

## Frequently Asked Questions about Standard 5

***In an effort to assist systems with planning and implementation of MIDC Standard 5, which requires that public defense operate independently from the judiciary, the MIDC offers the following answers to frequently asked questions about compliance with the standard. The approved standard contains the requirements by the Commission and is the primary resource for planning. The standard should be referred to for full context of excerpted materials in this resource. Please see the MIDC's website at <https://michiganidc.gov/standards/> for more information.***

### **1. Who can appoint counsel?**

The local indigent defense funding unit must utilize a licensed attorney in good standing with the State Bar of Michigan to act as an appointing authority and oversee all duties surrounding the appointment of a criminal defense attorney. This includes duties such as case assignment, approval of attorney compensation, establishing and reviewing attorney qualifications, and approval of services necessary for providing effective assistance of defense counsel. The funding unit may authorize non-attorney staff to perform any of the above duties if done under the direction of the appointing authority. Standard 5.A.

The judiciary and employees reporting to the judiciary<sup>1</sup> shall not serve as an appointing authority nor manage or oversee the administration of the local indigent defense system. Standard 5.A. Similarly, the judiciary or employees reporting to the judiciary shall not be employed or contracted by an independent appointing attorney to assist with management or administration of the indigent defense system.

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<sup>1</sup> This includes all state and local judges, magistrates, retired judges who may still act as a visiting judge, court administrators, and any other employee of the court.

**2. Can the judiciary select the lawyers eligible to accept adult criminal defense assignments?**

No. Indigent criminal defenders “should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution.” Standard 5.A. Standard 5 explicitly prohibits the judiciary and all employees reporting to the judiciary from selecting the lawyers eligible to serve in the local indigent criminal defense system.

Standard 5 will require a significant change for those systems who rely upon the judiciary to select the attorneys eligible to accept criminal defense assignments. While the MIDC will not direct local systems on how to manage their attorney selection process, there are some best-practice examples that can help systems meet the minimum requirements of Standard 5. These include creating an attorney selection panel or board with local criminal justice stakeholders, crafting application procedures and policies for approving and selecting eligible defense counsel, employing a lead attorney or a Managed Assigned Counsel Administrator to oversee the eligibility process, or some combination of these best practices.

**3. May judges or judicial employees be members of the local attorney selection panel, board, or other hiring committee?**

Yes, but with conditions. “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.” Standard 5.B (emphasis included). Systems utilizing attorney selection panels, boards or some type of hiring committee for either individual attorneys or leadership roles, such as Chief Public Defenders or Managed Assigned Counsel Administrators, can still include

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representatives from the judiciary, but they must be only advisory roles and shall not be voting members.

**4. Are there any instances where a judge might be allowed to appoint counsel to an indigent criminal case?**

No. However, in limited circumstances judges may provide input on the funding unit's appointment of an attorney. As stated in the Staff Comment to Standard 5:

“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.” (Emphasis added).

Systems should confer with their Regional Manager for any questions about allowable exceptions.

The judiciary is also permitted to inform a defendant of the name and contact information of their appointed attorney if the system provides access to the assigned attorney roster. Similarly, in systems with public defender offices or contracted indigent defense attorneys, the judiciary may refer a defendant to the appropriate indigent defender office or firm for appointment. Standard 5.B.

**5. If an attorney-client conflict occurs, who can remove an attorney from a case or make a reappointment of counsel?**

A motion to substitute counsel or withdraw from a case must be captured on the official court record as part of the case. These are legal motions; either the attorney of record or the client should bring these motions to be ruled upon by the court. However, once a ruling on the

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substitution or withdraw is made, the reappointment of counsel shall be done by the funding unit's appointing attorney.

## **6. What are some best-practices for making attorney assignments?**

When assigning an attorney to a case, it is important to maintain a consistent appointing protocol to reduce any selection bias. For example, local systems with rotating assigned counsel rosters should appoint the next available attorney on the list as the substitution. Similarly, public defender offices should select the next qualified attorney on their employee list. In cases that require unique skill sets, an attorney with specialized knowledge may be selected outside of the rotation; however this should be done sparingly.

In systems where the directing attorney of the county public defender office, non-profit law office, or other contracted law firm is the default assigned attorney of record, attorneys employed within those offices can be reassigned to a case without a court ruling. However, it is best practice to capture any such change on the official record by filing an appearance with the court.

## **7. If an attorney disagrees with a funding unit's decision of selection, appointment, or compensation can they appeal to the court?**

No. "The selection of lawyers and the payment for their services . . . [and] the 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." Standard 5.A. (emphasis added).

It is a best practice for local funding units to maintain policies that guide the management of their indigent criminal defense system. These

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policies should reflect fairness and equitable treatment; attorneys should always be appointed, compensated, and provided access to necessary services for their indigent clients so that even the mere inference of impropriety is avoided.

It is suggested that local policies also include objective procedures to resolve any issues of conflict between attorneys and indigent defense administrators. If a conflict requires intervention by a third-party decision-maker, this person should always be a licensed attorney. Some examples could include, but are not limited to, a county or city attorney representing the local funding unit or an attorney administrator or chief defender from another indigent defense system.

**8. If an attorney disagrees with a funding unit's complete or partial denial of funding for expert or investigative services, can they appeal to the court?**

Yes, but only if the denial gives rise to a constitutional violation. . Indigent defendants have a due process right to expert and investigative assistance at state expense, depending on the facts and circumstances of their case. *People v Kennedy*, 502 Mich 206; 917 NW2d 355 (2018). MIDC Standards require indigent criminal defenders to request funds for expert and investigative assistance when appropriate. Standard 3.B-C. All reasonable requests must be funded. Standard 3.B-C. When attorneys request such assistance, "the selection and approval of, and payment for, [the] expenses necessary for providing effective assistance shall not be made by the judiciary or employees reporting to the judiciary." Standard 5.A. However, "[j]udges are permitted and encouraged to contribute information and advice concerning the delivery of indigent defense services." Standard 5.B.

It is best-practice for local funding units to maintain policies that guide the management of their indigent criminal defense system. These policies should include objective procedures outlining a fair and

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equitable process of requesting and receiving funding for expert and investigative assistance.

Because of the constitutional importance of expert and investigative assistance when defending a criminal case, advice or input from the judiciary can be sought if such assistance is denied. However, internal procedures to manage the conflict between the attorney and the indigent defense administrator should be exhausted prior to approaching the court. Ideally, the local system would implement intermediary steps of decision-making prior to involving the judiciary. Any intermediary decision-maker must be a licensed attorney. This could include another attorney with appropriate authority from the funding unit or an attorney administrator or public defender from another jurisdiction.

Systems should contact their Regional Manager prior to any court involvement in the awarding or payment of expert or investigative services.

**9. Can a local system employ a judge, magistrate or court staff from another jurisdiction to serve as their independent appointing authority?**

No. Standard 5 requires the management of the local indigent criminal defense system to be independent from the judiciary. This prohibits the judiciary and employees reporting to the judiciary, regardless of where they serve, from selecting, appointing, or overseeing any part of the local indigent defense system and the attorneys serving under it. This prohibition does not apply to former employees of the judiciary.

**10. If a system employs a house counsel/docket attorney model of providing services, can a judge require that attorney to remain on a case?**

No. Standard 5 does not allow the judiciary to make appointments. Having a house counsel or docket attorney remain on a case beyond the

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defendant's initial appearance would be an appointment. Instead, the court should inform the appointing authority within the local system who shall then assign the case to appropriate counsel.

**11.If a system currently allows a member of the judiciary or staff reporting to the judiciary to perform services related to the delivery of indigent criminal defense, must those duties be reassigned?**

Generally, yes. The judiciary and employees reporting to the judiciary are prohibited from performing services related to the delivery of indigent criminal defense and administration of the attorneys serving within it. Standard 5. This includes services related to selecting and appointing counsel, management and compensation of counsel and any other expense necessary to provide adequate defense. Standard 5.A. However, the court can provide input and advice on the delivery of the indigent defense system. Standard 5.B. This could include actions such as assistance with reporting, data collection, or collaboration with the local system on drafting the annual MIDC grant.

**12. Can a member of the judiciary or an employee reporting to the judiciary sign the MIDC grant contract?**

No. All representatives of the court are prohibited from being a signatory on the MIDC grant contract, as Standard 5 requires complete independence from the judiciary in the delivery of indigent defense. If a court has previously acted as the funding unit or administered the grant on behalf of the funding unit, a new signatory and administrator outside of the employ of the judiciary must be used for the MIDC grant.

**13. Can judicial staff continue to submit the grant program report and/or financial status reports?**

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No. Judiciary staff *may* collect data and assist with required reporting, but the final submission and primary contact for the MIDC grant reporting shall not be a judiciary employee. Although the court, in most systems, is a necessary partner in collecting some of the information required for the program report, the program reports and financial status reports must be submitted by someone unaffiliated with the judiciary.

**14. If an appointing attorney is unable to perform its services related to the delivery of indigent criminal defense due to illness, emergency, or some other unique circumstance, can the judiciary or an employee reporting to the judiciary temporarily assume their duties?**

No. Similarly, the court shall not select another attorney to temporarily perform these services. Standard 5 explicitly prohibits the judiciary or any of its employees from performing services related to the delivery of indigent criminal defense and administration of the attorneys serving within it. This includes services related to selecting and appointing counsel, management and compensation of counsel and any other expense necessary to provide adequate defense. Standard 5.A.

Local systems should create policies that outline approved procedures to follow if their appointing attorney is temporarily unable to perform their job. Any temporary replacement should be a licensed attorney in good standing with the State Bar of Michigan. A local system may authorize a non-attorney to perform these duties if they report to a directing attorney. Some additional suggestions include, but are not limited to, identifying a replacement attorney within the local system that is independent of the judiciary, or using an attorney administrator or chief defender from another indigent defense system.