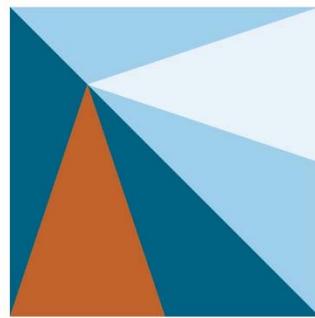


Position Paper on Attorney Fees after the Passage of the MIDC Act



MICHIGAN INDIGENT
DEFENSE COMMISSION

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Information for the Bench and Bar

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INFORMATION FOR THE BENCH AND BAR

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The Michigan Indigent Defense Commission was created by PA 93 of 2013, and signed into law by Governor Snyder in July of 2013.² The Commission is an independent agency, housed within the judicial branch of state government and composed of 15 members appointed by the Governor with recommendation of the Legislature, Supreme Court, the State Bar, and representing interests from the criminal justice system. The Commission has a mandate to:

- Collect and compile data for the review of indigent defense services in Michigan;
- Create minimum standards, adopted by the Michigan Supreme Court, to ensure all systems providing indigent defense meet constitutional obligations for effective assistance of counsel;
- Work with counties to implement plans to meet the standards and measure the performance of counties in providing public defense services;
- Award state funded grants to county systems to bring their system in compliance with the new minimum standards;
- Set standards ensuring workload is controlled to permit effective representation, an attorney has the training and experience that matches the complexity of the allegations against their client, and delivery of services is independent of the judiciary.

The MIDC Act covers many areas, including eligibility screening for assigned counsel, and factors that a court should consider when deciding whether to appoint counsel.³ The vast majority of counties in Michigan either use an assigned counsel system to appoint an attorney to an indigent defendant, or a “contract” system for appointing counsel.⁴ These systems contemplate a variety of methods of paying defense attorneys, including rates per hour, per case, per event, flat contract fees and other forms of

payment.⁵ Most of those systems have some mechanism by which attorneys can petition for reasonable fees beyond that which is provided by contract or rate schedule.⁶ Attorneys have been using case law based on statutory and constitutional provisions to support their requests. The MIDC is in the process of drafting specific standards governing economic incentives and disincentives⁷, as well as independence from the judiciary.⁸ These standards will produce compliance plans that overhaul the structure for attorney fee payments in Michigan. Until this transition, the MIDC provides this position paper on the state of the law for reasonable attorney fees under the MIDC Act.⁹

Prior to the MIDC Act, there was statutory language that described the chief judge’s consideration for awarding a reasonable fee for paying assigned counsel.¹⁰ At the same time that the MIDC Act was signed, Senate Bill 301¹¹ altered the statutory provision found at MCL 775.16, which **currently** reads as follows:

When a person charged with having committed a crime appears before a magistrate without counsel, the person shall be advised of his or her right to have counsel appointed. If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the Michigan indigent defense commission act.

Noticeably absent is any reference to the court assessing or awarding attorney fees. Despite this omission, local systems must provide reasonable compensation, and local courts must still consider motions seeking reasonable fees by assigned counsel and award reasonable fees – including those that may be extraordinary in nature – in appropriate cases to be paid from the county budget. This conclusion is reached after reviewing the MIDC Act, and case law interpreting earlier versions of MCL 775.16.

1. Basic Principles.

First, “[a]n indigent criminal defendant is clearly entitled to an attorney appointed at public expense.”¹² Michigan recognized this right before the United States Supreme Court did so in *Gideon v Wainwright*¹³, and judges in this state have been appointing counsel and compensating attorneys for assigned criminal defense work by statute since the late 1800’s.¹⁴ The statutory provision created a right to reasonable fees for assigned counsel.¹⁵ In other words, “[a]ppointed counsel had a statutory right to reasonable compensation for services provided to criminal indigent defendants long before indigent criminal defendants had a right, statutory or otherwise, to appointed counsel.”¹⁶ Michigan courts have

distinguished the legislature's intent in requiring counties to pay for counsel from the state's obligation "to provide adequate representation to indigent criminal defendants."¹⁷ Whether the constitutional guarantees to due process and equal protection "may be compromised by an unreasonable refusal to compensate for essential services of appointed defense counsel"¹⁸ has not been addressed in Michigan and is separate from the statutory right to compensation.

The MIDC was created as a result of efforts to improve legal representation for indigent criminal defendants. In October 2011, Governor Snyder issued Executive Order 2011-12, establishing the initial Indigent Defense Advisory Commission, which was responsible for recommending improvements to the state's indigent criminal defense system. These recommendations served as the basis for the MIDC Act that the governor signed into law in July 2013.¹⁹

The MIDC Act defines "indigent criminal defense system" as either of the following:

- (i) The local unit of government that funds a trial court combined with each and every trial court funded by the local unit of government [or]
- (ii) If a trial court is funded by more than 1 local unit of government, those local units of government, collectively, combined with each and every trial court funded by those local units of government.²⁰

The MIDC Act's reference to the *local* unit of government preserves the county's responsibility to fund indigent defense at the local level. Further, the MIDC Act specifically states that "an indigent criminal defense system shall maintain not less than its local share".²¹ The "local share" is defined as "an indigent criminal defense system's average annual expenditure for indigent criminal defense services in the 3 fiscal years immediately preceding the creation of the MIDC under this act, excluding money reimbursed to the system by individuals determined to be partially indigent."²² The current version of MCL 775.16, referencing the magistrate's duty to appoint counsel "if the person is eligible for appointed counsel under the Michigan indigent defense commission act" encompasses the county's obligation to pay for the local court's assignment of counsel as set forth in the Act itself. Though the language of MCL 775.16 has changed, it was necessarily done to be consistent with the MIDC Act, and is specific to the determination of indigency.²³ That determination remains with the trial court.²⁴ Michigan common law, as well as prior versions of MCL 775.16, established that the payment for assigned counsel was the responsibility of the county making the assignment.²⁵

The *state's* obligation to fund indigent defense systems is triggered by the requirement of compliance with the minimum standards created by the Commission.²⁶ To be sure, if the state does not

fund compliance plans then the standards set by the MIDC are not mandatory.²⁷ The first set of proposed minimum standards for indigent defense delivery systems have been conditionally approved by the Michigan Supreme Court as of this writing.²⁸ These standards involve the education and training of assigned counsel, the initial attorney-client interview, the request and use of experts and investigators, and counsel at first appearance in front of a judge.²⁹ There is no question that when these first standards are implemented significant state dollars will be required to fund compliance plans submitted by local courts and indigent defense providers and approved by the MIDC. There is also little doubt that with adequate funding, the quality of indigent defense representation will improve significantly over time pursuant to compliance with the minimum standards. This was entirely the purpose of the MIDC Act.

The state's funding of compliance plans does not relieve the local system's statutory obligation to assign counsel and pay a reasonable fee to assigned counsel. When future minimum standards address attorney fees, it may mean that the state will be required to fund attorney fees beyond the local share.³⁰ In any event, case law interpreting earlier versions of the statute remains instructive as to what constitutes a "reasonable fee". Attorneys should continue to petition the local system for payment when counsel deems any reasonable fees are appropriate.

2. Seeking a reasonable fee.

The burden of proving the reasonableness of a fee lies with the moving party.³¹ Assigned attorneys must document the time spent on each case at the earliest stages of the representation. This should be done in a manner consistent with the payment schedule in the county making the assignment. For example: if the county pays an hourly rate, then the attorney should document every hour – in varying increments – that the attorney is working on the case for the accused. This should include time spent in and out of court for purposes of any potential fee motion. If the county pays for events, the attorney must record every event performed on the case and note the time spent on the event. Though the "time" factor will not necessarily be relevant in most event-based cases, as litigation progresses it may be important to note if seeking additional fees. Best practices include recording time spent on the case in the following categories: client visits, court appearances, document review, preparation and research, motions filed, days spent in trial, and "miscellaneous" time spent on a case: reviewing discovery, organizing materials, phone calls, etc. All receipts and all out-of-pocket expenses should be preserved as well.

The mechanism for seeking reasonable fees depends on the court. In some counties a formal motion is required; in others, a letter outlining the basis for the request will suffice.³² In either scenario or anything in between, courts weigh a number of factors which should be addressed in detail in any motion. The most recent case on the topic is *In re Atchison*,³³ an unpublished Michigan Court of Appeals decision describing of the information the trial court will consider:

The trial court must first 'determine the fee customarily charged in the locality for similar legal services,' including the use of "reliable surveys or other credible evidence.' [*Smith v Khouri*, 481 Mich 519, 537 (2008) involving case evaluation sanctions]. The trial court's next step is to 'multiply that amount by the reasonable number of hours expended in the case.' *Id.* at 537. After determining this base line for compensation, the trial court 'may consider making adjustments up or down to this base number in light of the other factors listed in *Wood [v DAIE*, 413 Mich 573, 588 (1982)] and MRPC 1.5(a).' Some of the *Wood* and MRPC 1.5(a) factors overlap. The *Wood* factors include '(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.' *Id.* at 529. The eight factors to be considered under MRPC 1.5(a) are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent. [*Id.* at 529–530 .]

As an aid for appellate review, the trial court should briefly discuss each of the factors on the record. [*Smith v Khouri, supra,*] at 529 n14.

The lead attorney in *Atchison* worked as part of a consortium of attorneys, and he solicited the assistance of a more experienced attorney to work with him in a complicated murder case.³⁴ A contract was in place for the work; Atchison and co-counsel sought extraordinary fees for work provided substantially beyond that contemplated in the standard contract arrangement.³⁵ The trial court denied the request in part, awarding only some of the additional fees.³⁶ That decision was overturned by the Court of Appeals, finding that additional extraordinary fees were warranted on the facts of the case.³⁷ The lesson is to keep scrupulous records and be prepared to document the nature of the work provided. In some cases, fixed fee schedules *may* be inherently reasonable, particularly if agreed to by the parties before the proceedings.³⁸

Even where there is a fee “cap” in place, the Michigan Supreme Court recently reiterated that the trial court must still “address the reasonableness of the fee in relation to the actual services rendered” when presented with a request to exceed the maximum rate.³⁹ The Michigan Supreme Court has eschewed a mechanical calculation of reasonableness, but has held that “whatever the system or method of compensation utilized, the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform.”⁴⁰ What constitutes “reasonable compensation” can vary greatly among the circuits.⁴¹

If the motion for a reasonable fee is denied or the fee is reduced, a reviewing court will consider the denial or reduction for an abuse of discretion.⁴² A circuit court’s final decision on fees can be appealed to the Michigan Court of Appeals.⁴³ This generally involves the timely filing paperwork with the Court of Appeals and obtaining a transcript of the hearing where the fees were ruled upon.⁴⁴

3. Conclusion

Attorneys assigned to represent poor people charged with crimes work incredibly hard in this state, and they must be paid a reasonable fee for doing so. Nothing in the amendment to MCL 775.16 eliminated the requirement of the local system to assign or pay for appointed counsel. If anything, the MIDC Act reaffirms each indigent defense delivery system’s obligation to maintain its local share, while the MIDC establishes standards to improve the quality of representation through standards that the state is required to pay for to ensure compliance. Best practices require time spent on assigned cases to be tracked diligently. Attorneys performing work should continue to use local practices to petition for

reimbursement for their time and effort. Attorneys denied a reasonable fee should appeal that decision. The MIDC has the authority to accept recommendations and complaints on fee issues.⁴⁵

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² The Michigan Indigent Defense Commission (“MIDC”) Act is codified at MCL 780.981 *et. seq.*

³ MCL 780.991(3).

⁴ The most common exception would be for those counties with a public defender office taking some percentage of indigent cases. At the time of this writing, public defender offices provide representation in Bay, Chippewa, Kent, Lenawee, Muskegon, Washtenaw and Wayne Counties.

⁵ See generally, 2014 fee schedules provided by counties at http://www.sado.org/fees/10281_2014-Fee-Schedule.pdf (accessed May 2016). The MIDC conducted a survey of all court systems including how assigned counsel is paid. A report compiling the data collected is on the MIDC’s website, at <http://michiganidc.gov/policies-and-reports/>.

⁶ *Id.*

⁷ MCL 780.991(2)(b).

⁸ MCL 780.991(1)(a).

⁹ MCL 780.985(4).

¹⁰ The statute previously read: “Upon proper showing [of indigency], the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.” *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 122-23; 503 NW2d 885, 891 (1993) citing MCL 775.16. The language has been superseded, effective July 1, 2013.

¹¹ Public Act 94 of 2013, effective July 1, 2013.

¹² *People v Nard*, 78 Mich App 365, 368; 260 NW2d 98, 101 (1977) citing an earlier version of MCL 775.16 and *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

¹³ *Gideon v Wainwright*, *supra*.

¹⁴ *People v Loyer*, 169 Mich App 105, 137-38; 425 NW2d 714, 728 (1988) (Boyle, J., dissenting)(citing *inter alia*, “the clear legislative forerunner for MCL 775.16” from 1893).

¹⁵ *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 89; 438 NW2d 878, 881 (1989) (interpreting the provision as applied to assigned appellate counsel).

¹⁶ *Recorder's Court Bar Ass'n*, *supra*, at 123-24.

¹⁷ *Recorder's Court Bar Ass'n*, *supra*, at 127.

¹⁸ *In re Attorney Fees of Mullkoff*, *supra*, at 88-89.

¹⁹ See generally, the Michigan Indigent Defense Commission’s website, found at www.michiganidc.gov.

²⁰ MCL 780.983(f).

²¹ MCL 780.993(6). The statute goes on to state: “An indigent criminal defense system is not required to expend its local share if the minimum standards established by the MIDC may be met for less than that share, but the local share of a system that expends less than its local share under these circumstances is not reduced by the lower expenditure.” MCL 780.993(8).

²² MCL 780.981(g).

²³ See generally, House Fiscal Agency Analysis of SB 301, PA 94 of 2013, at <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-4529-4569088C.pdf> (accessed May 16, 2016).

²⁴ MCL 780.991(3)(a) provides “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.” That provision describes factors for consideration by the court and the general parameters for applying for assigned counsel.

²⁵ *Frederick v Presque Isle Cnty. Circuit Judge*, 439 Mich 1, 15; 476 NW2d 142, 148 (1991).

²⁶ MCL 780.993(7).

²⁷ MCL 780.997.

²⁸ The conditionally approved minimum standards can be found on the Michigan Indigent Defense Commission’s website, at <http://michiganidc.gov/standards/>.

²⁹ *Id.*

³⁰ When setting minimum standards, the MIDC Act states that the Commission “shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel” provided by the United States and Michigan Constitutions, and “shall adhere” to principles, including that “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation shall be avoided.” MCL 780.991(2)(b).

³¹ *Smith v. Khouri*, 481 Mich 519, 528-29; 751 NW2d 472, 478-79 (2008).

³² The Supreme Court Administrative Office has an approved form for tracking time and expenses and petitioning for assigned counsel fees. See MC221, found online at :

<http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc221.pdf> (accessed May 16, 2016).

³³ *In re Atchison*, No. 292281, 2012 WL 164437, at *6 (Mich. Ct. App. Jan. 19, 2012).

³⁴ *Id.* at *1.

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ *Id.* at *8.

³⁸ *In re Klevorn*, 185 Mich App 672, 676; 463 NW2d 175, 177 (1990). However, the “fixed-fee method of compensating assigned counsel based on the seriousness of the crime” has been found to be unreasonable, unjust, and a disincentive to due process. *Recorder’s Court Bar Ass’n, supra*, at 116.

³⁹ *In re Ujlaky*, 498 Mich 890; 869 NW2d 624 (2015). The *Ujlaky* case illustrates the importance of tracking time, even when fees are “capped” at a maximum rate, because extraordinary fees may be awarded. The Supreme Court went on to state that “[a]lthough the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, *ipso facto*, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may.”

⁴⁰ *Recorder’s Court Bar Ass’n, supra*, at 131.

⁴¹ *Recorder’s Court Bar Ass’n, supra*, at 129 (1993).

⁴² *In re Attorney Fees of Mullkoff, supra*, at 85.

⁴³ Most of the appellate litigation has been by way of an application for leave to appeal to the Michigan Court of Appeals pursuant to MCR 7.205. There is some authority for the possibility that the action could be filed as a claim of appeal pursuant to MCR 7.202(6)(a)(i) or (iv).

⁴⁴ MCR 7.204; MCR 7.205.

⁴⁵ MCL 780.989(1)(e).