

January 31, 2018

Michigan Indigent Defense Commission
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Re: Public Comments

OAKLAND COUNTY'S PUBLIC COMMENTS
PROPOSED STANDARD 8

This document shall serve as Oakland County's public comments on the Proposed Standard 8 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.*

- I. MIDC Standard 8 violates the separation of powers doctrine under Article 3, §2 of the Michigan Constitution.

MIDC Standard 8 (Economic Disincentives or Incentives) regulates "reasonable" rates of hourly compensation and permits unfettered billing allowances for indigent defense counsel.¹ As previously discussed in our pleadings in Oakland County v State of Michigan et al, COC No. 17-00216-MZ, COA No. 341172, LARA does not have the constitutional authority to regulate the legal profession or delegate constitutional functions of the judiciary to local funding units. Standard 8, which is expected to be approved along with MIDC Proposed Standard 5 (Independence from the Judiciary), infringes 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.

Standard 8 allows funding units to discipline and remove attorneys from representing indigent defendants if they determine the attorneys are engaging in repeated incidences of excessive billing. If a funding unit determines that an attorney's submitted reimbursement voucher is "unreasonable" and "excessive" (and also presumably in violation of Michigan Rules of Professional Conduct Rule 1.5 – Fees), local funding units must develop policies and engage in "efficient dispute resolution procedures" to manage disputes over billing.² Local funding units are also expected to create voucher appeal procedures. More specifically, Standard 8 states that "All local systems should have policies

¹ See MIDC Standard 8(B). Indigent defense counsel can submit payment vouchers for time spent in appearing in court, and out of court preparing the case, investigating the case, negotiating with opposing counsel, "tactical planning," preparing expert assistance, out of pocket expenses, mileage, and any "extraordinary expenses."

² MIDC Standard 8(F).

in place that outline voucher review procedures, **including the right for attorneys to appeal decisions...**³ The MIDC does not give the funding units any guidance on how they should develop appeal procedures “independent of the judiciary,” and who bears the cost of these appeals. The MIDC also gives the local funding units the right to remove attorneys from court appointed lists for repeated incidences of excessive billing.⁴

In effect, local funding units are being mandated to take over judicial functions – statutory interpretation of “reasonable” attorney fees, voucher denial appeals, and removal from local indigent defense practice. LARA, an executive branch agency, cannot legally require local funding units to perform these judicial functions. Since the LARA and MIDC require local funding units to perform essential functions of the judiciary, the MIDC is in violation of the separation of powers doctrine under Article 3, §2 of the Michigan Constitution.

Standard 8 also requires that local funding units take over a long-standing traditional function of the trial court in determining the reasonableness of attorney fees. This is not merely the judicial transfer of a burdensome “administrative task”⁵ to local funding units as the MIDC maintains. It transfers the trial court’s essential constitutional duty to ensure court appointed attorneys have the time, fees, expertise and resources necessary to provide effective assistance of counsel to indigent defendants under the Sixth Amendment of the United States Constitution and Article 1, §20 of the Michigan Constitution. Regardless of whether attorney fees are mandated by constitution, statute, or a regulation, it has always been the trial court’s responsibility to interpret legislative or regulatory intent and evaluate the reasonableness of attorney fees in litigated cases. *People v. Simpson (In re Ujlaky)*, 498 Mich. 890 (2015); and *People v. Timko*, 2016 Mich. App. LEXIS 2172, 2-3 (2016). No precedent exists that would allow LARA, an executive branch agency, to mandate that local funding units take over this judicial responsibility.

Even the unpublished case law the MIDC cites as authority, under “Sources and Authority for Proposed Standard 8,” *In Re Atchison & Hartman*, 2012 Mich. App. LEXIS 127 (2012), affirms that the trial court retains its traditional function of determining the reasonableness of attorney fees in criminal cases. In that case, the trial court feared that the precedent of awarding extraordinary fees in a murder case to two defense attorneys would promote the adding of co-counsel and lead to excessive billing for additional compensation by defense counsel. The Michigan Court of Appeals held that fear was unjustified given that the trial court retains the ultimate authority to determine the reasonableness of attorney fees:

... the trial court’s fear is unjustified as it ***will always retain the ability to determine the reasonableness of any requested attorney fee.***⁶

Case law establishes that the judicial branch is the only proper branch for the evaluation and determination of reasonable attorney fees in criminal cases. Trial court judges oversee their own cases and are in a unique position to determine the level of work a court appointed attorney performs and whether the attorney fees are reasonable. Moreover, the judiciary has adopted criteria for a trial

³ MIDC Standard 8 Staff Comments (1).

⁴ Ibid

⁵ Ibid.

⁶ *In Re Atchison & Hartman*, 2012 Mich. App. LEXIS 127, 19 (2012) (emphasis added).

court to consider in evaluating the “reasonableness” of attorney fees. See *Wood v. DAI-IE*, 413 Mich. 573, 588 (1982) (citing *Crawley v. Schick*, 48 Mich App 728, 737 (1973)).

Local funding units, in contrast, are not in the courtroom and have no ability to know what is occurring in court. Local funding units are not able to evaluate time spent or the work performed by any lawyer on any given case. Standard 8 will require local funding units to micromanage and audit indigent defense counsel time sheets regarding time spent in court and out of court despite the fact that they have no way to independently verify the tasks claimed by the attorney. Local funding units are not staffed or qualified in the evaluation of “reasonable” attorney fees under the guidelines established by the Michigan Supreme Court.

II. MIDC Standard 8 invites excessive and unreasonable billing which will deplete grant funds and hurt indigent defendants.

Given the unfettered billing allowances granted indigent defense counsel by MIDC Standard 8, the opportunity for abuse of hourly billing exists and there will likely be a significant increase in costs. Defense counsel will now be able to submit detailed timesheets and billable hours for work both in court and any activity undertaken or expense made outside of court that is reasonably related to the case at a rate of \$100 - \$120 per hour.⁷ Also, indigent defense counsel can presumably submit mileage from home to court, mileage from office to court, and mileage between courts.⁸ They can submit time sheets detailing work done on a case “preparing,” “investigating,” “negotiating,” or “tactical planning.”⁹ (Under the guise of “tactical planning,” defense counsel could presumably bill hours for merely “thinking” about the case). Finally, local funding units must reimburse defense counsel “**for any out-of-pocket expenses** incurred as a result of the representation.”¹⁰

More concerning, fee and cost vouchers must be approved by “independent” administrators who have the unilateral authority to approve or disapprove attorney fees and costs requests.¹¹ Vouchers must be routinely approved unless administrators or staff find cause to deny reimbursement.¹² However, as previously stated, funding units are not in any position to determine the reasonableness of attorney fees or whether there is cause to deny a submitted voucher. Since no pre-approval of expenses is required, indigent defense counsel can spend money on a case without any limits and submit receipts to the local funding unit after the fact.

This presents several problems for the local funding units and indigent defendants. First, it is likely that the cost of indigent defense representation will meet or exceed the cost of representation by private attorneys and this cost will be passed on to indigent defendants. Trial courts can order reimbursement from defendants of all costs reasonably related to adjudicating the case, including attorney fees. See MCL 769.1k(1)(b)(iv). The costs of these attorney fees are routinely assessed to indigent defendants in either the Judgment of Sentence or Order of Probation. In the end, Standard

⁷ Ibid.

⁸ MIDC Standard 8 (B) and (E).

⁹ MIDC Standard 8 (B).

¹⁰ MIDC Standard 8 (E).

¹¹ MIDC Standard 8(F).

¹² Ibid.

8 will only serve to put indigent defendants in greater debt and result in longer probation and parole terms.

The MIDC puts local funding units in an impossible situation. There is no way for a funding unit to predict what any attorney's billing will be like at the end of the case nor the amount of time that will be spent reviewing attorney billing statements. Moreover, it is reasonably foreseeable that the implementation of Standard 8 will cause funding units to expend their local share and run out of grant money mid-year. If funding units run out of money mid-year, the MIDC Act does not require funding units to spend ANY money in excess of their local share. MCL 780.993(7). Funding units are left with few options. The MIDC has not prepared for this reality and has no funding mechanism that would address this reasonably foreseeable problem.

III. LARA should disapprove Standard 8 and require the MIDC to establish a state-wide indigent defense counsel billing rules and procedures.

The courts of this State have historically approved attorney fees and costs for indigent defense. The MIDC Act removes this function from the judge assigned to the case, who was familiar with the case and the proceedings (motions, hearings, pretrials, and trials). Now administrative personnel of local funding units who have no knowledge of the case whatsoever, who may or may not be attorneys, and who may or may not have any experience or knowledge of criminal defense matters, will make determinations concerning attorney fees and costs. Local funding units must have the ability and authority to create procedures that fit within the funding units' administrative financial/scheme (e.g. the MIDC cannot require that a funding unit modify its financial system). Standard 8 has multiple deficiencies which must be addressed before one hundred thirty-four funding units venture into this area with little or no experience.

Standard 8 requires funding units to review vouchers submitted by indigent counsel for multiple in-court and out-of-court activities and expenses. MIDC only provides specific guidance on the hourly rates of pay (\$100 - \$120 per hour),¹³ but provides little else in terms of the development of compensation standards. Local funding units are advised to create "expected hourly thresholds"¹⁴ for every type of in-court activity (i.e. pretrials, preliminary exams, arraignments, motion hearings, evidentiary hearings, bench trials, jury trials, etc.). Standard 8 further requires that indigent defense counsel be compensated for all out-of-court activity related to the case (i.e. investigations, case planning, negotiations, tactical planning, etc.). For over one hundred thirty-four individual funding units to each establish their own separate hourly thresholds is not feasible or wise. The MIDC should establish the thresholds or develop a procedure for establishing thresholds.

Standard 8 further states that "[f]ee requests which exceed expected hourly thresholds should not be paid until an administrative review indicates that the charges were reasonably necessary."¹⁵ The MIDC provides no guidance on establishing this administrative review. Since the MIDC will be reimbursing for substantial amounts of these fees, the MIDC should establish a standard for resolving these issues.

¹³ MIDC Standard 8 (B).

¹⁴ Ibid.

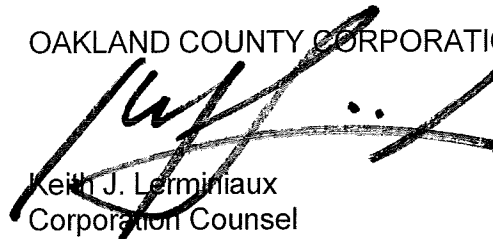
¹⁵ Ibid.

Standard 8 (F) states that the “[e]xpenditure of public dollars should be subject to control mechanisms and audits that verify expenditure accuracy. This should be accomplished by following generally accepted procedures that separate staff duties; establish billing policies; and ensure thorough review of vouchers including benchmark setting and investigation where necessary.” Standard 8 (F) further requires local funding units develop an “efficient dispute resolution procedure” for attorney invoices and costs. The MIDC does not provide funding units with any direction on what constitutes “generally accepted procedures”, what “billing policies” should be adopted, how billing investigations should be conducted, what “benchmark settings” should be followed, what audit procedures should be adopted, and what dispute resolution procedure should be followed. While there is an MIDC Regional Director assigned to each region, the Standard 8 policies, procedures and benchmarks for one hundred thirty-four funding units should be determined by the MIDC, not by the funding units or MIDC Regional Representatives on an ad hoc basis. Moreover, the Standard 8 policies, procedures and benchmarks need to be established by the MIDC in meetings that are open to the public.

The MIDC has failed to provide any details on how local funding units should begin to take over the billing review policy and procedures required under Standard 8. It is highly inefficient for the MIDC to require one hundred thirty-four separate funding units to develop their own event thresholds, separate billing policies, voucher review procedures, audit procedures, appeal procedures, dispute resolution policies, and attorney removal policies. Rather than proposing a vague and unworkable standard that leave one hundred thirty-four funding units guessing as to what the MIDC wants in this regard, LARA should disapprove this standard and require the MIDC to go back to the drawing board and develop a comprehensive state-wide compensation and billing procedure standard.

Sincerely,

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