



MICHIGAN INDIGENT DEFENSE COMMISSION

Frequently Asked Questions about the Indigency Standard

In an effort to assist local funding units with planning and implementation of the Indigency Standard, 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.

Screening

When should a person be screened for indigency?

A person should be screened for indigency as soon as reasonably possible after they make their request. Ideally, a person will be screened for indigency and, if eligible, have counsel appointed within 24 hours of making their request. If indigency screening cannot occur before a person's arraignment, the local funding unit should make counsel available for the limited purpose of providing representation at the arraignment unless an exception to Standard 4 applies.

Does the local funding unit have to "take over" screening for indigency from the judiciary?

No. A local funding unit can elect to allow the trial court to continue screening for indigency as part of its compliance plan. MCL 780.991(3)(a).

If a local funding unit is not assuming the responsibility for indigency screening, how does the Indigency Standard apply?

In addition to providing information about how to determine indigency, the standard offers directives concerning contribution and guidance on seeking reimbursement.

If the local funding unit decides to take over indigency screening from the judiciary, does everyone screening for indigency have to be an attorney?

No. The Indigency Standard provides that “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.” The local funding unit’s appointing authority, however, is ultimately responsible for overseeing the local funding unit’s indigency determination process, and an appointing authority must be a licensed Michigan attorney in good standing.

Who should be screened for indigency?

Unless there is no possibility of incarceration upon conviction or after sentencing, a local funding unit should conduct an indigency assessment of anyone who may wish to have counsel appointed or who seeks access to public funding for things like experts and investigators.

Does the ability to post bond make a person ineligible for appointed counsel?

No. Since MCR 6.005’s 1989 adoption of 1 ABA Standards for Criminal Justice (2d ed), Standard 5-6.1, Michigan has recognized that counsel should not be denied simply because a person can post, or has posted, bond.

Is it possible for a person with retained counsel to be indigent?

Yes. A person with retained counsel is not prohibited from seeking access to public funds for things like experts and investigators.

Does the fact that a person earns more than 200% of the federal poverty guideline automatically disqualify them for appointed counsel?

No. As with all people who are not presumed indigent, the screener should consider whether the person can obtain competent, qualified legal representation without substantial financial hardship to themselves or to their dependents.

Does the fact that a person earns less than 200% of the federal poverty guideline automatically qualify them for appointed counsel?

No. There are a number of factors, like earning less than 200% of the federal poverty guideline, which create a presumption of indigency. But this presumption is rebuttable. Accordingly, if a person has sufficient nonexempt assets that could be used to retain counsel, the person does not qualify for appointed counsel.

Is there any income or asset threshold that would automatically disqualify someone from being indigent?

No. Determining indigency requires a careful examination of every person's unique circumstances. If a charge is serious enough, a person with substantial income and/or assets might be unable to pay for all of their reasonably anticipated defense costs—thus making them partially indigent. Similarly, a person might have substantial income and/or assets but be unable to access them because, for example, they are subject to a conservatorship.

How should a screener handle someone who “works under the table”?

Many people have unreliable income because they work for cash, do odd jobs, or are incorrectly classified as independent contractors. If a person does not have steady income, the person should state an estimated monthly income based on the person's average monthly income for the past 12 months unless there is a good reason for not doing so.

Similarly, many people are unable to provide financial records for a variety of reasons. The Indigency Standard does not require a screener to verify a person's financial information if the person has provided the information under oath or affirmation. No one should be denied counsel simply because they failed to keep sufficient financial records to document their poverty.

Does the Indigency Standard require defense counsel to investigate and report on their client's financial status?

No. The Indigency Standard does not impose a duty on defense counsel to verify, correct, or update their client's financial information. Instead, the Indigency Standard makes clear that the duty to correct and update financial information lies solely with the client. In addition, information concerning the client's finances may, in some cases, be protected by the attorney-client privilege and/or the attorney's duty of confidentiality.

Contribution and Reimbursement

How does contribution differ from reimbursement?

Contribution and reimbursement are similar in that they both relate to the recoupment of expenses. Contribution, however, relates to funds ordered to be paid during the term of the attorney's appointment. Reimbursement relates to funds ordered to be paid after the term of the attorney's appointment—typically after sentencing.

Contribution

Does the Indigency Standard require the local funding unit to seek contribution?

No, the Indigency Standard does not require local funding units to seek contribution.

What should a local funding unit do if it wants contribution?

The local funding unit should first confirm that the person has sufficient nonexempt funds and/or income to allow the person to pay contribution by using the formula provided in the Indigency Standard. Assuming that the person is able to pay contribution, the local funding unit should ask the court to enter a contribution order.

If a person is ordered to pay contribution, where do they make their payments?

Like reimbursement payments, contribution payments are made to the court.

How is a contribution order enforced?

If a person who has been ordered to pay contribution fails to make a payment, the local funding unit can seek a wage assignment order. The Indigency Standard does not require a local funding unit to seek enforcement of an order for contribution and a local funding unit should not seek enforcement if doing so will impair the attorney-client relationship or the local funding unit knows that the person has good cause for failing to pay. Indeed, the local funding unit should adjust the amount and/or timing of contribution payments as necessary to avoid causing a substantial financial hardship.

Reimbursement

Should a local funding unit seek reimbursement for defense costs from a fully indigent person?

No. Although a court does not have to consider a person's ability to pay when assessing costs, Lt. Governor Gilchrist has pointed out that "[t]rying to collect defense costs from people who have no ability to pay creates more problems than it solves."¹ When it appears that a person has no meaningful ability to pay, a local funding unit should not seek reimbursement.

Challenging Indigency and Contribution Determinations

What should the process look like for appealing the local funding unit's denial of a request for appointment counsel or its calculation of a contribution amount?

Although some decisions by an appointing authority are subject to administrative review, decisions concerning whether a person is fully or partially indigent and whether a person should pay contribution are subject to "prompt judicial review." MCL 780.991(3)(e) and (f). If an appointing authority is denying a request for counsel, the appointing authority must provide a copy of the Request for Review of Appointing Authority Determination form with the denial of the request for appointed counsel.

¹ Press Release, Michigan Department of Licensing and Regulatory Affairs, LARA Director Signs New Indigent Defense Standard, Establishes Test for Eligibility for Defense Funding and Provides Guidance for Recouping Costs of Defense (Oct. 28, 2021), <https://www.michigan.gov/lara/0,4601,7-154-11472-571483--,00.html>.