (along with professional censure and exposure to civil liability) for breaking their client’s confidentiality.¹⁰¹ The program noted that buy-in from both social workers and attorneys on holistic defense teams is essential¹⁰² and that changes to legislation to cover social workers under the attorney-client privilege may be necessary.¹⁰³

Determining client eligibility was another challenge the SWDP faced.¹⁰⁴ Attorneys were responsible for determining eligibility but felt they did not always have sufficient time or information to make a confident referral.¹⁰⁵ Because the attorneys had to make the referral before the probable cause conference, they felt there was not enough information on their client’s background or criminal history to determine if the client

94. *Id.* at 12.

95. *Id.*

96. *Id.* at 13.

97. *Id.*

98. *Id.* at 14.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. KRAMER ET AL., *supra* note 10, at 10.

104. MATEI ET AL., *supra* note 2, at 15.

105. *Id.*

was in fact in a “straddle cell.”¹⁰⁶ Some eligible clients missed out on a referral entirely, while other defendants received a referral, only for the social worker to find out that a prison sentence was inevitable, regardless of social worker intervention.¹⁰⁷

This Article is most concerned with the final challenge: using an assigned counsel system. “[C]ommunication, coordination, and collaboration” were proven difficult because the assigned counsel attorneys did not operate out of one centralized office but rather were spread around the county.¹⁰⁸ There was also no clear leader or coordinator since each assigned attorney was in private practice, meaning there were no universal standards for culture, structure, or practice among the assigned counsel list attorneys.¹⁰⁹ Social workers may have difficulty integrating themselves into such heterogeneous work settings as holistic defense systems continue to expand.¹¹⁰

E. SWDP Recommendation for Implementation with an Assigned Counsel List

This Article explores one of the program’s recommendations on implementing a social worker program with an assigned counsel list. The recommendation is to “[c]onsider adding collaboration with SWDP as a requirement for attorneys to become eligible for the assigned counsel list.”¹¹¹ This recommendation comes as the SWDP faces challenges unique to the de-centralized nature of the assigned counsel system, including cultural challenges (no centralized leadership meant no system-wide standards or norms around representation expectations) and logistical challenges (there was no central location and assigned attorneys were spread across the county).¹¹²

III. ANALYSIS

SWDPs are necessary to provide holistic defense to indigent defendants across the state of Michigan. Most jurisdictions use, at least in part, an assigned counsel system to appoint attorneys to indigent defendants.¹¹³ The SWDP allows these private attorneys to reap the

106. *Id.*

107. *Id.*

108. *Id.* at 15.

109. *Id.*

110. KRAMER ET AL., *supra* note 10, at 9.

111. *Id.*

112. *Id.*

113. SIEGEL, *supra* note 46, at 10.

benefits of having a social worker on their defense team without facing the costs of employing one.¹¹⁴ Bringing social workers into this process improves client outcomes both by increasing understanding of their case and the judicial process as well as diverting clients from incarceration and increasing participation in community services.¹¹⁵ Holistic defense reduces costs,¹¹⁶ and having social workers involved in the sentencing process helps educate judges on non-carceral sentencing options, such as unique community resources they were not before aware of.¹¹⁷

There are, however, several challenges to overcome before SWDPs can be widely implemented across the state. Assigned counsel list systems are inherently decentralized—private attorneys are spread across the county rather than organized in a single public defense office.¹¹⁸ This can cause logistical obstacles to communication and coordination with program participants.¹¹⁹ The decentralized nature also means there is no clear leadership for these private attorneys and no consistent expectations of culture or methods of practice from one attorney to the next.¹²⁰ In addition, there may be generalized pushback from attorneys who are skeptical of the benefits a social worker can provide the defense team or concerned about the amount of time necessary to make holistic defense work.¹²¹ Finally, these logistical hurdles to implementation may be even higher in rural counties where there are only a few attorneys on the assigned counsel list who are spread hours apart across the county.¹²² The MIDC must address these issues to realize the benefits of holistic defense throughout Michigan.

A. Benefits to Implementing the Recommendation

Integrating social workers into indigent defense throughout Michigan is necessary to improve client outcomes and increase awareness of non-carceral community solutions in sentencing. Most of the local justice systems throughout the state use, at least in part, an assigned counsel list for indigent defense representation.¹²³ The SWDP could bring the benefits of holistic defense that are already realized in systems with a public

114. See generally KRAMER ET AL., *supra* note 10.

115. *Id.*; MATEI ET AL., *supra* note 2, at 14.

116. Anderson et al., *supra* note 17, at 823.

117. MATEI ET AL., *supra* note 2, at 11.

118. *Id.* at 15.

119. *Id.*

120. *Id.*

121. See Anderson et al., *supra* note 17, at 822.

122. See *infra* Section III.C.

123. SIEGEL, *supra* note 46, at 10.

defender office to those counties operating from an assigned counsel list. This would provide holistic defense to more indigent defendants in Michigan without increasing costs to individual private attorneys and would improve awareness of community solutions for courts around the state.

The first benefit of the SWDP was that it compensated attorneys who worked with a social worker with an additional stipend.¹²⁴ Such an incentive encourages participation in the SWDP, especially if mandatory participation (as the recommendation suggests) is unpopular or prohibitive to filling an assigned counsel list. This stipend also compensates attorneys who spend extra time referring clients and working with the social worker.¹²⁵ Social worker involvement leads to better outcomes for more clients and improved attorney-client relationships.¹²⁶

Further, the SWDP benefits the whole community, not just the clients receiving holistic representation. Diverting clients from incarceration saves local and state funding.¹²⁷ The SWDP successfully educates judges and court actors on the available community programs, something many attorneys may feel they do not have time (or do not get paid enough) to do themselves.¹²⁸ Finally, bringing the social worker into the defense teams helps the entire system, from the assigned attorney to the court, see the whole picture of who the client is. Judges appreciate having this extra information, and most people involved agree this leads to more impactful and accurate sentencing.¹²⁹

While public defender offices may have social workers on staff, this is likely not feasible for many private attorneys who represent indigent clients. Implementing an SWDP would provide these attorneys and their clients access to a social worker with no added cost. Overall, implementing SWDPs throughout Michigan would increase the number of indigent defendants who are represented by interdisciplinary, holistic defense teams. It would educate judges on unique community services available at sentencing and would improve outcomes for clients and other participants in this process.¹³⁰ While there may be challenges to implementation, as discussed below, the benefits of SWDPs are system-wide.

124. MATEI ET AL., *supra* note 2, at 7.

125. See Moore et al., *supra* note 24 (noting that the presence of social workers on the defense team afforded some attorneys more time to focus on legal strategies).

126. See *supra*, Section II.D.3.

127. See Anderson et al., *supra* note 17, at 828.

128. See MATEI ET AL., *supra* note 2, at 6–7.

129. *Id.* at 12.

130. *Id.* at 11.

B. Challenges to Implementation

There are several challenges to requiring attorneys on the assigned counsel list to participate in the SWDP. First, these private attorneys work independently and are not used to scrutiny or following instructions from management.¹³¹ Second, attorneys may fear that this requirement would increase the time necessary for SWDP cases when caseloads are already high and compensation low.¹³² Finally, the decentralization and large footprint of Michigan's urban areas means that the logistical challenges faced in the pilot program will persist in future iterations.

For example, there were 302 attorneys on the assigned counsel list in Wayne County in 2020.¹³³ While some of these attorneys may work together in private firms, there is no centralized leadership overseeing this group of attorneys. With no centralized leadership, there are no system-wide expectations for training, reporting, or defense practices.¹³⁴ In addition to the logistical burden of implementing the recommendation that all assigned counsel attorneys agree to participate in the SWDP, there may be pushback from attorneys who do not *want* to participate. If non-participating attorneys are no longer listed as assigned counsel, the reduction in available attorneys could lead to a drastic increase in caseloads for the remaining attorneys who do participate.

Attorneys may also fear that SWDP participation will cost time that they do not have.¹³⁵ However, based on the observations in the pilot SWDP program in Genesee County, this requirement may have the opposite effect.¹³⁶ Attorneys who participated in the pilot program “indicated that they spent more time with their clients both during the initial interview and throughout the case as a result of SWDP.”¹³⁷

The logistical challenges presented by the pilot SWDP program in Genesee County will persist in other areas throughout Michigan. How this impacts Michigan's rural areas is discussed below, but even the most urbanized areas of Michigan will face logistical challenges with their assigned counsel list spread across the county. Since the assigned counsel list inherently involves attorneys who are not operating out of a single

131. KRAMER ET AL., *supra* note 10, at 9.

132. *But see* Moore et al., *supra* note 24 (noting that some attorneys had more time to focus on legal strategies with assistance from social workers).

133. Wayne County, *MIDC FY20 Compliance Plan and Cost Analysis Renewal* (2020), (select document “Wayne County.pdf”), <https://drive.google.com/drive/folders/19U7G9d1Wu5icmymXqsU7POx4f6qBj1qi>.

134. KRAMER ET AL., *supra* note 10, at 15.

135. Anderson et al., *supra* note 17, at 831.

136. *See* MATEI ET AL., *supra* note 2.

137. *Id.* at 13.

public defender office, plans for effective communication and coordination will be necessary to implement this requirement.¹³⁸

C. Unique Challenges for Rural Communities

In addition to the above stated issues, there may be challenges to implementing this requirement unique to the rural areas of Michigan. First, rural counties may already suffer from scant assigned counsel lists and massive caseloads.¹³⁹ Second, logistical issues faced when there is no centralized office or location will only be exacerbated in the most rural areas of the state.

Many rural counties are already working from a notably short list of assigned counsel. In the short-term, mandatory SWDP participation can only thin their already sparse ranks and may increase the time clients wait to be appointed an attorney. For example, Chippewa County in Michigan's Upper Peninsula has a population of around 37,000 people,¹⁴⁰ yet listed only seven indigent defense attorneys on their 2020 MIDC compliance plan.¹⁴¹ Such counties cannot afford any loss of assigned counsel.

Further, Michigan's rural communities feel logistical complications of the decentralized assigned counsel system even more severely. Counties with sparse rural populations occupying large amounts of land, like most counties in the Upper Peninsula and Northern Michigan, take more than an hour and a half to drive across. Any communication or coordination challenges, like those reported by participants in the pilot SWDP, will only be intensified in Michigan's most rural counties. Any plans for future SWDPs must carefully address communication and coordination hurdles in these rural counties before participation is required for all attorneys on the assigned counsel list.

IV. CONCLUSION

Holistic defense invites social workers onto the defense team for indigent clients and can greatly improve client outcomes. Programs like the SWDP help reduce sentences and divert defendants away from

138. See KRAMER ET AL., *supra* note 10, at 9.

139. See Newton, *supra* note 35.

140. *Quick Facts: Chippewa County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/chippewacountymichigan/PST045221> [<https://perma.cc/P5R3-D8R5>] (last visited Apr. 17, 2022).

141. Chippewa County, *MIDC FY20 Compliance Plan and Cost Analysis Renewal* (2020) (select document "Chippewa County.pdf"), <https://drive.google.com/drive/folders/1mcPhN0ncxewXpZac-6A2mgzgOhMkwCJp>.

incarceration, educate judges on community resources available during sentencing, and improve the attorney-client relationship.

The MIDC generated recommendations based on the pilot SWDP in Genesee County, including a recommendation that attorneys who wish to be added to an assigned attorney list agree to participate in the SWDP. While there are several challenges to implementing this recommendation, some felt especially severely by rural communities in Michigan, the overall benefits should be weighed heavily against the potential risks.

The pilot SWDP brought holistic defense beyond the public defender offices that can afford to staff social workers, to those indigent defendants who are appointed a private attorney from the assigned counsel list. As the quality of indigent defense in Michigan continues to improve since the establishment of the MIDC, continued participation from interdisciplinary teams will be necessary to ensure that indigent defendants in Michigan receive the representation they are constitutionally entitled to.