

October 4, 2017

Michigan Indigent Defense Commission  
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Re: Public Comments

OAKLAND COUNTY'S PUBLIC COMMENTS  
PROPOSED STANDARDS 5 – 7

This document shall serve as Oakland County's public comments on the Proposed Standards 5 – 7 submitted by the Michigan Indigent Defense Commission (MIDC) to the Michigan Department of Licensing and Regulatory Affairs (LARA) pursuant to the Michigan Indigent Defense Commission Act (MIDC Act), MCL 750.981 *et al.*

1. Standard 5 – Independence from the Judiciary

As discussed in more detail in our pleadings in Oakland County v State of Michigan et al, COC No. 17-00216-MZ, MIDC Standard 5, MCL 780.991(1)(a) (“delivery of indigent criminal defense services shall be independent of the judiciary”) and MCL 790.985(1) (“The Michigan indigent defense commission is established within [LARA]”) are invalid and unconstitutional provisions for numerous reasons. They infringe on the Michigan Supreme Court's exclusive authority to regulate the legal profession in violation of the separation of powers doctrine under Article 3, §2 of the Michigan Constitution; they interfere with the Michigan Supreme Court's exclusive authority to supervise the administration of justice under Article 6, §4 of the Michigan Constitution; and they interfere with the judiciary's authority to promulgate rules governing practice and procedure under Article 6, §5 of the Michigan Constitution.

First, LARA has no constitutional authority to approve any minimum standards of indigent defense counsel. The MIDC should have been established within the State Court Administrator's Office (SCAO) like the Appellate Defender Commission. The Appellate Defender Act (ADA), signed into law in 1978, created the Appellate Defender Commission within the office of the State Court Administrator (MCL 780.711 *et. seq.*). Like the MIDC Act, the ADA directed the Commission to develop minimum standards to which all indigent criminal appellate defense services shall conform. MCL 780.712(5). The ADA also authorized the Commission to develop a system of indigent appellate defense services, which included the creation of the State Appellate Defender Office (SADO). MCL 780.712(4). The Act also funds the continuing legal education for those private attorneys who engage in indigent appellate defense services. MCL

780.712(7). Finally, the Appellate Defender Commission compiles and keeps a current statewide roster of private attorneys willing to accept criminal appellate appointments. MCL 780.712(6).

Instead, the MIDC sanctioned a statutory scheme that places oversight of indigent defense counsel in the hands of a state regulatory agency (LARA) which has no constitutional authority to regulate attorneys, change court practice and procedure, or approve minimum standards for indigent defense counsel. Moreover, LARA forces local municipalities, who are neither equipped or experienced in matters of such constitutional importance, to enforce the minimum standards, ignoring the fact that local municipalities have no authority under the Michigan Constitution to assume these essential functions of the court. Moreover, it is foreseeable, given that there are fewer restrictions on fundraising in municipal races than judicial races and no oversight by SCAO, that municipal employees will be more susceptible than the judiciary to politicizing indigent defense appointments and picking “favorite” attorneys for appointments, which is presumably what the MIDC was trying to avoid in approving this standard.

The MIDC also mistakenly relies on *Polk v. Dodson*, 454 U.S. 312, 321-322 (1981). That case does not support an “independence from the judiciary” standard. Polk County, Iowa, had a state authorized local Offender Advocate Office. Members of that public defender office were employees of the county. The United States Supreme Court held that a county is not liable for the ineffective assistance of the appellate public defender, although paid and ultimately supervised by the county, because a public defender does not act “under the color of state law” so as to give rise to a 42 U.S.C §1983 civil rights claim.

The United States Supreme Court **did not** hold that the regulation of the minimum education, training and qualifications of indigent defense counsel “shall be independent of the judiciary.” The Supreme Court did not rule that the determination of indigency and the appointment of indigent defense counsel “shall be independent of judiciary.” The Supreme Court did not rule that the appointment of defense experts “shall be independent of the judiciary.”

Furthermore, the MIDC desires that indigent defense counsel be “subject to judicial supervision only in the same manner and to the same extent as the “prosecution.” In Michigan, the county prosecutor is a constitutionally defined elected position with statutorily defined duties. See Article VII §4 of the Constitution of 1963 and MCL 49.153 *et al.* The MIDC could have lobbied the legislature for the creation of elected public defender positions in every county, like other states have done.<sup>1</sup> But the MIDC instead chose an unconstitutional statutory scheme.

## 2. Standard 6 – Indigent Defense Workloads

This standard directly regulates the conduct and activities of indigent defense attorneys. The Michigan Supreme Court has the exclusive constitutional authority to regulate the conduct and activities of attorneys who represent indigent criminal defendants. *Schlossberg v. State Bar Grievance Board*, 388 Mich. 389, 395 (1972); See also *Grievance Administrator v. Lopatin*, 462

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<sup>1</sup> See California Govt. Code 27703-04; Nebraska Rev. Stat. 23-3401(1); Florida Statute 27.50 et. seq.; and Tennessee Code Ann. 8-14-202(b)(1)(A).

Mich. 235, 242 (2000). For the reasons stated previously, LARA has no constitutional authority to approve this standard which regulates and limits the caseloads of indigent defense counsel. Standard 6 is therefore unconstitutional under the separation of powers doctrine, Article 3, §2, because it usurps the Michigan Supreme Court's exclusive constitutional authority to regulate the conduct and activities of attorneys.

### 3. Standard 7 – Qualification and Review

First, this standard directly regulates the minimum qualifications of indigent defense attorneys for various levels of criminal cases (misdemeanors to life offense cases). Under Standard 7, local funding units are responsible for ensuring that indigent defense counsel have the minimum qualifications to handle various levels of criminal case appointments. Local funding units are also mandated to regularly evaluate the “quality of the representation” and that “productivity is a component of the review process.”

Local funding units (executive branches of local government) have never been permitted under the Michigan Constitution to assess and review the qualifications of attorneys (except those who work directly for the local funding unit). As discussed in more detail in our pleadings in Oakland County v State of Michigan et al, COC No. 17-00216-MZ, only the Michigan Supreme Court has the exclusive constitutional authority under Article 6, §5 of the Michigan Constitution to regulate minimum qualifications and professional standards of attorneys who represent indigent criminal defendants. Therefore, Standard 7 is unconstitutional under the separation of powers doctrine, Article 3, §2 of the Michigan Constitution.

Finally, MIDC mandates that “***In all cases***” the “***evaluation of attorneys must be made by peers***” in the criminal defense community... ***including judges, prosecutors and clients.***” Standard 7 (C). If MIDC mandates that the local funding unit take the input from judges, prosecutors and clients, the MIDC is essentially turning the local funding unit into a type of Attorney Grievance Board, which is clearly the responsibility of the Michigan Supreme Court under Article 6, §5 of the Michigan Constitution. *Schlossberg v. State Bar Grievance Board*, 388 Mich. 389, 395 (1972); *Grievance Administrator v. Lopatin*, 462 Mich. 235, 242 (2000).

Sincerely,

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