



MICHIGAN INDIGENT
DEFENSE COMMISSION

Minimum Standards for Indigent Criminal Defense Services

APRIL 2017

The Michigan Indigent Defense Commission submitted Standards 1, 2, 3 and 4 to the Department of Licensing and Regulatory Affairs and a decision is pending. This packet also contains Standards 5, 6 and 7 which have been proposed by the Commission.

The MIDC invites comments on proposed Standards 5, 6 and 7 from all members of the public and the criminal justice community through October 6, 2017.

Michigan Indigent Defense Commission

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Standard 1 Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that “[d]efense counsel is required to attend continuing legal education relevant to counsel’s indigent defense clients.” MCL 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 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (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 proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court and submitted by the MIDC is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of 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 have reasonable knowledge of the changes and developments in the law. “Reasonable knowledge” as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. 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 for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

Standard 2 Initial Interview

The MIDC 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.” MCL 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 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). 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 proposed a minimum standard for the initial client interview. The version conditionally approved by the Court and submitted by the MIDC is as follows:

A. Timing and Purpose 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. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after 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. If confidential videoconference facilities are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pretrial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. 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.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client’s capacity to stand trial or to enter a plea pursuant to MCR

6.125 and MCL 330.2020. Counsel shall take appropriate action 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 in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pretrial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. *The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.*

2. *The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).*

3. *Certain indigent criminal defense systems 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.*

4. *In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.*

5. *Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.*

6. *The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.*

7. *In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.*

8. *Systems without adequate settings for confidential visits for either in-custody or out-of custody clients will need compliance plans to create this space.*

9. *This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.*

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 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (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 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel..." MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court and submitted by the MIDC is as follows:

- 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. Reasonable requests must be funded.
- C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.
- D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

- 1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.*
- 2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.*
- 3. Counsel should inform clients of the progress of investigations pertaining to their case.*
- 4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.*

Standard 4 Counsel at First Appearance and other Critical Stages

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." MCL 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. MCL 780.991(3)(a); (3) "...counsel continuously represents and personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court and submitted by the MIDC is as follows:

- 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

to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. 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.

Comments:

1. 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) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

Standard 5 Independence from the Judiciary

The MIDC Act requires the agency to establish minimum standards, rules, and procedures to adhere to the following: “The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.” MCL 780.991 (1)(a).

The United States Supreme Court addressed the issue of independence in *Polk v Dodson*, 454 US 312, 321-322; 102 S Ct 445, 451; 70 L Ed 2d 509 (1981):

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. . . *Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.* (Emphasis added.)

The MIDC proposes a minimum standard to ensure that indigent criminal defense services are independent of the judiciary:

A. The indigent criminal defense system (“the system”) should be designed to guarantee the integrity of the relationship between lawyer and client. The system and the lawyers serving under it should be free from political and undue budgetary influence. Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution. The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary.

B. The court’s role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver); and contributing information and advice concerning the system.

Staff Comment:

Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge’s input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of pressure from the judge.

Standard 6 Indigent Defense Workloads

The MIDC Act provides that “[d]efense counsel’s workload is controlled to permit effective representation.” MCL 780.991(2)(b). 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 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Fifth 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 “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.”

The MIDC proposes a minimum standard for indigent defense workloads:

The caseload of indigent defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.¹

These workloads will be determined over time through special Michigan specific weighted caseload studies.² Until the completion of such studies, defender organizations, county offices, public defenders, assigned counsel, and contract attorneys should not exceed the caseload levels adopted by the American Council of Chief Defenders – 150 felonies or 400 non-traffic misdemeanors³ per attorney per year.⁴ If an attorney is carrying a mixed caseload which includes cases from felonies and misdemeanors, or non-criminal cases, these standards should be applied proportionally.⁵

These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.

Staff comments:

1. *The MIDC is mindful of caseload pressures on the prosecution and fully supports proper funding for prosecutors to have reasonable caseloads.*
2. *The MIDC is aware that the problem of excessive caseloads is one that needs to be resolved in tandem with compensation reform, so that attorneys do not need to take on too many indigent defense assignments to earn a living. The MIDC is concurrently proposing a standard on economic disincentives or incentives for representing indigent clients.*
3. *The MIDC does not believe that caseload pressures should ever create a situation where indigent clients facing criminal charges do not receive the appointment of counsel.*
4. *Compliance plans should include a means to account for and audit caseload calculations.*

¹ Language parallels Supreme Court of Washington, *In the Matter of the adoption of new standards for indigent defense and certification of compliance*, Standard 3.2, June 15, 2012.

² See e.g. *Guidelines for Indigent Defense Caseloads*, Texas Indigent Defense Commission, January 2015; *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards*, American Bar Association, June 2014. The MIDC has issued a Request for Proposals for a Michigan study.

³ Non-traffic misdemeanors include offenses relating to operating a motor vehicle while intoxicated or visibly impaired. MCL 257.625.

⁴ *American Council of Chief Defenders Statement on Caseloads and Workloads*, Resolution, August 24, 2007. “Per year” refers to any rolling twelve-month period, not a calendar year.

⁵ *Id.* An example of proportional application might be 75 felonies and 200 non-traffic misdemeanors in a caseload.

Standard 7 Qualification and Review

The MIDC Act calls for a standard establishing that “Defense counsel’s ability, training, and experience match the nature and complexity of the case to which he or she is appointed.” MCL 780.991(2)(c). Further, the Act requires that “Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.” MCL 780.991(2)(f). The MIDC’s conditionally approved Standard 1 sets forth the requirements for the Education and Training of assigned counsel, and should be considered a prerequisite to, and means to achieve, the standard for qualification and review of criminal defense attorneys appointed to represent indigent accused defendants. 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. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). The right to effective assistance of counsel applies equally whether counsel was appointed or retained. *Cuyler v Sullivan*, 446 US 335, 344–45; 100 S Ct 1708, 1716; 64 L Ed 2d 333 (1980).

The MIDC proposes a minimum standard for qualification and review:

- A. **Basic Requirements.** In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications (hereafter “basic requirements”):
1. Satisfy the minimum requirements for practicing law in Michigan as determined by the Michigan Supreme Court and the State Bar of Michigan; and
 2. Comply with the requirements of MIDC Standard 1, relating to the Training and Education of Defense Counsel.
- B. **Qualifications.** Eligibility for particular case assignments shall be based on counsel’s ability, training and experience. Attorneys must meet the following case-type qualifications:
1. Misdemeanor Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - b. Serve as co-counsel or second chair in a prior trial (misdemeanor, felony, bench or jury); or
 - c. equivalent experience and ability to demonstrate similar skills.
 2. Low-severity Felony Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - i. Has practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice); and
 - ii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have reached a verdict, one of which having been submitted to a jury; or
 - iii. Have equivalent experience and ability to demonstrate similar skills.
 3. High-severity Felony Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - i. Has practiced criminal law for two full years (either as a prosecutor, public defender, or in private criminal defense practice); and
 - ii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in four criminal cases that have been submitted to a jury.

4. Life Offense Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - i. Has practiced criminal law for five full years (either as a prosecutor, public defender, or in private criminal defense practice); and
 - ii. Has prior experience as lead counsel in no fewer than seven felony jury trials that have been submitted to a jury.
- C. **Review.** The quality of the representation provided by indigent defense providers must be monitored and regularly assessed. Productivity is a component of the review process. Review is a process to evaluate the quality of the representation after an attorney has established the minimum requirements for eligibility. For attorneys seeking qualification under sections B(1)(c) or B(2)(a)(iii), the review process can be used for that purpose. In some cases, the review will give notice to an attorney whose performance can be improved. In all cases, the evaluation of attorneys must be made by peers in the criminal defense community, allowing for input from other stakeholders in the criminal justice system including judges, prosecutors and clients.

Staff Comments:

1. *The Minimum Standard for Qualification and Review applies to all attorneys accepting assignments to represent defendants charged in adult criminal cases, including attorneys employed by a public defender office.*
2. *Misdemeanors, low-severity felonies and high-severity felonies are defined in the Michigan Legislative Sentencing Guidelines. A "life offense" for purposes of this Minimum Standard includes any case where the offense charged or enhancement sought subjects the accused defendant in a criminal case to life in prison.*
3. *The MIDC Act focuses on qualifications that relate to counsel's ability, training and experience. Other non-merit based qualifications that relate to counsel's membership in a bar association or maintaining a local business address shall not be given undue weight.*
4. *The MIDC discourages imposing a geographic limitation on counsel's practice area, so long as counsel can meet with a client on an as-needed basis without hardship to the client and can appear in court when required.*
5. *The appointing authority should maintain a list of qualified counsel, but has the discretion to reach outside of the list of locally qualified attorneys when required in order to appoint counsel with the ability, training and experience to match the nature and complexity of the case to be assigned.*

Standard 8 Economic Disincentives or Incentives

Standard to be proposed for comment in 2017.