



MICHIGAN INDIGENT
DEFENSE COMMISSION

Attorney Caseload Distribution in Michigan's Assigned Counsel Systems

Research Brief - June 2017

Highlights

In April, 2017, the Michigan Indigent Defense Commission (MIDC) released its proposed Standard 5, Independence from the Judiciary. Consistent with the MIDC Act, the proposed standard requires indigent defense systems to be free from political and undue budgetary influence. This need for independence addresses two forms of conflict: (1) direct control over indigent defense functions by the judiciary through official policy, and (2) subtle or unwritten influence in indigent defense functions. The proposed standard is motivated by a lack of independence that characterizes many indigent defense systems around the state and the resulting danger that quality representation may be impeded by outside interference.

In assigned counsel systems, one common manifestation of the lack of independence is judicial involvement in the assignment of attorneys to indigent defense cases. In the MIDC's recent survey of indigent defense attorneys, many attorneys reported that their indigent defense systems do not use systems of random rotation; rather, appointments are often based on favoritism and not merit or fairness. In some systems, the lack of independence is written directly into local policy while in other systems, the influence of the judiciary is more informal. To follow up on attorney anecdotes, the MIDC collected assignment information from circuit courts across Michigan and conducted statistical analyses to determine the extent to which these courts utilize fair assignment processes. The analysis demonstrated that although each court system reports using a balanced rotation when assigning attorneys to indigent defense cases, the actual case assignment practices in the majority of the courts do not reflect a balanced rotation indicative of an actual independent system of selection. The few courts that do operate within the bounds of an expected caseload distribution offer models for fair rotations for other courts statewide.

As local systems design indigent defense services to comply with Standard 5, they will need to ensure a fair caseload distribution.

Attorney Caseload Distribution in Michigan's Assigned Counsel Systems
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Background

In April, 2017, the Michigan Indigent Defense Commission (MIDC) released its proposed Standard 5, **Independence from the Judiciary**.ⁱ Consistent with the MIDC Act,ⁱⁱ the proposed standard requires indigent defense systems to be free from political and undue budgetary influence. This need for independence addresses two forms of conflict: (1) direct control over indigent defense functions by the judiciary through official policy, and (2) subtle or unwritten influence in indigent defense functions. The proposed standard is motivated by a lack of independence that characterizes many indigent defense systems around the state and the resulting danger that quality representation may be impeded by outside interference.

A longstanding concern related to independence among practitioners and policymakers in the indigent defense community is the process by which cases are distributed to attorneys in assigned counsel systems. Although cases should ideally be assigned through a system of random rotation that eliminates bias among judges and attorneys, anecdotal evidence suggests that assignments are often based on favoritism rather than merit or fairness.

The American Bar Association (ABA) has asserted that the case assignment process, like other parts of the public defense system, should operate independently. In its *Ten Principles of a Public Defense Delivery System*,ⁱⁱⁱ the ABA argues that the same degree of independence enjoyed by retained counsel should be afforded to appointed counsel. Independence from political and judicial influence helps insulate appointed counsel from incentives that may compromise their ability to rigorously act in the interests of their clients. This principle echoes the sentiment expressed by the United States Supreme Court that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing ‘the interests of the client.’”^{iv}

In February, 2016, the MIDC administered a statewide survey to indigent defense attorneys to elicit feedback about improving indigent defense delivery, and concern over case assignments was pervasive among respondents.^v The following survey quotes reveal the extent to which attorneys hold negative attitudes towards the case assignment process:

“Who receives cases is arbitrary. Despite qualified individuals asking to receive capital case assignments, they are denied for invalid reasons while unqualified attorneys who have had repeated complaints continue to receive appointments. Attorneys who are not qualified or who don't want to be bothered to do their job continuously receive the most appointments because they just push clients through. It seems that the courts don't want to give appointments to attorneys who will hold hearings/trial or file motions. **The more you are willing to do for your clients, the less appointments you seem to receive.**”

“Judges make assignments. Some judges will only assign attorneys on their ‘private’ list. This brings into question the independence of counsel. Judges should be taken out of the equation.”

“Judges appoint lawyers who are known to never take cases to trial.”

“It is dependent on staying in good graces with the judge. If I file motions, ask for [an] expert, or go to trial, I am punished. I no longer get assignments.”

Source: attorney survey, February 2016

In response to the concerns voiced in the survey, the MIDC Research Unit set out to investigate the distribution of case assignments across circuit courts in Michigan to assess the prevalence of imbalance in the assignment process. If the scenarios depicted in these quotes are pervasive, case assignment processes will need to undergo considerable reform as part of compliance with the MIDC's proposed Standard 5.

Methodology

The MIDC selected eight circuits for this study. Two of these circuits are multi-county circuits that manage case assignments at the county level, and so we separated these courts for the purposes of the study. In total, then, we examined case assigned practices in ten courts. According to the court survey conducted by the MIDC in the summer of 2015,^{vi} each of the identified courts operates a rotation for their assignment of counsel. Courts were also selected based on their location within the state and their capacity to track case distribution among attorneys. Although many courts across the state do not keep detailed records about court appointments, the courts selected for this study all keep exceptional records.

To most effectively assess the fairness of case assignments systems, the research team would ideally collect data on the number of case offers made to each attorney. Under a fair rotation, all attorneys eligible to take cases within a given system (or a narrower tier within a system) would receive an exact or almost exact number of case offers. Unfortunately, very few courts in Michigan track this information. Among all of the circuit courts contacted by the MIDC, only one reported keeping a record of offered cases. Instead of analyzing the number of cases offered, the MIDC uses the *number of cases accepted by each attorney* as a proxy. This method is limited in that it allows for the possibility that attorneys are the cause of the imbalance and not court policies and practices; in other words, some attorneys might accept all or almost all of the offers they receive while other attorneys accept very few. As a result, the data cleaning process and statistical analysis, each described below, take steps to address this concern.

From each of the court systems, the MIDC requested the attorney roster that compiles the number of cases accepted by each attorney practicing indigent defense. For most courts, a single list of all attorneys was provided to the MIDC. In courts that use a multi-tiered system in which appointment levels are divided based on designated criteria, the

MIDC requested separate rosters. In some cases, the data were readily available electronically, while in other instances an employee of the court hand-counted attorney appointments. Once the data were delivered to the MIDC, the researchers contacted courts for clarification where necessary.

Based on the information gathered from court administrators and other court employees, the MIDC removed inconsistent data from the rosters. Since the project aimed to evaluate the distribution of cases to attorneys who practiced in 2015, all attorneys who were not on the roster list for the full year were removed. Were these data to remain in the sample then the results of the analysis would not be a useful determination of a balanced rotation. There are two main reasons why an attorney may not have been on the roster for a full year: (1) an attorney did not begin accepting indigent defense cases until after the year began or left indigent defense before the year ended; or (2) an attorney took an extended vacation or break within the time period. We also removed attorneys who chose only to accept a small number of cases throughout the year due to size of their private caseload or other personal reasons.^{vii}

While cleaning the data, the researchers came across the occasional issue that required legal expertise. For these particular issues, the research team consulted with MIDC staff attorneys with experience as appointed counsel. For instance, after cleaning the data from one circuit court, the researchers noticed an odd pattern. The majority of the observations hovered around the average caseload for the court but a few observations were extreme with values twice as high as the average. The court administrator's office was contacted for an explanation. The reason provided was that these law offices are close to the courthouse. When an attorney is required "ASAP," then one of these attorneys is appointed. Based on the principles outlined by the ABA,^{viii} this practice is not an acceptable anomaly^{ix} and demonstrates intended or unintended preferential treatment. Since the goal of this project is to quantify preferential treatment, the observations of these attorneys were left in the dataset.

Goodness-of-fit tests were used to analyze the data. A goodness-of-fit test compares two sets of information to determine the extent to which they are similar. For case assignments, the test compares the *observed* distribution of assignments with the *expected* distribution of assignments in a balanced rotation; in other words, how does the actual number of assignments differ from the expected number of assignments? A

goodness-of-fit test cannot determine the *cause* of variation in assignments, but the test can determine the extent to which case assignments depart from what would be expected in a balanced system. The test does allow for some degree of fluctuation and, as a result, helps account for naturally occurring variation between the offered and accepted case outcomes.^x

Results

The results of the goodness-of-fit tests indicate that although each court system reports using a balanced rotation when assigning attorneys to indigent defense cases, case distribution lists from only two courts statistically operate within the boundaries of an expected caseload distribution.^{xi} The case assignment practices in most courts do not reflect a balanced rotation indicative of actual independence, with several courts showing a considerable departure from the expected distribution of a balanced rotation.

Consistent with a Balanced Rotation

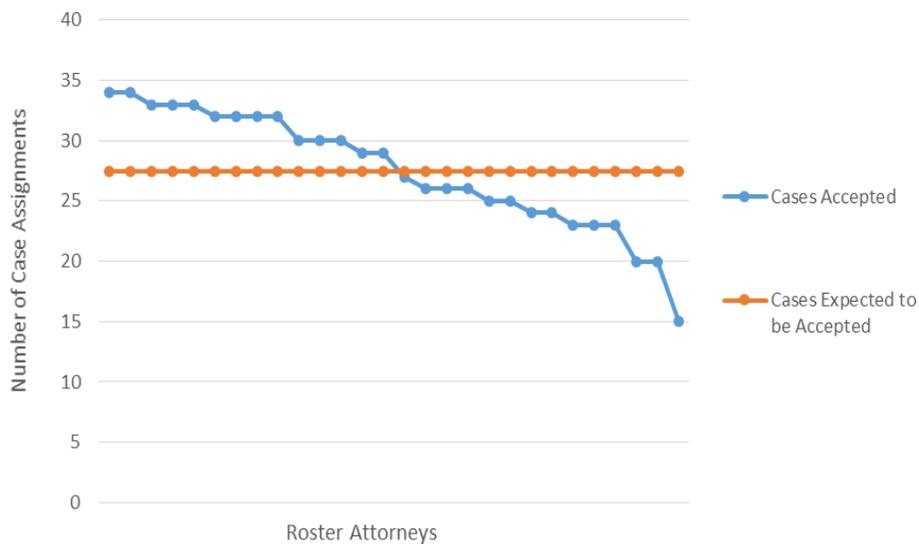
The MIDC identified two examples of courts that have developed case assignment processes consistent with a balanced rotation. Each of these examples is described below. The first court (“Court 1”) divides its cases into three levels: A, B, and C. These levels distinguish between the severity of charges, with Level A being the most severe. Attorneys are assigned to a level based on their qualifications. The appointment process is the same across all three levels. Attorneys who have met General Trial Division eligibility requirements are appointed to criminal cases by the Court Appointed Counsel Clerk on a rotating basis by alphabetic surname and by attorney classification (i.e., Level A, B, or C). Under some unusual circumstances, the court reports that the bench may make appointments of eligible attorneys to a case, although this appears to occur only infrequently.

Because Court 1 utilizes three distinct roster levels, each of the levels was analyzed independently. Figure 1 shows the Level C case distribution from the court. In this graph, the orange line represents the number of cases that would be expected to be given to each attorney working on Level C cases. The blue line represents the actual number of cases assigned to each indigent defense attorney. Each dot on the graph represents one attorney. The level at which it is placed on the graph reflects the number of case

assignments that each attorney received in 2015. In a graph of a system with a balanced rotation, both the orange and blue lines would look similar within a reasonable margin, meaning that some deviation from the uniform distribution is expected. Using probability, the test calculates the amount by which each observation can reasonably deviate from the expected value and still be within reason.

In Figure 1, each attorney is expected to receive 27.5 case assignments in a balanced rotation. In reality, attorneys were observed to have accepted a range of 15 to 34 case assignments. Although, at initial glance, it may appear that the rotation is imbalanced because the blue line deviates from the orange line at either extreme of the case range, the goodness-of-fit tests do not yield a significant result, which means that the departure from the expected number of cases is well within reason. Court 1’s rosters for Levels A and B show a similar type of balanced rotation based on their respective case distributions.

Figure 1. Accepted v. Expected Case Assignments: Court 1, Level C



The second court (“Court 2”) also utilizes multiple rosters. In this court, only one of the two rosters is consistent with a balanced rotation, which is likely a result of differences in the appointment processes between the tiers. Tier 1 is composed of high-level felonies in which a defendant faces incarceration of six or more years. Attorneys for Tier 1 cases are selected by judges. Tier 2 is composed of cases in which the defendant faces incarceration of five or fewer years. Tier 2 attorneys are offered appointments on a strict rotational basis that is computer-generated. Once an attorney has accepted an appointment, that

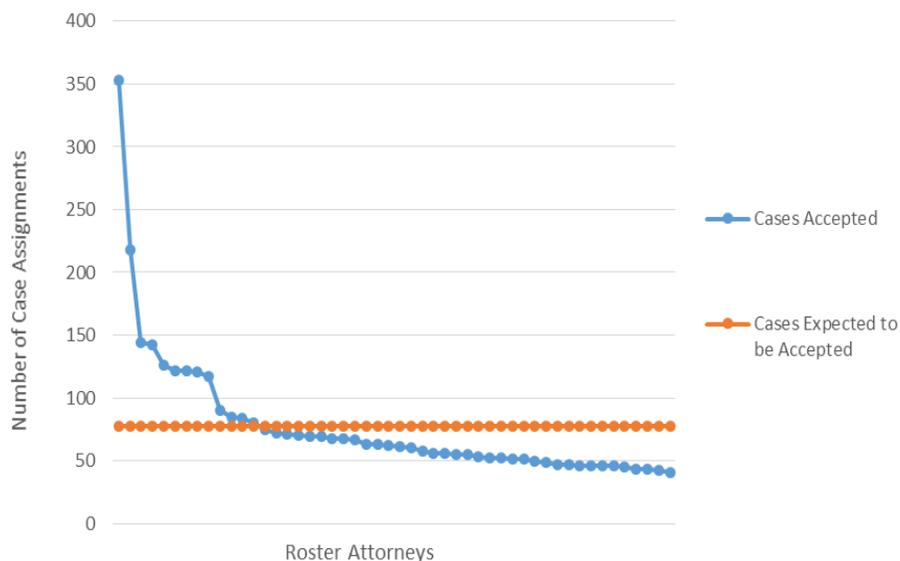
same attorney will not receive another offer until the remaining attorneys are offered appointments. The exception to the strict rotation is in cases when an attorney declines an appointment. In these instances, the appointment offer will go to the following attorney. Consistent with our expectations, the analysis suggested that only Tier 2, the process randomly generated by computer, reflected a balanced rotation.

Inconsistent with a Balanced Rotation

The case distributions in the remaining courts in this study are inconsistent with a balanced rotation. As with the first two courts, each court manages their attorney roster differently. However differently the rosters are managed, the expectation remains that in an unbiased system, cases are distributed in a balanced manner. Based on attorney caseload data, this does not hold true in the remaining systems.

Figure 2 shows the case assignment distribution from another circuit court (“Court 3”). Once again, the orange line represents the number of cases that would be expected to be given to each attorney working in indigent defense. The blue line represents the actual number of cases assigned to each attorney. As with Figure 1, each dot on the graph represents one attorney.

Figure 2: Accepted v. Expected Case Assignments: Court 3



In comparing Figure 1 and Figure 2, one can see that the departure from the expected distribution of case assignments is far more extreme in Figure 2, with the top ten

attorneys receiving considerably more cases than the other attorneys. In Figure 2, each attorney is expected to receive 77.44 case assignments in a balanced rotation. In actuality, attorneys were observed to have received a range of between 14 and 353 case assignments. In Figure 1, the average departure from the expected number of assignments is four cases in either direction. In Figure 2, the average departure from the expected number of assignments is 134.21 case assignments greater than the expected and 55.4 case assignments less than the expected.

Each of the courts with an imbalanced rotation shows a significant departure from a balanced rotation. The goodness-of-fit test shows that some court systems are more imbalanced than others. Whereas the first two courts do not show a significant departure from a balanced rotation, the deviation of the observed distribution in Court 3 is 2,530%^{xii} greater than what would be expected in a balanced rotation. The remaining courts in the study demonstrate a wide range of departures detailed in the appendix, with the greatest departure being 7,481% greater than expected. At this time there appears to be no identifiable similarities between the court systems that show similar departures from the acceptable level beyond their case assignment systems.

Conclusion

The results of the goodness-of-fit tests indicate that the majority of courts examined do not consistently appoint attorneys on a balanced rotational basis even when their assignment processes appear, on paper, to be independent and fair. In some instances, there are extreme differences between the top and bottom portion of attorneys accepting cases.

There are a number of possible reasons as to why a system may not operate in balance. The reasons can range from explicitly preferential treatment of specific attorneys to unintentional preference. Two examples of seemingly innocuous departures from a rotational list that can lead to an imbalance in attorney appointments can be seen in Courts 5 and 9 (described in the appendix).

- Court 5 appoints attorneys from a list. Typically court officials go down the list and appoint the next person on the list. However, it is the case that attorneys who are

present in the courtroom on another case may be assigned a current case in front of the court. In other instances, if an attorney had previously represented a client who has returned to court, Court 5 will appoint that same attorney regardless of the attorney's position on the list.

- Court 9 uses a rotation list from which they appoint attorneys. The appointments are made by either the scheduling clerk or judicial assistant. In most cases judges do not appoint attorneys, however exceptions may present in particularly complex cases. In these instances, the judge may appoint a co-counsel.

Such innocuous departures from independence can be difficult to identify. It can also be difficult to assess the extent to which they depart from the proposed Standard 5. In the examples above, the assignment of a case to an attorney who has previously represented a client may be acceptable if this process is guided by strict protocol. Similarly, assigning a specific attorney to represent a specific client because of unique skills and abilities that the attorney possesses may not violate judicial independence, so long as the decision is dictated by predetermined protocol and not the decision of a judge.

Many indigent defense systems across the state have taken great strides towards judicial independence in the last several years either as a result of the MIDC Act or of their own accord. Muskegon County, Lenawee County, and Berrien County, for instance, have all implemented public defender offices in the last four years and, in the process, have moved much of the indigent defense function out of the court and into their hands. Wayne County will continue to utilize an assigned counsel system but is in the process of shifting towards a fairer attorney rotation. With the release of the proposed standard, the MIDC is eager to continue assisting local indigent defense systems in developing and implementing reform efforts that foster independence and client-centric representation, while meeting MIDC minimum standards.

Appendix

Circuit Court	Degrees of Freedom^{xiii}	Chi-Square Statistic^{xiv}	Reject Null Hypothesis^{xv}	% Greater than Critical Value^{xvi}
Court 1				
Level A	19	14.44	No	-
Level B	20	25.74	No	-
Level C	27	23.75	No	-
Court 2				
Tier 1	39	252.70	Yes	363
Tier 2	206	49.73	No	-
Court 3	49	1744.68	Yes	2,530
Court 4	15	52.69	Yes	68
Court 5	13	38.05	Yes	70
Court 6	59	183.96	Yes	136
Court 7	7	95.19	Yes	577
Court 8	19	228.12	Yes	657
Court 9	41	687.61	Yes	1,107
Court 10	3	592.87	Yes	7,481

*H₀: The data are consistent with a uniform distribution

ⁱ The MIDC’s proposed Standard 5 is detailed on the MIDC website:

<http://michiganidc.gov/standards/#tab-id-5>.

ⁱⁱ MCL 780.991(1)(a).

ⁱⁱⁱ American Bar Association (2002). *Ten Principles of a Public Defense Delivery System*. Chicago, IL: American Bar Association.

^{iv} *Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

^v Michigan Indigent Defense Commission (2017). *Attorney Perspectives on Michigan’s Criminal Indigent Defense System: A Report of the Michigan Indigent Defense Commission*. Lansing, MI: MIDC.

^{vi} Michigan Indigent Defense Commission (2016). *Snapshot of Indigent Defense Representation in Michigan’s Adult Criminal Courts: The MIDC’s First Survey of Local Court Systems*. Lansing, MI: MIDC.

^{vii} These attorneys were identified through conversations with court staff, who explained that some attorneys informed the court that they would only be available for a limited (and typically very small) number of cases in a given year. These attorneys were removed from the data set since they did not participate in the typical case assignment process. On the other hand, attorneys who had only a small

number of cases but had not asked the court for a limited number of assignments remained in the data set.

^{viii} ABA, *supra* n.3.

^{ix} An acceptable anomaly would be that of all the attorneys on the roster, only these four attorneys were permitted to take certain cases such as child sexual abuse, DNA, or first degree murder cases. Because of the special skills needed in such cases, one would expect that only those attorneys possessing the required skills would be assigned.

^x The goodness-of-fit test is not explanatory, meaning that the test cannot help determine *why* a particular court system has a balanced or imbalanced rotation. The usefulness of the test lies in its application. The test can be used to examine a court's case assignment system and ascertain whether the rotation method used by the court is balanced or imbalanced. Once this information has been ascertained, further investigation will need to be conducted to determine the precise mechanisms that cause these systems to be imbalanced. Using this information, courts can make adjustments to their rotation systems. Furthermore, progress towards a balanced rotation can be quantified using additional tests.

^{xi} Significance is determined at the 0.05 level.

^{xii} All percentages are rounded to the nearest whole number.

^{xiii} Degrees of Freedom are the number of values that are available to vary in a statistic. Degrees of Freedom for this particular test is defined as $n-1$, which means the total number in the sample minus 1. In the case of Court 9, for instance, there were 42 attorneys in the analysis, subtracting 1 yields 41 degrees of freedom. The degrees of freedom are used to determine the critical values described below in footnote iv.

^{xiv} The Chi-Square test statistic is the value that is obtained from the chi-square equation. These values are compared to the critical values. If the chi-square test statistic is less than or equal to the critical value then the null hypothesis cannot be rejected.

^{xv} The null hypothesis is the direct opposite of a hypothesis. In an effort to avoid confirmation bias, scientists develop a hypothesis and then attempt to prove that the opposite is true. If the null hypothesis cannot be proven to be true then it is rejected, meaning there is support for the hypothesis. In the case of this analysis, we hypothesized that they rotation system is imbalanced. Therefore the null hypothesis states that the attorney rotation system is balanced. The test statistic showed that in most courts the system is imbalanced, rejecting the null hypothesis and therefore accepting the hypothesis.

^{xvi} Critical values are the values compared to the test statistic in order to determine whether or not to reject the null hypothesis. Critical values correspond to a given significance level, in the case of attorney rotation we used a 95% probability level.