



# INVESTIGATION AND EXPERTS

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

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## 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*.<sup>1</sup> The NLADA study involved an evaluation of trial-level indigent defense delivery systems across ten representative counties in Michigan.<sup>2</sup> The NLADA analyzed Michigan's compliance with the ABA Ten Principles of a Public Defense Delivery System.<sup>3</sup> "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."<sup>4</sup> 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 44<sup>th</sup> out of all 50 states in per capita indigent defense spending.<sup>5</sup>

In October 2011, Governor Rick Snyder issued Executive Order 2011-12, 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 2012<sup>6</sup> served as the basis for the legislation known as the Michigan Indigent Defense Commission Act, which the Governor signed into law in July 2013.<sup>7</sup> 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..."<sup>8</sup>

### STANDARD 3

The United States Supreme Court has held that the assistance of counsel includes the duty of counsel “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”<sup>9</sup> The Supreme Court has also recognized that criminal cases sometimes require “consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both.”<sup>10</sup>

MIDC Standard 3,<sup>11</sup> conditionally approved by the Michigan Supreme Court and submitted to the Department of Licensing and Regulatory Affairs, establishes minimum standards for defense investigation and experts. Standard 3.A reiterates defense counsel’s duty to investigate.<sup>12</sup> It also, in recognition of the necessity of prompt investigation to preserve evidence and locate witnesses,<sup>13</sup> requires the defense investigation to begin “as promptly as practicable.”<sup>14</sup> The staff comments recognize that, in certain circumstances, counsel can reasonably determine that particular investigation is unnecessary.<sup>15</sup> However, the Standard notes that “[d]ecisions to limit investigation must take into consideration the client’s wishes and the client’s version of the facts.”<sup>16</sup> Standard 3.B requires defense counsel, when appropriate, to request funds to retain a professional defense investigator, and requires that reasonable requests be funded.<sup>17</sup>

Standard 3.C states counsel’s duty to seek the assistance of experts when “reasonably necessary.”<sup>18</sup> Expert assistance should be sought for two primary purposes: either to “prepare the defense” or to “rebut the prosecution’s case.”<sup>19</sup> As such, it may be appropriate for a defense attorney to request expert assistance even if the attorney does not expect the expert to testify at trial.<sup>20</sup> Finally, Standard 3.D recognizes counsel’s ongoing duty to evaluate the need for defense investigation and expert assistance, based on developments in the case or new information that the defense attorney learns.<sup>21</sup>

### RATIONALE

The American criminal justice system is adversarial, and relies on the defendant to present a vigorous defense in order to identify the errors and omissions in the government’s investigation.<sup>22</sup> In order to identify those problems, the defense must conduct its own, independent investigation. In addition, criminal cases sometimes involve technical issues that are beyond lay—or lawyer—expertise.<sup>23</sup> In such circumstances, the defense attorney can only effectively represent his or her client by seeking assistance from qualified experts. The following sections discuss the value of defense investigations and defense experts.

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## INVESTIGATION

Defense investigation is critical to the effective assistance of counsel.<sup>24</sup> Competent investigation can have a significant impact on cases in all sorts of circumstances.<sup>25</sup> Despite its importance, investigation is routinely underutilized in Michigan Courts. One report by the *Lansing State Journal* found that across three counties, indigent defense attorneys only used outside investigators in two percent of cases during 2015.<sup>26</sup> One district court in south central Michigan has not received a single request for an investigator in twenty years.<sup>27</sup> Another district court denied a motion for an investigator solely because the judge had never seen an investigator appointed in that court before.<sup>28</sup> The need for substantially increased trial-level investigation in Michigan is demonstrated by the fact that “appellate investigations have led to fact development and exonerations for a significant number of clients, where little or no investigation was done by trial counsel.”<sup>29</sup> There have been multiple reversals of convictions by appellate courts for ineffective assistance based on a failure to investigate even basic claims such as an alibi investigation.<sup>30</sup>

In order to be effective, investigation should begin promptly.<sup>31</sup> Prompt investigation can locate evidence that would otherwise disappear and witnesses who would otherwise forget important facts.<sup>32</sup> It also gives the defense lawyer more time to locate difficult-to-find witnesses and complete multiple rounds of interviews, as necessary.<sup>33</sup> Defense attorneys are already operating at a disadvantage because they come into a case later, after the police and prosecution have already had a chance to conduct their investigation.<sup>34</sup> It is therefore crucial that the independent defense investigation begin as soon as possible.<sup>35</sup>

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## EXPERTS

As Justice Stephen Breyer has noted, “[s]cientific issues permeate the law.”<sup>36</sup> Lawyers, however, are not trained scientists. Just as a client cannot be expected to represent him or herself effectively in a court of law without the assistance of a lawyer, a lawyer cannot be expected to represent his or her clients effectively when scientific issues are involved without the assistance of an expert. Defense attorneys, then, must seek expert assistance wherever it is necessary to understand or litigate an issue in the case.<sup>37</sup> Failure to do so might rise to the level of ineffective assistance of counsel, while a court’s failure to approve an expert might result in reversal of convictions.<sup>38</sup>

Defense experts are important even though prosecution expert witnesses are scientists and the professional norms of science favor unbiased truth-seeking over partisan advocacy.<sup>39</sup>

Both jurors and lawyers—including defense lawyers—are sometimes too quick to believe purportedly scientific evidence.<sup>40</sup> Forensic science is often significantly less precise than the

technical vocabulary used by expert witnesses suggests. Forensic methods that have been famously overstated and abused include hair comparison,<sup>41</sup> historical cell-site location information,<sup>42</sup> arson investigation,<sup>43</sup> bite-mark comparison,<sup>44</sup> and firearms toolmark comparison.<sup>45</sup> Scientifically reliable methods, like blood-typing, can be misleading if the expert is not clear about their limitations.<sup>46</sup> Even DNA analysis, one of the most rigorous forms of scientific analysis, has recently come under attack for overstating the likelihood of a match when a mixture is examined.<sup>47</sup> Scientific and expert testimony can contain hidden errors that are all but impossible for the untrained eye to notice.<sup>48</sup> The problems of scientific evidence are not theoretical or remote. Inadequate use of experts at the trial level in Michigan has resulted in exonerations on appeal through methods as simple as retesting of evidence.<sup>49</sup> Nationwide, flawed forensic analysis is a significant contributor to wrongful convictions.<sup>50</sup> In Detroit, unreliable firearms evidence resulted in the complete closure of the Detroit Crime Lab.<sup>51</sup>

## COMPLIANCE

Most defense attorneys understand the need for using investigators and consulting with expert witnesses in their cases. Most courts understand that there are statutes and cases addressing the issue of when and how to appoint investigators and experts when the defendant does not have the funds to employ experts and investigators to assist with the defense. Virtually all system stakeholders agree that compliance with Standard 3 will be dependent upon money: how much of it there is, and who controls it. Related concerns involve the use, availability and training of investigators and experts. The following section is meant to offer suggestions for resolving many aspects of compliance, but is by no means exhaustive.

### *1. Systems Must Commit to Adequate Funding*

Insufficient funding prevents counsel from performing sufficient investigation.<sup>52</sup> Expert witnesses cannot be retained without adequate funds. The MIDC's first comprehensive survey of local court systems found that most funding units do not separately keep track of trial related expenses, such as payment for investigators and experts, but those that do generally report spending only a small fraction of their budget on these additional costs.<sup>53</sup> The lack of expenditures suggest that few systems are set up to provide such resources to counsel for indigent defendants. Attorneys anecdotally report facing obstacles to obtaining funds for these expenses even in court systems that technically allow for the petitioning of additional funds as necessary. Close to 60% of Michigan indigent defense attorneys reported not using an investigator in the last year and over 70% reported not using an expert.<sup>54</sup> Certain district courts have never seen a need for expert or investigator funding.

Therefore, the most important part of compliance with Standard 3 will be a commitment to adequate funding of investigators and expert witnesses. Such a commitment must begin with a system-wide recognition of the importance of these forms of assistance to an effective defense team.

This funding should include emergency money for unexpected circumstances such as a complicated murder case in a small county. The MIDC or a regional administrator can have funds for these purposes.

2. *Systems Should Consider the Creation of an Independent Review Process for the Request*

In many status quo Michigan systems, the judge presiding over a case may have ultimate control over whether funds for investigators and experts will be approved.<sup>55</sup> Michigan law requires a judge to appoint an expert or investigator when a defendant shows a need.<sup>56</sup> However, the law does not exclusively require this procedure for approval and other models are available. For example, the State Appellate Defender Office routinely pays for expert witness fees through an internal fund, federal defender offices in Michigan have investigators on staff, and the newly created Berrien County Public Defender Office will independently fund and make decisions regarding expert witnesses. The court approval process presents several potential problems. First, it might make defense attorneys hesitant to vigorously advocate for more funding, because of the risk of alienating the judge who will make many important decisions about the case.<sup>57</sup> Second, even if an attorney may apply for funds *ex parte*, there are reasonable concerns about sharing confidential case information and defense strategy with the court.<sup>58</sup> Third, a funding application to the court inevitably takes time, which delays investigations that are often time-sensitive.<sup>59</sup> Fourth, it means that the judge in District Court who presides over a felony case before the preliminary hearing might be less likely to approve funding before the case is transferred to Circuit Court,<sup>60</sup> hampering the possibility of prompt investigation.<sup>61</sup> The combination of all these problems means that defense attorneys may be hesitant to even request investigative assistance.<sup>62</sup>

Prosecutors have also opposed requests for expert assistance<sup>63</sup> from the defense. Counties should strongly consider a process for approval of experts and investigators independent of the trial court judge, and at a minimum, counties should allow and encourage *ex parte / in camera* motions for expert and investigative support.<sup>64</sup> This process might move expert requests to the Chief Judge, or the Court Administrator, county administration, or an independent administrator.

An independent process here is not yet required – the MIDC will pursue independence from the judiciary in a future standard,<sup>65</sup> but compliance plans should explore independent models for counties that wish to anticipate future standards in their planning.

### 3. *Systems should Train and Make Available a Pool of Investigators and Experts*

Having funds available for investigators and experts is not helpful if there are no investigators or experts to hire. The indigent defense system in Michigan and the MIDC must therefore take steps to ensure that there are sufficient numbers of both available in every part of the state in order to facilitate effective defense. Certain regions might share investigative and expert resources through an administrator or the MIDC. Access to investigators and experts is a challenge for communities in Northern Michigan and the Upper Peninsula. “There are not many private investigators in northern Michigan counties working on the criminal defense side, let alone willing to work for court appointed rates.”<sup>66</sup> Regions with these obstacles would be ideal candidates for a regional investigator office, but experts – depending on the expertise – will likely need to be outsourced. The North Carolina Office of Indigent Defense Services provides one model where a forensic resource attorney provides expert information and advice.<sup>67</sup> Similarly, the King County Department of Public Defense in Washington publishes presumptive guidelines for number of hours of work and an hourly rate for dozens of different types of potential experts.<sup>68</sup>

### 4. *Consideration of Public Defender Offices*

Public defender offices present the most straightforward solution to funding investigators and expert witnesses: the office staff should include a full-time investigative staff, and the office budget should include funds for expert witnesses that can then be distributed internally. PDS is an example of a public defender office with a dedicated corps of staff investigators.<sup>69</sup> In addition, PDS’s Administrative Support Division manages the process of obtaining expert witnesses for individual cases.<sup>70</sup> In Michigan, the State Appellate Defender Office includes two full-time investigators. Michigan’s smallest public defender offices like Bay or Chippewa County might establish a contract with investigators, but offices with sufficient caseloads should employ investigative staff. National standards suggest one investigator for every three staff attorneys.<sup>71</sup> The State of Washington requires one investigator for every four staff attorneys.<sup>72</sup> The San Francisco Public Defender employs about eighteen investigators for 93 staff attorneys and budgets \$500,000 for expert assistance for 4,000 felony cases and 1,000 misdemeanor cases.<sup>73</sup>

Handling the allocation of investigative and expert witness resources in-house means that concerns about confidentiality and excessive reliance on the judiciary are absent.<sup>74</sup> However, because public defender offices are not self-funding entities, they must justify the need for a certain level of investigative and expert funding. This justification will happen at a higher level of generality, rather than case-by-case or task-by-task, but public defender offices should still maintain detailed records of the work performed by their investigators and experts to strengthen their funding requests.

Several public defender offices around the country have established successful undergraduate internship programs to provide investigative assistance to their attorneys. Such programs are run by PDS,<sup>75</sup> the Georgetown University Law Center's Criminal Defense and Prisoner Advocacy Clinic,<sup>76</sup> the New Hampshire Public Defender,<sup>77</sup> and the Orleans Public Defenders.<sup>78</sup> Investigative interns perform valuable work that frees attorneys and staff investigators to focus on more complex issues.<sup>79</sup> Internship programs also train and develop future defense attorneys, who will be more likely to remain in Michigan after having formative experiences as interns with Michigan public defender offices. Internship programs will be most successful where attorneys themselves have significant training and experience in investigation, so that they are able to supervise interns effectively.<sup>80</sup> In Michigan, Washtenaw and Kent County Defender Offices have successful internship programs which contribute to investigative needs. Although helpful, these programs may never substitute for full-time professional investigators.

#### *5. Appointed Counsel Systems*

The core challenges of handling investigation and expert witnesses in appointed counsel system is to ensure that there is both adequate funding and proper incentives for their use. A typical compliance model will provide this funding and accessibility through courts, but many of these systems might look ahead to compliance models that move expert and investigator requests outside of the court system.

Whichever source of funding is used, standardized qualifications and payment rates must be established in order to make sure that the allocation of resources is fair and consistent. The Committee for Public Counsel Services (Massachusetts) has a collection of qualifications and pay rates for investigators and experts that provides a model for such a system in Michigan.<sup>81</sup>

In recent history, there has been a trend among the states of creating independent boards, commissions or agencies, outside the jurisdiction of the courts, to administer appointed counsel programs.<sup>82</sup> This process works particularly well for expert and investigator resources. Independent administrators help ensure that appointed counsel do not become dependent on the judiciary for funding, thus protecting their ability to zealously advocate for the client's best interests, rather than for the prompt resolution of cases to help move the court's docket.<sup>83</sup>

Independent administrators are also important because justifying a request for an investigator or expert witness may involve revealing some details of a possible defense theory.<sup>84</sup> Judges, as human beings, cannot be expected to forget such information when carrying out their other roles in a case, and so an independent administrator who does not share information with the judge or prosecutor is the most effective way to prevent inappropriate disclosure of confidential information.

Independent administrators handle requests for investigative and expert assistance in, among other jurisdictions, Sacramento County (California),<sup>85</sup> San Mateo County (California),<sup>86</sup> Erie County (New York),<sup>87</sup> Oregon,<sup>88</sup> Travis County (Texas),<sup>89</sup> Lubbock County (Texas),<sup>90</sup> capital cases in Louisiana through the Louisiana Public Defender Board,<sup>91</sup> and a new pilot project through the Michigan Appellate Assigned Counsel System.<sup>92</sup> Many of these programs feature staff investigators. The Capital Area Private Defender Service in Travis County, Texas has a full-time staff investigator who manages six contract investigators to serve a large assigned counsel roster in Austin.<sup>93</sup>

An independent administrator handling funding requests from assigned counsel for investigators and expert witness is likely to be the most effective approach, in jurisdictions with sufficient caseload to support that arrangement.<sup>94</sup> Possible models for this independent administrator can include a shared administrator for circuit and district courts, an administrator serving a number of different counties in a region, an administrator who is part of a larger independent “managed assigned counsel” office that also organizes attorney appointments and training<sup>95</sup>, and a court administrator who has independence from the trial judge in review and approval.

The assigned counsel administrator can maintain a roster of investigators who can be employed by assigned attorneys. These independent investigators can be either full-time or part-time investigators, but they should meet the same professional standards as the full-time investigators employed by the public defender office.

#### *6. Contract systems*

Contract systems may also adopt an independent administrator model, or they may rely more directly on court funding. Each model must ensure that the contract allows for caseload expenses such as investigations and experts beyond the standards contracting rate.<sup>96</sup> It is imperative that these caseload expenses be completely separate from the contracting process to avoid disincentives from properly investigating a client’s case or seeking proper expert assistance. One Michigan county actually pays out contract attorneys’ additional money in the following year’s contract from unused expert and investigator expenses, directly discouraging use of these resources.<sup>97</sup>

For example, Oregon has a process by which extraordinary expenses related to cases are paid through a mechanism outside the standard contract. In most death penalty and serious mandatory minimum sentence cases, funds for experts, investigators, and other expenses not specified in the contract are submitted to the Indigent Defense Services Division of the State Court Administrator’s Office for review.<sup>98</sup>



## 7. *Process and need for investigators and experts*

Seeking the appointment of an investigator or expert witness to assist the defense necessarily begins with defense counsel, and deference to that process should be afforded with the assumption that counsel thoroughly understands the legal and ethical prerequisites and for making such a request.

### *a. Investigation*

Standard 3.A does not adopt specific rules for what investigatory steps must be completed, or the order in which to complete them. The investigative needs of each case must be determined by reference to the discovery and other facts known to defense counsel, including facts obtained from the client during a client interview. Sound investigation requires judgment that can only be learned from experience, and so new attorneys—or attorneys who have not investigated a particular type of case before—should seek out advice and assistance from their more experienced colleagues.

The following general steps should be followed in each case to ensure prompt and efficient investigation. First, based on discovery and a client interview, the defense attorney should determine what witnesses the government is likely to call, and what witnesses, if any, may be helpful for the defense to call. The defense attorney should obtain any existing statements by potential witnesses, including recordings of police transmissions and police reports.<sup>99</sup> The defense attorney should also determine what physical evidence the government has in its possession and request a viewing,<sup>100</sup> and if any uncollected physical evidence might be helpful to the defense.

Second, the defense attorney should determine which witnesses to interview.<sup>101</sup> The defense attorney should contact and interview any witnesses who may be helpful to the defense. The defense attorney should also explore any plausible avenue of impeachment, including but not limited to bias and interest, prior criminal convictions, significant prior bad acts bearing on the witness's character for truthfulness, and defects in observational or testimonial capacities. Thorough investigation of each witness is an important part of preparation for cross-examination.<sup>102</sup> In addition to locating witnesses whose identities are already known, the defense attorney should also determine whether there are ways to locate other witnesses who may have witnessed the event, such as canvassing the area around the crime scene.

Third, the defense attorney should take appropriate steps with respect to physical and documentary evidence. For physical evidence in the possession of the government, the defense attorney should obtain access to and examine the evidence, documenting it as appropriate.<sup>103</sup> For uncollected physical evidence that will be helpful to the defense, the defense attorney should collect it, carefully preserving chain of custody and ensuring the evidence is not contaminated.<sup>104</sup>

In addition, the defense attorney should determine whether scientific testing is appropriate for any evidence—including but not limited to tests for fingerprints, serology, and DNA. Where the government has already conducted testing, the defense attorney should consult with an expert about whether retesting is appropriate. The defense attorney should also determine whether any additional documentary evidence—such as employment records and phone call logs—would be relevant to the case.

Fourth, after compiling a list of investigative tasks, the defense attorney must prioritize them. Three questions should guide the prioritization: (1) What tasks must be completed promptly to avoid losing access to evidence or witnesses? (2) What tasks will produce information most relevant to evaluating an early plea offer? (3) What tasks are likely to open up new avenues of investigation? Balancing these considerations is difficult, and again requires judgment calls that must be informed by experience and consultation with colleagues.

Finally, the defense attorney must periodically review and update both the list of investigative tasks and the priority order, in light of new facts learned through discovery and the defense investigation itself. Since investigation can often branch out in multiple directions, and connections between certain facts may not be immediately apparent, organization and periodic review is important. Even facts that do not seem immediately relevant should be kept catalogued, as their importance may become clear after more investigation, or even for the first time during a trial.

The preceding discussion is necessarily incomplete. Effective investigation requires creativity and a deep knowledge of the specific facts of the case.<sup>105</sup> It also requires the defense attorney to guard against cynicism and approach the case from the perspective of innocence. “The defender who presumes guilt finds little reason to investigate the defendant’s claims of innocence or to spend precious time consulting with the client.”<sup>106</sup>

#### *(1) Need for an Investigator*

The defense attorney, in consultation with the client, should retain primary responsibility for the course of the investigation and decisions about when to forego additional investigation. However, the actual investigation will often be beyond the personal capacity of the defense attorney, either because of limited time or the requirement of particular skills—such as witness interviewing—that trial lawyers do not necessarily possess. In addition, some investigative tasks may create a need to testify at trial: for example, a witness may need to be impeached with a prior, contradictory statement,<sup>107</sup> or a piece of physical evidence may need to be authenticated. In order to avoid the appointment of replacement counsel so that the original lawyer can testify, it is helpful to have another individual conducting those types of investigative tasks.<sup>108</sup>

In these circumstances, the defense attorney should seek out the assistance of a defense investigator.<sup>109</sup> The investigator's expertise should complement the attorney's skills, to provide the client with an effective defense team. As with the defense attorney, the investigator's skills and experience should be appropriate to the particular case.<sup>110</sup> Because prosecutors have investigatory assistance from the police, the ABA's *Ten Principles* recognizes that defense counsel need professional investigators to maintain parity.<sup>111</sup> The need for investigative assistance in misdemeanor cases can be evaluated on a more individualized basis.

*(2) Foregoing Investigation and Investigation After Client Expresses a Desire to Plead Guilty*

The Supreme Court recognized in *Strickland* that "reasonable professional judgments" may sometimes "support [a] limitation[ ] on investigation."<sup>112</sup> However, the Court made clear that counsel must make such a decision about "particular investigations."<sup>113</sup> That is, decisions to curtail investigation can only be made after considering what investigation could be done. A general decision not to investigate is insufficient, and the apparent weight of the evidence against a client does not provide a reason to forego investigation.<sup>114</sup>

When deciding to curtail investigation, the attorney should inform the client, and should respectfully consider requests from the client to continue a particular line of investigation, especially where the client has reason to believe it will produce helpful information.

The Supreme Court has recognized that an attorney's assistance can be unconstitutionally ineffective even in cases where the defendant ultimately pleads guilty.<sup>115</sup> The attorney's obligation to conduct an independent investigation is not terminated by a client's desire to plead guilty, nor by the client's admission to the attorney of his guilt.<sup>116</sup> This is true for several reasons. First, the client's professed desire to plead guilty may be based on a distrust of the criminal justice system or the defense attorney, a distrust that the attorney can only dispel by actually conducting the investigation. Second, the client's professed desire to plead guilty does not eliminate the attorney's obligation to provide reasonable advice about the plea, and at times the attorney cannot provide such advice without having conducted an independent investigation. Third, investigation may reveal information that is relevant to sentencing even after a plea agreement is reached.

The client's desire to plead guilty can justify curtailing an investigation, in one circumstance. If the client is being held in custody but will be immediately released upon pleading guilty, delaying the plea to conduct a more thorough investigation may not be in the client's best interests, and the attorney should defer to the client's judgment about those interests.<sup>117</sup>

*b. Consulting with Experts*

A wide variety of experts may be useful and appropriate for a defense attorney to consult, depending on the issues in a case. Common examples include arson investigators, firearms examiners, DNA examiners, drug analysts, medical doctors, pathologists, pharmacologists, psychologists, serologists, statisticians, and toxicologists, among others.<sup>118</sup> Local compliance plans may create a range of structures for requesting the use of such experts. Some jurisdictions utilize online forms to request experts,<sup>119</sup> while others use analog court forms and must provide “the factual justification for the request”<sup>120</sup> before receiving court approval. Streamlined, relatively simple procedures are preferable, and can encourage attorneys to use all available tools to advocate for their clients.

Defense experts are important for more than their testimony at trial, and can be crucial to the defense case even if they never testify. One significant role that non-testifying experts can play is preparing the defense attorney to cross-examine the government’s experts.<sup>121</sup> Even earlier in the process, an expert can help the defense attorney assess the evidence and decide whether additional investigation or testing is appropriate. A defense expert can also identify gaps or irregularities in the government’s expert’s report, where the defense attorney, unskilled in the particular area, would have never recognized the significance.

As with unperformed investigation, a defense attorney can never say what light an expert who is never consulted would have been able to shed on a case. Therefore, defense attorneys should err on the side of conducting at least an initial consultation with an expert, in order to obtain an informed opinion about whether additional expert analysis and advice is worthwhile.<sup>122</sup> Even consulting with only a single expert may constitute ineffective assistance of counsel, if the attorney does not have sufficient information to forego additional consultations.<sup>123</sup> Of course, there will be many cases in which there is no type of expert who could be called. However, defense attorneys should be in the habit of carefully considering whether every single case could benefit from expert assistance.

While decisions not to seek out expert assistance may sometimes be warranted, there are also several inappropriate reasons that attorneys might consciously or unconsciously rely on to not seek assistance. One is a lawyer’s confidence in his or her own mastery of a certain technical area. Another is the perception that a certain method has been in regular use in a particular jurisdiction for years without any challenge. It is precisely that circumstance that can lead to sloppy science, when everyone—including the expert—becomes accustomed to the idea that the testimony is infallible. A fresh, outside perspective on customary practices can reveal that what is considered normal and routine in one lab or jurisdiction is substantially out of date when compared to national standards.

### 8. Collect and Submit Data to the MIDC

In order to comply with Standard 3, the MIDC will be collecting system and case data points from the local delivery systems. The system-wide data points seek information about the (1) mechanism(s) by which attorneys request investigative assistance, and (2) mechanism(s) by which attorneys request funding for expert witnesses. The case-level data points will seek information about (1) requests for investigator or funds for investigator by defense counsel, (2) granting of investigator or funds for investigator to defense counsel, (3) request for expert witness or funds for expert witness by defense counsel, and (4) granting of expert witness or funds for expert witness to defense counsel.

## CONCLUSION

Investigators and expert witnesses are a crucial part of the defense team in many cases. Indigent defense providers in Michigan must ensure that these services are available to every defendant who needs them, and the compliance process should start with adequate funding that is controlled by an independent source outside the judiciary.

<sup>1</sup> 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* (Jun. 2008), available at [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) [hereinafter *A Race to the Bottom*].

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

<sup>3</sup> See ABA Standing Comm. on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, AMERICAN BAR ASSOCIATION 3 (Feb. 2002), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ten\\_principlesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ten_principlesbooklet.authcheckdam.pdf) [hereinafter *Ten Principles*].

<sup>4</sup> *Id.* at Introduction p. 4.

<sup>5</sup> *A Race to the Bottom*, *supra* n. 1, Executive Summary.

<sup>6</sup> 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>.

<sup>7</sup> The MIDC Act is found at MCL 780.981 et. seq.

<sup>8</sup> MCL 780.991(2).

<sup>9</sup> *Strickland v Washington*, 466 U.S. 668, 691; 104 S.Ct. 2052, 2066; 80 L.Ed.2d 674 (1984).

<sup>10</sup> *Harrington v Richter*, 562 U.S. 86, 106; 131 S.Ct. 770, 788; 178 L.Ed.2d 624 (2011).

<sup>11</sup> See generally MIDC Standard 3.

<sup>12</sup> See MIDC Standard 3.A.

<sup>13</sup> See below, “Investigation.”

<sup>14</sup> MIDC Standard 3.A.

<sup>15</sup> MIDC Standard 3, Staff Comment 1.

<sup>16</sup> MIDC Standard 3.D.

<sup>17</sup> MIDC Standard 3.B.

<sup>18</sup> MIDC Standard 3.C.

<sup>19</sup> MIDC Standard 3.C.

<sup>20</sup> See below, “Experts.”

<sup>21</sup> See MIDC Standard 3.D.

<sup>22</sup> See *A Race to the Bottom*, *supra* n. 1 at 68.

<sup>23</sup> See Letter from Dawn Van Hoek, Appellate Defender, State Appellate Defender Office, to the Michigan Indigent Defense Commission 2 (Aug. 6, 2015) [hereinafter Letter from Dawn Van Hoek], available at [http://michiganidc.gov/wp-content/uploads/2015/04/SADO-MAACS-Support-for-Standards-1-and-3-08\\_06\\_15.pdf](http://michiganidc.gov/wp-content/uploads/2015/04/SADO-MAACS-Support-for-Standards-1-and-3-08_06_15.pdf) (“A defense attorney well-trained on arson theory can do little on his or her own without funding of an investigator to find reports and witnesses, or an expert to analyze evidence and testify.”).

<sup>24</sup> See *Strickland v Washington*, 466 U.S. 668, 691; 104 S.Ct. 2052, 2066; 80 L.Ed.2d 674 (1984); Brief for the United States as *Amicus Curiae* in Support of Appellants, *Kuren v Luzerne County*, 57 MAP 2015, at \*18 (Pa. Sept. 10, 2015): Courts assessing a constructive denial-of-counsel claim should consider whether traditional markers of representation are present for clients of the public defender’s office. These include . . . the attorney’s ability to investigate the allegations and the client’s circumstances that may inform strategy . . . . When these markers of representation are absent, there is a serious question whether the assigned counsel is merely a lawyer in name only.

See also FLORIDA PUBLIC DEFENDER ASSOCIATION, FLORIDA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 4.2(A), at 17 (Aug. 7, 2013) (on file with MIDC staff); Committee on Assigned Counsel Standards, *Standards for Assigned Counsel*, 74 MICH. B.J. 674, 676 (Jul. 1995) (“Counsel shall conduct a timely investigation of the prosecution case and potentially viable defense theories.”) [hereinafter FLORIDA PUBLIC DEFENDER ASSOCIATION].

<sup>25</sup> See, e.g., April Higuera, *Homicide Investigation*, 31 CHAMPION 40, 43, 60 (Aug. 2007) (discussing examples of cases in which defense investigations “turned cases for the defense”); see also MICHIGAN INDIGENT DEFENSE COMMISSION, STANDARD 2: INITIAL INTERVIEW, 4-5 (Winter 2017) [hereinafter STANDARD 2].

<sup>26</sup> Justin A. Hinkley & Matt Mencarini, *Court-appointed attorneys paid little, do little, records show*, THE LANSING STATE JOURNAL (Nov. 3, 2016), <http://www.lansingstatejournal.com/story/news/local/watchdog/2016/11/03/court-appointed-attorneys-paid-little-do-little-records-show/91846874/> (“[T]he counties paid for outside experts and investigators in only 2% of cases.”).

<sup>27</sup> Communication with MIDC Regional Manager Ashley Carter.

<sup>28</sup> Communication with MIDC Regional Manager Cheryl Carpenter.

<sup>29</sup> Letter from Dawn Van Hoek, *supra* n. 23, at 2.

<sup>30</sup> See e.g. *People v Grant*, 470 Mich. 477; 684 N.W.2d 686 (2004); *People v Trakhtenberg*, 493 Mich. 38; 826 N.W.2d 136 (2012); *Avery v Prelesnik*, 548 F.3d 434 (CA6 2012); *Ramonez v Berghuis*, 490 F.3d 482 (CA6 2007).

<sup>31</sup> See *Assigned Counsel Manual: Policies and Procedures, Chapter IV: Criminal: Performance Standards and Complaint Procedures*, COMMITTEE FOR PUBLIC COUNSEL SERVICES 10, [https://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2012/MANUALChap4CriminalStandards.pdf](https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2012/MANUALChap4CriminalStandards.pdf) (last visited Jan. 30, 2016) (“Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction.”); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.1, at 181 (3d ed. 1993) [hereinafter DEFENSE FUNCTION] (“Defense counsel should conduct a prompt investigation of the circumstances of the case.”); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 62 (1976) [hereinafter GUIDELINES FOR LEGAL DEFENSE SYSTEMS] (“Early provision of counsel is equally important for discovering facts bearing upon the ultimate disposition of the case, whether by trial or otherwise.”) (quoting 1967 PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967)).

<sup>32</sup> See Committee on Assigned Counsel Standards, *supra* n. 24, at 820 (“Timely investigation is crucial, since witnesses and objects may disappear and memories fade rapidly.”); see also FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 24,

§ 1.3(B)(1)(a), at 7 (“Counsel must [t]ake early and prompt action after initial appointment to preserve necessary physical evidence.”).

<sup>33</sup> See DEFENSE FUNCTION, *supra* n. 31, § 4-4.1, at 182:

Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others. The resources of scientific laboratories may be required . . . . Neglect of any of these steps may preclude the presentation of an effective defense.

<sup>34</sup> See Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 149–50 (2011).

<sup>35</sup> See STANDARD 2, *supra* n. 25.

<sup>36</sup> Stephen Breyer, *Science in the Courtroom*, ISSUES IN SCIENCE AND TECHNOLOGY 52, 53 (Summer 2000).

<sup>37</sup> See Ellen Yaroshesky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 123, 134 (Allison D. Redlich, *et al.*, eds., 2014) (“While funding for experts may be denied defendants by the courts, it is nevertheless incumbent upon a defense attorney to file motions and litigate the necessity of being afforded a defense expert where forensic evidence is crucial to a case.”); FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 24, § 4.2(H)(1), at 19 (“Counsel should secure the assistance of experts where it is necessary or appropriate to: a. Prepare the defense; b. Adequately understand the prosecution’s case; c. Rebut the prosecution’s case; and d. Prepare for plea negotiations and sentencing.”).

<sup>38</sup> See *Harrington v Richter*, 562 U.S. 86, 106; 131 S.Ct. 770, 788; 178 L.Ed.2d 624 (2011) (“Criminal 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.”); *see, e.g., People v Ackley*, 497 Mich. 381, 389; 870 N.W.2d 858, 863 (Mich. 2015) (“[W]e conclude that counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant’s theory that the child’s injuries were caused by an accidental fall and prepare counsel to counter the prosecution’s expert medical testimony.”); *People v Trakhtenberg*, 493 Mich. 38; 826 N.W.2d 136 (Mich. 2012); *People v Agar*, 2016 WL 399933 (2016) (abuse of discretion for failure to fund a computer forensics expert).

<sup>39</sup> See Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1378–79 (2004).

<sup>40</sup> See Yaroshesky & Schaefer, *supra* n. 37, at 131 (“Jurors in criminal cases not only commonly expect forensic evidence, but often are willing to trust such evidence whole cloth without properly understanding its actual implications.”); *id.* (“[M]any defense attorneys may have been swayed by the assumed infallibility of forensic evidence, as well.”).

<sup>41</sup> See Spencer S. Hsu, *In a First, Judge Grants Retrial Solely on FBI Hair ‘Match’*, THE WASHINGTON POST (Feb. 2, 2016), [https://www.washingtonpost.com/local/public-safety/in-a-first-judge-grants-retrial-solely-on-fbi-hair-match/2016/02/02/e3adcc96-c49b-11e5-9693-933a4d31bcc8\\_story.html](https://www.washingtonpost.com/local/public-safety/in-a-first-judge-grants-retrial-solely-on-fbi-hair-match/2016/02/02/e3adcc96-c49b-11e5-9693-933a4d31bcc8_story.html); Karen Anderson & Kevin Rothstein, *5 Investigates: First-in-Nation Conviction Reversal Could Start Trend*, WCVB CHANNEL 5 (Jan. 28, 2016), <http://www.wcvb.com/news/5-investigates-firstinnation-conviction-reversal-could-start-trend/37696904>:

[A]fter several other men convicted with the help of the technology were exonerated by DNA testing, the FBI began a nationwide review of cases where their analysts tested and testified about microscopic hair analysis. So far more than 1,500 cases have been reviewed, and errors have been found in the vast majority of them.

See also Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST (Apr. 18, 2015), [https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html) (“Of 28 examiners with the FBI Laboratory’s microscopic hair comparison unit, 26 overstated forensic matches in ways that favored prosecutors in more than 95 percent of the 268 trials reviewed so far . . . .”); GARRETT, *supra* n. 34, at 85–86.

<sup>42</sup> See Tom Jackman, *Experts Say Law Enforcement’s Use of Cellphone Records Can Be Inaccurate*, THE WASHINGTON POST (Jun. 27, 2014), [https://www.washingtonpost.com/local/experts-say-law-enforcements-use-of-cellphone-records-can-be-inaccurate/2014/06/27/028be93c-faf3-11e3-932c-0a55b81f48ce\\_story.html?hpid=z1](https://www.washingtonpost.com/local/experts-say-law-enforcements-use-of-cellphone-records-can-be-inaccurate/2014/06/27/028be93c-faf3-11e3-932c-0a55b81f48ce_story.html?hpid=z1) (“In recent federal cases . . . judges have ruled that the analysis of cellphone records was not scientifically valid or reliable in locating people, in part because investigators have overstated its accuracy.”); *id.*:

[N]umerous experts and telecommunications workers say the FBI analysis techniques are wrong: Cellphone signals do not always use the closest tower when in use but instead are routed by a computerized switching

center to the tower that best serves the phone network based on a variety of factors. In addition, the range of cell towers varies greatly, and tower ranges overlap significantly, and the size and shape of a tower's range shifts constantly, experts say.

See also *id.*:

"It is not possible," [forensic expert Larry] Daniel said, "for anyone to reliably determine the particular coverage area of a cell-tower antenna after the fact based solely on historical cell-tower location data or call-detail records." He said weather, time of day, types of equipment and technology, and call traffic all affect an antenna's range.

See also Douglas Starr, *What Your Cell Phone Can't Tell the Police*, NEW YORKER (June 26, 2014), <http://www.newyorker.com/news/news-desk/what-your-cell-phone-cant-tell-the-police>.

<sup>43</sup> See *Arson Conviction Overturned*, INNOCENCE PROJECT (Aug. 13, 2014), <http://www.innocenceproject.org/news-events-exonerations/arson-conviction-overturned>:

Almost 25 years ago, a Pennsylvania man was convicted of setting a fire that claimed the life of his 20-year-old mentally ill daughter. Last week, his conviction and life sentence were overturned based on advances in arson science. . . . At that time, it was believed that fire from arson burned hotter than other fires. In the years since, that theory, along with what were once considered tell-tale signs of arson, has been debunked based on a lack of credible science to support them.

<sup>44</sup> See *Influential Texas Panel Recommends Halt to Use of Bite-Mark Evidence*, REUTERS (Feb. 11, 2016), available at <http://www.reuters.com/article/texas-bitemark-idUSL2N15R00N>; Radley Balko, *How the Flawed 'Science' of Bite Mark Analysis Has Sent Innocent People to Prison*, THE WASHINGTON POST (Feb. 13, 2015), available at <https://www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail/>.

<sup>45</sup> See Yaroshefsky & Schaefer, *supra* n. 37, at 134 ("In the case of ballistics analysis, for example, many diligent defense attorneys assumed that forensic experts could be relied on when they reported that they were able to match a bullet fired to a defendant's gun. More recently, however, evidence has come to light disputing the reliability of such analysis."); *Williams v United States*, No. 13-CF-1312, 2016 WL 275301, at \*7 (D.C. Jan. 21, 2016) (Easterly, J., concurring) ("Against this backdrop, there is only one permissible answer to the question left undecided in *Jones* regarding firearms and toolmark examiners' assertions of certainty in their pattern-matching conclusions: the District of Columbia courts should not allow them."); *id.* at \*8 ("As matters currently stand, a certainty statement regarding toolmark pattern matching has the same probative value as the vision of a psychic: it reflects nothing more than the individual's foundationless faith in what he believes to be true."); see also Spencer S. Hsu, *D.C. Court of Appeals Judge Faults Overstated Forensic Gun-Match Claims*, THE WASHINGTON POST (Jan. 22, 2016), [https://www.washingtonpost.com/local/public-safety/dc-court-of-appeals-judge-faults-overstated-forensic-gun-match-claims/2016/01/22/a4dbd8c2-c078-11e5-83d4-42e3bceea902\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-court-of-appeals-judge-faults-overstated-forensic-gun-match-claims/2016/01/22/a4dbd8c2-c078-11e5-83d4-42e3bceea902_story.html).

<sup>46</sup> See GARRETT, *supra* n. 34, at 86–87 (discussing a serologist who failed to tell the jury that the victim's blood type matched the perpetrators, giving rise to a possibility of contamination).

<sup>47</sup> See Gabrielle Banks, *Texas Leading Massive Review of Criminal Cases Based on Change in DNA Calculations*, HOUSTON CHRONICLE (Jan. 30, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-leading-massive-review-of-criminal-cases-6796205.php>; Keith L. Alexander, *National Accreditation Board Suspends All DNA Testing at D.C. Crime Lab*, THE WASHINGTON POST (Apr. 27, 2015), [https://www.washingtonpost.com/local/crime/national-accreditation-board-suspends-all-dna-testing-at-district-lab/2015/04/26/2da43d9a-ec24-11e4-a55f-38924fca94f9\\_story.html](https://www.washingtonpost.com/local/crime/national-accreditation-board-suspends-all-dna-testing-at-district-lab/2015/04/26/2da43d9a-ec24-11e4-a55f-38924fca94f9_story.html).

<sup>48</sup> See generally LEILA SCHNEPS & CORALIE COLMEZ, *MATH ON TRIAL: HOW NUMBERS GET USED AND ABUSED IN THE COURTROOM* (2013) (discussing cases in which mathematical arguments have been misused in the courtroom).

<sup>49</sup> See Letter from Dawn Van Hoek, *supra* n. 23, at 1.

<sup>50</sup> See Yaroshefsky & Schaefer, *supra* n. 37, at 124 ("Invalid or improper forensic testimony is seen in more than half of known wrongful conviction cases . . ."); GARRETT, *supra* n. 34, at 89; *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Feb. 8, 2016).

<sup>51</sup> Nick Bunkley, *Detroit Police Lab Is Closed After Audit Finds Serious Errors in Many Cases*, N.Y. TIMES (Sept. 25, 2008).

<sup>52</sup> See Letter from Dawn Van Hoek, *supra* n. 23, at 2 ("We believe that in many cases, appointed trial counsel refrains from investigation simply because funding is unavailable."); E-mail from Donald Johnson, Chief Counsel, State Defender Office, Legal Aid and Defender Association, Inc., to the Michigan Indigent Defense Commission (Jun. 24, 2015), available at [http://michiganidc.gov/wp-content/uploads/2015/04/Don-Johnson-recd-6\\_24\\_151.pdf](http://michiganidc.gov/wp-content/uploads/2015/04/Don-Johnson-recd-6_24_151.pdf) ("This



standard cannot be met without funding being provided. Currently, we only investigate in cases that appear to be headed to trial.”); *see also* Letter from Thomas J. Seger to the Michigan Indigent Defense Commission 1, 2 (Aug. 7, 2015) [hereinafter Letter from Thomas J. Seger], available at [http://michiganidc.gov/wp-content/uploads/2015/04/Thomas-J-Seger-8\\_7\\_15.pdf](http://michiganidc.gov/wp-content/uploads/2015/04/Thomas-J-Seger-8_7_15.pdf).

<sup>53</sup> Jonah Siegel, *Snapshot of Indigent Defense Representation in Michigan’s Adult Criminal Courts: The MIDC’S First Survey of Local Court Systems* (Feb. 2016) (on File with MIDC Staff).

<sup>54</sup> *Id.*

<sup>55</sup> *See, e.g.*, Christina Hall, *Judge OK’s \$15K for Cell Phone Expert in Armada Murder*, DETROIT FREE PRESS (Nov. 16, 2015), <http://www.freep.com/story/news/local/michigan/macomb/2015/11/16/armada-murder-april-mills-aprial/75876020/>.

<sup>56</sup> MCL § 775.15; *People v Tanner*, 469 Mich. 437; 671 N.W.2d 728 (2003); *People v Jacobsen*, 448 Mich. 639; 532 N.W.2d 838 (1995).

<sup>57</sup> *See A Race to the Bottom*, *supra* n. 1, at 62 (describing two courtrooms in Oakland County where observers “witnessed clear evidence of defense attorneys being more concerned about pleasing the judge than supporting their clients”); *id.* at 68 (“[I]n Ottawa County you need to play by the judges’ rules in order to stay in the game.”).

<sup>58</sup> *See* GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* n. 31, at 266.

<sup>59</sup> *See above*, “Investigation.”

<sup>60</sup> *See* Letter from Thomas J. Seger, *supra* n. 52 at 1–2; Letter from Kyle Trevas to the Michigan Indigent Defense Commission 2 (Aug. 7, 2015), available at [http://michiganidc.gov/wp-content/uploads/2015/04/Kyle-Trevas-8\\_7\\_15.pdf](http://michiganidc.gov/wp-content/uploads/2015/04/Kyle-Trevas-8_7_15.pdf).

<sup>61</sup> *See above*, “Investigation.”

<sup>62</sup> Norman Lefstein, AM. BAR ASS’N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 222 (2011).

<sup>63</sup> *See People v Agar*, 2016 WL 399933 (2016)

<sup>64</sup> *See Funding Expert Witnesses for Indigent Defendants: A Model for Unequal Protection*, Jim Kolowsowsky, Michigan Bar Journal, May 2016.

<sup>65</sup> MCL § 780.991(1)(a).

<sup>66</sup> Communication with MIDC Regional Manager Mike Naughton.

<sup>67</sup> *Forensic Resources*, INDIGENT DEFENSE SERVICES, available at <http://www.ncids.com/forensic/index.shtml?c=Training%20and%20Resources,%20Forensic%20Resources> (2017).

<sup>68</sup> DPD Expert Fee Guidelines, on file with MIDC.

<sup>69</sup> *See Investigations Division*, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, <http://pdsdc.org/about-us/legal-support-services/investigations-division> (last visited Feb. 6, 2016).

<sup>70</sup> *See Administrative Support*, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, <http://pdsdc.org/about-us/legal-support-services/administrative-support> (last visited Feb. 6, 2016).

<sup>71</sup> *See* GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* n. 31, at 9–10.

<sup>72</sup> *Washington Defender Association Standards for Public Defense Services*, available at <http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense>.

<sup>73</sup> E-mail correspondence with San Francisco Public Defender Chief Jeff Adachi, Mar. 22, 2016.

<sup>74</sup> *See above*, “Systems Should Consider the Creation of an Independent Review Process for the Request;” text accompanying n. 55–65.

<sup>75</sup> *See Criminal Law Internship Program*, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, <http://www.pdsdc.org/careers/criminal-law-internship-program> (last visited Jan. 30, 2016).

<sup>76</sup> *See Criminal Defense & Prisoner Advocacy Clinic: Investigative Internship Program*, GEORGETOWN UNIVERSITY LAW CENTER, <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/criminal-defense-prisoner-advocacy/investigative-internships-hs-students.cfm> (last visited Jan. 30, 2016).

<sup>77</sup> *See Investigator Internships*, NEW HAMPSHIRE PUBLIC DEFENDER, <http://www.nhpd.org/employment/internships.aspx> (last visited Jan. 30, 2016).

<sup>78</sup> *See Investigator Internship*, ORLEANS PUBLIC DEFENDERS, <http://www.opdla.org/employment-opportunities/law-clerks-internships/112-investigator-internship> (last visited Jan. 30, 2016).

<sup>79</sup> *See* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, HALTING ASSEMBLY LINE JUSTICE: PDS: A MODEL OF CLIENT-CENTERED REPRESENTATION 18 (August 2008), available at

[http://www.nlada.net/sites/default/files/dc\\_haltingassemblylinejusticejseri08-2008\\_report.pdf](http://www.nlada.net/sites/default/files/dc_haltingassemblylinejusticejseri08-2008_report.pdf) [hereinafter

HALTING ASSEMBLY LINE JUSTICE]:

The [intern] program adds 20 to 50 bright, energetic college students to the PDS ranks every semester. . . . The use of interns allows PDS to devote its most experienced staff to its most difficult and complex cases. . . . The use of interns also allows PDS to maintain an acceptable caseload level for investigators and interns, assuring that each case is completely investigated.

<sup>80</sup> See *id.*:

Part of the success of the intern program rests with the requirement that new attorneys investigate their own cases. Following their eight-week training and while their caseloads are at a level designed to accommodate this additional work, juvenile attorneys pair with one of their colleagues to conduct case investigations. . . . These attorneys are then uniquely equipped to prepare detailed investigation memos and provide specific direction to interns and later to staff investigators.

<sup>81</sup> See generally *Qualifications and Rates for: Investigators, Social Service Providers, and Expert Witnesses*, COMMITTEE FOR PUBLIC COUNSEL SERVICES 4–5 (Dec. 19, 2011), [https://www.publiccounsel.net/billing\\_information/expert\\_qualifications\\_and\\_rates/pdf/Expert.pdf](https://www.publiccounsel.net/billing_information/expert_qualifications_and_rates/pdf/Expert.pdf) [hereinafter *Qualifications and Rates*].

<sup>82</sup> See *Federal Indigent Defense 2015: The Independence Imperative*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 35, available at [www.nacdl.org/federalindigentdefense2015](http://www.nacdl.org/federalindigentdefense2015) (2015) (“The defense function must be insulated from . . . pervasive involvement and control by the judiciary. . . . Greater independence now enjoys much wider and deeper support than it did two decades ago.”).

<sup>83</sup> See National Symposium on Indigent Defense, *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations*, U.S. DEPARTMENT OF JUSTICE 11, available at <http://www.sado.org/fees/icjs.pdf> (Feb. 1999) (“The primary means of ensuring defender independence is to provide for oversight by an independent board or commission, rather than direct oversight by judicial, legislative, or executive agencies or officials.”).

<sup>84</sup> See American Council of Chief Defenders, Best Practices Comm., *Implementation of the ABA’s Ten Principles in Assigned-Counsel Systems*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION 8 (Sept. 13, 2010), [http://www.nlada.org/Defender/Defender\\_ACCD/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf](http://www.nlada.org/Defender/Defender_ACCD/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf) (“An organization independent of the courts . . . offers the practical advantage that the private attorney can apply for [qualified experts, investigators, and interpreters] without having to reveal details of a possible defense theory.”).

<sup>85</sup> See *Policies & Procedures for Assigned Counsel, Investigators, & Other Ancillary Service Providers*, SACRAMENTO COUNTY, CONFLICT CRIMINAL DEFENDERS §§ 3.2, 4.1 at 11, 14 (Jul. 1, 2015), <http://www.ccd.saccounty.net/Pages/PoliciesProcedures.aspx>.

<sup>86</sup> See American Council of Council of Chief Defenders, Best Practices Comm., *supra* n. 84, at 8.

<sup>87</sup> See *id.*

<sup>88</sup> See OR. REV. STAT. § 135.055(3)(c) (2013) (independent state-wide administrator makes the initial determination for cases in circuit court, but denial of authorization may be appealed to the presiding judge of the court); PUBLIC DEFENSE SERVICES COMMISSION, OFFICE OF PUBLIC DEFENSE SERVICES, PUBLIC DEFENSE PAYMENT POLICIES AND PROCEDURES § 3.2.3 at 12–13 (Feb. 18, 2014), available at <http://www.oregon.gov/OPDS/docs/CBS/PDPPP20140218.pdf>.

<sup>89</sup> NATIONAL LEGAL AID & DEFENDER ASSOCIATION, THE TRAVIS COUNTY MANAGED ASSIGNED COUNSEL JOURNEY (May 20, 2015), available at <http://tidc.texas.gov/media/37799/150520nladawebinar-travismac.pdf> [hereinafter TRAVIS COUNTY MANAGED ASSIGNED COUNSEL]

<sup>90</sup> See E-mail from Alex Bunin, Chief Public Defender, Harris County Public Defender’s Office, to Jonathan Sacks, Executive Director, Michigan Indigent Defense Commission (Sept. 25, 2015) (on file with MIDC staff).

<sup>91</sup> See E-mail from Jim Looney, Executive Director, Louisiana Appellate Project, to Jonathan Sacks, Executive Director, Michigan Indigent Defense Commission (Sept. 25, 2015) (on file with MIDC staff).

<sup>92</sup> *Appellate Investigation Project: Making Investigations More Accessible for MAACS Appeals*, STATE APPELLATE DEFENDER OFFICE, available at <http://www.sado.org/Articles/Article/397> (last visited Feb. 17, 2017).

<sup>93</sup> 2015 Annual Report, CAPITAL AREA PRIVATE DEFENDER SERVICE 18, available at [https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity\\_public&page=18](https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity_public&page=18) (last visited Feb. 3, 2017).

<sup>94</sup> Jurisdictions with small caseloads will find it inefficient to duplicate the administrative structure necessary to have an independent administrator handling funding requests for assigned counsel. See GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 31, at 134.

<sup>95</sup> TRAVIS COUNTY MANAGED ASSIGNED COUNSEL, *supra* n. 89.

<sup>96</sup> See *Contracting for Indigent Defense Services: A Special Report*, BUREAU OF JUSTICE ASSISTANCE (Apr. 2000), available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

<sup>97</sup> Communication with MIDC Regional Manager Chris Dennie (Jan. 4, 2017).

<sup>98</sup> *Id.* at 17.

<sup>99</sup> See FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 24, at § 4.2(A)(1)(a).

<sup>100</sup> See *id.* at § 4.2(F).

<sup>101</sup> See HALTING ASSEMBLY LINE JUSTICE, *supra* n. 79, at 18.

<sup>102</sup> See 1A GILLESPIE MICH. CRIM. L. & PROC. § 18:21 (2d ed.) (“Once counsel has determined his or her approach to a witness, additional preparation is needed for effective execution of that approach. This involves a detailed awareness of . . . information about the witness learned from independent defense investigation . . .”).

<sup>103</sup> See MCR 6.201(A)(6).

<sup>104</sup> Before deciding to collect any physical evidence, defense counsel should carefully consider the disclosure obligations that arise from doing so. See *People v Nash*, 418 Mich. 196, 219; 341 N.W.2d 439, 448 (Mich. 1983); see also, generally, Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer’s Responsibility for Real Evidence*, 63 STAN. L. REV. 813 (2011).

<sup>105</sup> For another discussion of investigatory tasks, see Higuera, *supra* n. 25, at 42–43.

<sup>106</sup> Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL’Y REV. 161, 168 (2009).

<sup>107</sup> See HALTING ASSEMBLY LINE JUSTICE, *supra* n. 79, at 18.

<sup>108</sup> See Committee on Assigned Counsel Standards, *supra* n. 24, at 676. See also Letter from Thomas J. Seger, *supra* n. 52.

<sup>109</sup> See Higuera, *supra* n. 25, at 40 (“A private investigator can make the difference in winning or losing a case.”).

<sup>110</sup> See MCL § 780.991(2)(c) (“Defense counsel’s ability, training, and experience [must] match the nature and complexity of the case to which he or she is appointed.”); see also Higuera, *supra* n. 25, at 41–42 (discussing characteristics to look for in a defense investigator).

<sup>111</sup> See *Ten Principles*, *supra* n. 3 (“There should be parity of workload, salaries and other resources (such as . . . investigators . . .) between prosecution and public defense.”).

<sup>112</sup> *Strickland v Washington*, 466 U.S. 668, 691; 104 S.Ct. 2052, 2066; 80 L.Ed.2d 674 (1984).

<sup>113</sup> *Id.*

<sup>114</sup> See *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411, Exhibit A, at 8 (Nev. 2008) [hereinafter *Nevada Standards*], available at <http://nvcourts.gov/AOC/Templates/documents.aspx?folderID=9993> (“The investigation regarding guilt should be conducted regardless of . . . overwhelming evidence of guilt . . .”).

<sup>115</sup> See *Hill v Lockhart*, 474 U.S. 52, 58; 106 S.Ct. 366, 370; 88 L.Ed.2d 203 (1985).

<sup>116</sup> See DEFENSE FUNCTION, *supra* n. 31, § 4-6.1, at 203 (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed . . .”); *Nevada Standards*, *supra* n. 114, Exhibit A, at 8 (“The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime . . . or any statement by the client that evidence bearing upon guilt is not to be collected or presented.”).

<sup>117</sup> See Rapping, *supra* n. 106, at 164–65 (“As the assistant to the defendant, the lawyer must remain mindful that it is the client’s case, and it is the client who determines the goals of the representation.”).

<sup>118</sup> See *Qualifications and Rates*, *supra* n. 81.

<sup>119</sup> *Investigator Request*, CAPITAL AREA PRIVATE DEFENDER SERVICE, <http://www.capds.org/investigator-request.html> (last visited Feb. 2, 2017). The form asks for basic information about the case, including the client name and case number, the charge, and tasks to be completed by the investigator. The web-based form includes a reminder to leave out any confidential attorney-client information when completing the form.

<sup>120</sup> *Memorandum re: Expert Fee and Expense Applications (Non-Capital and Non-Criminal Cases at the Trial Level)*, Office of Indigent Services State of North Carolina, available at <http://www.ncids.org/Rules%20&%20Procedures/Fee%20and%20Expense%20Policies/ExpertNon-CapPolicy.pdf>

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(Dec. 3, 2015); *see also* State of North Carolina Form AOC-G-309 (2015), available at <http://www.nccourts.org/Forms/Documents/1265.pdf>.

<sup>121</sup> *See* Giannelli, *supra* n.39, at 1376 (“[E]ffective cross-examination of a prosecution expert frequently requires the advice of a defense expert.”); *id.* at 1385; *People v Agar*, No. 321243, 2016 WL 399933, \*3 (Mich. Ct. App. Feb. 2, 2016) (“[C]ounsel’s admission that he needed help in understanding the technical issues at play supplies clear information that the defense would have benefited from an adequately educated counsel, even in the examination of the people’s expert.”).

<sup>122</sup> *See People v Trakhtenberg*, 493 Mich. 38, 53; 826 N.W.2d 136, 144 n. 9 (“[A] defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a *reasonable, informed determination* as to whether an expert should be consulted or called to the stand.” (internal quotation marks omitted)).

<sup>123</sup> *See People v Ackley*, 497 Mich. 381, 389; 870 N.W.2d 858, 863 (Mich. 2015).