
Incentivizing Quality Indigent Defense Representation

March 2018



MICHIGAN INDIGENT
DEFENSE COMMISSION

Recommendations
for Reforming
Compensation
Mechanisms in
Michigan

Incentivizing Quality Indigent Defense Representation
March 2018
Christopher Sadler and Jonah Siegel, MIDC Research Unit

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ABOUT THE MICHIGAN INDIGENT DEFENSE COMMISSION

The Michigan Indigent Defense Commission shall develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and with the Michigan Indigent Defense Commission Act. We will identify and encourage best practices for delivering the effective assistance of counsel to indigent defendants charged with crimes. We will collect data, support compliance and administer grants to achieve these goals. We will accomplish our mission through collaboration, transparency and accessibility to all partners in the criminal justice community.

200 North Washington Square, Lansing, MI 48913

(517) 657-3066

info@michiganidc.gov

Highlights

In its 2008 report of Michigan's indigent defense systems, the National Legal Aid and Defender Association (NLADA) found that inadequate attorney compensation is one of the reasons that the state of Michigan fails to provide constitutionally adequate legal representation to poor people charged with crimes. Inadequate compensation is the norm and not the exception across the state and, in response, the Michigan Indigent Defense Commission addresses attorney payment in its eighth proposed standard, *Economic Incentives and Disincentives*.

At the heart of inadequate compensation are incentive mechanisms, a phrase that refers to the formal and informal guidelines designed by courts to reimburse attorneys for providing representation to indigent clients. Through such mechanisms, courts have the power to incentivize certain attorney behavior. However, many local systems currently disincentivize quality representation by forcing attorneys into a position where they must choose between acting in their own self-interest or in the interest of the client. This conflict does a disservice to both attorneys and indigent clients. Conversely, a compensation system that does not provide reasonable control mechanisms incentivizes abuse and leads to runaway costs. A well-designed system balances the needs of the client, the defense attorney, the court, and the taxpayers who fund the system.

This report reviews the current incentive mechanisms utilized by systems across the state and discusses the strengths and weaknesses of each. It then offers a series of recommendations for local systems to implement compensation structures that directly encourage attorneys to provide effective representation. Such encouragement can be achieved by remunerating attorneys based on the effort they expend; implementing court policies that reimburse attorneys for out-of-pocket expenses; creating an environment insulated from undue judicial pressure; instituting controls that manage the number of hours that appointed attorneys dedicate to indigent defense; and designing clear guidelines for how attorney performance will be appraised.

These incentive mechanisms are most easily implemented in systems that utilize either salary or hourly payment plans, or a modified flat-fee system that provides reasonable compensation at the approved rates for cases that require a trial, or unusual investigation or motion practice. Where local systems choose to employ a type of payment plan other than salary or hourly (including flat-fee, capped hourly, proportional, or blended systems), proposed Standard 8 provides that they must be carefully designed to minimize disincentives and provide compensation that is equivalent to the required minimum rate as outlined below. For hourly plans,

proposed Standard 8 sets the following minimum hourly rates: \$100 per hour for misdemeanor cases, \$110 per hour for felony cases, and \$120 per hour for life offense cases, plus cost of living increases and expense reimbursement. The report also offers suggestions for designing system protocols to ensure that the incentives built into payment plans are able to function properly, protecting local systems, taxpayers, attorneys and clients.

Commissioners

Pursuant to MCL 780.987, the Governor appointed the following Commissioners as submitted by the person, group or organization listed below:

Michael Puerner, Chair, Senate Majority Leader

Brandy Robinson, Vice Chair, those whose primary mission or purpose is to advocate for minority interests

Gary Walker, Secretary, Prosecuting Attorneys Association of Michigan

Hon. James Fisher, Michigan Judges Association

Hon. Thomas Boyd, Michigan District Judges Association

Hon. Jeffrey Collins, Senate Majority Leader

Nancy J. Diehl, State Bar of Michigan

Frank Eaman, Criminal Defense Attorneys of Michigan

Joseph Haveman, Speaker of the House of Representatives

Derek King, local units of Government

Tom McMillin, Speaker of the House of Representatives

Kristina Robinson, Chief Justice of the Michigan Supreme Court

David Schuringa, the general public

John Shea, Criminal Defense Attorneys of Michigan

William Swor, Criminal Defense Attorneys of Michigan

Thomas P. Clement, *ex officio* member, Supreme Court

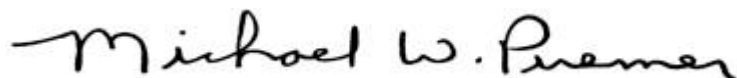
Statement from the Chair

From our agency's inception, it has been clear that addressing the issue of economic incentives and disincentives would be one of the Michigan Indigent Defense Commission's (MIDC) most formidable and complicated challenges. Disincentives to providing quality representation are endemic to many indigent defense systems, both throughout Michigan and nationally. Without reform, such disincentives will continue to disservice attorneys, taxpayers, and indigent defense clients, whose liberty and well-being are at risk.

The MIDC's proposed Standard 8 addresses several facets of economic incentives and disincentives, including recommended payment models; required minimum hourly rates for attorneys; guidelines for reimbursements; and suggested oversight mechanisms. In this report, we explore the problems created by disincentives as well models for reform that most effectively minimize disincentives.

It is our hope that based on the recommendations contained in this report, local indigent defense systems will adopt revised approaches to compensation that better serve stakeholders. Through compliance with proposed Standard 8, attorneys will be directly compensated for the time they spend on cases and will not have to balance their needs with the needs of their clients. Through ongoing monitoring, taxpayers will be confident that their money is being spent responsibly and in a sustainable fashion. Most importantly, clients will receive the quality representation that they deserve under the Sixth Amendment.

Respectfully Submitted,

A handwritten signature in black ink that reads "Michael W. Puerner". The signature is written in a cursive, flowing style.

Michael Puerner
Chair
Michigan Indigent Defense Commission

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Introduction

In a 2008 report entitled *Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis*, the National Legal Aid and Defender Association (NLADA) found that despite the efforts of many hard-working attorneys across the state, Michigan fails to provide constitutionally adequate legal representation to poor people charged with crimes.¹ One of the primary drivers of inadequate representation is the way in which attorneys in the state are compensated for providing indigent defense representation. Through a detailed investigation, the report revealed how current practices harm both attorneys and their clients. Attorneys rarely receive adequate payment to compensate for the hours of indigent defense representation that they provide. Additionally, attorneys are offered little economic incentive to expend the amount of effort required to truly provide clients with effective assistance of counsel. In many indigent defense systems, current practices generate conflict of interests between attorneys and clients, violating ethical guidelines put into place by the American Bar Association and the State of Michigan's Rules of Professional Conduct.² Insufficient levels of compensation ultimately discourage attorneys from providing client-centered representation and force them to triage their Sixth Amendment responsibilities in favor of some clients over others, resulting in harm to the most vulnerable clients.³

At the heart of these concerns are *incentive mechanisms*, a phrase that we use to describe the formal and informal guidelines designed by courts to reimburse attorneys for providing representation to indigent clients. Through such mechanisms, courts have the power to incentivize certain attorney behavior. Although there are countless attorneys across the state who provide effective assistance of counsel, early exploration by the Michigan Indigent Defense Commission (MIDC) echoes the NLADA's findings that the mechanisms established by many court systems ultimately offer counterproductive incentives to attorneys. These mechanisms force attorneys into a position where they must choose between acting in their own self-interest or in the interest of the client. Indigent defense systems that systematically foster this conflict do a disservice to attorneys, indigent clients, and indigent defense systems as a whole.

The impact of incentive mechanisms on attorney representation can best be understood by thinking about these mechanisms as a group of incentives that influence attorney actions. These incentives are dictated by payment plans, local guidelines that define how attorneys will earn compensation in exchange for their services and how much they will receive. Michigan indigent defense systems utilize a variation on one of four plans – flat-fee, hourly, salary, and contract – or a blended

system that combines multiple plans. As will be discussed further, some of these plans are better suited than others to encouraging quality representation by attorneys.

Not surprisingly, not all incentive mechanisms are created equal. Ideally, local systems will employ incentive mechanisms characterized by three components: (1) the mechanisms directly encourage attorneys to provide effective representation; (2) the mechanisms are straightforward for local systems to administer, and (3) the mechanisms ensure that taxpayer dollars are spent responsibly. To accomplish these objectives, local systems must remunerate attorneys reasonable wages based on the effort they expend; implement court policies that reimburse attorneys for out-of-pocket expenses; create an environment insulated from undue judicial pressure; institute controls that manage the number of hours that appointed attorneys dedicate to indigent defense; and design clear guidelines for how attorney performance will be appraised, including active termination policies.

The MIDC's proposed Standard 8: *Economic Incentives and Disincentives* lays the groundwork for designing incentive mechanisms that are consistent with the constitutional right to counsel, fiscally responsible, and sustainable for local systems. The proposed standard rests on the presumption that attorneys "must have the time, fees, and resources to provide the effective assistance of counsel guaranteed to indigent criminal defendants by the United States and Michigan Constitutions."⁴ Through compliance with the proposed standard, local systems can avoid economic incentives that impair defense counsel's ability to provide effective representation.

Incentive Mechanisms

Payment Plans

To generate effective representation, local systems should employ payment plans in which attorneys are rewarded for efficient, high quality work. Clients, in turn, reap the benefits of this work. At the same time, local and state government must ensure that public dollars are being spent responsibly and efficiently. Currently, many systems are failing to strike this balance, largely due to compensation mechanisms that are misaligned or counterproductive. As a result, attorneys are either discouraged from expending effort on behalf of their clients or encouraged to direct cases in ways that increase income. Several attorneys describe the dilemma below:

"We are not compensated enough to properly spend the time with each client. We must overbook in order to survive financially."

"[We receive such] low pay for indigent misdemeanor work, [the] only incentive is to process cases through in record speed."

Currently, many courts across the state of Michigan utilize payment plans that exacerbate the dilemma between the client and the attorney. Although all of Michigan's payment plans provide some level of reward to attorneys for services, many of the plans reward only initial bursts of effort. This places attorneys in a position where they must choose between continuing effort on a particular case (beneficial for the client) or reducing and even eliminating effort once a maximum income threshold has been reached (beneficial for the attorney). Here, an attorney alludes to the tension between making a living and providing effective services to clients:

"For the most part, assigned counsel either are married, have partners, or have two incomes in their household with one of the persons having benefits. The only way an attorney can make a fair wage doing only assigned cases is to get an excessive amount of cases (most of which end up in pleas); be on the capital list which provides a one-time much larger amount of payment, [or] go to Trial in all assigned cases... It is virtually impossible for one attorney (one family income) to live modestly on Assigned Counsel Fee Levels and provide high quality services to each client as is minimally required."

Asking attorneys to incur expenses that are not reimbursed also creates a disincentive to provide effective representation. Often times, attorneys are expected to cover filing fees, mileage costs, investigation expenses, or other auxiliary expenses pertinent to effective representation. Each of these expenses add to the overall cost of a case. Anecdotally, even when official court policy intends to cover these expenses, attorneys often run into obstacles seeking reimbursement. One attorney details some of these out-of-pocket expenses: *"Serving subpoenas is always a challenge, and we do not have the witness fee[s] to serve the witness. One time I needed the transcript for a split exam, I had to pay the court reporter out of my pocket for the transcript to properly prepare for the exam continuation."* When attorneys who already face disincentives to expend effort are asked to shoulder these expenses without reimbursement, indigent defense systems essentially put the well-being of attorneys into opposition with the well-being of clients. Attorneys are forced to weigh the costs and benefits of providing these critical services, and one party is bound to suffer as a result. At the same time, of course, the judiciary and court funding units have a legitimate interest in not providing unlimited payment for services not justified by the facts and complexity of a case.

Judicial Involvement

A second key component of incentive mechanisms is the nature and intensity of judicial involvement with the indigent defense function. In many court systems, judges hold an extraordinary amount of power over the operations of indigent defense. They may determine payment plans, award case assignments, and appraise attorney performance, among other forms of authority. In *A Race to the Bottom*, the NLADA explains that providing judges with wide discretion compromises the integrity of the attorney-client relationship. In systems in which judges are able to exert such broad discretion, defense attorneys understand that their income is tied to the whims of the judge.⁵ As one attorney explains in the MIDC's attorney survey,

"Favoritism to attorneys who will not work for the clients is the trend. You are punished if you make motions, see client multiple times, do proper discovery and advocate for your client at every step of representation... Let's face it, most cases set for bench trial end up in guilty [verdicts]. In our county when you set a case for jury trial, a sped-up schedule is thrown at you. When you do all of your discovery, motion practice (if it needs to be done), and other related matters, you are pressured to settle. Many times cases will be dismissed the day of trial. It has been my experience that I never get a commitment from the prosecutor or the Court that the case will not go forward until the last moment. What this does is work the heck out of an attorney and then cause you to be treated like you are a trouble maker. Furthermore, if a jury is brought in the Defendant has to pay \$300 and up as a jury fee. In times past I have seen defendants go to jail for not paying that fee even though the case was dismissed. Ridiculous! If you constantly set cases for bench trial that you know are not going to settle and/or do not represent your client properly, mysteriously you get a ton of cases assigned to you as a reward for that behavior."

As a result, judges in many local systems can exert power over attorneys by changing the compensation incentives. For example, a judge may signal to an attorney that taking a case to trial has a cost such as not receiving future indigent defense appointments or not being fully reimbursed for expenses. Such signaling by judges changes the relative cost to the attorney of a particular decision, and the decision now becomes either, take the case to trial at the cost of future appointments or negotiate a plea deal with the benefit of receiving future appointments. In these cases, attorneys are unable to make decisions based solely on the best interests of a client. The MIDC's proposed Standard 5 addresses concerns related to the independence of the defense function.⁶

Current Compensation Mechanisms in Michigan

The basic idea is that remuneration – paying someone for an act or service – offers an incentive for an individual to give up their free time in order to work. Given the finite number of hours that we all have each day, our willingness to give up leisure hours for work hours is largely governed by how we are compensated. In simpler terms, we must be paid to give up our free time. In the case of indigent defense, this “free” time may often translate to time spent on other forms of work, such as retained cases. This section highlights the various incentive mechanisms currently utilized throughout criminal courts in Michigan. The mechanisms are analyzed in terms of monetary incentives and how those incentives shape the willingness of attorneys to provide effective legal representation to indigent clients. Although this discussion emphasizes payment plans, the issue of judicial involvement is inherently woven throughout the analysis.

Indigent defense stakeholders typically separate indigent defense delivery into three broad categories: public defender offices, assigned counsel, and contract counsel. For the purposes of this paper, the distinction between these three delivery models is less important than the actual mechanisms used to compensate attorneys, which do not always map neatly onto one of these three categories.

Figure 1. Current Overlap Between Delivery Models and Compensation Mechanisms

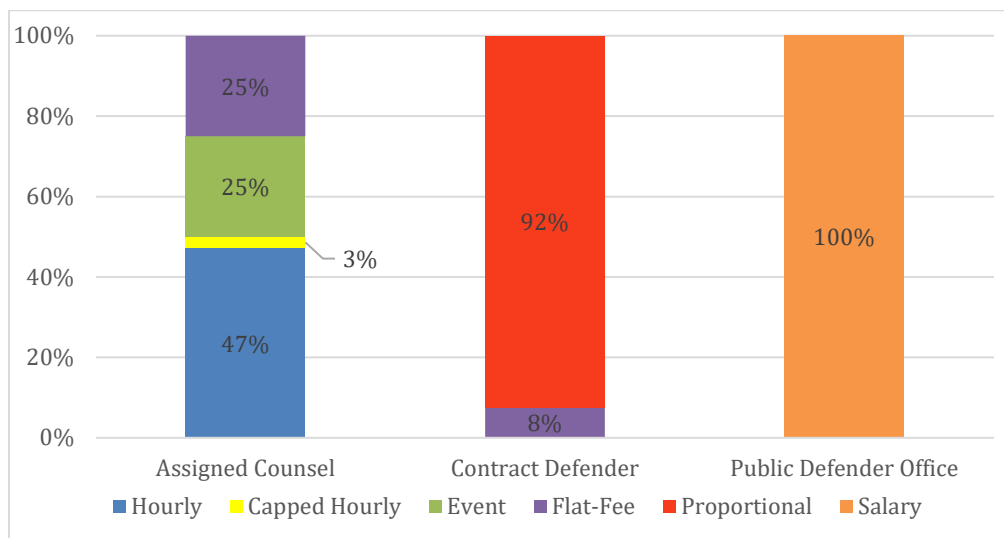


Figure 1 offers a sense of the current overlap between delivery models and the mechanisms used to compensate attorneys. The chart includes circuit courts only, with each county included as its own data point even when indigent defense systems are unified (for example, even though the three counties that compose the 13th Circuit

Court all compensate assigned counsel attorneys using an event-based schedule, they are counted as three different court systems in this calculation). The chart illustrates that assigned counsel systems and contract defenders utilize a variety of compensation mechanisms. While assigned counsel systems primarily pay uncapped hourly rates, contract defenders almost exclusively rely on proportional plans, each described further below.

In the remainder of this section, we describe each payment plan and its related incentives and disincentives.

Salary

Salary-based systems are those in which an organization provides a wage for a set amount of hours. Under this plan, an attorney would agree to a defined wage under the assumption that the number of hours worked is somewhat fixed. At present, nine public defender offices in Michigan compensate their attorneys using salary wages.

There are several features of a salary-based system that incentivize attorneys to provide effective representation to their clients. First, the total compensation package and amount of effort required are known ahead of time. As a result, attorneys have a sense of their financial outlook and time commitments. Second, salaried attorneys are often compensated reasonably and in-line with other county employees.⁷ Finally, salaried positions typically include benefits such as personal leave time and insurance. With all of these pieces of information on hand, an attorney can decide if the amount of effort that is demanded is worth the compensation. Salary-based systems appeal to employers by providing simplicity and fiscal certainty, which helps organizations generate reasonably accurate budget projections.

Salary-based plans are not without challenges. Inadequate salaries can make it difficult to attract or retain employees. Challenges can also arise when employees and employers hold conflicting views of expected work time or workload. For example, an attorney may agree to a certain wage expecting to work 40 hours per week but then end up with a large caseload that requires working considerably more hours than originally expected. Rigid expectations can result in dissatisfaction or poor work quality if attorneys are forced to move through cases quickly to stay within their hours. Another shortcoming of salary systems is the fact that attorneys receive the same compensation regardless of how hard or effectively they work for their clients. Careful management practices paired with the MIDC's proposed Standard 6: *Indigent Defense Caseloads* can reduce such dissatisfaction by regulating the number of cases an attorney can carry.⁸

Flat-Fee

In a flat-fee appointment system, attorneys are assigned cases and are compensated at a single rate. The rate of compensation is not dependent upon the number of hours that attorneys work. For example, in one central Michigan court system, attorneys who receive an indigent defense appointment receive a flat sum of \$300 for felony cases whether they work one hour or 10 hours. One attorney explains flat-free payment in the following: *“Flat-fee for cases at district court level means you may attend court four or five times and receive the same pay you would receive if you only attended once.”*

Flat-fee compensation mechanisms can be problematic because they risk encouraging attorneys to provide the least amount of effort possible. Under these payment plans, one of two issues can arise. Consider a scenario with two outcomes: In the court described above, attorneys are paid \$300 for a felony case. On the premise that attorneys are compensated \$60 per hour in a nearby jurisdiction, the assumption is that a case will take approximately five hours of work. However, a new case requires eight hours of labor instead of five. Under ideal circumstances, assuming that something about the case required additional time, this attorney would be compensated \$480 (eight hours at \$60 per hour); however in this flat-fee system the attorney continues to be compensated \$300. One potential outcome is for the attorney to work the additional three hours without extra compensation. This decision benefits the client while harming the attorney. A second possibility is that the attorney ceases work after five hours as he will not be compensated for additional effort. This decision might severely harm the client.

Historically, many local systems have utilized flat-fee payment plans under the assumption that they are simpler and do not require attorney time-tracking or close oversight. However, flat-fee systems that aim to incentivize quality representation and also maintain fiscal responsibility should collect and track hourly attorney invoices. Regular analysis and oversight of the amount of time attorneys spend on cases will ensure that attorneys, clients, and taxpayer dollars are all protected.

Hourly

Hourly systems take one of two forms. In uncapped hourly plans, attorneys are paid a standard hourly rate. Because there is no stated limit to the number of hours for which attorneys can bill, all invoices must be subject to review, and excessive expenditures should be flagged. Uncapped hourly systems are beneficial to attorneys

and clients because attorneys get paid directly for their time, and as a result, clients whose cases require a great deal of effort will likely receive the time necessary to their case. Properly run hourly systems require the setting of internal hourly case thresholds and strict review of attorney invoices to prevent discrepancies and abuse. Without hourly controls, the funding units and taxpayers risk being overcharged for unnecessary services.

A capped hourly system is one in which an attorney is paid a rate based on the number of hours worked up to a defined ceiling. Once the ceiling has been reached, the attorney receives no further compensation for additional hours worked. Unlike a flat-fee compensation system, there is not a guaranteed income since compensation depends on the number of hours worked. An attorney who works zero hours receives zero compensation. As an attorney consumes more labor hours, the amount of compensation increases incrementally. An incentive problem arises once an attorney reaches the income cap. At this point the attorney is faced with the same issue as under the flat-fee plan: additional effort is not compensated. The consequence of a capped hourly plan is that clients are provided with effort, but only to the point at which effort becomes costly to the attorney.

Like all of these models, hourly payment plans can be blended with other payment plans, such as a system incorporating both a flat-fee designed to provide reasonable compensation in routine cases, and an hourly rate for additional services upon a showing of need. Such models are acceptable so long as the flat-fees are demonstrated to be comparable to the hourly rates recommended by the MIDC in Standard 8 and local systems take steps to minimize disincentives.

Proportional

In a proportional plan, most often used in contract systems, attorneys or firms are under a service contract with a defined court system and are typically remunerated based on the portion of the total number of indigent defense cases they receive. In one southeast Michigan court, for instance, the total indigent defense contract is worth \$135,000. In this system, three attorneys accept a defined percent of the indigent defense workload and are compensated proportionally. In a given year, Attorney A may be compensated at \$27,000 for accepting 20% of indigent defense cases. Attorneys B and C earn \$54,000 each for each accepting 40% of indigent cases. Current proportional plans are extremely simple for local systems to manage since there is little negotiated or tracked aside from contract renegotiations.

Proportional plans in indigent defense can be problematic because there are too many unknown factors in order to make a contract simultaneously beneficial to attorneys and clients. The most important factors related to the efficiency of a proportional plan are the complexity of cases and the time required to adequately represent clients. At the time that a contract is awarded, these factors are unknown. Due to this missing information, an attorney cannot bid on a contract with reasonable certainty that a profit can be made while providing vigorous representation. An attorney who is awarded a contract for 40% of all indigent defense cases within a jurisdiction may quickly find that in order to adequately represent each client they must work more hours on indigent defense than are profitable. In practical terms, when dealing with percentages, 40% could be 100 cases or it could be 130 cases. The potential for unplanned variation is dangerous for clients because attorneys who are seeking to maximize profit must, by the very nature of the need for income, adjust their defense practices accordingly. This adjustment often means expending less effort per client as the number of clients increase. In summarizing pay issues in his court system, one contract attorney explains, *"We are paid a flat rate per year with the indigent defense contracts with no consideration for the amount of cases, whether motions are filed, or whether the case proceeds through trial. Unfortunately, this is a disincentive to file pre-trial motions or proceed to trial."*

Per Event

Per event plans are those in which attorneys are paid according to the tasks they accomplish. Each tangible task is assigned a value. The more tasks that an attorney completes, the more valuable their basket becomes. At the end of a case, the attorney is paid the value of their basket. For example, one metropolitan court values a plea deal at \$110; a sentencing hearing at \$60 dollars; a full day trial at \$180; and a motion at \$60. Under this circumstance, an attorney who prepares and files a motion, prepares a case, and goes to trial for a single day will earn a total of \$240. Generally speaking, this is a small return for all the time invested.

Per event payment plans are challenging because they encourage attorneys to engage in activities that provide high returns for minimal effort. The quicker an attorney can complete a task, the greater the return. Those tasks that have the potential of consuming a great deal of time become less desirable to attorneys. One example is the decision to negotiate a plea deal or take a case to trial. Trials are time consuming and compensation for trials is usually low, which means the monetary return on effort is minimal. Plea deals can generally be negotiated fairly quickly and the compensation per plea deal is not much lower than the compensation for a trial. In the metropolitan court described above, an attorney can make more money negotiating two plea deals

in a day than spending the day at trial. Because the difference in compensation is so minimal, attorneys are incentivized to exceed the compensation of a single trial by mass producing plea deals. The consequence of this is that attorneys may ignore the needs of a particular case and instead take a case down a path that produces the highest compensation for the least amount of effort. The attorney quoted below, for instance, describes how compensation rises dramatically once a case is bound over from district to circuit court.

“The pay is garbage. \$460 for a low level felony. \$800 for an upper tier felony. A little over \$1,000 for a capital matter. There are financial incentives to waive over your client. Obtaining a dismissal in District Court equates to \$50. As soon as you waive over or the matter gets bound over, you get the full value of the case (\$460/\$800).”

In event-based systems, many of the activities in which attorneys engage are not specifically included in payment plans and thus become unpaid tasks. They can also encourage unnecessary events, which waste court time and add no value to case outcomes. For example, many courts pay for trial time in court but not for trial preparation. As one attorney explains, in their event-based system, you “lose your shirt if you go to trial.” Other courts pay for some hearings but not all; for instance, a court might pay for a sentencing but not for a competency hearing. Per event plans rarely capture the entirety of work in which attorneys engage and, as a result, attorneys are forced to engage in unpaid work to provide effective representation to their clients.

Recommendations

Given the potential for disincentives in many of the payment plans currently utilized in Michigan court systems, proposed Standard 8 provides a strategic framework to help local systems design incentive mechanisms that foster quality indigent defense representation. With targeted modifications, local systems in Michigan can be effectively reformed to encourage current attorneys to engage in representation that is both efficient and effective while also attracting new attorneys into indigent defense work. Recognizing that courts, attorneys, and clients must all be simultaneously protected by incentive mechanisms, the proposed standard aims to encourage compensation characterized by the following:

- Payment plans that incentivize attorney effort and client-centered representation;
- Reasonable compensation rates for attorneys; and

- Administrative and review practices that promote efficiency and protect against error and the misuse of taxpayer dollars.

This section discusses the guidelines set forth by proposed Standard 8 for addressing each of these criteria.

Payment Plans

Designing payment plans that meet the requirements set forth by proposed Standard 8 is feasible and beneficial for all stakeholders involved. The MIDC recommends that local indigent defense systems consider either a salary-based payment plan (public defender offices) or an uncapped hourly payment plan (assigned counsel and contract defender systems). Both of these plans offer incentives that promote high quality representation. When these plans are not possible or desirable, proposed Standard 8 provides recommendations for designing other types of plans that minimize disincentives. All of these systems should be supported by strict system protocols and enforcement guidelines, which are further discussed below, to ensure fiscal responsibility and sustainability.

For salary-based plans, local systems should ensure that attorneys are paid reasonable salaries that keep up with cost of living adjustments and given benefits. Proposed Standard 8 suggests looking to the rates paid by state offices such as the Michigan Attorney General for Special Assistant Attorneys General for guidance.⁹ Employers should actively monitor staff hours so that attorneys are not overworked. Making sure that attorneys are reasonably compensated for the number of hours that they work goes a long way towards ensuring that attorneys are satisfied with their employment and are therefore willing to put forth the effort necessary to provide effective representation. Yearly merit wages are also extremely important for promoting job satisfaction and effort. Raises should be based on evaluative criteria and should be effort- and performance-based.

For uncapped hourly plans, proposed Standard 8 requires that attorneys are compensated promptly and reasonably for their time. This includes both in court and out of court time such as directing an investigation, negotiating, or tactical planning. Although in Michigan, hourly-based plans are typically used in assigned counsel systems, contract systems could and should take advantage of hourly payment plans. Rather than the current proportional model used in most contract systems, which bases compensation on the portion of cases awarded to an attorney, the MIDC suggests utilizing a payment plan based on time worked. To accomplish this, attorneys and counties should enter into an agreement that states the number of representation hours that an attorney is willing to provide and the compensation that

the attorney is willing to accept for those hours. Once an attorney has reached the agreed upon hours, the county and attorney may enter into an additional compensation contract, provided that the attorney has additional hours to dedicate to indigent defense. By retooling the current contract model, contracts can be used to incentivize appropriate effort per case. Contract systems must follow the guidelines laid out in proposed Standard 8, Section C. Uncapped hourly systems, in particular, must implement system protocols such as the ones described below in the *System Protocols* section to ensure that attorneys are not overbilling for their work.

Other forms of payment plans such as flat-fee, capped hourly, event-based, and blended systems that incorporate any of these models present additional challenges that have been discussed throughout this paper. Where local systems choose to employ such plans, proposed Standard 8 provides that they must be carefully designed to minimize disincentives and provide compensation that is equivalent to the required minimum rate as outlined below. All systems should also follow the guidelines recommended in this report's *System Protocols* section. So long as compensation is sufficient and disincentives are minimized, a blended model may meet the needs of a local system.

Local units should make decisions about payment plans based on their unique and individualized needs. Regardless of the plan that is selected, administrators should aim to create systems that are *accountable*, meaning that the interests of attorneys, clients, and taxpayers are simultaneously protected, and *sustainable*, meaning that they must be able to manage their compensation models in both the short and long term. Although developing new approaches can be challenging, designing and executing sustainable models is critical to lasting success.

Reasonable Wages

As part of poorly designed payment plans, the majority of Michigan's indigent defense systems remunerate attorneys at underwhelmingly low rates. A low wage rate is problematic because it can encourage attorneys to shortchange their clients in terms of effort. In a 2015 report, *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, the Sixth Amendment Center demonstrates why a reasonable wage rate is vital to effective assistance of counsel: The Sixth Amendment Center discovered that under indigent defense contracts, attorneys will begin to lose money after six hours of work because overhead expenses are not factored into the wage rate. Since attorneys begin to lose money at six hours, attorneys are encouraged to limit the amount of time spent on a case to five hours. Limiting time interferes with the ethical obligations of attorneys to provide effective assistance of counsel to each client they

represent.¹⁰ The ABA's *Ten Principles of a Public Defense Delivery System* also emphasizes the importance of reasonable wages. In this document, the ABA states that "...counsel should be paid a reasonable fee in addition to actual overhead expenses."¹¹ Providing a reasonable wage rate that includes overhead costs encourages attorneys to spend the necessary amount of time with each client, ultimately improving outcomes for clients. In addition to making additional hours of effort more attractive, competitive wages also help attract more qualified and experienced attorneys.

Given the importance of adequate compensation, what is a fair rate to compensate attorneys for indigent defense representation? To get a baseline, the MIDC turned to the Sixth Amendment Center report described above. The report concluded that Wisconsin attorneys earned a rate that did not cover their operational costs, which means that for each hour worked, attorneys lost money. The MIDC has found that this problem extends to Michigan as well. As the Sixth Amendment Center describes, attorney rates can be viewed as the sum of two components:

$$\text{Required Hourly Rate} = \text{Overhead} + \text{Attorney Fee}$$

In this formula, "Overhead" refers to the up-front costs required to maintain and operate a law practice, which may include expenses such as office rent, telecommunications, utilities, support staff, accounting, bar dues, legal research services, business travel, staff wages, and professional liability insurance. The "Attorney Fee" can be thought of as the portion that an individual attorney earns for time worked.

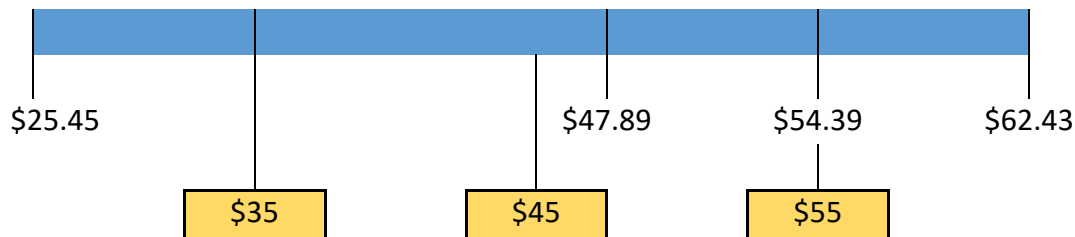
Method

To determine our required hourly rate, the MIDC collected data from practicing Michigan attorneys and the Michigan Civil Service. First, we investigated the average total costs of running a law practice in the State of Michigan ("Overhead"). By surveying 250 criminal defense attorneys across Michigan, we identified that attorneys in Michigan currently pay, on average, \$55 per hour per attorney to run a law practice. In other words, in order to break even on a case (earning \$0 per hour) an attorney must earn a minimum rate of \$55 per hour. However, this number does not reflect what it would cost to run a functioning practice that is resourced enough to provide quality defense. At present, many attorneys decrease overhead costs by running their practices out of their homes, minimizing administrative support, not participating in training opportunities, and canceling subscriptions to research

databases. To design a system in which overhead is not based on current practices but is based on the true cost of running an effective office, the MIDC adjusted the cost by \$10 per hour to **\$65 per hour**. This adjustment is intended to factor in the amount necessary to adequately staff an office, pursue training opportunities, and take advantage of other necessary resources.

To calculate the second part of the formula, the Attorney Fee, we turned to Civil Service attorney compensation rates for guidance on appropriate hourly rates. At the State level, civil service staff attorneys earn between \$25.45 per hour and \$47.89 per hour. Senior attorneys earn up to \$54.39 per hour, and law specialists, the most experienced category of attorneys, earn up to \$62.43 per hour.¹² With this in mind, we suggest the following Reasonable Fees: **\$35 per hour for misdemeanor cases, \$45 per hour for felony cases, and \$55 per hour for life offense cases**. In the chart below, we have located these recommended fees on the scale of civil service compensation.

Figure 2. Recommendations Based on Civil Service Attorney Compensation



Although many states have chosen to reimburse attorneys at the same hourly rate for all types of cases, we argue that representation on misdemeanor cases, felony cases, and life offense cases all require different levels of experience and expertise and, as such, warrant different levels of compensation. This framework is consistent with the Civil Service philosophy of compensating employees differently based on years and types of experience, degree of independence, and work responsibilities.

In total, then, to correct the disincentive that causes attorneys to lose money for each hour worked, the Center requires the following hourly rates for indigent defense representation:

$$\begin{aligned} \text{Required Hourly Rate} &= \$65 \text{ (Overhead)} + \$35 / \$45 / \$55 \text{ (Attorney Fee)} \\ &= \$100 / \$110 / \$120 \text{ per hour} \end{aligned}$$

These rates also require annual cost of living increases and expense reimbursement for attorneys, which should cover any reasonable out-of-pocket expenses for representing clients, including expert and investigator services, gas and mileage, discovery costs, printing and copying, and court fees. We believe that these rates are fair, consistent with best practices, and allow Michigan to be competitive with other states.¹³ For more information on the importance of reasonable fees as well as strategies for attorneys in the state to seek reasonable fees, please also see our 2016 position paper on attorney fees.¹⁴

System Protocols

Regardless of the delivery model or models utilized by a court system, proposed Standard 8 requires that all indigent defense systems put appointment, review and compensation protocols into place to systematize the delivery of indigent defense services. These protocols protect not only attorneys and clients but also taxpayers, whose dollars fund indigent defense representation. As such, officials should be cognizant to avoid mechanisms that spend freely without concern for the ethical implication of tax spending or consideration of state and local budgets. For this reason, courts must provide the appropriate oversight and controls to ensure that tax dollars are spent according to the prudent needs of indigent clients. These protocols are sometimes overlooked in assigned counsel systems and contract defender systems since, in contrast to public defender offices, they are not pre-established.

In order to responsibly shift indigent defense representation to members of the private bar in any of these delivery models, indigent defense systems should develop or reform current Purchase-of-Service agreements. Purchase-of-Service agreements are those contracts between government agencies and third-party service providers that deliver a defined service. Successfully executing Purchase-of-Service agreements requires that systems implement a series of monitoring practices. This section discusses the types of processes that government administrators should follow in order to thoughtfully develop and responsibly manage their systems. Such processes will ensure that state dollars are spent responsibly and that the incentives built into payment plans are able to function properly. The discussion below is particularly relevant to systems that are implementing new types of delivery models or have not adequately monitored their systems in the past. Complying with proposed Standard 8 will require a thorough review and sometimes revision of these protocols in all systems.

There are three major steps in planning to purchase a service from a third-party provider. These steps are not exclusive to what is typically termed a “contract system”

because, in fact, every indigent defense system uses some form of contract as a contract is an agreement between two parties. Every system that pays a third-party for indigent defense services should utilize a written contract. First, local systems should conduct a needs assessment that explores questions such as:

- How many hours of indigent defense representation might a system require?
- What are the skills and experience that are required from indigent defense attorneys?
- How many attorneys are available within a jurisdiction to accept indigent defense appointments?
- What are the specific tasks that will be required of each attorney who accepts indigent defense appointments?
- How will attorney performance be evaluated?

Second, local systems should plan their budgets by asking questions such as:

- Will this be a single or multiple year agreement?
- How much money is available for purchase of service for each year of an agreement?
- Through what mechanism will attorneys be compensated?
- How much will be budgeted to functions such as attorney expense reimbursement, attorney training, experts, and investigators?
- What budget controls will be implemented to ensure that both local and state money is being spent responsibly? How can these metrics be captured to demonstrate fiscal success?

Third, local systems should plan their approach to bids, select service providers, and award contracts. In this phase, local stakeholders should determine necessary qualifications for candidates and then search for interested and capable parties. They should also design agreements that include issues such as compensation type and amount, invoicing procedures, performance measures, and attorney termination. Overall planning is a group process that should involve all relevant actors to the budget system as well as indigent defense.

Once contracts are in place, local systems will embark upon contract management and monitoring, the most difficult part of contracting with third-party service providers. Indigent defense systems are ultimately responsible for the quality of the service that contractors are providing. To this end, local systems should employ measures such as meeting with service providers to evaluate performance; random checks of relevant files and paperwork, including financial documentation; and monitoring a client complaint mechanism where defendants can lodge a complaint if

they believe there is a problem with their appointed attorney. In the remainder of this section, we discuss two facets of contract management that are particularly critical: invoicing and attorney review.

Invoicing

The submission and review of itemized bills are critical in any indigent defense system but especially those that utilize non-salary-based payment plans. Attorneys should be required to submit itemized bills that detail the services that they have provided. Although systems that use flat-fee, event based, proportional, or any kind of blended plans may not think hourly invoices are necessary, they are essential to oversight, budget predictions, contract renegotiations, and the prevention of abuse. Itemized bills ensure that attorneys track the hours spent in each case, which can help when allocating future hours dedicated to indigent defense. Also, itemized bills can be used by local systems as accountability mechanisms by which administrators can inventory expenditures and track inconsistencies. As part of billing procedures, local systems should review each bill and ask questions of attorneys if irregularities are perceived. To know whether something is an irregularity, local systems should set reasonable internal thresholds that indicate the expected number of hours or the expected amount of payment per case. Although all invoices are reviewed, those that surpass these reasonable thresholds receive heightened scrutiny and require attorneys to submit additional explanation. This process may be met with frustration from attorneys as it could slow down the compensation process, but it is not unusual for public expenditures to be scrutinized. Intense scrutiny of public expenditures is part of good fiduciary practices and will allow local systems to be confident in their spending.

Drawing again on proposed Standard 5, the involvement of judges must be eliminated from the approval and adjustment of payment to attorneys. Approval and adjustment of payment should be assigned to the finance department of a county or to an independent indigent defense administrator or committee, and the decision to supply payment should be based on the itemized bill submitted by an attorney. The itemized bill should detail and justify the time spent on a particular case. Once an itemized bill has been submitted, it should be reviewed in a systematic fashion and flagged for review by an additional person when concerns arise. Once approved, payment can move ahead.

Although the MIDC will not be reviewing invoices for every case in every system, the agency will help ensure that indigent clients are receiving quality representation in ways that are fiscally responsible. As such, the MIDC will provide statewide guidance as to best practices and also oversee local spending through the grants monitoring

process. The review of attorney invoices may play a role in this oversight where appropriate.

Review of Attorney Performance

Every court in the State of Michigan asserts that attorney performance is appraised annually, but this does not appear to be standard practice on the ground. The purpose of performance appraisal is to track attorney performance and measure it against a system's expectations. If a review reveals that attorneys are not meeting the indigent defense system's expectations, then the system should have a plan to boost the performance of the attorney. If an attorney cannot meet the minimum performance requirements, then that attorney should be removed from practicing in the given jurisdiction. Performance appraisal systems can be used to "raise the bar" of attorney effectiveness and will help ensure that taxpayer dollars are being spent efficiently and responsibly. The MIDC recommends that reviews be conducted by an independent indigent defense administrator or board, and MIDC proposed Standard 7 outlines the process for review.¹⁵

Conclusion

"[E]veryone deserves a committed attorney, not just those that can afford the high cost of representation."

For too long, attorneys across the state have fought for the rights of indigent clients at the expense of their own financial stability. Many are reaching their breaking point, finding that the rate of compensation is so low that they cannot even cover their overhead costs. One attorney explains, *"It is becoming harder and harder as the pay scale is less than what I would earn at a fast food restaurant. When you figure in parking, mileage and time for which I am not compensated I am losing money by accepting assignments."*

Designing and implementing compensation structures that adequately reward attorneys for their work is a critical step toward creating indigent defense systems that facilitate quality representation for clients. The MIDC's proposed Standard 8 aims to move systems closer to meeting constitutional standards for representation through an examination of incentive mechanisms and the implementation of local protocols to guide compensation practices.

Through thoughtfully designed compensation mechanisms, local systems can effectively incentivize attorneys to defend their clients without having to compromise

their own standards of practice or personal well-being. Administrators will be able to oversee their indigent defense systems with relative ease, minimize waste and abuse, and ensure the effective and efficient allocation of tax dollars. Most importantly, clients will receive prompt attention and competent representation consistent with the constitutional requirements of the Sixth Amendment.

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- ¹ *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis*, National Legal Aid & Defender Association (2008).
- ² *Ten Principles of a Public Defense Delivery System*, American Bar Association (2002); Michigan Rules of Professional Conduct: <http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf>.
- ³ *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, Sixth Amendment Center (2015).
- ⁴ MIDC proposed Standard 8: <http://michiganidc.gov/standards/#tab-id-8>
- ⁵ NLADA, *supra* n.1.
- ⁶ MIDC proposed Standard 5: <http://michiganidc.gov/standards/#tab-id-5>
- ⁷ Several public defender offices in Michigan compensate attorneys reasonably and consistently with other county employees. For example, unionized public defenders in Washtenaw County operate on the same pay grade as prosecutors in the county, starting out at \$54,023 and earning as much as \$104,008 (information retrieved from correspondence with the Chief Public Defender and <http://www.ewashtenaw.org/government/boc/open-book/salary-reports/2015-salary-report>). Other offices including ones in Berrien, Chippewa, Lenawee and Bay counties also offer reasonable salaries to their employees.
- ⁸ MIDC proposed Standard 6: <http://michiganidc.gov/standards/#tab-id-6>
- ⁹ For line defenders, the MIDC recommends a salary range of \$54,516.80 - \$102,606.00. For Directors and Deputy Directors, the MIDC recommends a salary range of \$80,024.00 - \$116,521.60.
- ¹⁰ Sixth Amendment Center, *supra* n.3.
- ¹¹ ABA, *supra* n.2.
- ¹² See the Michigan Civil Service Compensation plan: http://www.michigan.gov/documents/mdcs/SecAReport_1_535124_7.pdf
- ¹³ We also note that the recommended rates follow inflation rates from the past few decades; anecdotally we know that in the early 1980s, attorneys in many counties were paid approximately \$40 per hour. With inflation, these rates should have grown to between \$120 and \$130 per hour in 2018 according to the Bureau of Labor Statistics (https://www.bls.gov/data/inflation_calculator.htm).
- ¹⁴ *Position Paper on Attorney Fees After the Passage of the MIDC Act*, Michigan Indigent Defense Commission (2016).
- ¹⁵ MIDC proposed Standard 7: <http://michiganidc.gov/standards/#tab-id-7>