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April 27, 2016

Mr. Jonathan Sacks
Executive Director of MIDC
300 North Washington Square
Lansing, Michigan 48933

Dear Mr. Sacks,

Regarding MIDC proposed "standards".

The statute creating MIDC¹ is atrociously written; with legal principles espoused so badly as to be incomprehensible. You probably have recognized this but let's be sure.

- MCL 780.991 is a hoot. Section 1 says:

The MIDC shall establish *minimum* [omit *minimum*] standards, rules and procedures to effectuate . . . delivery of indigent criminal defense services . . .

A standard is an authoritative principle or measure. There are no minimum yardsticks. Besides, SCOTUS has already created standards, *infra*, p. 2.

- . . . the judges of this state are permitted . . . to contribute information and advice . . .

It's nice to know judges will retain their right of free speech.

- Section 2 says:

The MIDC shall *implement* [no more *establish?*] minimum standards, rules and procedures to *guarantee* [no more *promote?*] the right to counsel.

- Another hoot is MCL 780.993(d)(ii)

. . . Local legal services [shall be provided if] "the defendant is *determined to be* [omit *determined to be*] indigent . . .

Does this mean that one who is caught robbing a bank to avoid indigency will not get needed appointed counsel [AC]; but Pope Francis, a Jesuit determined to be indigent by his vow of poverty, would get one if ever needed?

- MCL 780.989(1) combines *authority* and *duties* in one paragraph The courts will have to guess whether the MIDC is exercising discretion to act or complying with a perceived duty to act. Will judicial review be *de novo* or for abuse of discretion?

¹ MCL 780.981.

Your so-called standards are not standards but rules of practice. SCOTUS has established constitutional standards with *Strickland*² and its genre; the court's opinion begins:

This case requires us to consider the proper standards for judging a criminal defendant's contention that . . . counsel's assistance at the trial or sentencing was ineffective, [466 U.S. at 671]

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. [id. at 687]

See also ABA Standards for Criminal Justice, 4-1 et seq. *The Defense Function*, cited in *Strickland*, id. at 688.

Your proposals exceed your statutory mandate. Deal with services peculiar to legal services to the indigent and not the myriad general faults in the criminal justice system, e.g. conference rooms in the court house. How skillful an architect are you?

I perceive 4 choices for you..

1. Urge the legislature to repeal the act and start over. The *Appellate Defender Act*³ would be a good frame upon which to build a new law. It was written years ago by experienced legislators -- brief and to the point, leaving implementation of legislative intent to regulations of the entity it created unfettered by legislative claptrap.
2. Urge SCOM to adopt a court rule superseding the statute. SCOM did this with the mediation statute, MCL 600.4951. This is fraught with constitutional issues concerning separation of powers.
3. Urge SCOM to declare the statute unconstitutional as a violation of separation of powers. I have too many things on my plate to help, but start with *Buback v Romney*, 380 Mich. 209 (1968). SCOM was equally divided so neither opinion is binding but they are a good start for research. You figure out how to get a case or controversy before SCOM so it can act.
4. Check 'none of the above' and try my axle grease for the already-invented wheels of justice.

Buried in the middle of your proposals is the major element of your statutory mandate, the employment of an auditor. I agree whole heartedly. My proposal calls for an Inspector-general.[IG] Auditor arouses thoughts of a bean counter with a green eye shade. *General* in IG conveys a South American aura and gives the office some added pizzazz.

² Strickland v. Washington, 466 U.S. 668 (1984)

³ MCL 780.12 et seq.

- I. ***Appoint an inspector general. to eliminate the rascals among the AC's.***
IGs are common for government entities with outside vendors. It could also serve a mentoring function for the neophytes in the profession.
 - a. IG would inspect cases selected randomly.
 - b. Do not delay this long overdue function. **I offer to be an unpaid volunteer IG for a pilot program in Macomb County.**⁴ Perhaps make it a duo lest I get carried away with my ideas.

2. ***Show a little kindness to assigned counsel (AC).***

Induce competent counsel to participate with incentives in addition to compensation. Given my penchant for error some had better be tried in pilot programs.

- a. Make assignments -- if requested by the AC and circumstances permit -- in batches of 2 to 4 for the same venue. The AC would go to the same district court on one day for several arraignments or exams and save time without interfering with AC's obligation of effective representation.
- b. Reward AC with precedence on the district court arraignment and motion dockets and conference with the prosecutor (with judicial discretion to permit variance to accommodate special circumstances.)
- c. Reserve 2 or 3 parking spaces for AC parking at district court on days for state cases, usually 2 a week. For busy courts, e.g. the 36th in Detroit without parking on court property, slightly different arrangements need to be tried, perhaps a voucher system covering all or part of the parking fee with safeguards to prevent abuse. (Perhaps MIDC could negotiate a discount -- as I did for clients when I was in downtown Detroit.) This may not be additional expense to the system because AC should recover travel expenses when the case is over.

3. ***Ease up on CLE.***

Reduce CLE lectures for an AC with XX years experience or perhaps in your discretion after asking opinions of judges before whom the AC has appeared. I quit organized CLE when the lecturers made more mistakes than I did..

4. ***Have a strong mentoring program.***

Required for lawyers within the first 2 or 3 years of practice or less with your approval or that of the chief judge. I would enjoy mentoring, a learning experience for the mentor.

⁴ If interested, hurry. I've practiced in each of the past 8 decades and on the down-hill side of 90.

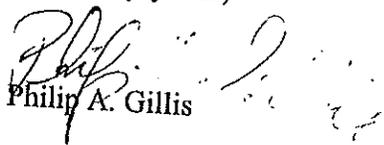
Mr. Jonathan Sacks, April 27, 2016, page 4.

My grandson, admitted to the Michigan and California Bars has no criminal law experience, He is working off his student loan doing b o r i n g government real estate work. Look into hiring his kind for s year or two with a mentor.

5. *Create competition among the ACs.*
Allow a defendant to get a new lawyer one time and only from the AC list and only with approval (liberally granted) of MIDC rep or IG. Jail inmates would spread the word. Quality of ACs would improve once the hacks and lackadaisical AC rascals start to lose business.
6. An on-duty arraignment attorney is a bad idea.⁵ Plea-bargain offers sometime expire after arraignment. Exam waivers should not be forced on defendant without advice of regular counsel.
7. A detailed but not too burdensome statement by AC of his representation. to be submitted with or in his request for fees.

Since administrative orders will be required along with lobbying, I am copying this to SCAO, law school deans and a few colleagues.

Very truly yours,


Philip A. Gillis

⁵ See the second staff comment to standard 4. It would also violate the MIDC statute § 11(2)(d). (which is also a bummer.) Substitution with a colleague would be proper if counsel has interviewed the defendant and reports to the director or the IG in advance with good reason. for allowing substitution and requiring the attorney to consult with his colleague in sufficient detail.