Standard 1

Education and Training of Defense Counsel

The Michigan Indigent Defense Commission Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." M.C.L. §780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education." The MIDC proposes a minimum standard for the education and training of defense counsel to effectuate *Strickland*, the MIDC Act, and the Ninth Principle:

A. Knowledge of the law. Counsel shall know substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to know the changes and developments in the law. What is the measure for this? New attorneys may know current case law but lack the actual experience to effect adequate defense. How can this knowledge be equated to actual competencies or performance expectations?

B. Knowledge of scientific evidence and applicable defenses. Counsel shall know all forensic and scientific issues that can arise in a criminal case, know all legal issues concerning defenses to a crime, and be able to effectively litigate those issues. What is the measure for this? Ability to ask the right questions? To know how to research a case on forensic and scientific issue? Ability to talk with the proper resources/experts? Ability to re-enact the crime to properly investigate what happened?

C. Knowledge of technology. Counsel shall know how to utilize office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be able to thoroughly review materials that are provided in an electronic format. Each court system affords different technology and technology is a broad term that could mean just equipment or hardware and software or an entire informatics structure. . What is Counsel expected to know versus requesting technology support from each court to comply with an effective defense? Does technology here also include using powerpoint and other presentations/displays in court? What is the minimum requirement necessary to effect adequate counsel?

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Very broad statement. What should the focus of the CLE be? How encompassing should it be, i.e., all Criminal Law crimes? Or specific to the case Counsel is assigned or agrees to represent? Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation Is this really an obligation or a necessity to comply with the standards? for annual continuing legal education by attending local trainings or statewide conferences. Are these training sessions geared towards meeting these standards? Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. By whom/what certified program? Is this enough? Shouldn't there be a mentorship program set up to prepare newer

attorneys to ensure proper foundation? All attorneys shall annually complete at least twelve (12) hours of continuing legal education.

Staff comments:

- *The quality of the training should be analyzed through evaluations, and the effectiveness of the training shall be measurable and validated.*
- *The minimum of twelve hours of training represents typical national and Michigan requirements, and is accessible in existing programs offered statewide.*

Standard 2
Initial Interview

The Michigan Indigent Defense Commission Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." M.C.L. §780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v. Morris*, 470 F.3d 596, 602 (CA6, 2006). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client." The MIDC proposes a minimum standard for the initial client interview to effectuate the MIDC Act and the Fourth Principle:

A. Timing of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any court proceeding so as to be prepared for that proceeding. When a client is in custody, counsel shall conduct an initial client intake interview within 72 hours of appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting.

B. Setting of the interview: All client interviews shall be conducted in a confidential setting. Counsel shall ensure that confidential communications between counsel and the client are conducted in private. Counsel and the indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel. How is this standard going t be effected? Courts are not set up to accommodate. What is the transition plan? What steps should Counsel take when a confidential area is not available?

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, what if they are not available? What recourse? including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate how? What criteria should be used for this assessment? How competent is counsel to always determine this? whether the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate the client's capacity to stand trial or to enter a plea pursuant to Mich. Ct. R. 6.125 and M.C.L. §330.2020. Counsel shall take appropriate action what does this mean? where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings, including seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in-court proceedings, or other accommodations.

Staff comments:

- *The Commission recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client.*
- *The 72 hour requirement is typical of national requirements.*
- *The Commission recognizes that certain indigent criminal defense systems currently only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.*

Standard 3
Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011).

The MIDC proposes a minimum standard for investigations and experts:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

Staff comments:

- *The Commission recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client.*
- *The Commission emphasizes that a client's professed desire to plead guilty does not alleviate the need to investigate.*

Standard 4
Counsel at First Appearance

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." M.C.L. §780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. M.C.L. §780.991(3)(a); (3) …counsel continuously represents and personally appears at *every court appearance* throughout the pendency of the case." M.C.L. §780.991(2)(d), emphasis added. The United States Supreme Court has held that assistance of counsel is required at critical stages of proceedings, and that the right to counsel attaches when a defendant's liberty is subject to restriction by the court. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

The MIDC proposes a minimum standard on counsel at first appearance:
A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed and made available to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. The representation includes, but is not limited to the arraignment on the complaint and warrant or the setting of a case specific interim bond while defendant is in custody. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Staff comments:

- *The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) at this time. M.C.L. §780.991(2)(d) also addresses vertical representation, which will be the subject of a future minimum standard.*
- *One of several potential compliance plans for this standard will be an on duty arraignment attorney who will not necessarily represent the indigent client at later proceedings.*
- *Standard 4 is written to make sure that interim bonds may be set to allow release from custody so that the requirement for counsel at first appearance does not lengthen any jail stays. The Standard only applies to case-specific interim bonds set by a judge or magistrate while a defendant is in custody, not those set by police or implemented by the jail staff.*

Sources and Authority

Standard 1 - Education and Training of Defense Counsel

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principles 6 and 9)

Florida Performance Guidelines for Criminal Defense Representation (Section 1.2)

Authority:

M.C.L. §780.991(2)(c) and (2)(e)

Standard 2 - Initial Interview

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principle 4)

Florida Performance Guidelines for Criminal Defense Representation (Section 2.1)

Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures (Part IIB)

Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-4)

Authority:

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

US v. Morris, 470 F.3d 596 (CA6, 2006)

M.C.L. §780.991(2)(a)

Mich. Ct. R. 1.111B

Mich. Ct. R. 6.125

MRPC 1.6

Standard 3 - Investigation and Expert Witnesses

Sources:

Florida Performance Guidelines for Criminal Defense Representation (Section 4.2)

Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures (Parts IVA, VIA)

Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-7)

Authority:

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

Harrington v. Richter, 562 U.S. 86 (2011)

Ake v. Oklahoma, 470 U.S. 68 (1985)

Hinton v. Alabama, 134 S. Ct. 1081 (2014)

People v. Trakhtenberg, 493 Mich. 38 (2012)

Wiggins v. Smith, 539 U.S. 510 (2003)

Avery v. Prelesnik, 548 F.3d. 434 (2008)

Standard 4 - Counsel at First Appearance

Sources:

ABA Ten Principles of a Public Defense Delivery System - Principle 3

Authority:

Rothgery v. Gillespie County, 554 U.S. 191 (2008)

United States v. Cronic, 466 U.S. 648 (1984)

Powell v. Alabama, 287 U.S. 45 (1932)

US v. Morris, 470 F.3d 596 (CA6, 2006)

M.C.L. §780.991(1)(c), (2)(a), (3)(a, d)

Mich. Ct. R. 6.005(A)