

MUSKEGON COUNTY

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Michigan Indigent Defense Commission (MIDC)
Third Floor, 200 N. Washington Square
Lansing, MI 48933
comments@michiganidc.gov

Re: Public comment on proposed Standards 5 thru 8

THANK YOU for this opportunity to comment on your proposed standards for indigent criminal defense services, four through eight (Standards). I know of no other organization within the County of Muskegon (Muskegon) that will be submitting comments at this time.

Standard Five: Independence from the Judiciary

When announced, I took the liberty to circulate this specific standard by email to every jurist in Muskegon. While they may still wish to submit their own views in their own words, I have received only one response directly. Judge William Marietti, Chief Judge of the 14th Circuit Court wrote back and said, "That's what I've been advocating since the beginning." I take his position as 100% support of this Standard.

The Director of Muskegon County Public Defenders (Director) shares in this full support with a bit of elaboration. Muskegon has a public defenders office whose director is chosen by the elected Muskegon County Commissioners (Commissioners) and he or she serves at their will. The Commissioners exercise exclusive control of the processes by which they make their selection and if necessary, termination of the Director. During the previous selection period, the Commissioners held interviews conducted by a panel that included sitting judges of Muskegon. The judges participated in the questioning, discussions and voting on recommendations to the Commissioners. As there are no other checks and balances on the directorship, and as the judges are amongst the most knowledgeable persons available for this process, it is this director's opinion that selection and removal of the Director should remain at the discretion of the Commissioners.

Standard Six: Indigent Defense Workloads

We welcome the establishment of workloads for attorneys that allow us to practice

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effectively. We do not have a better method to determine appropriate workloads than that suggested in this Standard. We do, however, have reservations to express.

First, the choice of not counting traffic offenses in a public defender's workload - whether a choice that was administrative or statutory - introduces an inaccuracy into your results. All jurisdictions that I am aware of appoint their public defenders to handle driving while license suspended cases, leaving the scene of an automobile accident cases and driving while under the influence of intoxicants cases¹. The appointment statute says "misdemeanor" and does not discriminate based upon whether or not the crime occurs in an automobile. I expect that counties where the public defender is appointed today for these offenses will still appoint public defenders for them after the passage of this Standard. Public defenders will still have to do the work. To suggest that we are attempting to establish a system that limits the work public defenders must do and then to deliberately ignore some of the work we know they are doing introduces error into the process.

Since driving crimes are not counted, does that mean public defenders will not be compensated from the State of Michigan (Michigan)? In other words, if a person is charged with retail fraud, will the lawyer who represents him or her be paid a different, presumably higher rate, than the lawyer who represents a person who is accused of drunk driving (for which the penalties are, in my experience, substantially higher)?

Of greater concern is how we will be allowed to reach numeric goals once they are established.

We are an organization of thirteen lawyers. To meet the staffing levels described in this initial offering, I expect we would have to increase our attorney staff by eight to twelve lawyers². That would create two problems. First, is quality. Our standards are very high here and it will be our intention to keep quality even at the expense of support from Michigan. That means we may not be able to make strict numerical targets. We are hoping for a process whereby if we can certify efforts to attract and retain quality attorneys but are not successful in meeting numerical targets, we will not be found out of compliance with this standard.

The second problem is akin to the first. We have found, through difficult experience, that the chemistry of the work force matters. Having staff that buys into the established culture is important. For that reason, we would be requesting the opportunity to phase in our employment of additional attorneys and staff. We simply could not handle the addition of twelve attorneys simultaneously. We do not have the administrative infrastructure for that many people in place. Many of our new hires will be coming to us with little experience and we cannot train such a

¹ I am assuming that when these "driving" offenses are felonies, they are to be counted as felonies and not treated as driving offenses.

² There would also have to be a commensurate increase in staffing support.

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large group with existing staff.

Therefore, should this Standard be approved, our compliance plan would phase-in the growth over the course of two or three years, depending on how many persons will be joining us. To comply with this Standard, we plan to hire six attorneys a year with the expectation that, as has been our history, two attorneys will leave us via attrition. In other words, we would add four lawyers, net, plus the additional staff necessary each year until we reach targets. We would hope that MIDC would consider such options.

Finally, we are hoping that MIDC, once it establishes its numerical workloads, will allow public defenders to innovate. *The American Bar Association (ABA), Formal Opinion 06-441 of May 13, 2006, page 4*, recites factors relevant to determine appropriate workloads for lawyers and one of which is, "...the availability of support services..." This language is directly quoted in the *Missouri State Public Defender Commission Caseload Crisis Protocol on page 2*. The point is this, we employ student interns here. Our interns are law school students, social work students and other undergraduates, mostly with an interest in law. We are also seeking recent law school graduates who are studying for a bar examination, awaiting results or looking for experience.

Beyond our interns we have a synergy created by having a group of criminal law lawyers all in one building working with one-another. It is not just that we can cover for one-another which means we can take vacation time, training time, parental leaves, etc., it means that we are a cauldron of ideas and experiences. We talk about cases, exchange ideas, push the envelope. We have a dedicated research attorney, a luxury and joy unknown to those who are in private practice. The bottom line is we do more with less already. While we welcome having more resources, we do not assume that the fiscal and political mood will always support this philosophy. If we find a cheaper, more efficient or more effective path to the goals of this Standard, we hope not to fall out of compliance because of it.

Standard Seven: Qualifications and Review

We pride ourselves in reaching Standards before they are enacted and this one is no exception. We expect to have all our attorneys (who have not reached the top level) to qualify for at least one level higher by the time the Standard is enacted than where they are presently.

We would request that MIDC promulgate directions as to how we can qualify attorneys who are not full-time criminal defense attorneys but who have equivalent experience and ability to demonstrate similar skills. This is crucial for us as we have a co-equal family division that we rely on for support and are fully capable of practicing criminal law.

Standard Eight: Economic Disincentives or Incentives The attorneys in this office are

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ecstatic about the possibility of receiving a living wage. We are curious as to why compensation is tethered to the Michigan Attorney General's Office (AG) as opposed to the local prosecutor. After all, our benefit packages and the AG's are likely different so compensation will not be equivalent, but that is more a question than quibble. The overall reaction is positive.

Our only source of real concern with this Standard is,

"D. Conflict Counsel. When any conflict of interest is identified by a public defender office or by assigned counsel, the case should be returned for reassignment to the designating authority."

We would ask you to add the word "irreconcilable" to that language so that it requires the following:

"D. Conflict Counsel. When any irreconcilable conflict of interest is identified by a public defender office or by assigned counsel, the case should be returned for reassignment to the designating authority."

As you are aware, conflict of interest can be waived by adult parties. If we are doing our jobs right, many of our clients will see a greater value with staying with us than departing. They ought to have that option. They should not have to accept lesser care over a conflict they do not care about.

Secondly, ethical shields (formerly, Chinese Walls) are still good practice in Michigan. In this office, where we have a family division and a criminal division, conflicts are not uncommon. We have successfully deployed ethical shields that surpass the requirements of state law and precedent and delivered representation to fully informed clients.

Anecdotally, we have just completed *People of the State of Michigan vs. Jeffrey Willis*. A serial murder, rape, kidnaping case wherein some might argue we had a conflict. The nature of the "conflict" is unimportant to this point, which is the greater justice was done by keeping the case and putting the ethical shield in place. This office was able to assign six attorneys and twelve or thirteen interns to that case. There is no other office or group of attorneys who could have devoted such resources to one defendant. Because we were able to do so, Mr. Willis got two fair trials and the former client with whom the conflict existed, was not injured by our representation. At the rates of compensation the Standards are now advocating, it would have cost Muskegon \$250,000 to conflict these cases out and Mr. Willis would have received lessor care. At market rates, we assume three times the cost.

If a conflict is 1) reconcilable, 2) does not impact the interests of the client, 3) waived with the full knowledge and agreement of the current client and with ethical shielding for another affected (former) client, and 4) may offer the client superior representation, the public defender

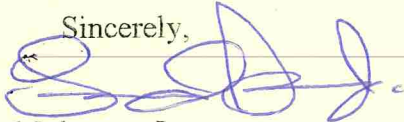
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ought not to be required to quit the case.

HAVING NOW said my piece, I congratulate MIDC for all its work in crafting these and past Standards. Thank you for considering my concerns.

Sincerely,



Fred Johnson, Jr.
Director, Muskegon Office of the Public Defender