

Proposed Standard for Determining Indigency and Contribution – submit comments to LARA-MIDC-info@michigan.gov by 5 p.m. September 14, 2020

The MIDC Act requires the MIDC to “promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent.” MCL 780.991(3)(e). It also directs the MIDC to “promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to [their] defense.” MCL 780.991(3)(f). The United States Supreme Court has long recognized that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v Illinois*, 351 US 12, 19; 76 S Ct 585; 100 L Ed 891 (1956).

Accordingly, the MIDC proposes this minimum standard for making indigency determinations for those local funding units that elect to assume the responsibility of appointing counsel and for setting the amount that a partially indigent defendant must contribute to their defense.

Definitions

As used in this Standard:

“Appointing authority” means the individual or office selected by the local funding unit that determines indigency and approves requests for counsel and/or requests for experts and investigators.

“Available assets” means funds and property in which defendant has an ownership interest and ability to liquidate that are not exempt assets.

“Basic living expenses” means costs related to those needs which must be met in order to avoid serious harm in the near future. These costs include, but are not limited to, housing, food, clothing, childcare, child support, utilities, medical insurance, other necessary medical expenses, and transportation (fares, car payments, car insurance, gasoline).

“Current monthly expenses” means those costs that defendant pays on a regular monthly basis. These costs include, but are not limited to, basic living expenses, court obligations, minimum credit card payments, loan payments, tuition payments, phone, internet, and cable. If an expense is not assessed in monthly installments but should be treated as a current monthly expense because it is a regularly occurring or long-term obligation, the expense should be converted to monthly installments.

“Exempt assets” means funds and property that defendant would be able to protect from levy and sale under execution under MCL 600.6023 if they were a judgment debtor.

“Gross Income” means funds or compensation periodically received from any source during a 52-week period. Gross income includes, but is not limited to, wages, pensions, stock dividends, rents, insurance benefits, trust income, annuity payments, and public assistance.

“Indigent” means an inability to obtain competent legal representation on one’s own without substantial financial hardship to one’s self or one’s dependents.

“Local funding unit” means the governmental entity or entities listed as a grantee in the grant contract with the MIDC.

“Net income” means gross income minus those deductions required by law or as a condition of employment. These deductions include, but are not limited to, taxes, union dues, and funds withheld pursuant to a garnishment or support order.

“Partially indigent” means an inability to afford the complete cost of legal representation but an ability to contribute a monetary amount toward one’s representation.

“Prosecuting authority” means any governmental agent or entity pursuing charges against defendant.

“Public assistance” means governmental benefits or subsidies like food assistance, temporary assistance for needy families, Medicaid, disability insurance, or public housing.

“Seasonal income” means income that is earned from regularly reoccurring employment that lasts for 26 weeks or less in any 52-week period.

“Substantial financial hardship” means an inability to meet the basic living expenses of one’s self or one’s dependents.

Indigency Determination

(a) A defendant is rebuttably presumed to be indigent if defendant receives personal public assistance, earns a net income less than 140% of the federal poverty guidelines, is currently serving a sentence in a correctional institution, is less than 18 years of age, and/or is receiving residential treatment in a mental health or substance abuse facility. See MCL 780.991(3)(b).

(b) A defendant who cannot, without substantial financial hardship to themselves or to their dependents, obtain competent, qualified legal representation on their own also qualifies for appointed counsel. MCL 780.991(3)(b).

(c) Factors to be considered when determining eligibility for appointed counsel under subparagraph (b) include net income, property owned by defendant or in which they have an economic interest to the extent that it is an available asset, basic living expenses, other current monthly expenses, outstanding obligations, the number and ages of defendant’s dependents, employment and job training history, and their level of education. MCL 780.991(3)(a). In addition, the seriousness of the charges faced by defendant, whether defendant has other pending cases, whether defendant is contributing to the support and maintenance of someone other than a dependent, and local private counsel rates should also be considered. This subsection does not provide an exhaustive list of factors for the appointing authority to consider.

(d) A defendant who cannot obtain competent counsel on their own without substantial financial hardship, but who has the current or reasonably foreseeable ability to pay some defense costs, is partially indigent.

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(e) A defendant must be screened for indigency as soon as reasonably possible.

(f) Defendants who have retained counsel or who are representing themselves can request to be screened for indigency in order to qualify for expert and investigator funding.

Household and Marital Income

The appointing authority will not presume that defendant can use household income, including income of a spouse, and joint marital assets to pay defense costs unless it has information that defendant's household income and/or joint marital assets should be considered.

Joint Bank Accounts

The appointing authority will presume that defendant owns 50% of the funds in a joint bank account. Defendant must inform the appointing authority if they own more than 50% of the funds in a joint bank account. Conversely, defendant can rebut the presumption of 50% ownership by submitting a sworn statement explaining why the presumption should not apply.

Seasonal Income

If defendant earns a seasonal income, the appointing authority should consider how defendant's expected annual income compares to the federal poverty level instead of comparing defendant's current monthly income to the federal poverty level. For example, the federal poverty level for Defendant A's household is \$4,000 per month. Defendant A earns his annual income over three summer months when Defendant A makes \$9,000 to \$10,000 per month. Even though Defendant A's current monthly income is double the federal poverty level, Defendant A should be treated as someone who only makes about 75% of the federal poverty level.

Self-Employment Income

If defendant is self-employed, the appointing authority should consider defendant's adjusted gross income. Adjusted gross income is determined by deducting business expenses and any expenses required by law from gross income. An expense is a "business expense" if it is ordinary and necessary. Expenses are ordinary if they are common and accepted in defendant's trade or business. Expenses are necessary if they are helpful and appropriate for defendant's trade or business.

Educational Grants and Scholarships

A grant or scholarship, or any part thereof, is not income unless it is provided to defendant on a periodic basis and it exceeds the tuition and boarding costs paid to an

educational provider. A grant or scholarship is an available asset to the extent that it exceeds defendant's tuition and boarding costs and is allowed to be used for non-tuition and boarding expenses by the grantor. For example, Defendant A receives a number of grants and scholarships at the beginning of the school year. Defendant A has no boarding costs and has \$1,000 in scholarship funds left over after paying tuition. Although the \$1,000 is not income, it is an available asset. Student loan proceeds, however, are not available assets.

Liquidation of Assets

The appointing authority can only consider defendant's income and available assets when deciding whether defendant has sufficient means to retain counsel. Under no circumstances can the appointing authority demand that defendant liquidate or mortgage an exempt asset.

Debts as Disqualifiers

The appointing authority cannot reject a request for counsel because defendant has a regularly recurring expense that the appointing authority deems excessive unless the appointing authority can show that the expense is unnecessary, can be easily eliminated, and the elimination of the expense would result in defendant having sufficient income to retain counsel. For example, if Defendant A has a \$150 monthly cellphone bill, Defendant B has a \$600 monthly car payment, and Defendant C has a \$1,700 mortgage, they might be eligible for appointed counsel.

Change in Financial Condition

The effect of a change in defendant's financial condition during the course of the case depends on whether the change is positive or negative for defendant.

(a) If defendant's financial condition declines during the case, defendant can request to be rescreened to see if counsel should be appointed or if the contribution amount should be reduced or eliminated. This rescreening should occur as soon as reasonably possible.

(b) If defendant's financial condition significantly improves during the course of the case, a redetermination of defendant's status as indigent/partially indigent should be made and a redetermination of defendant's contribution payments should occur. If defendant has sufficient income and/or available assets, defendant should make contribution payments equaling 100% of the costs of representation. There should never be a change of attorney by the court or appointing authority based solely on defendant's new ability to retain counsel.

(c) Defendant has an ongoing duty during the pendency of the case to report significant improvements in their financial condition to the appointing authority. The obligation to

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report a change of financial condition belongs exclusively to defendant, not their attorney.

(d) The prosecuting authority lacks standing to challenge the continuation of appointed counsel due to defendant's improved financial condition.

Appointing Authority

Except as otherwise provided, a local funding unit can designate the individual(s) or entity of its choice to review applications for the appointment of counsel provided that they agree to comply with all applicable MIDC Standards and policies and they agree to take adequate measures to safeguard the sensitive nature of the information disclosed during the application process. Only a licensed attorney, however, can review requests for experts and investigators.

Managed assigned counsel coordinators and public defender offices can serve as appointing authorities. Anyone currently employed by a court funded by the local funding unit cannot serve as an appointing authority or be employed by the appointing authority to assist with their screening responsibilities.

Cost of Indigency Assessment

There is no cost for requesting an assessment for indigency. No screening costs can be passed to defendant.

Contribution

This Standard does not require local funding units to seek contribution. But if a local funding unit elects to pursue contribution in a specific case, this Standard controls, among other things, when and how much contribution can be sought.

The appointing authority cannot require an indigent defendant to contribute to the cost of their defense.

An appointing authority cannot require a partially indigent defendant to contribute to the cost of their defense if doing so would cause defendant a substantial financial hardship.

In setting the amount of contribution, the appointing authority should first subtract defendant's current monthly expenses from defendant's monthly net income. If the result is negative, the appointing authority cannot require contribution. If the result is positive, the appointing authority shall direct defendant to remit no more than 25% of the result each month. For example, Defendant A's net monthly income is \$2,000. Defendant A's

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current monthly expenses are \$1,600. Defendant A should contribute \$100 per month towards Defendant A's defense costs.

The appointing authority may adjust the amount and/or timing of contribution payments as necessary to avoid causing defendant a substantial financial hardship. Under no circumstances will defendant be required to contribute more than the actual cost of defense. If defendant fails to pay any ordered contribution, the local funding unit may seek a wage assignment.

Defendant's obligation to make contribution payments ends at sentencing or when defendant's defense costs are paid—whichever is earlier. If at sentencing the sum of defendant's contribution payments are less than the cost of defendant's defense, the appointing authority can request a reimbursement order on or after defendant's sentencing. If defendant contributed more than the cost of their defense, if all charges against defendant are dismissed, or if defendant is found not guilty of all charges against them, the amount of defendant's contribution payments must be refunded to defendant. If defendant becomes indigent during the proceedings, defendant's contribution payments must be applied towards the costs of defendant's defense before they can be used to pay any assessment.

Judicial Review

(a) If defendant disagrees with the appointing authority's decision to deny defendant's request for appointed counsel, an expert, or an investigator or its decision concerning contribution, defendant can request a review of the determination by the judge assigned to defendant's case. This right of review also applies to Defendant's second or subsequent request for counsel and second or subsequent request for review of a contribution determination.

(b) Defendant can request a review by making an oral motion while on the record or by filing a Request for Review of Appointing Authority Determination form or other document seeking review with the court. The appointing authority shall provide defendant with a copy of the Request for Review of Appointing Authority Determination form with its denial of the request for appointed counsel.

(c) The prosecuting authority lacks standing to seek judicial review of the appointing authority's decision to appoint or deny counsel or the appointing authority's decision concerning contribution.

(d) Defense counsel lacks standing to seek judicial review of the appointing authority's decision to appoint counsel.

Determination of Reimbursement

The Michigan Supreme Court has determined that the U.S. Constitution does not require that defendant's foreseeable ability to pay be considered before a defendant can be directed to pay reimbursement for appointed counsel. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009). But "[t]he public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Adkins v E I DuPont de Nemours & Co*, 335 US 331, 339; 69 S Ct 85; 93 L Ed 43 (1948).

Local funding units should only seek reimbursement from defendants who have a meaningful ability to pay it. Thus, if a defendant is indigent, and is expected to remain indigent in the near future, the local funding unit should not seek any reimbursement for defense costs.

The amount of requested reimbursement cannot exceed the actual cost. Local systems with a public defender office, however, can use an average hourly cost that encompasses employee salaries, fringe benefits, and office overhead when determining attorney's fees. This average hourly cost cannot exceed the hourly rate paid to attorneys on the local system's roster of conflict attorneys for the same type of case.

The amount of a reimbursement request should not cause defendant substantial financial hardship. In deciding the amount of reimbursement to request, the local funding unit should consider defendant's current income, available assets, current monthly expenses, and dependents, as well as any reasonably anticipated changes to defendant's economic situation in the near future.

Many defendants will be unable to afford to repay their cost of defense in a lump sum payment. When that is the case, the local funding unit should suggest a payment plan based on what defendant could reasonably afford to pay towards defense costs for up to two years if defendant were convicted of a misdemeanor or up to five years if defendant were convicted of a felony. During the repayment period, the amount and/or timing of installment payments should be adjusted as necessary to avoid causing defendant a substantial financial hardship. If defendant has good cause for failing to pay the full amount of the requested defense costs by the end of the repayment period, the local funding unit should ask the court to waive the balance. Similarly, while it may be appropriate to have the probation department assist the court in collecting defense costs, it is inappropriate to make defendant's failure to pay a probation violation absent a determination that the defendant is able to comply with the order without manifest

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hardship and that the defendant has not made a good-faith effort to comply with the order. See MCR 6.425(E)(3)(a).

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