Minimum Standards for Indigent Criminal Defense Services

November 2020

Standards 1, 2, 3, and 4 were approved by the Department of Licensing and Regulatory Affairs (LARA) on May 22, 2017. These standards cover training and education of counsel, the initial client interview, use of investigation and experts, and counsel at first appearance and other critical stages.

Standard 5, which requires independence from the judiciary, was approved by LARA on October 29, 2020.

This packet contains the complete text of the approved standards as well as standards pending approval by LARA which were submitted in September 2018 (amended June 2019). Those standards address defender workload limitations, qualification and review of attorneys accepting assignments in adult criminal cases, and attorney compensation.

This packet also contains a standard for determining indigency and contribution which was approved by the MIDC in October 2020 and is pending submission to LARA.

Information about these standards, plans for compliance, and funding can be found on our website at www.michiganidc.gov.

MICHIGAN INDIGENT
DEFENSE COMMISSION

Standard 1 Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

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Standard 2 Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." See *United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's Ten Principles of a Public Defense Delivery System provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting. If confidential videoconference facilities are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pretrial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

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D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pretrial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

8. Systems without adequate settings for confidential visits for either in-custody or out-ofcustody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

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Standard 3 Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel…" MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4 Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) …counsel continuously represents and

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personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

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Standard 5 - Independence from the Judiciary

The MIDC Act requires the agency to establish minimum standards, rules, and procedures to adhere to the following: "The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services." MCL 780.991 (1)(a).

The United States Supreme Court addressed the issue of independence in *Polk v Dodson*, 454 US 312, 321-322; 102 S Ct 445, 451; 70 L Ed 2d 509 (1981):

> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. . . *Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages*. (Emphasis added.)

The MIDC proposes a minimum standard to ensure that indigent criminal defense services are independent of the judiciary:

> A. The indigent criminal defense system ("the system") should be designed to guarantee the integrity of the relationship between lawyer and client. The system and the lawyers serving under it should be free from political and undue budgetary influence. Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution. The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary.
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> B. The court's role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver). Judges are permitted and encouraged to contribute information and advice concerning the delivery of indigent criminal defense services, including their opinions regarding the competence and performance of attorneys providing such services.

Staff Comment:

Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge's input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge.

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Standard 6 - Indigent Defense Workloads

The MIDC Act provides that "[d]efense counsel's workload is controlled to permit effective representation." MCL 780.991(2)(b). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Fifth Principle of The American Bar Association's Ten Principles of a Public Defense Delivery System provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "[d]efense counsel's workload is controlled to permit the rendering of quality representation."

The MIDC proposes a minimum standard for indigent defense workloads:

The caseload of indigent defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.[1]

These workloads will be determined over time through special Michigan specific weighted caseload studies.[2] Until the completion of such studies, defender organizations, county offices, public defenders, assigned counsel, and contract attorneys should not exceed the caseload levels adopted by the American Council of Chief Defenders – 150 felonies or 400 non-traffic misdemeanors[3] per attorney per year.[4] If an attorney is carrying a mixed caseload which includes cases from felonies and misdemeanors, or non-criminal cases, these standards should be applied proportionally.[5]

These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.

Staff comments:

1. *The MIDC is mindful of caseload pressures on the prosecution and fully supports proper funding for prosecutors to have reasonable caseloads.*
2. *The MIDC is aware that the problem of excessive caseloads is one that needs to be resolved in tandem with compensation reform, so that attorneys do not need to take on too many indigent defense assignments to earn a living. The MIDC is concurrently proposing a standard on economic disincentives or incentives for representing indigent clients.*
3. *The MIDC does not believe that caseload pressures should ever create a situation where indigent clients facing criminal charges do not receive the appointment of counsel.*
4. *Compliance plans should include a means to account for and audit caseload calculations.*

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[1] Language parallels Supreme Court of Washington, *In the Matter of the adoption of new standards for indigent defense and certification of compliance,* Standard 3.2, June 15, 2012.

[2] See e.g. *Guidelines for Indigent Defense Caseloads*, Texas Indigent Defense Commission, January 2015; *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards*, American Bar Association, June 2014. The MIDC has issued a Request for Proposals for a Michigan study.

[3] Non-traffic misdemeanors include offenses relating to operating a motor vehicle while intoxicated or visibly impaired. MCL 257.625.

[4] *American Council of Chief Defenders Statement on Caseloads and Workloads*, Resolution, August 24, 2007. "Per year" refers to any rolling twelve-month period, not a calendar year.

[5] *Id.* An example of proportional application might be 75 felonies and 200 non-traffic misdemeanors in a caseload.

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Standard 7 - Qualification and Review

The MIDC Act calls for a standard establishing that "Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed." MCL 780.991(2)(c). Further, the Act requires that "Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards." MCL 780.991(2)(f). The MIDC's conditionally approved Standard 1 sets forth the requirements for the Education and Training of assigned counsel, and should be considered a prerequisite to, and means to achieve, the standard for qualification and review of criminal defense attorneys appointed to represent indigent accused defendants. The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). The right to effective assistance of counsel applies equally whether counsel was appointed or retained. *Cuyler v Sullivan*, 446 US 335, 344–45; 100 S Ct 1708, 1716; 64 L Ed 2d 333 (1980).

The MIDC proposes a minimum standard for qualification and review:

A. **Basic Requirements.** In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications (hereafter "basic requirements"):
    1. Satisfy the minimum requirements for practicing law in Michigan as determined by the Michigan Supreme Court and the State Bar of Michigan; and
    2. Comply with the requirements of MIDC Standard 1, relating to the Training and Education of Defense Counsel.

B. **Qualifications.** Eligibility for particular case assignments shall be based on counsel's ability, training and experience. Attorneys shall meet the following case-type qualifications:
    1. Misdemeanor Cases
        a. Satisfaction of all *Basic Requirements*; and
        b. Serve as co-counsel or second chair in a prior trial (misdemeanor, felony, bench or jury); or
        c. equivalent experience and ability to demonstrate similar skills.
    2. Low-severity Felony Cases
        a. Satisfaction of all *Basic Requirements*; and
            i. Has practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice); and
            ii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in <u>two</u> criminal cases that have reached a verdict, one of which having been submitted to a jury; or
            iii. Have equivalent experience and ability to demonstrate similar skills.
    3. High-severity Felony Cases
        a. Satisfaction of all *Basic Requirements*; and
            i. Has practiced criminal law for two full years (either as a prosecutor, public defender, or in private criminal defense practice); and
            ii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in <u>four</u> criminal cases that have been submitted to a jury; or

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iii. Has a significant record of consistently high quality criminal trial court representation and the ability to handle a high-severity felony case.

4. Life Offense Cases
   a. Satisfaction of all *Basic Requirements*; and
      i. Has practiced criminal law for five full years (either as a prosecutor, public defender, or in private criminal defense practice); and
      ii. Has prior experience as lead counsel in no fewer than seven felony jury trials that have been submitted to a jury; or
      iii. Has a significant record of consistently high quality criminal trial court representation and the ability to handle a life offense case.

C. **Review.** The quality of the representation provided by indigent defense providers must be monitored and regularly assessed. Productivity is a component of the review process. Review is a process to evaluate the quality of the representation after an attorney has established the minimum requirements for eligibility. For attorneys seeking qualification under sections B(1)(c) or B(2)(a)(iii), the review process can be used for that purpose. In some cases, the review will give notice to an attorney whose performance can be improved. In all cases, the evaluation of attorneys must be made by peers in the criminal defense community, allowing for input from other stakeholders in the criminal justice system including judges, prosecutors and clients.

Staff Comments:

1. *The Minimum Standard for Qualification and Review applies to all attorneys accepting assignments to represent defendants charged in adult criminal cases, including attorneys employed by a public defender office.*
2. *In public defender offices, equivalent experience in misdemeanor and low severity felony cases can include training programs or supervised assignments.*
3. *Misdemeanors, low-severity felonies and high-severity felonies are defined in the Michigan Legislative Sentencing Guidelines. A "life offense" for purposes of this Minimum Standard includes any case where the offense charged or enhancement sought subjects the accused defendant in a criminal case to life in prison.*
4. *The MIDC Act focuses on qualifications that relate to counsel's ability, training and experience. Other non-merit based qualifications that relate to counsel's membership in a bar association or maintaining a local business address shall not be given undue weight.*
5. *The MIDC discourages imposing a geographic limitation on counsel's practice area, so long as counsel can meet with a client on an as-needed basis without hardship to the client and can appear in court when required.*
6. *The appointing authority should maintain a list of qualified counsel, but has the discretion to reach outside of the list of locally qualified attorneys when required in order to appoint counsel with the ability, training and experience to match the nature and complexity of the case to be assigned.*

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Standard 8 - Attorney Compensation (Economic Disincentives or Incentives)

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. The MIDC Act calls for a minimum standard that provides: "Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided." MCL 780.991(2)(b). Fair compensation for assigned counsel may optimally be achieved through a public defender office, and the MIDC recommends an indigent criminal defender office be established where assignment levels demonstrate need, together with the active participation of a robust private bar. MCL 780.991(1)(b). In the absence of, or in combination with a public defender office, counsel should be assigned through a rotating list and be reasonably compensated. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized. This standard attempts to balance the rights of the defendant, defense attorneys, and funding units, recognizing the problems inherent in a system of compensation lacking market controls.

The MIDC proposes the following minimum standard regarding economic incentives and disincentives:

A. Rates of Payment for Salaried Public Defenders. Reasonable salaries and benefits and resources should be provided to indigent defense counsel. The rates paid by the Michigan Attorney General for Assistant Attorneys General, or other state offices serve as guidance for reasonable compensation.

B. Compensation and Expenses for Assigned Counsel. Assigned counsel should receive prompt compensation at a reasonable rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses. Assigned counsel should be compensated for all work necessary to provide quality legal representation. Activities outside of court appearances, such as directing an investigation, negotiating, or tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are equally important to quality representation.

Attorney hourly rates shall be at least $100 per hour for misdemeanors, $110 per hour for non-life offense felonies, and $120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees' salaries. Counsel must also be reimbursed for case-related expenses as specified in Section E.

To protect funding units, courts and attorneys alike, local systems should establish expected hourly thresholds for additional scrutiny. Assigned counsel should scrupulously track all hours spent preparing a case to include with invoice submission. All receipts or documentation for out-of-pocket and travel-related expenses actually incurred in the case qualifying for reimbursement should be preserved. Fee requests which exceed expected hourly thresholds should not be paid until an administrative review indicates that the charges were reasonably necessary.

Event based, capped hourly rates, and flat fee payment schemes are discouraged unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate. If utilized, these alternative schemes must be based on a compensation system that realistically assesses the cost of providing competent representation, including the costs of trial,

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investigation, expert assistance, and extraordinary expenses, and should take into consideration objective standards of representation consistent with those set forth in other minimum standards for indigent defense. They should also follow all expense reimbursement guidelines in Section E.

C. Contracting for Indigent Defense Services. The terms of any indigent defense contract should avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services. Contracts may only be utilized if:

(1) They are based on reliable caseload data, and in conjunction with a method, specified in the contract, for compensation to account for increases or decreases in caseload size;
(2) They are based on a compensation system that realistically assesses the cost of providing competent representation as described above in Section B;
(3) They provide for regular, periodic payments to the indigent defense organization or attorney;
(4) They include a mechanism to seek reimbursement for case-related expenses;
(5) They include a provision allowing for counsel to petition for additional compensation for the assignment of co-counsel in any case where the offense charged or enhancement sought subjects the indigent defendant to life in prison;
(6) They implement the MIDC required hourly rates; when hourly schemes are not utilized, local systems must demonstrate that compensation is at least equivalent to these rates.

D. Conflict Counsel. When any conflict of interest is identified by a public defender office or by assigned counsel, that case should be returned for reassignment to the designating authority. Payments to conflict counsel (fees or any other expenses incurred during the representation) shall not be deducted from the line item or contract negotiated with the primary providers (public defender office, house counsel, assignment system or through any agreement with private attorneys or law firms).

E. Reimbursements. Attorneys must be reimbursed for any reasonable out-of-pocket expenses they incur as a result of representation. Mileage should be reimbursed based on prevailing local norms and should not be less than State of Michigan standard published rates.

F. Payments. Vouchers submitted by assigned counsel and contract defenders should be reviewed by an administrator and/or her and his staff, who should be empowered to approve or disapprove fees or expenses. This is efficient, ensures the independence of counsel, and relieves judges of the burden of this administrative task. It also helps to equalize fees through a centralized fee-approval system. Vouchers should be approved in a timely manner unless there is cause to believe the amount claimed is unwarranted. In lengthy cases, periodic billing and payment during the course of representation should be allowed.

Expenditure 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. The approval process should be supported by an efficient dispute resolution procedure.

Sources and Authority for Proposed Standard 8:
A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis, National Legal Aid & Defender Association (2008).

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U.S.C.A. Const. Amend. 6; Mich. Const. 1963 Art. 1, § 20.
ABA 10 Principles of a Public Defense Delivery System (Principle 8).
American Bar Association Criminal Justice Standards for Providing Defense Services, Standard 5-2.4.
Position Paper on Reasonable Fees After the Passage of the MIDC Act, Michigan Indigent Defense Commission (Summer 2016).
In re Atchison, No. 292281, 2012 WL 164437 (Mich. Ct. App. Jan. 19, 2012).

Staff Comments:

1. *Attorneys should be reimbursed for expenses for investigators, expert witnesses, transcripts, and any reasonable out-of-pocket expenses incurred in the course of representation.*
2. *For hourly payments, local systems should establish protocol through which indigent defense administrators oversee the submission, review and approval of invoices for both assigned counsel and contract counsel. Attorneys should be directed to submit explanations for any invoices in which their hours exceed the expected maximum hours. After attorneys submit itemized bills, the administrator and/or staff should review and determine whether the case falls into the category of minimal scrutiny, meaning that it falls within the expected number of allotted hours, or the category of heightened scrutiny for exceeding an expected hourly threshold, meaning the administrator needs to further investigate the invoice. Bills should not be automatically approved or denied if they fall too far above or below the expected threshold, but rather the attorneys' explanations should be reviewed, and if the administrator does not find the explanation sufficient, the administrator should invite further explanation. Upon receiving additional details, the administrator then makes a final decision. All local systems should have policies in place that outline voucher review procedures, including the right for attorneys to appeal decisions and the right for administrators to remove attorneys from panel lists or terminate contracts for ongoing submissions that exceed the threshold. Other appropriate remedies or punishments for abusive billing practices should be developed by local systems.*
3. *Due to the potential to disincentivize quality representation, event based, capped hourly rates, and flat fee payment schemes will be subjected to increased monitoring and auditing as a condition of receiving MIDC funds.*
4. *The MIDC will collect data on event based, capped hourly rates, and flat fee payment schemes for the first year after implementation of this standard and revise the standard if these schemes are disincentivizing quality representation.*

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Standard for Determining Indigency and Contribution

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). The MIDC is also mindful that a system of screening for indigency should not create "cumbersome procedural obstacles" for a defendant. *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984).

Accordingly, the MIDC proposed a minimum standard for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense. The version approved by the Commission is as follows:

<u>Definitions</u>

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).

"Contribution" means "an ongoing [payment] obligation [for one's defense costs] during the term of the appointment." *People v Jose*, 318 Mich App 290, 298; 896 NW2d 491 (2016).

"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 or funds and property that defendant would be able to exempt under 11 USC 522 if they were a debtor in a bankruptcy case. Defendant must choose either the state or federal exemptions.

"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.

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"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.
"Reimbursement" means a repayment "obligation arising after the term of appointment has ended." *Jose*, 318 Mich App at 298.
"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 system must have a reasonable plan for screening for indigency which is consistent with this Standard. A plan that leaves screening decisions to the court can be acceptable.
(b) A defendant is rebuttably presumed to be indigent if defendant receives personal public assistance, earns a net income less than 200% 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).
(c) 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).
(d) Factors to be considered when determining eligibility for appointed counsel under subparagraph (c) 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.
(e) 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.
(f) A defendant must be screened for indigency as soon as reasonably possible, but a determination as to whether a defendant is partially indigent can be deferred until contribution or reimbursement is requested or ordered.
(g) 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

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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.

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(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 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.

Obligations of Appointing Authority
(a) When defendant provides information about their financial condition under oath or affirmation, the appointing authority has no obligation to independently verify the information or require supporting documentation from defendant. This Standard, however, does not prohibit the Appointing Authority from investigating defendant's financial situation or requiring defendant to provide supporting documentation.
(b) Information about defendant's financial situation is confidential and the Appointing Authority can only disclose this information with defendant's consent, upon court order, or upon request from the MIDC or its designee for purposes of auditing, data collection, or investigation.
(c) This Standard does not impose an obligation on the Appointing Authority, assigned counsel, or the funding unit to recover defense costs from defendant.

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 current

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

The amount of contribution payments cannot be based on whether Defendant could convert an available asset into cash. Nonexempt funds belonging to defendant, however, could be directed to be paid as a single lump sum payment that is no more than 25% of the total amount of the nonexempt funds. For example, Defendant A has $500 in nonexempt funds. Defendant A could be directed to make a single contribution payment totaling $125. Funds from Social Security and other means-tested benefits are always exempt from contribution when in the hands of the benefits recipient.

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).

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

Comments:

1. *When assessing the reasonableness of a proposed plan for indigency screening, the Commission will generally look at whether the plan ensures that each defendant's financial situation is properly considered and the cost of the screening plan. The Commission also acknowledges that a screening plan should not require screening of defendants for whom there is no possibility of incarceration upon conviction. See MCL 780.983(f)(i).*

2. *The MIDC Act provides that a rebuttable presumption of indigency arises when a defendant earns an income less than 140% of the federal poverty guideline. MCL 780.991(3)(b). Research and input from stakeholders, however, reveals that it is unlikely that a defendant earning an income less than 200% of the federal poverty guideline would be able to retain counsel without experiencing substantial financial hardship.*

3. *A public defender office or managed assigned counsel coordinator who is screening for indigency should be mindful of the rules concerning conflicts of interest.*

4. *This Standard should be liberally construed to favor the appointment of counsel and the granting of requests for expert and investigator fees. See People v Gillespie, 41 Mich App 748, 753; 201 NW2d 104 (1972) (ambiguities about defendant's ability to retain counsel should be resolved in defendant's favor).*

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