EDUCATION AND TRAINING OF DEFENSE COUNSEL

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*.[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 Order[6], 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[7] 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 cases[31] 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 principles[39] 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

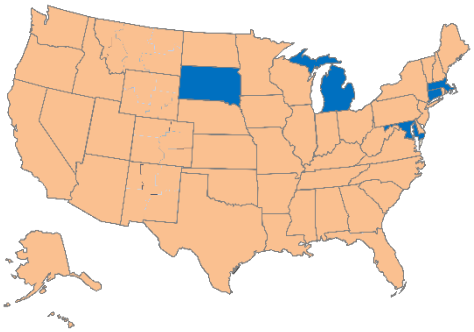
is the most important area for the MIDC to address.

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 Maryland[50] and the District of Columbia[51] 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.

> "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*

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:

- 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 Michigan[69];
(d) The *Gideon's Promise* Core 101 Summer Institute[70];
(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 year[75], 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_tenprinciplesbooklet.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)*

INITIAL INTERVIEW

A GUIDE TO IMPLEMENTATION OF THE MINIMUM STANDARDS FOR DELIVERY SYSTEMS

PREPARED BY THE MICHIGAN INDIGENT DEFENSE COMMISSION[1]

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*.[2] The NLADA study involved an evaluation of trial-level indigent defense delivery systems across ten representative counties in Michigan.[3] The NLADA analyzed Michigan's compliance with the ABA Ten Principles of a Public Defense Delivery System.[4] "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."[5] 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.[6]

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[7] 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 2

The Michigan Indigent Defense Commission Act (MIDC Act)[10] includes the principle that "[d]efense counsel [must be] provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client."[11] The MIDC Act also recognizes the importance of effective representation and of a strong attorney-client relationship.[12] The initial client interview is a crucial step both in beginning to investigate the case, and in laying the groundwork for a positive relationship. The American Bar Association (ABA) expounds on the principle requiring sufficient time and space for attorney-client meetings by stating that "[c]ounsel should interview the client as soon as practicable."[13]

Effective representation requires that an attorney investigate a case thoroughly, from the very beginning. That investigation must start as soon as the lawyer is appointed, with the initial client interview. Effective representation also requires frequent and frank communication between the attorney and the client.[14]

MIDC Standard 2,[15] conditionally adopted by the Michigan Supreme Court and submitted to the Department of Licensing and Regulatory Affairs for approval, establishes minimum standards for client interviews. This standard only involves the initial client interview and other confidential client interviews are expected, as necessary. Standard 2 addresses the timing and content of the interview, the confidential setting, counsel's responsibilities to prepare for the interview, and counsel's ongoing responsibilities to monitor issues relating to the client's participation in the representation and trial process. Standard 2's approach to each of these issues is consistent with national standards, constitutional requirements, and Michigan law.

Standard 2.A establishes two general requirements for the timing of initial interviews. The interview must occur "as soon as practicable after appointment," and "sufficiently before any subsequent court proceeding."[16] For clients held in local custody—that is, clients not held by the Michigan Department of Corrections (MDOC) or in another county[17]—Standard 2.A further specifies that the initial interview shall take place within three business days after the appointment of counsel.[18] The general requirement of a prompt interview and the specific three business day requirement match national standards.[19] Standard 2.A also requires defense attorneys to "conduct subsequent client interviews as needed."[20]

Standard 2.B requires a confidential setting for all client interviews.[21] This requirement is essential to protect the attorney-client privilege.[22] Since client interviews might take place in a variety of facilities—including "courthouses, lock-ups, jails, prisons, [and] detention centers"[23]—Standard 2.B requires adequate facilities for interviews in all of those locations, among others. Finally, Standard 2.B recognizes that defense counsel cannot singlehandedly create spaces for confidential interviews, and so places the burden of compliance on "the indigent criminal defense system" as a whole.[24] Nonetheless, defense lawyers have an important role to play in identifying where confidential interview spaces are necessary and advocating for change. Defense lawyers should not accept a status quo that prevents them from maintaining confidentiality.

A confidential setting for interviews is essential to protect attorney-client privilege.

Standard 2.C requires the defense lawyer to obtain relevant documents before the initial client interview, if possible.[25] This includes "charging documents, recommendations and reports concerning pretrial release, and discoverable material."[26] Implicit in this part of the Standard is the requirement that counsel adequately review the materials before the interview, in order to make the interview effective. In particular, counsel should be familiar with facts bearing on pretrial release,[27] with facts that may be relevant to initial investigation,[28] and with any facts suggesting that pretrial diversion may be available.[29]

Standard 2.D has two parts. Standard 2.D.1 requires the defense lawyer, both at the initial interview and on a continuing basis, to evaluate the client's competency under Mich. Ct. R. 6.125 and M.C.L. § 330.2020.[30]

Standard 2.D.2 requires defense lawyers to take "whatever steps are necessary" to overcome language barriers or other "communication differences."[31] Such steps include seeking the appointment of an interpreter to assist with every step of the criminal process, including "pretrial preparation, interviews, investigation, and in-court proceedings."[32]

RATIONALE

PRETRIAL RELEASE ADVOCACY

The first priority of the initial interview, especially for an in-custody client, is to obtain information for pretrial advocacy, particularly pretrial release and bail arguments.[33] The information that is relevant to a release argument will vary by client, and the attorney should be flexible in the interview, actively listening to the client and asking for more information where necessary. Some

Critical information cannot be learned in a rushed interview conducted immediately before a hearing.

aspects of the interview will be consistent across clients, however. The attorney should ask about significant medical issues, education, work history, financial resources, marital status, dependents, other family and community ties, housing situation, criminal history and ongoing cases, parole or probation status, and citizenship or immigration status.[34]

In addition to gathering information to use in pretrial release arguments, the attorney should have a frank discussion with the client about compliance with the conditions of release.[35] Pretrial release advocacy that is guided by the client's particular needs is an aspect of client-centered representation in which the attorney "remain[s] mindful that it is the client's case, and it is the client who determines the goals of the representation."[36] An in-depth interview will help the attorney know which conditions to contest. This information cannot be learned in a rushed interview conducted immediately before the hearing.[37]

PROMPT INVESTIGATION

In order to be effective, investigation should begin promptly.[38] Such investigation can locate evidence that would otherwise disappear and witnesses who would otherwise forget important facts.[39] It also gives the defense lawyer more time to locate difficult-to-find witnesses and complete multiple rounds of interviews, as necessary.[40] Because "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant,"[41] the initial client interview is an important step in investigation.[42]

The importance of prompt investigation is illustrated by the case of Ashly Smith.[43] Mr. Smith was charged in Wayne County with armed robbery and associated charges.[44] His lawyer was appointed on May 21, 2012, but had not met with Mr. Smith as of June 4, 2012.[45] Until the night before trial, Mr. Smith's lawyer only ever spoke to him in court or in the bullpen of the jail.[46] While Mr. Smith gave his lawyer information about several potential alibi witnesses, the lawyer did not speak to any of those witnesses until the day of trial.[47]

The American adversarial system of justice relies on the assumption that an independent, vigorous defense investigation will ferret out errors and omissions in the government's investigation.[48] It is impossible to determine what investigation will be necessary solely by reading police reports and other discovery, and investigation must begin promptly, to prevent information, witnesses, or physical evidence from being lost. Even when the government does not insist on an immediate response to a plea offer, an in-custody client's interests will be best served by an attorney who is able to assess the strength of the government's case as quickly as

possible. A prompt initial interview, at which the attorney can learn what the client knows about the charges that is relevant to investigation, is thus crucial to fulfilling the ethical obligation to investigate, and to preventing wrongful convictions.

BUILDING A STRONG ATTORNEY-CLIENT RELATIONSHIP

"Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."[49] The initial client interview is the first opportunity to start building trust,[50] and building trust is especially important for attorneys representing indigent defendants, because "[o]ur clients don't choose us, they have little reason to trust us, and they have likely heard tales about the inadequacies of court-appointed counsel."[51] A trusting relationship is difficult when the client meets the attorney for the first time in court. One South-Central Michigan defense attorney noted: "It's really impossible to establish a rapport with your client in that short of a time frame."[52] When an attorney meets with the client promptly, it demonstrates to the client that the attorney cares about the case and is invested in the client.[53] The longer the attorney goes without meeting with the client, the more the client will resent the attorney, and the more the client will hear from other detainees that appointed attorneys cannot be trusted. **This is the status quo, where a Lansing State Journal report recently found this "scenario in nearly a quarter of criminal cases it reviewed, where indigent defendants met their attorneys for the first time on the day of their first court appearance."**[54]

This relationship and communication is important in cases where the government makes a plea offer that requires immediate action by the defendant. Richard Morris was charged in Wayne County with weapons and drug charges.[55] On the same day that he first met with his attorney, Mr. Morris was told that if he did not plead guilty immediately, the state charges would be dismissed and he would be recharged in federal court.[56] Mr. Morris's attorney had received only partial discovery at the time of the offer, and was only able to speak to him in the "bull pen," a cell behind the courtroom that did not allow for confidential conversations.[57] The attorney had no opportunity to conduct an independent investigation or to interview witnesses.[58] Further, the attorney incorrectly advised Mr. Morris about the sentencing guidelines range he would face in federal court, underestimating by about forty months.[59] Based on this incorrect advice, from an attorney who had no idea how strong the government's case was, Mr. Morris rejected the plea offer.[60] The federal appeals court concluded that "the lack of time for adequate preparation and

> A strong attorney-client relationship will help the lawyer foster a sense of loyalty and fidelity to the client and will allow the client to develop respect and trust for the advocate.
>
> *-Jonathan Rapping*

the lack of privacy for attorney-client consultation, would have precluded any lawyer from providing effective advice."[61]

ADVISING THE CLIENT ABOUT THE PROCESS

An attorney is more familiar with and knowledgeable about the criminal justice system than the client.[62] Educating the client about the attorney-client relationship and the stages of the case is an important function of the initial interview.[63] The nature, and limits, of attorney-client privilege are particularly important for the client to understand,[64] as are the methods by which the client can contact the attorney.[65] To the extent that the attorney has the initial discovery materials before the interview,[66] he or she should also explain the charges, the possible penalties, and the potential defenses.[67]

Sometimes, the attorney will not be able to obtain much, or any, discovery before the initial interview.[68] However, the initial interview is still valuable in these circumstances. While the factual allegations are part of pretrial release advocacy, the lawyer also needs to obtain a variety of information about the client's personal, family, and employment situation that is not affected by the particular case.[69] Client-specific challenges, such as language barriers and competency issues, can also often be ascertained at an initial interview even without reviewing any discovery.[70]

Crucially, an attorney need not have received any discovery in order to begin building an effective attorney-client relationship,[71] or to advise the client about crucial aspects of the process.[72] The attorney should be up front with the client about how information is obtained, what the delays are, and what information the attorney needs from the client in the meantime. An initial interview that demonstrates "commitment to [the client's] case, and concern for their well-being" may, in the long run, save the attorney time that would otherwise be spent "constantly reassur[ing the client] that [the attorney is] working on his case."[73] Ultimately, the attorney-client relationship will be stronger if it is grounded in honesty and communication, than if the client is left to wait in custody for several days without meeting or hearing anything from his lawyer.

It is also important for the attorney to warn the client, as soon as possible, not to discuss the case with anyone other than the attorney, particularly when the client is in custody.[74] Any information the client reveals could be harmful, either because it is directly incriminating, or because it includes facts that enable someone to fabricate a false incriminating statement. It can be very tempting for clients—especially in-custody clients—to discuss their case. This temptation makes it all the more necessary for counsel—a counsel whom the client trusts[75]—to issue firm warnings against discussing the case, early and often.

ADDRESSING CLIENT-SPECIFIC CHALLENGES EARLY

The initial client interview is also an important opportunity for the defense lawyer to become aware of any specific issues that require special attention in representing the client, issues that may not be reflected in paperwork. Two examples of such issues are language or cultural barriers that impede effective communication between the client and the lawyer, and the client's mental state and competency. Other individual challenges may arise, however, and the only effective method for the defense lawyer to become aware of them is through a prompt client interview.

Cultural issues and language barriers can impair an effective attorney-client relationship. Clients from certain cultural backgrounds, especially immigrant clients who are unfamiliar with the criminal justice system in the United States, may be particularly distrustful of attorneys.[76] The lack of trust is important for the lawyer to overcome, and doing so may require frequent attorney-client interaction.[77]

Language barriers are an obvious obstacle to effective communication, but identifying an appropriate interpreter is not a simple task: it may require considering dialect, cultural biases, and the political situations in home countries.[78] Hearing and speech impairments or disabilities also create language barriers that attorneys must overcome.[79] Early identification of cultural or language barriers or other communication difficulties through a prompt initial client interview will give the defense lawyer more time to address such issues in the best possible way for their client.

The defense lawyer's duty to investigate extends to investigating the client's mental state at the time of the offense and the client's competency to proceed in the criminal justice system.[80] The defense lawyer's role in this regard is crucial, "because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court."[81] Personal interaction with the defendant will often be the first indicator for the defense lawyer that such a reason exists. Competency is a central issue at all stages of the process, because it affects the defendant's ability to understand the proceedings and assist in his defense.[82] Therefore, the information that can be ascertained about the defendant's mental state at an early client interview is important to protecting the client's rights.

A third area is immigration consequences. The initial interview is an opportunity to evaluate whether there will be immigration or deportation consequences to a conviction.[83]

EXPLORING THE POTENTIAL FOR PRETRIAL DIVERSION OR SPECIALTY COURTS

Various pretrial diversion programs or specialty courts are available to avoid criminal adjudication.[84] While eligibility for some programs can be determined based on the charging paperwork and the client's criminal history, other programs are designed to address underlying issues that may not be evident from the paperwork, such as mental health and substance abuse. Meeting with and interviewing the client is an important step for the attorney in determining whether any such program is a feasible alternative to criminal prosecution. Even when program eligibility is based only on the client's criminal history, the attorney should discuss that history with the client in order to ensure that the information provided is accurate. The earlier the attorney pursues pretrial diversion or specialty court eligibility, the more helpful it is to the client. A prompt initial interview is therefore an important opportunity to screen clients for eligibility for these programs.

INITIAL INTERVIEWS WITH OUT-OF-CUSTODY CLIENTS

When a client is not in custody, the prime focus of the initial interview shifts. Bail and pretrial release advocacy are not as central, though counsel should still determine if any conditions of release can be modified. However, the importance of the initial interview for all the other reasons is unchanged if the client is not in custody.

Standard 2 recognizes that initial interviews with clients who are not in custody cannot be unilaterally scheduled by the attorney, and so the standard limits the attorney's obligation to initiate contact.[85] Attorneys should encourage out-of-custody clients to schedule the meeting as soon as possible, and should take reasonable measures to schedule meetings at times that are feasible for their clients.

COMPLIANCE

Pursuant to the MIDC Act, the local delivery system will determine the best methods for compliance with Standard 2. Some of the change for funding units will be through the establishment of an effective notification process for appointment of counsel. However, compliance with Standard 2 will also require counties or other funding systems to ensure that there is a confidential space for attorney-client interviews in both the holding facilities and courthouses, and to make any necessary arrangements to facilitate the initial interview within three business days for clients in local custody. These measures including paying counsel for the visit, reimbursing counsel for travel, and making accommodations for video visits by counsel to clients held in various detention facilities. This compliance only involves the initial client interview, and other confidential client interviews are expected, as necessary. The following is

a guide for the most critical components of compliance. It is by no means exhaustive. Proper compliance will require cooperation with every stakeholder in the criminal justice system.

1. *Appointment and Notification Process*
    a. *The notification must be timely*

When an attorney is appointed to represent an indigent defendant, the local indigent defense system must promptly notify the attorney of the appointment.[86] There should be established procedures in place for notification to public defender offices, administrators, or individual attorneys, depending on the local practice. In any case, notice should be provided electronically, with physical copies of the relevant paperwork following the initial notification. In jurisdictions where the court directly appoints attorneys, staff should maintain up-to-date contact information for the attorneys on the list to facilitate prompt notice. Where assignment to specific attorneys is handled by a separate office, that office should promptly notify the assigned attorney of the new case.

Connecting the time of the initial interview to the time of appointment presumes that defense counsel will receive prompt notice of appointment. Defense attorneys may receive delayed notice of appointment,[87] and sometimes notice is delayed for several days.[88] In a forthcoming MIDC survey of attorneys, 21% of over 400 respondents reported notification of appointment up to 72 hours or later.[89] One county reported a system where attorneys have to pick up their assignments in a box at the courthouse and never receive direct notification. If an attorney does not know that he or she has been appointed to represent a client, a prompt initial interview is clearly impossible. Compliance plans will need to require immediate notification.

    b. *The notification should contain as much information as possible.*

The standard requires defense attorneys to prepare for an initial interview by obtaining available reports and discoverable material.[90] Public comments on MIDC Standard 2 demonstrate a concern that initial discovery will not be available.[91] While defense attorneys can take some steps to secure earlier access to discovery, compliance with this part of the standard will require the cooperation of other stakeholders. Close to 40% of Michigan attorneys practicing indigent defense reported that they do not timely receive discovery.[92] Electronic delivery of the discovery, with physical copies following, is one way to speed up the process.

Although Standard 2 does not and cannot require the provision of discovery beyond the timeline established by Mich. Ct. R. 6.125, the MIDC is hopeful that adoption of this standard will result in prosecutor's offices, police departments or other investigatory units supplying discovery in a prompt manner. This is already happening in certain jurisdictions.

The initial order notifying counsel of the appointment must also contain complete information about how to contact the client, including the full legal name, telephone number, and a current address. Counsel cannot be required to spend precious time after appointment investigating or in other ways gathering basic information to contact a client.

2. Facilities

Compliance with Standard 2 may mean that funding units and detention facilities will seek grant funding from the MIDC for purposes of renovations. These requests will be necessary in order to create adequate spaces for confidential client interviews.

a. Confidential space for attorney-client meetings in courthouses

Counties must ensure that they have adequate on-site court facilities for confidential attorney-client interviews for both in-custody and out-of-custody clients. Interview rooms should be sufficiently numerous that there is no need to have multiple attorneys interviewing clients in the same room, and sufficiently private that attorneys and clients can converse freely and effectively. In particular, the security procedures for in-custody interview rooms must be efficient enough that attorneys have time to utilize the rooms, and designed in such a way that law enforcement agents cannot overhear the conversation.

Space for a confidential interview in the courthouse is important, because sometimes counsel's first opportunity to interview the client will take place at the courthouse.[93] Some courthouses do not have confidential interview spaces available.[94] The MIDC's first comprehensive survey of local indigent defense systems found that only 37% of counties had a confidential meeting space available in both the court and holding facility, while a full 9% of systems had a confidential space in neither location.[95] Over 60% of Michigan attorneys reported a lack of designated confidential meeting spaces in courts, and close to 50% reported a lack of confidential space in holding facilities.[96] In one county in the Thumb, neither the in-court meeting space nor the holding facility is confidential; the deputies are able to watch and listen in both scenarios without giving the client or counsel any sense of privacy.[97] Interviews in courtrooms or in hallways are not sufficiently confidential, and thus do not protect the attorney-client privilege.[98] Even where space is available, it is often overcrowded and thus not truly confidential.[99] Confidential interview spaces must generally be separately provided for both in-custody and out-of-custody clients.[100] In addition, even ostensibly private rooms can pose challenges for confidential communication if they are not sufficiently soundproofed, especially if security procedures require law enforcement officers to be standing guard nearby.[101]

The MIDC anticipates that certain compliance plans will require cost-effective courthouse renovations. For example, Oakland County Circuit Court has discussed shifting an open holding area with artificial dividers into two separate confidential meeting spaces. Other compliance

plans will need to shift court scheduling or transport process for in custody defendants. For example, if a county's holding facility does not allow for confidential space and renovations are not a realistic or cost-effective possibility, then the confidential communication might instead take place in a jury room or other space next to the courtroom.

b. Confidential space for attorney-client meetings in detention facilities

Detention facilities must provide adequate facilities, both physical and virtual, for attorneys to efficiently and confidentially meet with their clients. Attorney-client visiting rooms must be designed to enable effective attorney-client communication and sharing of documents, and they must be soundproof so that confidential conversations can take place without staff overhearing. There must also be enough visiting rooms so that attorneys do not have unreasonably long waits to meet with their clients.

Detention facilities should also have long enough attorney-client visiting hours so that attorneys can schedule time for visits without interfering with court schedules or other commitments.

The availability of confidential interview rooms varies significantly between detention facilities. Almost a quarter of attorneys reported a lack of confidential meeting space in detention facilities. At some jails, there is an open room with no privacy where deputies may watch and listen. In others, the phones used to communicate with in-custody clients do not properly function.

Even when rooms exist, they are not always available. One comment to the MIDC proposed standards described a jail where confidential interview rooms are typically booked at least one day in advance, creating an additional delay before counsel can conduct a client interview. Less serious overcrowding problems can still result in waits for confidential interview rooms, which further increases the time that must be spent on initial interviews. Obstacles to efficient client meetings at a jail can discourage defense lawyers from their work.

As the standard requires interviews to be confidential "to the extent reasonably possible," a local system's compliance plan should be cost-effective and sensible. Reasonable renovations should be part of compliance plans, but the MIDC may not fund construction of new jails or courthouses.

3. Costs for initial interview

a. Payment for initial interview

Public comments expressed concerns about the effects of funding limitations on the feasibility of conducting initial interviews. Some counties may only provide funding for a limited number of attorney-client visits. Almost 40% of attorneys representing indigent clients in Michigan reported

payment for only one visit. Compliance plans will need to provide funding for both the initial visit and additional visits as needed.

b. Travel expenses for initial interview

In rural parts of the state, lawyers sometimes serve multiple counties. This can mean that clients are housed in facilities spread over a significant geographic area. Attorneys should be reimbursed for case-related travel expenses (such as mileage) for traveling to visit with their clients in compliance with Standard 2.

4. Video-conferencing

Clients are sometimes housed in MDOC custody or in jails in distant jurisdictions rather than in local jails. Several public comments expressed particular concern about the difficulties of conducting initial interviews with clients in MDOC custody. One comment indicated that MDOC does not allow defense counsel to communicate with clients in MDOC custody by confidential video-conference. In some areas, prompt and frequent in-person visits with clients who are not in local custody may not be feasible. In rural and Northern Michigan, attorneys with practices that encompass multiple counties can find themselves traveling at least an hour to appear in court.[102] To overcome this challenge, other methods of confidential communication such as video-conferencing will need to be available for attorney-client interviews when in-person interviews are not feasible. MDOC has confidential video-conferencing facilities for appellate attorneys and the MIDC anticipates working to implement procedures for trial attorneys to use this equipment.

Detention facilities in more rural areas may need to seek MIDC grant funding for compliance to purchase and maintain the technology necessary for secure videoconferencing to allow attorneys from outside the area to interview clients held in those facilities.

Defense attorneys who rely on video-conferencing to interview clients in distant detention facilities are responsible for keeping up to date with the software and procedures used by the detention facilities. Attorneys must make sure that the software is secure in order to maintain attorney-client privilege, and that their hardware and network capabilities are sufficient to enable effective communication.

Since video-conferencing as a means of communication is less personal and more prone to distractions than face-to-face client interviews, best practices warrant use of this tool only when distance makes a timely and effective in person interview impossible. It is also expected that counsel follow the video-conference with a confidential in-person visit when the client has been brought to local custody or the court.

5. Systems for Compliance

Multiple systems of indigent defense delivery may satisfy the initial interview requirement if they provide sufficient notification to attorneys, confidential meeting spaces, and sufficient funding for the interviews. Larger counties may consider establishment of a public defender office to ensure an in-custody client visit within three business days, where a team of attorneys working together may efficiently interview clients in local jails. A salaried office of public defenders may also prove more cost effective than additional hourly reimbursements for an initial client interview.

The MIDC Act provides a process for the formation of state-funded compliance plans to meet the standards.[103] Compliance plans for the initial confidential interview will be submitted together with those for other MIDC minimum standards and a request for any funding necessary beyond the local share.[104] 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 allowing for a proper initial interview as implemented through state funding.

6. Collect and Submit Data to the MIDC

To show that the funding units are in compliance with Standard 2, 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) and timeline for notifying attorneys of new appointments and (2) existence of confidential space for attorney-client interviews in holding facilities and courthouses. The case-level data points will seek information about (1) the date that the Defendant requested appointed counsel, (2) whether court-appointed counsel was granted, (3) the date of appointment of counsel (4) the date assigned counsel was notified of the appointment, and (5) the date of an in-custody client visit. Information about such reporting will be detailed in the grant administration process.

CONCLUSION

The purpose of the standard is to ensure prompt and confidential communication between the lawyer and client. Effective representation requires that an attorney investigate a case and maintain a client relationship thoroughly from the start. That process must start as soon as the lawyer is appointed, with the initial client interview. Effective representation also requires frequent and frank communication between the attorney and the client. Compliance with Standard 2 will ensure that these fundamental principles of effective representation are met.

[1] The Commission wishes to thank Andrew MacKie-Mason, *J.D. Candidate, Class of 2017, The University of Chicago Law School*, for his invaluable research and contributions to this whitepaper.
[2] 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 [hereinafter *A Race to the Bottom*].
[3] The counties studied were Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne.
[4] *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_tenprinciplesbooklet.authcheckdam.pdf [hereinafter *Ten Principles*].
[5] *Id.* at Introduction p. 4.
[6] *A Race to the Bottom, supra* n. 2, Executive Summary.
[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 MIDC Act is found at MCL §§ 780.981 et. seq.
[9] MCL § 780.991(2).
[10] MCL §§ 780.981 *et seq.*
[11] MCL § 780.991(2)(a).
[12] *See* MCL § 780.991(2)(b) ("Defense counsel's workload is controlled to permit effective representation."); MCL § 780.991(2)(d) ("The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case.").
[13] *Ten Principles*, *supra* n. 4.
[14] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2013); *Strickland v Washington*, 466 U.S. 668, 688; 104 S. Ct. 2052, 2065; 80 L. Ed. 2d 674 (1984); *see also* 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, 165 (2009) ("Without effective communication, the lawyer's duties to provide zealous and loyal representation, to advocate for the client's cause, and to thoroughly study and prepare are severely hampered."); J. Nick Badgerow, *Can We Talk? The Lawyer's Ethical, Professional and Proper Duty to Communicate with Clients*, 7 KAN. J. L. & PUB. POL'Y 105, 105 (Spring/Summer 1998) ("[C]ommunication is a two-way street, and communication is essential to good representation of client by lawyer.").
[15] *See generally* MIDC Standard 2.
[16] MIDC Standard 2.A.
[17] MIDC Standard 2, Staff Comments.
[18] MIDC Standard 2.A.
[19] *See, e.g.*, FLORIDA PUBLIC DEFENDER ASSOCIATION, FLORIDA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 2.1(A), at 12 (Aug. 7, 2013) (on file with MIDC staff); *Assigned Counsel Manual: Policies and Procedures*, *Chapter IV: Criminal: Performance Standards and Complaint Procedures*, COMMITTEE FOR PUBLIC COUNSEL SERVICES 3, https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2012/MANUALChap4CriminalStandards.pdf (last visited Jan. 30, 2016); State Bar of Texas, *Performance Guidelines for Non-Capital Criminal Defense Representation*, 74 TEX. B.J. 616, 621 (2011); *In re* Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411, Exhibit A, at 23 (Nev. Oct. 16, 2008), *available at* http://nvcourts.gov/AOC/Templates/documents.aspx?folderID=9993; North Carolina Commission on Indigent Defense Services, *Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level*, THE NORTH CAROLINA COURT SYSTEM: OFFICE OF INDIGENT DEFENSE SERVICES 2 (Nov. 12, 2004), http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf. *See also* Committee on Assigned Counsel Standards, *Standards for Assigned Counsel*, 74 MICH. B.J. 674, 675 (July 1995) ("Counsel shall conduct a timely interview of the client after being appointed and sufficiently before any court proceedings so as to be prepared for that proceeding."); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-3.2, at 152 (3d ed. 1993) [hereinafter DEFENSE FUNCTION] ("As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused.").

[20] MIDC Standard 2.A.
[21] MIDC Standard 2.B.
[22] *See, e.g.*, FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19, § 1.3(E)(3), at 9 ("Counsel should not discuss the case or any confidential information when others are present and able to hear.").
[23] MIDC Standard 2.B.
[24] MIDC Standard 2.B.
[25] MIDC Standard 2.C.
[26] MIDC Standard 2.C.
[27] *See below*, "Pretrial Release Advocacy."
[28] *See below*, "Prompt Investigation."
[29] *See below*, "Exploring the Potential for Pretrial Diversion."
[30] *See* MIDC Standard 2.D.1.
[31] MIDC Standard 2.D.2.
[32] *Id. See also* MICH. CT. R. 1.111.
[33] *See* Committee on Assigned Counsel Standards, *supra* n. 19, at 675:

> The most obvious function of the client interview is gathering information necessary to provide representation at the early stages of the case. . . . Counsel should [ ] obtain information such as family and community ties, employment and educational history, prior criminal record, pending charges, present probation or parole status, physical and emotional health, and the financial resources available for posting bail.

See also ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.1, at 79 (3d ed 1992) [hereinafter PROVIDING DEFENSE SERVICES] ("Where the accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant's pretrial release from custody."); *Guidelines for Representation*, MISSOURI STATE PUBLIC DEFENDER § 2.1(d), at 5 (Nov. 1, 1992), http://www.publicdefender.mo.gov/contracts/Guidelines%20for%20Representation.pdf [hereinafter *Guidelines for Representation*].
[34] For a general overview of areas to cover in the initial interview, *see* MICHIGAN INDIGENT DEFENSE COMMISSION, THE INITIAL INTERVIEW (on file with MIDC staff). For a detailed questionnaire to guide the initial interview, *see* MICHIGAN INDIGENT DEFENSE COMMISSION, INITIAL INTERVIEW GUIDELINES (on file with MIDC staff). *See also* FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19, § 2.1(D)(2), at 13 (listing information for counsel to obtain in the initial interview); *id* § 2.2(E), at 14 ("Counsel should be prepared to present to the judge the facts and legal criteria supporting the least restrictive release conditions."); *id.* § 2.2(G), at 15 ("[I]f appropriate and with the client's express permission, counsel should alert the court, to any special medical, psychiatric and/or security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs."); *id.* § 2.2(K), at 15 ("Counsel should be prepared to present witnesses in support of the request for release.").
[35] *See* WASHINGTON STATE BAR ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 2.1 at 5 (June 3, 2011), *available at* http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Performance%20Guidelines%20for%20Criminal%20Defense%20Representation%20060311.ashx ("The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable *and acceptable* to the client.") (emphasis added).
[36] Rapping, *supra* n. 14, at 164–65. *See also id.* at 167, *quoting* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 9 (1998) ("[M]ost [clients] are in a better position to make case decisions [than attorneys] because so many decisions ultimately turn on the values and priorities that the client alone best appreciates.").
[37] It is expected that in many cases the initial interview will take place after bond is initially set at arraignment with an on-duty attorney present (see MIDC Standard 4). A client's attorney will use the initial interview to evaluate whether there is an argument to change bond or custody status at a pretrial hearing.
[38] *See* DEFENSE FUNCTION, *supra* n. 19, § 4-4.1, at 181 ("Defense counsel should conduct a prompt investigation of the circumstances of the case.").
[39] *See* Committee on Assigned Counsel Standards, *supra* n. 19, at 676 ("Timely investigation is crucial, since witnesses and objects may disappear and memories fade rapidly."); *see also* FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19,

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

[40] *See* DEFENSE FUNCTION, *supra* n. 19, § 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.

[41] *Strickland v Washington*, 466 U.S. 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984).

[42] *See* FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19, § 2.1(E), at 14 (noting that, "[w]henever possible, counsel should use the initial interview and subsequent client interviews to gather additional information relevant to preparation of the defense," and providing a non-exhaustive list of information for counsel to obtain to assist in investigation).

[43] *See People v Smith*, 497 Mich 1003; 861 N.W.2d 630 (Mich. 2015) (denying leave to appeal).

[44] *People v Smith*, No. 312721, 2014 WL 1320243 at 1 (Mich. Ct. App. Apr. 1, 2014).

[45] *Id*. at 2 (Gleicher, P.J., dissenting).

[46] *Smith*, 861 N.W.2d at 631 (Kelly, J., dissenting).

[47] *Id.* at 631–32.

[48] *See A Race to the Bottom*, *supra* n. 2, at 68.

[49] DEFENSE FUNCTION, *supra* n. 19, § 4-3.1, at 149. *See also* FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19, § 1.3(E)(1), at 9; Rapping, *supra* n. 14, at 171 ("A strong attorney-client relationship will help the lawyer foster a sense of loyalty and fidelity to the client and will allow the client to develop respect and trust for the advocate.").

[50] *See* Committee on Assigned Counsel Standards, *supra* n. 19, at 675.

[51] Jonathan Rapping, *Building a Relationship with Your Client*, THE ADVOC.: J. OF CRIM. JUST. EDUC. & RES. 4, 4 (Nov. 2005). *See also* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 460 (1976) [hereinafter GUIDELINES FOR LEGAL DEFENSE SYSTEMS] ("A large part of the difficulty inherent in the relationship of defenders and assigned counsel with the client community whom they serve can be traced to the overriding problem of the clients' association of the defense system with other components of the criminal justice system.").

[52] Justin A. Hinkley & Matt Mencarini, *Court-appointed attorneys paid little, do little, records show*, The Lansing State Journal, *available at* http://www.lansingstatejournal.com/story/news/local/watchdog/2016/11/03/court-appointed-attorneys-paid-little-do-little-records-show/91846874/ (Nov. 3, 2016).

[53] *See* GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* n. 51, at 460 ("[S]tudies indicate that the most common complaint of defender clients was the infrequency of contact with and communication from the defender.").

[54] *See* Hinkley & Mencarini, *supra* n. 52.

[55] *United States v Morris*, 377 F. Supp. 2d 630, 632 (E.D. Mich. 2005), *aff'd in part, rev'd in part*, 470 F.3d 596 (6th Cir. 2006).

[56] *United States v Morris*, 470 F.3d 596, 598 (6th Cir. 2006).

[57] *Id.* at 599.

[58] *Id.*

[59] *Id.* at 598–99.

[60] *Id.* at 599.

[61] *Id.* at 602.

[62] *See* Rapping, *supra* n. 51, at 5.

[63] *See* Committee on Assigned Counsel Standards, *supra* n. 19, at 675 ("Among the other important tasks that can be accomplished at that point are the following: Explaining the attorney-client privilege and the necessity of full disclosure by the client of all potentially relevant facts; . . . explaining the procedures involved in a criminal case, how and when counsel can be reached, and when counsel will see the client next; and attempting to answer the client's most urgent questions realistically . . . ."); FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 19, § 2.1(D)(3), at 13 (listing information for the attorney to provide the client at the initial interview).

[64] *See* Rapping, *supra* n. 51, at 5.

[65] *See, e.g.*, *A Race to the Bottom*, *supra* n. 2, at 77–78:

> [A]s there is no funding available for accepting collect calls from the jail to the public defender's office [in Chippewa County], the agency has made it a policy not to accept such calls. In-custody clients who wish to communicate with counsel between in-person meetings will write notes addressed to the public defender's office. The note cannot be sealed, per jail security regulations, and is therefore tri-folded and handed to the deputy on duty who then places the note in a drop box at the jail designated for inmate-to-public defender correspondence . . . . It was noted that under both circumstances, client-to-attorney and attorney-to-client mail, sensitive information relating to a case had from time to time been read by a sheriff's deputy.

(citations omitted).

[66] *See above*, "Exploring the Potential for Pretrial Diversion;" *see also above* "Prompt Investigation."

[67] *See* Rapping, *supra* n. 51, at 5.

[68] *See above*, "Exploring the Potential for Pretrial Diversion."

[69] *See above,* "Pretrial Release Advocacy."

[70] *See above*, "Addressing Client-Specific Challenges Early."

[71] *See above*, "Building a Strong Attorney-Client Relationship."

[72] *See above*, "Advising the Client About the Process."

[73] Rapping, *supra* n. 51, at 4.

[74] *See* Committee on Assigned Counsel Standards, *supra* n. 19, at 675 ("Among the other important tasks that can be accomplished at that point are the following: . . . advising the client not to discuss the case with police officers, cellmates, co-defendants, or anyone else . . . .").

[75] *See above*, "Building a Strong Attorney-Client Relationship."

[76] *See* AMA N. APPIAH, CULTURAL ISSUES IN CRIMINAL DEFENSE § 1.1(a), at 7 (4th ed. 2015) ("[M]any immigrants are mistrustful of attorneys and many times cannot understand or believe in the concept of attorney-client privilege. . . . For clients who have been abused, either in terms of domestic violence or persecuted in their home countries, the issue of trust may be the single greatest obstacle to an advocate.").

[77] *See id.* ("[M]ultiple interviews with immigrant clients may be needed to gain trust.").

[78] *See id.* § 1.1(b), at 8.

[79] *See generally, e.g.*, National Consortium of Interpreter Education Centers, *Best Practices: American Sign Language and English Interpretation within Court and Legal Settings*, DEAF INTERPRETER INSTITUTE (2009), http://www.diinstitute.org/wp-content/uploads/2012/06/Best-Practices-Legal-Interpreting.pdf.

[80] *See, e.g.*, *Bouchillon v Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("To do no investigation at all on an issue that not only implicates the accused's only defense, but also his present competency, is not a tactical decision. . . . It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems."). *See also* DEFENSE FUNCTION, *supra* n. 19, § 4-3.1, at 149 ("During his or her initial or early discussions with the client, defense counsel should also take care to observe whether the client appears to be suffering from any mental disability."); *Guidelines for Representation*, *supra* n. 33, § 2.1(f), at 6.

[81] *Bouchillon*, 907 F.2d at 597.

[82] *See* State Bar of Texas, supra n. 19, at 623 ("The client must be able to understand, assist counsel, and participate in the proceedings against the client in order to stand trial or enter a plea.").

[83] *See Padilla v Kentucky*, 559 US 356; 130 S.Ct. 1473; 176 L.Ed.2d 284 (2010).

[84] *See, e.g.*, *Wayne County Prosecutor: Diversion Section*, WAYNE COUNTY, MI, http://www.waynecounty.com/prosecutor/359.htm, (last visited Jan. 30, 2016) (listing pretrial diversion programs available in Wayne County).

[85] *See* MIDC Standard 2.A.

[86] MIDC here presumes that the Standard 2 attorney is often not the same person as the on-duty attorney for MIDC Standard 4, counsel at first appearance.

[87] *See, e.g.*, *A Race to the Bottom*, *supra* n. 2, at 75 ("[O]ne [Oakland County] district court judge indicated that the delay in the assignment of an attorney by the circuit court frequently results in late notice to the attorney and inadequate time to prepare for the preliminary examination in district court."); *id.* at 76 ("[I]n some cases [in Marquette County] the notice of assignment is mailed to the defense attorney's office, ensuring additional delay beyond the arraignment date.").

[88] *See* E-mail from Janet M. Mistele to Marla McCowan, Director of Training, Outreach and Support, Michigan Indigent Defense Commission (Aug. 20, 2015) [hereinafter E-mail from Janet M. Mistele], *available at* http://michiganidc.gov/wp-content/uploads/2015/04/Janet-Mistele-8_20_15.pdf; Letter from Kyle Trevas to the

Michigan Indigent Defense Commission 1 (Aug. 7, 2015) [hereinafter Letter from Kyle Trevas], *available at* http://michiganidc.gov/wp-content/uploads/2015/04/Kyle-Trevas-8_7_15.pdf; Letter from Thomas J. Seger to the Michigan Indigent Defense Commission 1 (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; Letter from Fred Johnson, Jr. to the Michigan Indigent Defense Commission Chair 1 (Jul. 13, 2015) *available at* https://michiganidc.box.com/s/n28kmrmc3493qeibja5dsciv2wt1lljz [hereinafter Letter from Fred Johnson, Jr.].n.

[89] Forthcoming MIDC survey of attorneys.

[90] MIDC Standard 2.C.

[91] *See* Letter from Kyle Trevas, *supra* n. 90, at 1–2; Letter from Thomas J. Seger, *supra* n. 90, at 1; E-mail from Barbara Bosler to the Michigan Indigent Defense Commission 4 (July 29, 2015) [hereinafter E-mail from Barbara Bosler], *available at* http://michiganidc.gov/wp-content/uploads/2015/04/Barbara-Bosler-7_29_151.pdf; Letter from Fred Johnson, Jr., *supra* n. 90, at 5; E-mail from Andrew D. Stacer to the Michigan Indigent Defense Commission (June 24, 2015), *available at* http://michiganidc.gov/wp-content/uploads/2015/04/Andrew-Stacer-recd-6_24_151.pdf.

[92] *Snapshot of Indigent Defense Representation in Michigan's Adult Criminal Courts: The MIDC'S First Survey of Local Court Systems*, February 2016.

[93] *See A Race to the Bottom*, *supra* n. 2 at 72 (noting that initial interviews of defendants in Wayne County Circuit Court "are frequently conducted in court (or in the 'bullpen'—a cell behind the courtroom)").

[94] *See, e.g.*, Letter from The Honorable John Chmura, Chief Judge, 37th Dist. Ct., to Jonathan Sacks, Executive Director, Michigan Indigent Defense Commission 1 (Dec. 7, 2015), *available at* http://michiganidc.gov/wp-content/uploads/2015/04/37th-District-Court-Judges-12_7-15.pdf.

[95] *Snapshot of Indigent Defense Representation in Michigan's Adult Criminal Courts: The MIDC'S First Survey of Local Court Systems*, February 2016.

[96] *Id.*

[97] Communication with MIDC Regional Manager Cheryl Carpenter.

[98] *See A Race to the Bottom*, *supra* n. 2, at 72 ("[M]ost attorneys spoke to their non-custody clients . . . in the hallway outside the courtroom or in the back of the courtroom. These conversations could be overheard by anyone within 10 feet or so. Similarly, most of the in-custody clients were interviewed while they were sitting in the jury box (next to other defendants, bailiffs, and court personnel)."); *id.* at 75 ("For clients who are incarcerated, the lack of confidential space for attorney-client discussions is a serious and significant problem [in Oakland County].").

[99] *See id.* at 72 (describing interview rooms in Wayne County Circuit Court, and noting that "frequently several attorneys are using the same room simultaneously, either to meet with their own clients or to make phone calls").

[100] *See, e.g.*, *id.* at 74 (noting that Grand Traverse County Circuit Court has confidential interview rooms for out-of-custody clients, but not for in-custody clients).

[101] *See id.* at 77 (describing interview rooms at Chippewa County Circuit Court in which the attorney "must talk softly" because "it is possible to hear through the door and a sheriff's deputy will usually stand guard outside the door"); *see also id.* (describing interview rooms at the Chippewa County jail in which "eavesdropping by sheriff's deputies was reported to be a problem").

[102] Communication with MIDC Regional Manager Mike Naughton.

[103] MCL § 780.993.

[104] MCL § 780.993.

INVESTIGATION AND EXPERTS

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 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[6] served as the basis for the legislation known as the Michigan Indigent Defense Commission Act, which the Governor signed into law in July 2013.[7] 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…"[8]

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."[9] 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."[10]

MIDC Standard 3,[11] 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.[12] It also, in recognition of the necessity of prompt investigation to preserve evidence and locate witnesses,[13] requires the defense investigation to begin "as promptly as practicable."[14] The staff comments recognize that, in certain circumstances, counsel can reasonably determine that particular investigation is unnecessary.[15] 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."[16] Standard 3.B requires defense counsel, when appropriate, to request funds to retain a professional defense investigator, and requires that reasonable requests be funded.[17]

Standard 3.C states counsel's duty to seek the assistance of experts when "reasonably necessary."[18] Expert assistance should be sought for two primary purposes: either to "prepare the defense" or to "rebut the prosecution's case."[19] 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.[20] 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.[21]

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.[22] 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.[23] 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.

INVESTIGATION

Defense investigation is critical to the effective assistance of counsel.[24] Competent investigation can have a significant impact on cases in all sorts of circumstances.[25] 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.[26] One district court in south central Michigan has not received a single request for an investigator in twenty years.[27] Another district court denied a motion for an investigator solely because the judge had never seen an investigator appointed in that court before.[28] 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."[29] 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.[30]

In order to be effective, investigation should begin promptly.[31] Prompt investigation can locate evidence that would otherwise disappear and witnesses who would otherwise forget important facts.[32] It also gives the defense lawyer more time to locate difficult-to-find witnesses and complete multiple rounds of interviews, as necessary.[33] 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.[34] It is therefore crucial that the independent defense investigation begin as soon as possible.[35]

EXPERTS

As Justice Stephen Breyer has noted, "[s]cientific issues permeate the law."[36] 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.[37] 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.[38]

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

Both jurors and lawyers—including defense lawyers—are sometimes too quick to believe purportedly scientific evidence.[40] 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, [41] historical cell-site location information, [42] arson investigation, [43] bite-mark comparison, [44] and firearms toolmark comparison.[45] Scientifically reliable methods, like blood-typing, can be misleading if the expert is not clear about their limitations.[46] 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. [47] Scientific and expert testimony can contain hidden errors that are all but impossible for the untrained eye to notice. [48] 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. [49] Nationwide, flawed forensic analysis is a significant contributor to wrongful convictions. [50] In Detroit, unreliable firearms evidence resulted in the complete closure of the Detroit Crime Lab.[51]

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.[52] 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.[53] 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.[54] 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.[55] Michigan law requires a judge to appoint an expert or investigator when a defendant shows a need.[56] 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.[57] 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.[58] Third, a funding application to the court inevitably takes time, which delays investigations that are often time-sensitive.[59] 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,[60] hampering the possibility of prompt investigation.[61] The combination of all these problems means that defense attorneys may be hesitant to even request investigative assistance.[62]

Prosecutors have also opposed requests for expert assistance[63] 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.[64] 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,[65] 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."[66] 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.[67] 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.[68]

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.[69] In addition, PDS's Administrative Support Division manages the process of obtaining expert witnesses for individual cases.[70] 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.[71] The State of Washington requires one investigator for every four staff attorneys.[72] 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.[73]

Handling the allocation of investigative and expert witness resources in-house means that concerns about confidentiality and excessive reliance on the judiciary are absent.[74] 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,[75] the Georgetown University Law Center's Criminal Defense and Prisoner Advocacy Clinic,[76] the New Hampshire Public Defender,[77] and the Orleans Public Defenders.[78] Investigative interns perform valuable work that frees attorneys and staff investigators to focus on more complex issues.[79] 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.[80] 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.[81]

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.[82] 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.[83]

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.[84] 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),[85] San Mateo County (California),[86] Erie County (New York),[87] Oregon,[88] Travis County (Texas),[89] Lubbock County (Texas),[90] capital cases in Louisiana through the Louisiana Public Defender Board,[91] and a new pilot project through the Michigan Appellate Assigned Counsel System.[92] 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.[93]

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.[94] 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[95], 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.[96] 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.[97]

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.[98]

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.[99] The defense attorney should also determine what physical evidence the government has in its possession and request a viewing,[100] and if any uncollected physical evidence might be helpful to the defense.

Second, the defense attorney should determine which witnesses to interview.[101] 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.[102] 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.[103] 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.[104]

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.[105] 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."[106]

(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,[107] 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.[108]

In these circumstances, the defense attorney should seek out the assistance of a defense investigator.[109] 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.[110] Because prosecutors have investigatory assistance from the police, the ABA's *Ten Principles* recognizes that defense counsel need professional investigators to maintain parity.[111]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."[112] However, the Court made clear that counsel must make such a decision about "particular investigations."[113] 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.[114]

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.[115] 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.[116] 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.[117]

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.[118] Local compliance plans may create a range of structures for requesting the use of such experts. Some jurisdictions utilize online forms to request experts,[119] while others use analog court forms and must provide "the factual justification for the request"[120] 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.[121] 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.[122] 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.[123] 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.

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

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

[3] *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_tenprinciplesbooklet.authcheckdam.pdf [hereinafter *Ten Principles*].

[4] *Id.* at Introduction p. 4.

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

[6] 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.

[7] The MIDC Act is found at MCL 780.981 et. seq.

[8] MCL 780.991(2).

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

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

[11] *See generally* MIDC Standard 3.

[12] *See* MIDC Standard 3.A.

[13] *See below,* "Investigation."
[14] *MIDC* Standard 3.A.
[15] MIDC Standard 3, Staff Comment 1.
[16] MIDC Standard 3.D.
[17] MIDC Standard 3.B.
[18] MIDC Standard 3.C.
[19] MIDC Standard 3.C.
[20] *See below*, "Experts."
[21] *See* MIDC Standard 3.D.
[22] *See A Race to the Bottom*, *supra* n. 1 at 68.
[23] *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 ("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.").
[24] *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].
[25] *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].
[26] 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.").
[27] Communication with MIDC Regional Manager Ashley Carter.
[28] Communication with MIDC Regional Manager Cheryl Carpenter.
[29] Letter from Dawn Van Hoek, *supra* n. 23, at 2.
[30] *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).
[31] *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 (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)).
[32] *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.").

[33] *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.

[34] *See* Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 149–50 (2011).

[35] *See* STANDARD 2, *supra* n. 25.

[36] Stephen Breyer, *Science in the Courtroom*, ISSUES IN SCIENCE AND TECHNOLOGY 52, 53 (Summer 2000).

[37] *See* Ellen Yaroshefsky & 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.").

[38] *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).

[39] *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).

[40] *See* Yaroshefsky & 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.").

[41] *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; 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-b510-962fcfabc310_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.

[42] *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 ("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.

[43] *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.

[44] *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/.

[45] *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.

[46] *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).

[47] *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.

[48] *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).

[49] *See* Letter from Dawn Van Hoek, *supra* n. 23, at 1.

[50] *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).

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

[52] *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 ("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.

[53] 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).

[54] *Id*.

[55] *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-millsap-trial/75876020/.

[56] 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).

[57] *See A Race to the Bottom*, *supra* n. 1, at 62 (describing two courtrooms in Oakland County were 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.").

[58] *See* GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* n. 31, at 266.

[59] *See above*, "Investigation."

[60] *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.

[61] *See above*, "Investigation."

[62] 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).

[63] See *People v Agar*, 2016 WL 399933 (2016)

[64] *See Funding Expert Witnesses for Indigent Defendants: A Model for Unequal Protection*, Jim Kolowsowsky, Michigan Bar Journal, May 2016.

[65] MCL § 780.991(1)(a).

[66] Communication with MIDC Regional Manager Mike Naughton.

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

[68] DPD Expert Fee Guidelines, on file with MIDC.

[69] *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).

[70] *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).

[71] *See* GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* n. 31, at 9-10.

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

[73] E-mail correspondence with San Francisco Public Defender Chief Jeff Adachi, Mar. 22, 2016.

[74] *See above*, "Systems Should Consider the Creation of an Independent Review Process for the Request;" text accompanying n. 55–65.

[75] *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).

[76] *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-interships-hs-students.cfm (last visited Jan. 30, 2016).

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

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

[79] *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 [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.

[80] *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.

[81] *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 [hereinafter *Qualifications and Rates*].

[82] *See Federal Indigent Defense 2015: The Independence Imperative*, National Association of Criminal Defense Lawyers 35, *available at* 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.").

[83] *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.").

[84] *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 ("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.").

[85] *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.

[86] *See* American Council of Council of Chief Defenders, Best Practices Comm., *supra* n. 84, at 8.

[87] *See id.*

[88] *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.

[89] 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]

[90] *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).

[91] *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).

[92] *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).

[93] *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 (last visited Feb. 3, 2017).

[94] 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.
[95] TRAVIS COUNTY MANAGED ASSIGNED COUNSEL, *supra* n. 89.
[96] *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.
[97] Communication with MIDC Regional Manager Chris Dennie (Jan. 4, 2017).
[98] *Id.* at 17.
[99] *See* FLORIDA PUBLIC DEFENDER ASSOCIATION, *supra* n. 24, at § 4.2(A)(1)(a).
[100] *See id.* at § 4.2(F).
[101] *See* HALTING ASSEMBLY LINE JUSTICE, *supra* n. 79, at 18.
[102] *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 . . . .").
[103] *See* MCR 6.201(A)(6).
[104] 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).
[105] For another discussion of investigatory tasks, *see* Higuera, *supra* n. 25, at 42–43.
[106] 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).
[107] *See* HALTING ASSEMBLY LINE JUSTICE, *supra* n. 79, at 18.
[108] *See* Committee on Assigned Counsel Standards, *supra* n. 24, at 676. *See also* Letter from Thomas J. Seger, *supra* n. 52.
[109] *See* Higuera, *supra* n. 25, at 40 ("A private investigator can make the difference in winning or losing a case.").
[110] *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).
[111] *See Ten Principles*, *supra* n. 3 ("There should be parity of workload, salaries and other resources (such as . . . investigators . . .) between prosecution and public defense.").
[112] *Strickland v Washington*, 466 U.S. 668, 691; 104 S.Ct. 2052, 2066; 80 L.Ed.2d 674 (1984).
[113] *Id.*
[114] *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 . . . .").
[115] *See Hill v Lockhart*, 474 U.S. 52, 58; 106 S.Ct. 366, 370; 88 L.Ed.2d 203 (1985).
[116] *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.").
[117] *See* Rapping, *supra* n. 106**Error! Bookmark not defined.**, 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.").
[118] *See Qualifications and Rates*, *supra* n. 81.
[119] *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.
[120] *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

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

[121] *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.").

[122] *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)).

[123] *See People v Ackley*, 497 Mich. 381, 389; 870 N.W.2d 858, 863 (Mich. 2015).

COUNSEL AT FIRST APPEARANCE AND OTHER CRITICAL STAGES

A GUIDE TO IMPLEMENTATION OF THE MINIMUM STANDARDS FOR DELIVERY SYSTEMS

PREPARED BY THE MICHIGAN INDIGENT DEFENSE COMMISSION[1]

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*.[2] The NLADA study involved an evaluation of trial-level indigent defense delivery systems across ten representative counties in Michigan.[3] The NLADA analyzed Michigan's compliance with the ABA Ten Principles of a Public Defense Delivery System.[4] "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."[5] 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.[6]

In October 2011, Governor Rick Snyder issued Executive Order 2011-12[7], 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[8] served as the basis for the legislation known as the Michigan Indigent Defense Commission Act, which the Governor signed into law in July 2013.[9] 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…"[10]

STANDARD 4

The Michigan Indigent Defense Commission Act ("the MIDC Act") allows the MIDC to establish minimum standards which "ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel."[11] The MIDC Act directs the agency to keep in mind certain principles when creating these standards, one being that "[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case."[12] This includes the defendant's first time appearing in court to hear the charges against her. The presence of counsel at this first stage has a drastic impact on the rest of the defendant's journey through the criminal justice system,[13] and outcomes are radically different for defendants with counsel at first appearance and defendants who appear alone.[14]

The United States Supreme Court has repeatedly recognized that the right to counsel is implicated when the defendant's liberty is jeopardized, which encompasses a criminal defendant's first appearance in court.[15] Advocating for the pretrial release of defendants at first appearance is so significant that doing so is a mandated professional standard for criminal defense attorneys nationwide.[16] Prominent public interest groups have also emphasized the necessity for counsel's appointment "as soon as feasible after accused persons are arrested, detained, or request counsel."[17] Despite the documented importance of legal guidance in these early stages, only 6% of Michigan's district courts require attorneys to be present at both the bail hearing and at arraignment.[18]

A defendant's very first appearance before the court takes place in the district court and provides formal notice of the charges pending against the defendant.[19] During this arraignment, the court advises the client of the charge, tells him of the right to counsel, usually determines eligibility for appointed counsel and typically sets bail.[20] Nearly all criminal defendants in Michigan are entitled to bail,[21] and judges are prohibited by law from setting excessively high bail amounts.[22] Judges must fix bail based only on certain factors, such as the seriousness of the offense, the need to protect the public, the defendant's criminal record, and the likelihood the client will appear at future proceedings.[23]

As part of its first set of proposed standards, MIDC Standard 4 addresses counsel at first appearance and other critical stages.[24] Standard 4.A proposes the assignment of counsel immediately upon the finding of a defendant's indigence.[25] Since this must be determined "as soon as the defendant's liberty is subject to restriction by a magistrate or judge,"[26] Standard 4.A entails providing counsel at this initial stage. Standard 4.B calls for the presence of appointed counsel at pretrial appearances as well as for other critical stages of all criminal proceedings.[27] The Staff Comments suggest the possible solution of hiring an "on-duty arraignment attorney to

represent defendants"[28] at every arraignment in Michigan to ensure compliance with the Standard.[29]

RATIONALE

THE IMPORTANCE OF COUNSEL AT FIRST APPEARANCE

Appearing for the first time in court without an attorney is a reality for indigent defendants in Michigan. Data collected through MIDC court watching showed over three quarters of arraigned clients were not accompanied by an attorney,[30] and over half the clients who pled guilty at their first appearance did so unrepresented.[31] Whether counsel is present at these proceedings influences custody and bail decisions, the interests of the client, and overall efficiency. National and statewide observations of trial court systems show the advocacy of a lawyer at the first appearance stage has a net positive effect in all three areas.

CUSTODY AND BAIL DETERMINATIONS

In most jurisdictions, judges either set a bail amount at the initial arraignment proceeding or release the accused on his own recognizance.[32] In Michigan, there is a presumption against pretrial detention and in favor of a defendant's release as he or she awaits further proceedings. Michigan Court Rule 6.106 requires courts to release a defendant on his own recognizance, "unless the court determines that such release will not reasonably ensure the appearance of the defendant . . . or that such release will present a danger to the public."[33] The court must provide reasons "state[d] on the record that the defendant's appearance or the protection of the public cannot otherwise be assured" in order to lawfully deny a personal recognizance bond,[34] and those reasons must also be indicated on official court forms.[35]

However, the presence or absence of a lawyer can be an unintended factor that makes the difference between release and custody. With a lawyer at first appearance, defendants across the country are more than twice as likely to be released without bail, and almost five times more likely to receive a reduction in bail at arraignment.[36] Overwhelmingly, judges imposed higher financial conditions on uncounseled defendants than on defendants who appeared with their lawyers.[37] Providing the accused the benefit of counsel at first appearance could make an enormous difference in the cost of and likelihood of getting out of jail while awaiting trial.[38]

IMPACT ON DEFENDANTS

Lengthy pretrial incarceration is associated with excessively high bail, a common reality for clients without counsel at first appearance.[39] A study of courts in Harris County, Texas, showed that defendants able to afford bail saw substantially fewer days pass while awaiting trial, and saw

better chances their charges would ultimately be dismissed.[40] Also alarmingly, the probability a defendant will receive a conviction increases if he remains in jail until the trial.[41]

The effect of longer pretrial incarceration extends unmistakably into a defendant's sentencing. Defendants detained for the whole pretrial period are four times more likely to receive jail time – and three times likelier to receive a prison sentence – as defendants released before trial.[42] Moreover, both state and federal studies demonstrate these defendants serve significantly longer sentences than defendants able to make bond.[43]

Lacking the advocacy of a lawyer at the first stage can have enormous collateral impacts in the lives of clients and their families.[44] If he enjoys steady employment, it is unlikely he will keep it much longer as he sits behind bars, unable to report for work because he cannot make bail.[45] Defendants held on bail routinely lose their jobs during pretrial incarceration, and the consequences of this involuntary unemployment may mean an inability to make rent or pay a mortgage.[46] Eviction frequently becomes a reality for the families of defendants who remain in jail for long pretrial periods, and family dislocation tends to be another collateral repercussion of a high bail.[47]

Counsel at first appearance sets the tone throughout the representation to ensure the most effective navigation of the legal intricacies of a defendant's case. The defendant and the court sees from the outset of the case the advocacy of appointed counsel. Further, to the extent reasonable conditions of bond can be set, in light of the charge, release decisions can be made in a more informed manner.

In sum, guaranteeing counsel at first appearance could affect a client's waiting time in jail, largely because of counsel's ability to argue in favor of lower bail amounts. Shorter pretrial incarceration periods could diminish collateral consequences for the client and her family, and might provide the client a better chance of acquittal.

INCREASED SYSTEM EFFICIENCY

Guaranteeing representation at first appearance would increase efficiencies throughout the criminal justice system. In terms of pretrial incarceration costs, taxpayers would spend less if lawyers were available to argue bail reductions for defendants at first appearance.[48] Michigan pilot programs (see below) showed less use of jail bed space and less jail time between arraignment and release as defendants were released earlier. Transport costs likewise would be expected to fall, with fewer in-custody defendants requiring secure escort between a jail and post-arraignment proceedings.

Courtroom efficiency likewise would increase. Counsel at first appearance could identify or inappropriate charges earlier on, and bring prosecution attention to these cases. Cases that

routinely are eligible for diversion or deferred sentencing programs likewise would be identified earlier on, and before a defendant pleads guilty to an offense that otherwise would be entered into such a program. Reducing court caseloads with appropriate resolutions along these lines eases dockets and permits courts to spend more time on the cases that need it. As further detailed in case studies below, two pilot projects in Michigan showed increased efficiencies through a decrease in hearings, quicker case dispositions, and an increase in cases resolved outside of the criminal justice system.

THE IMPORTANCE OF COUNSEL AT CRITICAL STAGES

The language of Standard 4 extends beyond counsel at first appearance by demanding provision of counsel to eligible defendants "at other critical stages, whether in court or out of court."[49] The purpose of this requirement is to assure that each defendant is either represented or makes an "unequivocal and knowing, intelligent, and voluntary"[50] waiver of counsel when facing any critical stage during his or her case. Unfortunately, this is not a reality for many Michigan defendants. As reported in the 2008 NLADA report, members of the American Council of Chief Defenders observed district court proceedings in ten sample counties throughout Michigan. They observed that most misdemeanor defendants in Michigan are not afforded the right to counsel at all, in violation of established Supreme Court precedent.[51] In *Argersinger v. Hamlin*, the Supreme Court held that, "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."[52] This broadened the defendant's right to counsel under *Gideon* to include misdemeanor cases carrying potential imprisonment as well as felony matters. In 2002, the Supreme Court went further and required counsel for defendants given probation or suspended sentences that may become actual incarceration if the defendant violates the terms of her probationary or suspended sentence.[53]

The NLADA conducted court watching in Michigan and reported several troubling anecdotes about misdemeanants sentenced to probation without attorneys and who also appeared without counsel at their probation violation hearings. These defendants were often sent to jail following the revocation of their probation and were never given a chance to meet with an attorney throughout any stage of the process.[54] One anecdote cataloged a woman who pled guilty without a lawyer even though she had not waived her right to counsel. The NLADA reported that the factual basis of this woman's plea "would [have] raise[d] questions with a defense attorney," yet the judge gave her delayed adjudication and a year of probation.[55] Because a probation violation can directly result in actual incarceration, a lawyer was constitutionally required to represent her unless she knowingly and intelligently waived counsel. NLADA concluded that District Courts in Michigan routinely failed to supply counsel to eligible misdemeanants. Standard 4's requirement of counsel at all critical stages pushes Michigan jurisdictions to

eliminate these constitutional violations and provide misdemeanor defendants with counsel to avoid the unexpected consequences of guilty verdicts.

CONNECTED ISSUES

The MIDC encourages local funding units and communities to address other issues surrounding indigent defense as they work to provide counsel at first appearance and critical stages. There exist many national initiatives to improve trial-level indigent defense services that surround bail reform, risk assessment tools, and pretrial release. Indigent criminal defense systems throughout Michigan should contemplate the interplay between each of these services and guaranteeing counsel at first appearance.

BAIL REFORM

In recent years, there has been a nationwide push for bail reform as the disparate consequences of money bail on poor defendants have become increasingly apparent. Multiple successful lawsuits against money bail have been brought on behalf of defendants through many avenues.[56] In 2015, the nonprofit Equal Justice Under Law brought nine class action lawsuits to challenge money bail systems in several states,[57] and the organization's efforts in Alabama, Mississippi, Louisiana, and Missouri have deconstructed money bail systems throughout cities across those states.[58]

Nonprofits are not the only players speaking out against money-driven bail systems. During the pendency of the 2015 case of *Varden v. City of Clanton,* the United States Department of Justice filed a statement of interest reminding the court, "Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay."[59] High bail amounts are imposed on indigent clients who are unable to pay, and those impoverished clients see disproportionately more time in custody before trial than their affluent counterparts just because their counterparts have the money for release.[60]

DEFERRED SENTENCE PROGRAMS AND PROBLEM-SOLVING SYSTEMS

Counsel at first appearance could also help identify alternative resolution programs, including deferred sentence programs, earlier in the criminal process. Michigan has many statutory programs, including those for minors in possession of alcohol, youthful offenders under the Holmes Youthful Trainee Act, first-offenders in possession of personal use amounts of illegal controlled substances, and first-offenders charged with domestic violence. In addition, many counties have local programs involving mental health courts, drug courts for repeat offenders, and programs that address particular issues affecting the homeless, prostitutes, shoplifters, and

the like. A defendant charged with one of these offenses but without counsel very well might not know of these programs and plead guilty without their benefits.

PROSECUTOR PRESENCE

The MIDC has received a number of inquiries relating to the role of a prosecutor in this system of counsel at first appearance and critical stages. Many prosecutors ask if, like the indigent defense offices throughout the state, their offices would be required to have a prosecutor at first appearance under Standard 4. The answer to this question is no. The MIDC standards are binding on indigent defense systems only, and the choice to staff these arraignments that should be made by each individual prosecutor office after taking stock of its available resources.

CONFIDENTIALITY CONCERNS

The standard does not require an initial client interview to be in a completely confidential space if it is solely for purposes of arraignment. The information discussed at this preliminary stage will be focused primarily on information that would be given to the judge for his or her consideration for release (including conditional release) under MCR 6.106. It is not the occasion for Counsel to discuss a detailed strategy for defending the case. Counsel should have the time to familiarize himself or herself with the allegations underlying the complaint, as well as time and space to consult with the defendant about those allegations generally, and it is equally important to gather information relevant to pretrial release including ties to the community, support within the community, work and education history, physical and mental health, and prior criminal history. A consultation in a space that is semi-private but where steps are taken to ensure that the conversation is not overheard meets the standard's requirement.

Where the defendant intends to enter a guilty plea at arraignment, a confidential discussion would be required after counsel reviews discovery material. Once a defendant decides to enter a guilty plea, the nature of the information relayed would change.

COMPLIANCE MODELS – INGHAM, KENT, AND HURON COUNTY PILOT PROJECTS

Beginning operation in the spring of 2014, the 55th District Court in Ingham County and the 63rd District Court in Kent County instituted SCAO-funded programs designed to provide criminal defendants counsel at all arraignments.[61] More recently, Huron County began a similar pilot project in the 73B District Court.[62] These programs explored the benefits and challenges of counsel at first appearance in anticipation of future MIDC minimum standards. Transitioning into the programs presented logistical challenges and required collaboration between all

stakeholders, but the districts adapted to these challenges and implemented largely successful programs.

INGHAM COUNTY PILOT PROJECT

The 55th District Court in Ingham County implemented their First Appearance Project through a court appointed counsel system. One of the goals of this project was to determine the practicality of providing attorneys at first appearance, considering "Michigan indigent criminal defense systems will [potentially] be required to provide counsel at arraignment."[63] The first phase of this project – FAP I – lasted from April 1 through September 30, 2014, and the second phase – FAP II – lasted from October 1, 2014, through March 31, 2015. During FAP I, four court appointed attorneys rotated in cycles of half-day shifts, representing each defendant needing a lawyer during that shift.[64] Case assignments arrived in this same way during FAP I, meaning a lawyer who covered a particular shift was required to follow each of those assigned cases to disposition.[65] This presented significant issues, however, if the attorney on duty had scheduling conflicts that prevented her from being at arraignment. During FAP I, Magistrates in this county saw people wait as long as four hours for an arraignment because their court-appointed attorney was tied up with other cases.[66] Because of this problem, the cases assigned during FAP II were distributed by the presiding judge based on the date of the case (even date to one attorney and odd dates to another) rather than based on which attorney was on duty for that day.[67]

Data collected during FAP I indicates the program was largely a success when evaluating courtroom efficiency and jail population. The life of a typical case was twenty percent shorter than it had been in the same period of 2013.[68] The time defendants spent in jail between arraignment and release declined by twenty-eight percent, and within the same period of time jail bed utilization also saw a downturn.[69] Through the execution of this project, the 55th District resolved over thirteen percent of its cases even before arraignment, who often reduced the charge to a civil infraction or non-reportable misdemeanor.[70] Data for Ingham County's program demonstrates that providing counsel at first appearance proceedings is possible and practical, so long as adjustments are made to accommodate attorney scheduling conflicts.

EXPERIENCES WITH INGHAM COUNTY PROGRAM

Those involved with the program in Ingham County had positive experiences in general, even though some felt the project demanded more time than expected. Stacia Buchanan has been a defense attorney with Ingham County for twelve years, and became involved in the program as soon as it was initiated.[71] She was hopeful the court-appointed attorneys could assist defendants in better understanding the court system.[72] Ms. Buchanan experienced firsthand the challenge of needing to be in two courtrooms at once during her arraignment rotations, which occasionally resulted in lengthy delays for her other non-arraignment clients.[73] On the whole, however, Ms.

Buchanan was able to settle cases while at a client's first arraignment, which cut down on the number of court appearances and the times the clerk had to handle a file.[74] "An attorney at first appearance is a valuable step towards providing the counsel guaranteed by the Constitution," she concluded.

Magistrate Mark Blumer also spoke of his opinion on the counsel at first appearance project after both FAP phases in the 55th District Court. He was pleased with how efficient all four on-duty attorneys have become at obtaining favorable outcomes before matters appear in court, especially in traffic cases, thereby decreasing docket size.[75] Magistrate Blumer also noticed a reduction in failures to appear, which he attributed to the increased familiarity the defendant gained with the process early on. A first appearance accompanied by counsel, he hypothesized, makes defendants less intimidated and more likely to come back.[76] The Magistrate also observed a dramatic difference between the number of people who pled guilty before counsel was guaranteed and the number who pled guilty during both FAP phases.[77] Significantly fewer defendants pled guilty if they were accompanied by counsel, and those who returned after a "not guilty" plea often saw reduced charges or sentences. "Logistical issues aside," he said, "it makes the system work better both for the court and for the defendant."[78]

KENT COUNTY PILOT PROJECT

From March 2014 through September 2015, at least one attorney from the Kent County Office of the Defender worked each day as a court-appointed arraignment attorney.[79] Each participating attorney worked in this capacity for three week rotations.[80] The lawyer on duty represented each defendant appearing in court that day, meeting briefly with all walk-ins and in-custody clients beforehand to explain the proceeding and obtain bond information.[81] The public defender conducted video conferences with the in-custody defendants scheduled for arraignment, which gave the public defender the chance to privately address the group and briefly counsel each person before his or her arraignment.[82] On days where non-custodial arraignments were scheduled along with walk-in and in-custody proceedings, a second public defender would cover arraignments so both courtrooms could be in session at once.[83] For misdemeanors not requiring victim consultation, the 63rd District Court coordinated with the prosecutor's office and conducted pretrial conferences which resolved cases as quickly as possible, many times on the same day as a first appearance.[84]

This program had three goals: improving the county's public defense system by providing lawyers as early as feasible after arrest;[85] improving the use of docket time by eliminating easily-resolvable court appearances;[86] and protecting defendants' rights against incrimination by utilizing Kent County's public defenders.[87] The program's original format provided all arrestees *Request for Court-Appointed Counsel* forms which, if approved, guaranteed vertical representation throughout the remainder of the case.[88] Since the appointment was made as

early in the process as possible, the logistical issue of collecting forms and reviewing eligibility information arose. To address this problem, the program provided "limited legal representation for arraignment purposes for everyone"[89] during its second year. Defendants now wait until after the arraignment to fill out the form to obtain another public defender for further representation if they are eligible for representation. The 63rd District Court found that this modification greatly increased the ease of access to public defenders in a case's early stages.[90]

The project also worked to increase utilization of docket time. March to September of 2014 saw an eleven percent decline in total hearings – encompassing arraignments, pretrials, and pleas – from the same time in 2013.[91] That same period in 2015 saw a twenty percent decrease in the total number of hearings since 2013.[92] Additionally, the 126-day disposition rate for misdemeanor matters rose slightly from 95.22% to 96.34%.[93] In terms of the project goals, Kent County saw less success for the second than for the first or third, perhaps because "progress toward goals #1 & #3 might have a negative impact on progress toward goal #2."[94] The county found that providing representation earlier in the process did not always help move cases along to quicker dispositions.[95] Overall, however, the district found the program effectively protected the rights of the defendant, and that "sufficient progress [was] made on each of the stated goals of the grant project."[96]

EXPERIENCES WITH KENT COUNTY PROGRAM

On the whole, those who interacted with the Kent County First Appearance Pilot Project had positive experiences with the program. Its success seemed to help ease widely held concerns surrounding counsel at first appearance. MIDC Regional Manager Chris Dennie was a public defender on duty in Kent County during the project and spoke highly about his experience with the program. The new procedures, he believed, helped streamline the in-court arraignments. Because defendants had already spoken with a lawyer, judges spent less court time explaining the arraignment process to defendants, which allowed arraignments to move quicker than before.[97] He also spoke of how grateful defendants were for the assistance of a lawyer at first appearance.[98] "Overall," commented Mr. Dennie, "I think [the program] was excellent because of the help it gave to the defendants; that's the whole point. Courts want to be efficient and that's great, but the additional help it provided defendants was an invaluable asset."[99]

In March of 2016, Chief Judge Sara Smolenski and Judge Jeffrey O'Hara for the 63rd District Court expressed their support for the MIDC's Proposed Minimum Standards, and lent particular support to Standard 4.[100] Reflecting on the court's provision of counsel at first appearance, Judges Smolenski and O'Hara outlined the details of the pilot program and its successes and challenges. The judges echoed the program's singular critique: that considerable time was spent distributing and collecting forms from every defendant during the project's first phase. Identified as a "significant burden on staff resources both at the county jail and the court,"[101] the pre-

arraignment use of the forms was discontinued and "limited legal representation" for all defendants at first appearance was implemented during the second grant cycle, calling it "much more efficient and less burdensome for court and jail staff."[102] Both Judges endorsed counsel at first appearance as "the right thing for Michigan," and as a "protect[ion of] criminal defendants' constitutional rights."[103] The 63rd District's experience with the pilot project demonstrates the practicality and plausibility of implementing Standard 4 in funding units throughout Michigan.

HURON COUNTY PILOT PROJECT

Beginning in August of 2016, the 73B District Court began providing attorneys for defendants at arraignment,[104] wishing to take a "proactive approach to the MIDC proposed standard of counsel at first appearance."[105] Each weekday at noon, one of the seven or eight arraignment attorneys arrives at court, receives "a confidential discovery packet from the prosecutor," and has time to meet with defendants before the first appearance begins.[106] Arraignments start at 1:30 pm, with both the prosecutor and the defense attorney present (whether physically or virtually through a Polycom system at the jail).[107] The attorney on duty represents all defendants for the duration of the arraignment, and the court passes the file to a permanent court-appointed attorney if the case continues;[108] that permanent attorney is notified by email of the appointment by the end of the day.[109] Arraignment attorneys are paid $65 hourly and receive compensation for a minimum of an hour if at least one arraignment takes place.[110] During the project – August 2016 to January 2017 – the court saw 352 defendants, and 18% of those defendants had their matters resolved at the first appearance.[111] The court estimates that this represents an 8% increase in first appearance resolutions from 2015 numbers.[112]

Experiences with the pilot project in Huron County have been largely positive. Court personnel in 73B felt the administrative challenges they encountered at the beginning of the process had solutions that were simple to implement.[113] These included creating "appropriate forms, intake procedures, and data entry [methods],"[114] and court administrators and prosecutors felt these fixes "increased their overall efficiency."[115] In a series of focus groups, arraignment attorneys articulated the belief that defendants had lower anxiety about the court procedures after this project, mainly because an attorney provided clients "a better understanding of the process with which to make informed decisions."[116] Even defendants' long-term attorneys saw positive changes, sharing in focus groups that subsequent hearings and client meetings "run more smoothly because . . . clients are now receiving clear and comprehensive information at the outset by the arraignment attorney."[117] The court plans to continue providing all defendants with counsel at arraignment.

Based on the data collected from each program and the experiences of the people involved, the first appearance projects in the 55th, 63rd, and 73rd District Courts were successful, and all three could serve as models for other local systems looking to provide counsel at arraignment.

SPECIFIC COMPLIANCE AREAS

It is probable that challenges will arise as each jurisdiction works to provide counsel at first appearance and critical stages as required by Standard 4. However, the MIDC believes innovative solutions can be crafted to allow each local indigent defense system to remain in compliance with the standard, while also prioritizing its individual needs. This section addresses the most anticipated compliance challenges and gives some guidance for working through them. Local systems will find some of the proposed tactics work better for certain areas than others, and these solutions are provided to present problem-solving ideas to offices throughout the state. This is by no means an exhaustive list of problems and potential solutions that may arise as compliance efforts begin.

RURAL AREAS AND LOW-VOLUME SYSTEMS

In a jurisdiction with a highly trafficked indigent defense system, there are typically more attorneys on staff or present in the courtroom on a day-to-day basis. In these areas, it may not be difficult to find enough attorneys to represent defenders at arraignment. However, compliance may be more difficult to achieve in rural jurisdictions with low-volume systems. These systems may not have enough attorneys to cover both the cases in court that day and the individuals who need to be arraigned. For instance, in some areas of the Upper Peninsula, criminal attorneys defending clients in the nearest courthouse must drive two hours one way to do so.[118] This means visiting clients can also take four hours round-trip, as the jails are often housed in the same facility as the court. In these sparse areas, criminal defense accounts for only a portion of a lawyer's practice, and frequent periods of unpaid travel time detract from many lawyers' desire to participate in appointed counsel systems.[119] As a result, there are very few defense attorneys in rural northern areas. Consider the structure in Keweenaw, Baraga, and Houghton counties, where a single defense attorney handles the misdemeanors for all three counties. Understandably, an attorney in this type of position might be unwilling or unable to serve as on-duty counsel at first appearance while maintaining his current caseload.

The challenges of travelling to a courthouse combined with the low number of defendants and attorneys moving through the courts in rural areas might make Standard 4 compliance seem unwieldy or impractical. Viable methods for overcoming such challenges are possible, however, and one potential solution was executed during the 63rd District's pilot program in Kent County. At the start of the program, the district "did not have the proper equipment for the attorney for the Kent County Office of the Defender to connect to the jail," reported Kevin McKay, Court Administrator for the 63rd District.[120] This meant an arraignment attorney had to find an open courtroom to confidentially speak with her in-custody clients, or phone in to the jail's video room

from the court.[121] This issue was eliminated after the court obtained the license and equipment needed for Polycom videoconferencing technology that provided attorneys valuable facetime with their in-custody defendants.[122] After the system was in place, the arraignment attorney on duty was able to converse with in-custody defendants before their court appearances. This allowed attorneys to talk to clients from the convenience of their office, and then travel to the courtroom to be present for in-court arraignments. This helped attorneys balance their caseloads and their arraignment duties.

The total cost of the license and video equipment was under $200 for the 63rd District,[123] though it may be slightly more in jurisdictions that cannot provide easy access to a desktop computer in their courtrooms. The system – and other teleconferencing systems like it – provides for interactions between two or more parties who use the software from their laptop or desktop computer. A free mobile application is also available for attorneys using this equipment on their tablets or mobile devices. Based on the low cost and the relative ease of access of this tool, many rural areas could benefit from providing counsel at first appearance through a videoconferencing system.

WALK-IN ARRAIGNMENTS

Another issue that may stall compliance efforts surrounds walk-in arraignments. Standard 4 requires attorneys to be present to represent defendants regardless of whether the defendant is scheduled to appear, but in many places walk-in arraignments are few in number. Jurisdictions working to comply with Standard 4 might find arraignment attorneys sitting inactive as they await defendants who need on-the-spot representation. For example, attorneys involved in the 63rd District pilot program found themselves sitting in court waiting for walk-in arraignments after the scheduled arraignments were completed for the day, even though Kent County does not see many walk-in arraignments.[124] According to some attorneys who participated in the program, most of this walk-in time was down time that could have been better spent handling other matters.[125]

Though the infrequency of walk-in arraignments is a reality for many places in Michigan, funding units that already utilize a walk-in system should not feel pressured to alter the structure if their current methods are successful.

Systems may adopt a plan where local attorneys serve as on-call counsel for walk-ins. In this hypothetical, a funding unit could contract with local attorneys to pay them for any walk-ins they see. This type of model would probably be most beneficial in areas where a lawyer's practice is within a reasonable distance from the courthouse, and the defendant could choose to wait for the lawyer to arrive or waive counsel at this stage. In one Southeast Michigan county, for instance, walk-in defendants who tell the judge they want to plead guilty can do so once the city

attorney comes to the courthouse from city hall.[126] For suburban or urban areas, it would likely present little inconvenience to call a nearby defense attorney for walk-ins in the same manner. However, the on-call system would not necessarily preclude attorneys from providing counsel to walk-in defendants remotely in more rural places, with attorneys again relying on teleconferencing to represent defendants at arraignment.

OVERNIGHT, WEEKEND, AND HOLIDAY ARRAIGNMENTS

Some district courts in Michigan only conduct arraignments on specific days or until the court closes, while others follow established procedures to provide arraignments after regular business hours and on the weekends. For the indigent criminal defense systems that already have preexisting overnight, weekend, or holiday arraignment structures, compliance with Standard 4 will require attorneys to represent all defendants who appear during these off-peak proceedings. These proceedings are just as critical as arraignments conducted during regular court hours, so defendants remain entitled to defense counsel during overnight, weekend, and holiday appearances. Jurisdictions with these systems already in place might achieve compliance by instituting some form of on-call rotation, perhaps utilizing nearby public defender offices or contract attorneys to staff the court as it is needed. Video arraignments may diminish compliance issues in this area as well. Though the timing of these arraignments may pose scheduling inconveniences to the defense attorneys involved, compliance can offer "greater protections for indigent defendants, and [can lead to] superior criminal justice outcomes."[127]

CONFLICTS

Many judges, court administrators, and defense attorneys often express concern over whether arraignment attorneys will be prone to client conflicts that interfere with their day-to-day practices. The MIDC believes conflicts can be minimized through the limited representation model seen in the 55th and 63rd District Courts, since the lawyer's representation is for bond purposes only. In the Kent County program specifically, regional consultants for the MIDC have found a lack of conflict for arraignment lawyers representing codefendants within the 63rd District. Because of the limited nature of the representation at that stage, conflicts are thought to be minimal if they exist at all. In fact, the paperwork detailing the assignment of counsel in the 63rd District informs defendants that the lawyer they receive the day of their arraignment will not be the attorney for the entire case.[128] The clearly limited nature of the representation helped the program remain free of attorney conflict.

For rural areas with fewer attorneys, such as northern Michigan and the Upper Peninsula, it may be less plausible to provide one attorney for limited representation at arraignments and then another to carry the case through its disposition. In these environments, it may make sense for arraignment attorneys to provide entirely vertical representation in the event conflicts do not

arise at the initial arraignment. As with the other compliance methods, the effectiveness of any of these tactics will vary based on the characteristics of the local system, and each should determine which compliance plans will function most effectively in that jurisdiction.

DELAY

Another common concern among Michigan's indigent defense offices is the impact this standard will have on the use of court time and the potential for a delayed process that might result in more time in custody for indigent clients awaiting arraignment. The MIDC does not expect that well-structured compliance systems will slow down a jurisdiction's usual pace of arraignments. In a letter of support for the MIDC's proposed standards, Chief Judge Donald Allen for the 55th District celebrated the district's pilot program for its impact on courtroom efficiency.[129] "Having counsel available at first appearance resulted in efficient court proceedings," the Judge Allen wrote, noting the average life of a case age "decreased . . . from 32.65 days to 26.22 days"[130] during the program's lifetime. Moreover, Judge Allen saw his "court's failure to appear rate decrease[] from 124 to 113,"[131] which also indicates the program's effective utilization of court time. With fewer no-show defendants, judges typically issue fewer bench warrants. Since bench warrants eventually force a court to spend extra time on a single defendant, a decrease in failures to appear allows for more effective use of docket time by eliminating the need to repeat pretrials for the same defendant.

Compliance with Standard 4 is not intended to keep people incarcerated longer as they await trial, and statistics for the 55th District program and similar programs in other states indicate this is not a consequence of counsel at first appearance. Chief Judge Donald Allen, Jr. praised the 55th District's program for its effect on defendants' times in jail, noting a decrease in the average time of arraignment from 8.99 days to 6.443 days.[132] A similar first appearance project was implemented in a rural New York county, and the review study saw no increase in the length of pretrial incarceration over the program's two year duration.[133] If implemented properly, Standard 4 compliance plans should not increase the length of time a defendant spends in jail waiting for her trial.

Ideally, compliance plans will be created after thorough coordination with the local funding unit, judges, court administrators, and local attorneys to determine a model to meet everyone's needs while working to protect the rights of all defendants. As stated, these challenges represent only a few that local districts may face, and the corresponding solutions explore a limited number of ways to tackle them.

COMPLIANCE PROCESS

REQUEST GRANT FUNDING

The MIDC Act provides a process for the formation of state-funded compliance plans to meet the standards.[134] Compliance plans in all these areas will be submitted together with a request for any funding necessary beyond the local share.[135] 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.

COLLECT AND SUBMIT DATA TO THE MIDC

In order to comply with Standard 4, the MIDC will be collecting system and case data points from the local delivery systems. The system-wide data points seek information about the Delivery model(s) for provision of counsel at first appearance. The case-level data points will seek information about (1) the presence of counsel at first appearance, (2) the mechanism by which counsel at first appearance was provided, and (3) the type and amount of bail issued, if any. Information about such reporting will be detailed in the grant administration process.

CONCLUSION

The purpose of the standard is to ensure representation of counsel when a judge or magistrate makes an initial custody determination and other critical stages. An indigent defendant will be introduced to the criminal justice process by an attorney and will be less likely to be placed in custody. The presence of counsel or a proper informed waiver will ensure that far fewer indigent defendants plead guilty in Michigan without an understanding of the consequences. Compliance with Standard 4 will ensure that these fundamental principles of effective representation are met.

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[1] The Commission wishes to thank Claire Corsey, *Esq., Michigan State University College of Law, Class of 2016*, for her invaluable research and contributions to this whitepaper.

[2] Nat'l Legal Aid and Defender Ass'n, *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 [hereinafter *A Race to the Bottom*].

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

[4] *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_tenprinciplesbooklet.authcheckdam.pdf [hereinafter *Ten Principles*].

[5] *Id.* at Introduction p. 4.
[6] *A Race to the Bottom, supra* n. 2, Executive Summary.
[7] Mich. Exec. Order No. 2011-12 (Oct. 13, 2011), http://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf.
[8] 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.
[9] The MIDC Act is found at MCL §§ 780.981 et. seq.
[10] MCL § 780.991(2).
[11] MCL § 780.985(3).
[12] MCL § 780.991(2)(d).
[13] *The Colorado Bail Book*: *A Defense Practitioner's Guide to Adult Pretrial Release*, Colorado Criminal Defense Institute, Colorado State Public Defender, National Association of Criminal Defense Lawyers, Sept. 2015 (12) [hereinafter "*The Colorado Bail Book*"].
[14] *See generally id.*
[15] *See Brewer v Williams*, 430 U.S. 387, 398-99; 97 S.Ct. 1232, 1239; 51 L.Ed.2d 424 (1977); *Michigan v Jackson*, 475 U.S. 625, 629, n.3; 106 S. Ct. 1404, 1407, n. 3; 89 L.Ed.2d 631 (1986); *Rothgery v Gillespie County*, 554 U.S. 191, 194; 128 S.Ct. 2578, 2581-82; 171 L.Ed.2d 366 (2008).
[16] *See* AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS 4-2.3 (4th ed. 2015), *available at* http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html ("A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance."); Nat'l Legal Aid and Defender Ass'n, *Standards for the Administration of Assigned Counsel Systems*, Standards 2.1 and 2.3, *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel#twoone (requiring that counsel be available to "provide quality representation in all relevant legal proceedings involving their clients," and that all criminal defendants "receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists.").
[17] The Constitution Project Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, THE CONSTITUTION PROJECT 1, 197 (2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.
[18] 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).
[19] 1A GILLESPIE MICH. CRIM. L. & PROC. § 16.4 (2d ed.).
[20] MCR 6.104(E).
[21] MCL § 765.5 ("No person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great.").
[22] MCL § 765.6(1) ("[A] person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive.").
[23] MCL § 765.5(1)(a)-(d).
[24] MIDC Standard 4, *available at* https://michiganidc.box.com/s/5ynapyh807j4zqs2o404ef3ehn3o5t2h.
[25] MIDC Standard 4.A.
[26] *Id.*
[27] MIDC Standard 4.B.
[28] MIDC Standard 4, Staff Comments (explaining that representation will not be vertical and the attorney represents defendants at this first proceeding only).
[29] For many clients, then, the on duty arraignment attorney would differ from their attorney who represents them throughout the case, including the initial interview process required by MIDC Standard 2.
[30] *MIDC Court Watching Data Points* (on file with MIDC Staff). This data was collected by all six Regional Managers throughout all regions. A total of 441 court proceedings were observed over a three-month period.
[31] *Id*.
[32] MCR 6.106(A).
[33] MCR 6.106(C).
[34] Milton L. Mack, Jr., *Memorandum to All Judges, Court Administrators, and Magistrates: MC 240 – Order for Pretrial Release*, 1 (Jun. 7, 2016).

[35] MCR 6.106(B)(4).
[36] Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1753 (2002).
[37] *Id.* at 1720 ("Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual's ability to pay.").
[38] Colbert *et. al*, *supra* n. 36 ("…leaving the accused indigent defendant without an attorney when liberty is at stake and a lawyer's advocacy could make the biggest difference in determining whether a judicial officer continues incarceration.").
[39] *The Colorado Bail Book*, supra n. 13.
[40] Gerald R. Wheeler & Gerald Fry, *Project Orange Jumpsuit: Evaluation of Effects of Pretrial Status on Case Disposition of Harris County Felony & Misdemeanor A/B Defendants*, 4 (2013) (finding that in Harris County, Texas, "[s]tatistically identical defendants who make bond experience: 86% fewer pretrial jail days; 33.3% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.").
[41] Jeffrey A. Kruse, Note, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1824 (1993) (citing Brant Houston & Jack Ewing, Brant Houston & Jack Ewing, *Blacks and Hispanics Must Pay More to Get Out of Jail; Inequalities Are the Rule in the Bail System*, HARTFORD COURANT, Jun. 16, 1991, at A1).
[42] *See* LAURA AND JOHN ARNOLD FOUNDATION, *Pretrial Criminal Justice Research Summary* (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.
[43] *Id*.
[44] *See* Myles Braccio & Jessie Lundberg, Notes, 69 Mont. L. Rev. 463, 497 (2008).
[45] Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 43 (1998).
[46] *Id.*
[47] *Id.*
[48] Colbert *et. al*, *supra* n. 36, at 10.
[49] MIDC Standard 4B.
[50] *People v Anderson*, 398 Mich. 361; 247 N.W.2d 857 (1976).
[51] *A Race to the Bottom*, *supra* n. 2 at 15 ("Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases.").
[52] *Argersinger v Hamlin*, 407 U.S. 25, 37; 92 S.Ct. 2006, 2012; 32 L.Ed.2d 530 (1972).
[53] *Alabama v Shelton*, 535 U.S. 654, 662; 122 S.Ct. 1764, 1770; 152 L.Ed.2d 888 (2002) ("Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not.").
[54] *A Race to the Bottom*, *supra* n. 2, at 20.
[55] *Id.* at 18.
[56] *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/ (last visited Apr. 1, 2016).
[57] *Id.*
[58] *Id.*
[59] *Director Lisa Foster of the Office for Access to Justice Delivers Remarks at ABA's 11th Annual Summit on Public Defense*, *available at* https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit (Feb. 6, 2016).
[60] *Id.* ("Today, roughly 60 percent of the jail population nationally is comprised of pretrial defendants – up from 50 percent in 1996 and 40 percent in 1986. And the overwhelming majority of those people are poor. Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed . . . – people who are already poor – are held in custody pretrial.").
[61] These programs were possible through grant funding by the SCAO Court Performance Innovation Fund Grant.
[62] Report from Judge David B. Herrington for MJI Regional Judicial Seminar, Feb. 2, 2017 (on file with MIDC Staff).
[63] Thomas P. Boyd, Chief Judge 55th District, *State Court Administrative Office Court Performance Innovation Fund Grant: Final Progress Report (FY 2015)* 1, 2.

[64] *Id.* at 1.
[65] *Id.*
[66] Interview with Magistrate Mark Blumer re: 55th District Pilot Program – Feb. 19, 2016.
[67] Boyd, *supra* n. 63, at 1.
[68] *Id.*
[69] *Id.*
[70] *Case Study: Ingham County First Appearance Project (FAP): Goal and Objectives*, 1.
[71] Interview with Stacia Buchanan re: 55th District Pilot Project (Feb. 29, 2016).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Interview with Magistrate Mark Blumer re: 55th District Pilot Program (Feb. 19, 2016).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] J. Kevin McKay, *State Court Administrative Office Court Performance Innovation Fund Grant: Quarterly Progress Report (FY 2015)* 1, 2 (Mar. 1, 2015 – Jun. 30, 2015).
[80] Interview with Chris Dennie re: 63rd District Pilot Program (Feb. 23, 2016).
[81] *Id.*
[82] *Id.*
[83] McKay, *supra* n. 79.
[84] Hon. Sara J. Smolenski, Hon. Jeffrey J. O'Hara, *Letter from 63rd District Court in Support of Proposed Standards* 1, 2, *available at* https://michiganidc.box.com/s/dcpsz6zp9i47ppdvdn3jgbh8onq8vwd8 (Mar. 2, 2016).
[85] McKay, *supra* n. 79, at 1.
[86] *Id.*
[87] *Id.* at 2.
[88] *Id.* at 1.
[89] *Id.*
[90] *Id*.
[91] J. Kevin McKay, *State Court Administrative Office Court Performance Innovation Fund Grant: Final Progress Report (FY 2015)* 1, 1 (July 1, 2015 – Sept. 30, 2015).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 2.
[95] *Id.* at 2-3.
[96] *Id*. at 3.
[97] Interview with Chris Dennie re: 63rd District Pilot Program (Feb. 23, 2016).
[98] *Id.* (Mr. Dennie mentioned on several occasions he was approached by former arraignment-only clients and thanked profusely for increasing their comfort with the court system. These defendants seemed to benefit mentally from being represented so early in the process.).
[99] *Id.*
[100] Smolenski & O'Hara, *supra* n. 84, at 1.
[101] *Id.* at 2.
[102] *Id*. at 2.
[103] *Id.* at 3.
[104] Report from Judge David B. Herrington for MJI Regional Judicial Seminar, Feb. 2, 2017.
[105] *Id*. at 1.
[106] *Id*. at 1 ("[The c]ourt receives a confidential discovery packet from the prosecutor and holds the packet for the defense attorney with the intake form.").
[107] *Id*. at 2. ("The jail has a room for arraignments to be held by Polycom and also for attorneys to meet with the defendants that are incarcerated.").
[108] *Id*. ("Packets are returned to the court to return to the prosecutor to forward to appropriate court appointed attorney in the case. The intake forms are forwarded to the new court appointed attorney . . .)".

[109] *Id*. at 2.
[110] *Id*. at 3.
[111] *Id*. at 3 (". . . 18% of the cases result in arraignment and plea or arraignment, plea & sentencing . . .").
[112] Communication with MIDC Research Director Jonah Siegel (Jan. 24, 2017).
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] Interview with Mike Naughton re: Compliance Challenges (Mar. 21, 2016).
[119] *Id.*
[120] McKay, *supra* n. 91, at 2.
[121] *Id.*
[122] *Id*.
[123] Interview with Kevin McKay re: Polycom License (Apr. 4, 2016).
[124] Interview with Chris Dennie re: Compliance Challenges (Mar. 16, 2016).
[125] *Id*.
[126] Interview with 37th District Court Administrator Robert Curtis re: Walk-In Arraignments – Apr. 4, 2016.
[127] Hon. Donald J. Allen, *Letter from 55th District in Support of Proposed Standards* 1, 2 (Mar. 21, 2016).
[128] *63rd District Court – CAA Notice (Noncustodial)* (Mar. 2015), *available at* https://michiganidc.box.com/s/sxxm0ooph5j7kc6pzpuy0en21vmj3tq8 ("If you do not have an attorney today, then an attorney from the Kent County Office of the Defender will be with you in court and represent you for today's arraignment. **This is only for today's purposes and is limited to the arraignment only.**" (emphasis in original)).
[129] Allen, *supra* n. 127, at 1-2. The Chief Judge noted the increase of court efficiency – with shorter average case ages, sooner resolutions of cases, and fewer no-show defendants – and the decrease in time spent in jail for defendants.
[130] *Id.* at 1.
[131] *Id.* at 2.
[132] *Id.* at 1.
[133] Kirstin A. Morgan, Andrew Davies, & Alissa Pollitz Worden, *Providing Counsel at First Appearance in a Semi-Rural County*, slide 17 (Nov. 21, 2014), *available at* https://michiganidc.box.com/s/c5zijnnwx8x0cl106cbkmhqfrq3a9r20.
[134] MCL § 780.993.
[135] MCL § 780.993.

Proposed Minimum Standards – Set 1

SUBMITTED TO THE DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS – FEBRUARY 2017

Michigan Indigent Defense Commission
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Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1 Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." Strickland v Washington, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's Ten Principles of a Public Defense Delivery System provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court and submitted by the MIDC is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

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

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

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

Comment:

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

Standard 2 Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." See United States v Morris, 470 F3d 596, 602 (CA 6, 2006) (citing United States v Cronic, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's Ten Principles of a Public Defense Delivery System provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

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

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

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

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

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pretrial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

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

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

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

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

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

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

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

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

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

Standard 3 Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v Washington, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." Harrington v Richter, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel…" MCL 780.985(3).

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

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

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

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4 Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) …counsel continuously represents and

personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

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

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

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

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

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

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

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

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

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