



EDUCATION AND TRAINING OF DEFENSE COUNSEL

A GUIDE TO IMPLEMENTATION OF THE MINIMUM STANDARDS FOR DELIVERY SYSTEMS
PREPARED BY THE MICHIGAN INDIGENT DEFENSE COMMISSION

SPRING 2017

BACKGROUND

In 2008, Michigan was the subject of a report by the National Legal Aid and Defender Association entitled: *A Race to the Bottom Speed & Savings Over Due Process: A Constitutional Crisis*.¹ The NLADA study involved an evaluation of trial-level indigent defense delivery systems across ten representative counties in Michigan.² The NLADA analyzed Michigan's compliance with the ABA Ten Principles of a Public Defense Delivery System.³ "The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."⁴ At the conclusion of the year-long study, the NLADA found that none of the counties studied in Michigan were constitutionally adequate and that Michigan ranked 44th out of all 50 states in per capita indigent defense spending.⁵

In October 2011, Governor Rick Snyder issued an Executive Order⁶, establishing the Indigent Defense Advisory Commission, a group of stakeholders that were responsible for recommending improvements to the state's legal system. The Advisory Commission's recommendations in 2012⁷ served as the basis for the legislation known as the Michigan Indigent Defense Commission Act, which the Governor signed into law in July 2013.⁸ Commissioners were appointed in 2014 and the first Executive Director and Staff began working in 2015.

The statute creating the Commission provides: "The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the constitution of the United States and section 20 of article I of the state constitution of 1963..."⁹

STANDARD 1

The MIDC Act states that “[i]ndigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels’ indigent defense clients.”¹⁰ 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.”¹¹ 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 “[d]efense counsel is provided with and required to attend continuing legal education.”¹²

The MIDC’s first minimum standard addresses the education and training of defense counsel.¹³ The standard describes the areas of law that counsel must know, and contains requirements that attorneys must annually fulfill. The complete text of the standard approved by the Michigan Indigent Defense Commission is available on the MIDC’s website.

The knowledge requirement has three components: law, scientific evidence and defenses, and technology. In terms 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” and there is an obligation to stay abreast of changes and developments in these subjects.¹⁴ It is equally important that counsel “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.”¹⁵ Finally, it is incumbent on assigned counsel to be reasonably able to use technology found in offices and courts so that counsel can work efficiently and “review materials that are provided in an electronic format”.¹⁶ The minimum standard for education and training is not designed to impose unrealistic expectations on assigned counsel. Rather, the knowledge component contains a requirement of reasonableness: criminal defense attorneys must know the relevant law and be able to defend a client’s case. The standard defines reasonable knowledge as “knowledge of which a lawyer competent under MRPC 1.1 would be aware.”¹⁷

Criminal defense attorneys must have reasonable knowledge of the relevant law and be able to defend a client’s case.

There are two specific data points that will be collected to satisfy compliance with the standard. Attorneys who have been practicing criminal law in Michigan for less than two years will need to participate in one “basic skills acquisition” class.¹⁸ This will give the newest attorneys an

opportunity to learn critical lessons of advocating for the indigent in the safety of a simulated environment before accepting assignments.¹⁹ All attorneys accepting adult criminal assignments at the trial court level shall annually complete at least twelve hours of continuing legal education.²⁰ The courses taken to satisfy this requirement must be relevant to criminal defense.²¹

The minimum standard for education and training will provide counsel with the foundation and means to improve the quality of indigent defense representation in Michigan.

RATIONALE

In 1963, the United States Supreme Court issued the landmark decision in *Gideon v. Wainwright*, which established the constitutional right to appointed counsel in state court prosecutions.²² Michigan recognized this right long before the United States Supreme Court did so in *Gideon*, and judges in this state have been appointing counsel and compensating attorneys for assigned criminal defense work by statute since the late 1800's.²³ The decision in *Gideon* must be “read in conjunction with”²⁴ the United States Supreme Court’s earlier decision in *Griffin v. Illinois*²⁵, in which Justice Hugo Black wrote that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”²⁶ Taken together, poor people charged with crimes are “entitled to a lawyer with the time, resources, experience, training, and commitment for which a person with means would pay.”²⁷

Fifty years elapsed between the establishment of the constitutional right to appointed counsel and the creation of the Commission charged with setting standards for the delivery of indigent defense in Michigan. During that time, the unfortunate truth has been that “the methods we use to appoint, pay, train and supervise appointed counsel virtually guarantee that many will not perform their role effectively, to the detriment of their clients and the criminal justice system itself.”²⁸ More than twenty five years ago practitioners complained that there was “little effort to support and train the Michigan criminal defense bar.”²⁹ Decentralized programming existed (and

still exists) statewide, but institutional resources dedicated to training judges and prosecutors created a sense of imbalance: “On one side are carefully trained and salaried prosecutors; in the middle are carefully trained and salaried judges; on the other side are poorly paid assigned counsel whose training is sporadic at best. Yet assigned defense attorneys, who are often under experienced and unsupervised, need

“I strongly believe that indigent defense should not be a training ground for lawyers.”

--Wayne County Participant
MIDC Attorney Survey 2016

careful and regular training, at least as much as judges and prosecutors. This imbalance is costly and inefficient for the entire system.”³⁰

Despite these decades-old urgings, the need for training only increased in Michigan. Even just a few cases³¹ illustrate that when counsel is not adequately trained, the criminal justice system fails:

- **Edward Carter** was convicted of a sexual assault in 1972 after representation by an inexperienced attorney.³² Carter was identified through a photographic lineup as the perpetrator of the crime, which involved a sexual assault and robbery at knifepoint of a pregnant woman. His appointed attorney had only practiced law for 18 months prior to Carter’s trial. She met with him two times: at the preliminary hearing and the day before his bench trial. She never requested an analysis of fingerprints found at the scene and failed to note that serology tests showed the semen was not Carter’s blood type. Her inexperience and lack of investigation or preparation for the case resulted in Carter’s conviction. He was exonerated in 2010.
- **Richard Armstrong** was also convicted after representation by an inexperienced attorney in a serious crime that went to trial.³³ Armstrong, 25-years old, was accused by a 15-year old girl of sexual assault and rape. Many family members and friends testified about suspicious behavior and witnessed interactions between the two parties, and everyone had a different version of the story. It was essential for the jury to believe Armstrong’s defense and to recognize that the complainant had a reputation for lying. Part of the defense’s attack on the credibility of the complainant involved scrutinizing incoming and outgoing cell phone records between the two parties. Defense counsel attempted to admit the evidence, but the prosecution successfully objected to a lack of foundation. Defense counsel had only been practicing law for eight months at the time and did not realize there were other avenues and possible efforts to admit the crucial phone records. His failure to know how to admit evidence to support the defense prevented the jury from properly evaluating the complainant’s credibility. Armstrong’s conviction was overturned on appeal in 2011.
- **Carol Jean Wilson** was convicted of uttering and publishing false or forged instruments.³⁴ The entire case rested upon the prosecution’s ability to prove Wilson had indeed stolen and forged a check. The defense attorney initially requested a handwriting expert, but the expert’s first test was inconclusive. The expert requested more writing samples for a second test, but the defense attorney never responded to the request. Appellate counsel supplied the expert with the necessary items and the second test revealed the check was actually signed by the alleged victim. During a post-conviction hearing, trial counsel

offered that he was worried the result of the second test would be bad and did not want to give the prosecution more evidence. However, the rules of evidence do not require that counsel disclose a report from an expert witness to the prosecution if the defense decides to not use the expert at trial. Additionally, the defense attorney mistakenly believed he needed a discovery order to get the needed sample checks, but he actually only need to issue a simple subpoena. The lack of education and training directly resulted in the client's conviction. Ms. Wilson's conviction was overturned on appeal in 2013.

Michigan has not entirely ignored the problem. To be sure, "[t]he State Bar of Michigan--through almost 40 years of meetings, symposia, articles, task forces, reports, testimony, and proposals--has tirelessly advocated for constitutionally adequate indigent criminal representation."³⁵ Nationwide, criminal justice reform gained momentum in the last fifteen years. In 2002, the American Bar Association adopted the Ten Principles of a Public Defense Delivery System. The Principles serve as a guide for stakeholders charged with creating and funding new, or improving existing, public defense delivery systems.³⁶ The Ninth Principle and commentary states that "[d]efense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."³⁷ Also in 2002, indigent defense reform in Michigan began to "spark"³⁸ through a number of efforts, including the State Bar's Representative Assembly approval of eleven principles³⁹ to serve as a foundation for providing legal representation to indigent criminal defendants.⁴⁰

A joint resolution between the State Bar of Michigan and the Michigan Legislature was the impetus for the NLADA's year-long study of indigent defense, which ultimately produced the *Race to the Bottom* report in 2008.⁴¹ The report described how all of the counties studied failed to comply with the ABA's Ten Principles, and those failures were detailed at length.⁴² The NLADA was particularly troubled by the absence of adherence to the ninth principle on training and education of assigned counsel:

"It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses."⁴³

When the MIDC Act was signed in 2013, the framework for reform could really begin. The Act specifies the principles that the Commission must adhere to, which largely if not identically in some instances mirror the ABA's Ten Principles.⁴⁴ Training and education for lawyers is one of the most basic concepts, and the statute mandates that “[i]ndigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels’ indigent defense clients.”⁴⁵ Education and Training is part of the first minimum standards, and will set the foundation and structure for future standards that will relate to the qualification and evaluation of counsel.

Nearly half of the criminal defense attorneys surveyed in 2016 said that

Qualifications of Assigned Counsel

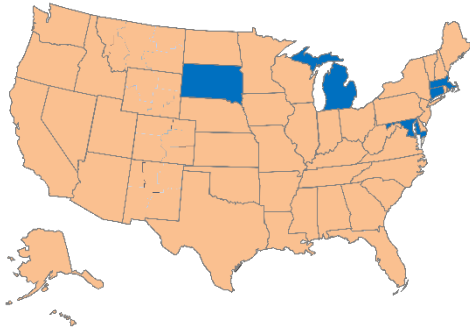
is the most important area for the MIDC to address.

In 2015, the MIDC conducted Michigan’s first comprehensive survey of trial level public defense. The survey revealed that over 80% of Circuit and District Courts have no training requirements whatsoever for attorneys representing poor people on criminal cases.⁴⁶ This finding reinforces the need for an early standard on training and education. Quality training designed around minimum standards for assigned attorneys will help to ensure the accused is afforded the constitutional right to the effective assistance of counsel. And beyond that, the effects of well-trained, supported and resourced lawyers are felt at all levels and by all parties in the criminal justice system. It has long been reasoned that “[p]roperly trained defense lawyers know when to plead their clients guilty and when to go to trial. A client who has competent counsel and enters a plea which is consistent with his or her due process rights is a satisfied client. Not only are the costs of a trial avoided, so too are the costs of appeal. Similarly, where a competent attorney defends a client at a trial, if there is a conviction and a subsequent appeal, the issues will be clearly defined. All of these functions of competent and properly trained defense counsel affect the criminal justice system as a whole. They eliminate unnecessary trials, avoid inappropriate guilty pleas and sentences, and reduce the appellate caseload. Everyone benefits from the education of defense attorneys, not just the wrongfully accused.”⁴⁷

NATIONWIDE PRACTICE

A mandatory requirement for training and education will also bring Michigan in line with virtually every other state in the nation. Michigan is one of only six jurisdictions in this country that have no continuing legal education requirements for lawyers.⁴⁸ The other states without such requirements are Connecticut, Maryland, Massachusetts, South Dakota and the District of

Columbia.⁴⁹ Both Maryland⁵⁰ and the District of Columbia⁵¹ have comprehensive training programs for their system-wide public defender offices, and Connecticut specifies that their public defenders should complete twelve hours annually and assigned counsel should complete



six hours annually.⁵² Unlike Michigan, South Dakota “does not require court-appointed attorneys on criminal cases to be trained, supervised and evaluated, as required by *Principles 9 and 10.*”⁵³ The annual requirement of twelve hours in Michigan is an approximate average of the requirements by states nationwide to maintain a law license, though it will only be mandatory pursuant to the MIDC Act and applicable to attorneys accepting adult criminal cases.

The MIDC’s standing committee on Training and Evaluation Standards looked to several states in formulating the requirements for the education and training of assigned counsel. Much of the language was originally based on Florida’s Performance Guidelines for Criminal Defense Representation.⁵⁴ The Standard is also informed by the Model and Michigan Rules of Professional Conduct on competence of counsel.⁵⁵ Aside from knowing the law and evidence to provide competent representation, MIDC Standard 1 requires a reasonable knowledge of office technology that can be found in the Florida Performance Guidelines.⁵⁶ In 2012, the American Bar Association approved a change to the Model Rules of Professional Conduct to state that lawyers have a duty to maintain competency in technology, that is: “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁵⁷ Standard 1 incorporates all of the essential components to effectively represent people who are poor and facing adult criminal charges in Michigan courts.

CORRELATING TRAINING TO EFFECTIVE REPRESENTATION

Training plays a “central role...in the quality of an indigent defense delivery system...”⁵⁸ For decades people have known that assigned cases should not serve as training grounds for new lawyers, and that merely having a law license is insufficient to address all of the nuances of representing the indigent accused: “That a licensed attorney is capable of handling any type of case is an idea of the past. Nowhere is the need for specialized skill more compelling than in the defense of the criminally accused, where the law is constantly changing and the consequences of a mistake may include conviction of the innocent or unwarranted loss of liberty.”⁵⁹

Furthermore, the popularity of programs such as *Gideon's Promise* and growth of organizations such as the National Association for Public Defense make clear that it is more important than ever for people doing assigned work to have high quality training and continuing support for the specialized field of representing poor people. Appointed attorneys require specific, targeted training beyond what is generally offered in courses for criminal defense: To be a good appointed attorney, one must develop “an expertise in a specialty (indigent defense) within a specialty (criminal defense) within a specialty (criminal law) within a specialty (law).”⁶⁰

In order for training to be meaningful and address the goal of providing the highest quality indigent defense representation, systems will need to conduct initial and ongoing needs-assessments for assigned counsel. There is no one-size-fits-all approach to training. Systems must identify who is taking assigned cases in the court, and work with training providers to design courses for new or experienced attorneys. New attorneys (with fewer than two years of experience defending criminal cases in Michigan) will complete skills courses, while more experienced attorneys are provided with continuing legal education. New and experienced attorneys should be given inventories to complete on their own and self-identify deficiencies or interests so that they are provided with training that they both want and need. Attorneys should complete evaluations for training programs that they participate in, and feedback should be taken constructively. Training providers must regularly follow up with attorneys to ensure that training needs were met and additional courses or areas of study can be identified.

Training providers must identify *who* is taking assigned cases in the court, and then design courses to meet the needs of new or experienced attorneys.

The evaluations for training and education should be designed to acquire information about program content and effectiveness of trainers. These are *not* evaluations of trainees or assigned counsel, which will be the subject of a future minimum standard designed by the MIDC. The existence of statewide training requirements will provide the foundation for subsequent evaluations of the quality of the representation by assigned counsel. Deficient qualifications of assigned counsel as defined by these future standards will allow attorneys the opportunity to participate in targeted training to improve their practice.

COMPLIANCE

The MIDC recognizes that there are robust training programs taking place statewide. Nevertheless, mandatory training for assigned counsel is going to be a new requirement in the majority of systems.⁶¹ Implementing the training standard will involve a series of considerations identified by the training director or committee dedicated to designing indigent defense educational programs.

MIDC Standard 1 states that “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.”⁶² The MIDC Act does not specify how to comply with the standard; it is up to the local system to determine the best method for compliance. The data points that will be collected are (1) attorneys who have been practicing criminal law in Michigan for less than two years will need to participate in one “basic skills acquisition” class;⁶³ and (2) attorneys shall annually complete at least twelve hours of continuing legal education.⁶⁴ Data shall be provided to the MIDC as required by the Michigan Supreme Court and indicated below.

The following section is meant to offer suggestions for resolving many aspects of compliance, but is by no means exhaustive.

METHOD AND DELIVERY

1. *Identify the Person or Group Responsible for Training Indigent Defense Counsel and Generally Describe their Responsibilities*

Training for assigned counsel should be planned in an intentional and thoughtful manner by a person or group of people who are responsible for the training. There can be a number of options, ranging from: a Training Director employed by a Public Defender Office; a Defense Counsel Administrator or Coordinator (either an independent agency or a member of the Court Administrator’s Office); a Board of Directors, Association or Committee of stakeholders whose mission includes the creation of educational programming for criminal defense attorneys; or volunteer stakeholder(s) or others interested in coordinating training. There are many bar associations and organizations in Michigan providing training for assigned counsel. These groups are key stakeholders and should be included in the planning for compliance with Standard 1.

Public Defender Offices (including Regional Defender Offices) should strive for compliance with the NLADA’s Defender Training and Developments Standards.⁶⁵ In Public Defender Offices there is typically a person tasked with organizing the training of attorneys and staff. In some offices, this person has an official title of Training Director, and in other instances a person is identified somewhat organically by the department as having an aptitude for training responsibilities. In any event, public defender offices should “ensure that the training efforts are administered and overseen by a person or persons who have training as a specific job duty, and whose other work duties are adjusted to ensure that the training responsibilities can be competently directed.”⁶⁶ The core functions of the training director in a public defender office are to do the following:

“The defender organization must provide training opportunities that insure the delivery of zealous and quality representation to clients.”

*NLADA Defender Training and Development
Standard 1.1*

- create written training plans;
- design purposeful training objectives and curriculum;
- maintain training resources;
- evaluate/undertake quality review of training content, trainees, trainers (all or most are employees); and
- conduct the ongoing needs assessments for all attorneys (and support staff) in coordination with managers/supervisors.

In systems where those responsible for training include independent **Managed Assigned Counsel System Administrators, Public Defender Administrators**, or who are members of **Court Administration** overseeing assigned counsel (list or contract based), the responsibilities associated with training will be slightly more relaxed than that of a Training Director at a Public Defender Office. Here, the assigned attorneys are not employees, though most other related functions of the training director are in place. The person(s) responsible for training in this model should:

- Create (written) training plans;
- Design purposeful training objectives and curriculum;
- Maintain training resources; and
- Evaluate/undertake quality review of training content, trainees, and trainers.

The remaining organizing person(s) or groups, including Boards, Associations, Committees or volunteers who create educational programming for criminal defense attorneys can be described as **Decentralized Training Providers**. The bulk of training in Michigan will continue to be provided

to assigned counsel in this manner. These providers could be court staff and other criminal justice community stakeholders, while other groups are exclusively composed of and for criminal defense attorneys, and many serve other functions besides training in the legal community. These people or groups:

- Create training plans;
- Maintain training resources; and
- Evaluate training content.

Some training providers do not fit neatly into one of the above categories, but most tend to look more like one than another. All providers have the shared characteristics of creating training plans, maintaining training resources, and evaluating training content. Compliance plans should be designed to fortify resources and support to improve the training provided to assigned counsel.

2. Create a Training Plan for Compliance with MIDC Standard 1

There are two types of training that must be provided pursuant to MIDC Standard 1: a skills training for attorneys practicing criminal law in Michigan for less than two years, and twelve hours of continuing legal education for all attorneys annually.⁶⁷ For both types of training, compliance plans will identify training needs and specific training objectives as a prerequisite to MIDC grant funding. Like the previous section, this information is meant to provide guidelines and ideas for compliance with Standard 1 but is not an exhaustive list. The MIDC looks forward to creative, effective, and proactive compliance plans.

a. Skills Training for New Attorneys

(1) Program Objectives

The “basic skills acquisition” training envisioned by the MIDC is not a short orientation class. Rather, this course should be a two day-long (or more) model developed to accomplish many of the following objectives:

- understanding the unique role of representing the indigent accused;
- adherence to client-centered values and ethics;
- knowing how to conduct client interviews and witness interviews;
- knowing how to examine a witness and prepare arguments around themes and theory;
- learning basic concepts of pretrial motion practice;
- effectively make objections and admit exhibits;
- selecting a jury and presenting a theory at jury trial; and/or
- understanding how to advise and advocate in guilty plea proceedings and sentencings.

It is not necessary to master any or all of these topics in skills training, but an introduction to the topics with a good working knowledge of the concepts by the end of the session is critical. Equally important is that there is an opportunity for further training on these subjects made available to all new attorneys.

When possible, local practice should be infused in the skills training. For example, *voir dire* is conducted in many different ways across the state. Any attorney eligible to receive an assigned case that can go to trial should understand the general concepts of empaneling a jury as well as any particular local nuances that take place during the process.

(2) Possible Compliance Plans

The following programs are offered as possible compliance plans to implement one or more of the objectives of the basic skills acquisition class:

- (a) A multi-day Trial College offered by the Criminal Defense Attorneys of Michigan (CDAM)⁶⁸;
- (b) CDAM's Award Winning "A is for Attorney" Program, offered at the regional conferences;
- (c) CDAM's Skills Training Course with content developed in coordination with the Michigan Indigent Defense Commission using the *Gideon's Promise* model as adapted for lawyers in Michigan⁶⁹;
- (d) The *Gideon's Promise* Core 101 Summer Institute⁷⁰;
- (e) Any Public Defender Office or program designed for training new assistant defenders.

This list should not preclude other training providers from developing skills training programs. Training models should be created statewide, particularly in large urban areas, in order to most effectively meet the needs of inexperienced practitioners accepting assigned cases. The MIDC strongly encourages the use of a mentorship program to complement the skills training requirement for new attorneys.

b. Continuing Legal Education

(1) Program Objectives

The annual requirement that assigned counsel attend 12 hours of continuing legal education allows for a number of programming objectives. Standard 1 identifies three critical components for continuing legal education:

- **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 know 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.⁷¹
- **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, know the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.⁷²
- **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.⁷³

The goal in creating programming is to identify the primary needs of assigned counsel based on trends in the law, practice or needs in particular jurisdictions. Trends can vary from year to year and should underscore the value of having a committee-based (or, multi-person) process for identifying the training needs, especially for training attorneys of multiple levels of experience. The ideal programs will contain basic legal updates and information about changes in the law, defense-oriented training for scientific and other evidence, ethics in the modern practice of law, and use of technology for lawyers.⁷⁴

(2) Possible Compliance Plans

- (a) Existing training required by court systems specifically required for assignment eligibility. *There are some court systems that already have training requirements in place that meet all of the objectives identified by the MIDC. In some cases compliance plans will need to be written to improve program resources or adjustments will need to be made in terms of required hours to meet the standard. However, in courts where a training requirement exists in name only without any specifications, providers and objectives will need to be identified prior to approval for compliance.*
- (b) Any programs developed and conducted by Public Defender Offices for their assistant defenders.
- (c) CDAM Regional Conferences. *The Criminal Defense Attorneys of Michigan offer two regional trainings each year⁷⁵, and full attendance at one of those conferences will satisfy the 12-hour requirement pursuant to the Standard.*
- (d) CDAM’s statewide trainings will count towards the 12-hour requirement in Standard 1.

- (e) Trainings provided by SADO's Criminal Defense Resource Center will count *towards* the 12-hour requirement in Standard 1.
- (f) Trainings provided by the State Bar of Michigan's Criminal Law Section will count *towards* the 12-hour requirement in Standard 1.
- (g) The MIDC may conduct at least 12 hours and up to 24 hours of training each year that will count towards the 12-hour requirement in Standard 1.

(3) Programming Subject to Approval

The MIDC recognizes that there is no shortage of high quality training offered in Michigan and nationwide. Many programs designed for and by criminal defense attorneys will easily satisfy compliance with Standard 1. However, information about how the standard will be satisfied in a particular system will need to be identified by the training providers or coordinators seeking approval of a particular training as a compliance model. In designing the best model of high quality training for assigned counsel, training providers are encouraged to consider the economies of regional coordination of training that borrows from existing programs in Michigan, as well as online programming such as webinars or virtual classrooms.⁷⁶

Participation in non-Michigan based CLE completed annually to satisfy an attorney's licensing requirements in another state *can* count towards the 12-hour requirement in Standard 1, subject to a process for approval by the MIDC.

c. Evaluation Process

Evaluations will be required of every training program. Attorneys should be told of the training objectives before the training, and be required to complete an evaluation at the conclusion of the training. The evaluations will include components related to the overall program and instructors but will also seek information as to whether the stated objectives have been met and whether the information will be useful to improve representation for clients. Good compliance models for training will provide for follow up evaluations up to 6 months post-training to ascertain whether the information is actually being used and for potential topics and training for future programs and needs. The best evaluations account for differences in trainings, from small group trainings to large group presentation methods. Situational learning evaluations can also be completed by the trainers to assist in identifying future training needs. Sample evaluation forms are included in the Appendix.

3. Request Grant Funding

The MIDC Act provides a process for the formation of state-funded compliance plans to meet the standards.⁷⁷ Compliance plans will be submitted together with a request for any funding

necessary beyond the local share.⁷⁸ For that reason, the standards should not be examined in the framework of *status quo* indigent defense delivery. Rather, they establish requirements for system changes to be implemented through state funding.

This standard is not designed to place any financial burden on assigned counsel. **System practices that require assigned counsel to subsidize mandatory training will not be approved.** 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.

4. *Collect and Submit Data to the MIDC*

Systems will be responsible for ensuring that attorneys have completed their annual credits and that a summary of the evaluations of the training is provided to the MIDC. Information about such reporting will be detailed in the grant administration process. In conditionally approving the minimum standard, the Michigan Supreme Court included the following requirement in establishing the MIDC as the clearinghouse for all training data and reporting, which has been adopted by the MIDC:

“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 Michigan Supreme Court annually by April 1 for the previous calendar year.”⁷⁹

For purposes of clarification:

- Attendance in a basic skills acquisition course can count towards the 12-hour requirement for the same reporting year;
- The approved hours should count towards practice in multiple counties;
- Webinars and out-of-state CLE participation can be part of a compliance plan, subject to an approval process by the MIDC.

CONCLUSION

The purpose of a minimum standard for the education and training of assigned counsel is to provide counsel with the foundation and means to improve the quality of indigent defense representation in Michigan. Compliance plans that meet these objectives will be approved by the Commission, and support will be provided to ensure the standard is met by delivery systems statewide.

¹ National Legal Aid & Defender Association, *Evaluation of Trial Level Indigent Defense Systems in Michigan: A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* (June 2008), available at http://www.mynlada.org/michigan/michigan_report.pdf (accessed February 2017).

² The counties studied were Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne.

³ ABA Ten Principles of a Public Defense Delivery System with commentary (2002) can be found online at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf (accessed February 2017).

⁴ *Id.* at Introduction p. 4.

⁵ *A Race to the Bottom*, *supra* n. 1, Executive Summary.

⁶ Executive Order 2011-12.

⁷ The Advisory Commission's report is available on the Michigan Indigent Defense Commission's website, at <http://michiganidc.gov/wp-content/uploads/2015/05/Final-Report-Advisory-Commission.pdf>.

⁸ The Michigan Indigent Defense Commission ("MIDC") Act is found at MCL 780.981 *et. seq.*

⁹ MCL 780.991(2).

¹⁰ MCL 780.991(2)(e).

¹¹ *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984).

¹² ABA Ten Principles, *supra* n.3.

¹³ MIDC Standard 1.

¹⁴ MIDC Standard 1.A.

¹⁵ MIDC Standard 1.B.

¹⁶ MIDC Standard 1.C.

¹⁷ MIDC Standard 1.A.

¹⁸ MIDC Standard 1.D.

¹⁹ It is understood that at the time the standards are adopted and compliance is planned, some attorneys with less than 2 years of experience practicing criminal defense in Michigan may have already been assigned and worked on indigent cases. The attorneys identified as having 2 years or less at the time a compliance plan is submitted will need to complete a basic skills course within one year from the time that the plan is approved.

²⁰ MIDC Standard 1.D.

²¹ MIDC Standard 1.D.

²² *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

²³ The original attorney compensation statute was 1857 P.A. 109. See *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 124; 503 NW2d 885, 892 (1993); See also *People v Loyer*, 169 Mich App 105, 138; 425 NW2d 714, 728 (1988)(Boyle, J., dissenting, "Judges in this state were appointing lawyers for indigent defendants charged with serious felonies as early as 1850, see *Bacon v. Wayne County*, 1 Mich. 461 (1850)").

²⁴ Jonathan A. Rapping, *Reclaiming Our Rightful Place: Reviving the Hero Image of the Public Defender*, 99 Iowa L Rev 1893 (2014).

²⁵ *Griffin v Illinois*, 351 US 12, 19; 76 S Ct 585, 591; 100 L Ed 891 (1956) (finding that the constitutional rights to due process and equal protection require transcripts to be provided to an indigent defendant to perfect and appeal).

²⁶ Rapping, *Reclaiming Our Rightful Place*, *supra* n.24.

²⁷ *Id.*

²⁸ Thomas E. Daniels, *Gideon's Hollow Promise – How Appointed Counsel Are Prevented From Fulfilling Their Role in the Criminal Justice System*, 71 Mich BJ 136 (1992).

²⁹ F. Randall Karfonta, *Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers*, 71 Mich BJ 164 (1992).

³⁰ *Id.*

³¹ The MIDC wishes to thank Marissa Geyer (Michigan State University College of Law J.D. Candidate, 2017) for her contribution to the case illustrations in this whitepaper.

³² See the National Registry of Exonerations webpage at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3091> (accessed February 2017).

³³ *People v Armstrong*, 490 Mich 281; 806 N.W.2d 676 (2011).

³⁴ *People v Wilson*, No. 308076, 2013 WL 2420966 (Mich. Ct. App. June 4, 2013).

³⁵ Julie I. Fershtman, *Indigent Criminal Defense In Michigan, After Decades of Struggle, Meaningful Reform May Be in Reach*, 91 Mich BJ 10 (2012).

³⁶ *ABA Ten Principles*, *supra* n.3.

³⁷ *Id.*

³⁸ *A Race to the Bottom*, *supra* n.1.

³⁹ Michigan adopted the ABA's Ten Principles, and added an 11th for public defender offices: "When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism. The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society."

http://www.sado.org/content/pub/10600_11-principles.pdf (accessed February 2017).

⁴⁰ Fershtman, *Indigent Criminal Defense In Michigan*, *supra* n.35.

⁴¹ *A Race to the Bottom*, *supra* n.1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ MCL 780.991(2).

⁴⁵ MCL 780.991(2)(e).

⁴⁶ Jonah Siegel, *Snapshot of Indigent Defense Representation in Michigan's Adult Criminal Courts: The MIDC'S First Survey of Local Court Systems* (February 2016), at p.17 reporting that "At present, just 15% of indigent defense systems report the existence of local guidelines dictating participation in CLE courses."

⁴⁷ Karfonta, *Balancing the Scales of Justice*, *supra* n.29.

⁴⁸ See American Bar Association Mandatory Continuing Legal Education Information by Jurisdiction, available online at https://www.americanbar.org/cle/mandatory_cle/mcle_states.html (accessed February 2017).

⁴⁹ *Id.*

⁵⁰ Maryland's Office of the Public Defender partners with *Gideon's Promise* to train assigned counsel. See press release dated May 20, 2015 http://www.opd.state.md.us/Portals/0/Gideon_Jon_Rapping_Maryland_docx.pdf (accessed February 2017).

⁵¹ The Public Defender Services training programs are detailed on their website at <http://www.pdsdc.org/professional-resources/pds-training-programs> (accessed February 2017).

⁵² See Connecticut Guidelines on Indigent Defense, Guideline 2.1 "Training and Experience" http://www.ct.gov/ocpd/lib/ocpd/PDF_Graphics/PD_Guidelines.pdf (accessed February 2017).

⁵³ See Sixth Amendment Center, "How an otherwise model assigned counsel compensation plan contributes to South Dakota's indigent defense problems" (May 2013) available at <http://sixthamendment.org/how-an-otherwise-model-assigned-counsel-compensation-plan-contributes-to-south-dakotas-indigent-defense-problems/> (accessed February 2017).

⁵⁴ See Florida Performance Guidelines for Criminal Defense Representation Standard 1.2, Education, Training and Experience of Counsel, approved by the Florida Public Defender Association August 7, 2013 (available from the MIDC).

⁵⁵ MRPC 1.1.

⁵⁶ See Florida Performance Guidelines for Criminal Defense Representation, *supra* n.54.

⁵⁷ ABA Comment on Rule 1.1 Competence, Comment 8, which can be found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (accessed February 2017).

⁵⁸ Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 Loy J Pub Int L 177, 186 (2008).

⁵⁹ Daniels, *Gideon's Hollow Promise*, *supra* n.28.

⁶⁰ This concept and description of the specialization is attributed to the teachings of Jonathan Rapping, President and Founder of *Gideon's Promise*, a nationally renowned criminal justice innovator and 2014 MacArthur Foundation "Genius" Fellow.

⁶¹ Sigel, *Snapshot of Indigent Defense Representation*, *supra* n.46.

⁶² MIDC Standard 1.D.

⁶³ MIDC Standard 1.D.

⁶⁴ MIDC Standard 1.D.

⁶⁵ The National Legal Aid and Defender Association Defender Training and Development Standards (blackletter) can be found at http://www.nlada.net/sites/default/files/nlada_defendertrainingstandards_1997.pdf (accessed February 2017).

⁶⁶ NLADA Defender Training Standard 1.4.

⁶⁷ MIDC Standard 1.D.

⁶⁸ Information about the Criminal Defense Attorneys of Michigan's programs can be found on CDAM's website at <https://cdamofmichigan.com/>. Note: CDAM designates three members to the MIDC for approval by the governor. MCL 780.987.

⁶⁹ To be developed in 2017.

⁷⁰ Information about the Gideon's Promise Core 101 program can be found at <http://www.gideonspromise.org/programs/core-101> (accessed February 2017).

⁷¹ MIDC Standard 1.A.

⁷² MIDC Standard 1.B.

⁷³ MIDC Standard 1.C.

⁷⁴ Certain areas like immigration and deportation consequences of convictions will prove particularly relevant. See *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

⁷⁵ See CDAM's website, *supra* n.68.

⁷⁶ See, e.g., the training offered by the National Association for Public Defense, <http://publicdefenders.us/>.

⁷⁷ MCL 780.993.

⁷⁸ *Id.*

⁷⁹ MIDC Standard 1.D.

Sample evaluation – single topic session

Please rate the following
For the session:

	Poor	Fair	Good	Very Good	Excellent
Quality of information presented					
Usefulness of information presented					
Credibility of presenter(s)					
Opportunity for questions/answers					
Relevance of Topic to your practice					

Any comments or suggestions as to how this session could be improved?

I am interested in training on the following topics:

Sample evaluation – multiple topic session

Your OVERALL rating of this session (circle one number):

1 2 3 4 5 6 7 8 9 10

POOR

GOOD

EXCELLENT

Suggested guidelines for rating:

1, 2 or 3

Did not learn anything
Or not very much *and/or*
Did not like the sessions/speakers

4, 5, 6 or 7

learned a few things
And/or
speaker was ok

8, 9, 10

learned several things relevant
to my practice *and/or*
speaker was very good/informative

Please rate the following presentations:

	Poor	Fair	Good	Very Good	Excellent
Topic A (Speaker for Topic A)					
Topic B (Speaker for Topic B)					
Topic C (Speaker for Topic C)					

I am interested in training on the following topics:

Any comments, including how this session could be improved? *(Please use other side if necessary)*