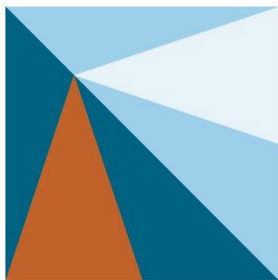


GRANT MANUAL



MICHIGAN INDIGENT
DEFENSE COMMISSION

Revised February 2024
(revisions in red)

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This Grant Manual is created for the convenience of stakeholders seeking information about compliance with the MIDC's standards and the contracts issued to indigent criminal defense systems pursuant to an approved plan and cost analysis. The Commission makes policy determinations regarding funding for the standards. The MIDC's staff serves as liaisons between stakeholders and the Commission and are responsible for bringing novel questions to the Commission for consideration and action. This manual is designed to capture decisions that the Commission has made through action on prior plans and costs for compliance with the standards. This manual will be revised regularly to reflect policy decisions by the Commission and made available on the Commission's public website. Notifications of updates will be communicated to local funding units.

The MIDC Act, in its entirety, is the primary document governing MIDC activities and should be referred to for full context of excerpted materials in this manual.

General Authority

The Michigan Indigent Defense Commission ("MIDC") Act is found at MCL §780.981 *et seq.*

Relevant Provisions of the MIDC Act for Standards, Compliance, and Reporting

The MIDC Establishes Standards for Indigent Defense

The MIDC is responsible for "[d]eveloping and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and this act." MCL §780.989(1)(a).

The MIDC Creates Rules and Procedures for Compliance Plans for Indigent Criminal Defense Systems

The MIDC has the authority and duty to establish “rules and procedures for indigent criminal defense systems to apply to the MIDC for grants to bring the system’s delivery of indigent criminal defense services into compliance with the minimum standards established by the MIDC.” MCL §780.989(1)(g).

Indigent Criminal Defense System Creates Compliance Plan

“No later than 180 days after a standard is approved by the department, each indigent criminal defense system shall submit a plan to the MIDC for the provision of indigent criminal defense services in a manner as determined by the MIDC and shall submit an annual plan for the following state fiscal year on or before October 1 of each year. A plan submitted under this subsection must specifically address how the minimum standards established by the MIDC under this act will be met and must include a cost analysis for meeting those minimum standards. The standards to be addressed in the annual plan are those approved not less than 180 days before the annual plan submission date. The cost analysis must include a statement of the funds in excess of the local share, if any, necessary to allow its system to comply with the MIDC's minimum standards.” MCL §780.993(3) (emphasis added).

Local Share

The local share refers to “an indigent criminal defense system's average annual expenditure for indigent criminal defense services in the 3 fiscal years immediately preceding the creation of the MIDC under this act, excluding money reimbursed to the system by individuals determined to be partially indigent. Beginning on November 1, 2018, if the Consumer Price Index has increased since November 1 of the prior state fiscal year, the local share must be adjusted by that number or by 3%, whichever is less.” MCL §780.983(i).

“[A]n indigent criminal defense system shall maintain not less than its local share. If the MIDC determines that funding in excess of the

indigent criminal defense system's share is necessary in order to bring its system into compliance with the minimum standards established by the MIDC, that excess funding must be paid by this state.” MCL §780.993(7). The requirement for spending the local share is activated by the need to spend in excess of that total. The statute does not dictate the *order* in which the state dollars and local share be spent during the contract year. The local share can be contributed at any time during the contract year.

“An indigent criminal defense system must not be required to provide funds in excess of its local share. The MIDC shall provide grants to indigent criminal defense systems to assist in bringing the systems into compliance with minimum standards established by the MIDC.” MCL §780.993(8).

Approval of Compliance Plans

“The MIDC shall approve or disapprove all or any portion of a plan or cost analysis, or both a plan and cost analysis, submitted under subsection (3), and shall do so within 90 calendar days of the submission of the plan and cost analysis. If the MIDC disapproves any part of the plan, the cost analysis, or both the plan and the cost analysis, the indigent criminal defense system shall consult with the MIDC and, for any disapproved portion, submit a new plan, a new cost analysis, or both within 60 calendar days of the mailing date of the official notification of the MIDC's disapproval. If after 3 submissions a compromise is not reached, the dispute must be resolved as provided in section 15. All approved provisions of an indigent criminal defense system's plan and cost analysis must not be delayed by any disapproved portion and must proceed as provided in this act. The MIDC shall not approve a cost analysis or portion of a cost analysis unless it is reasonably and directly related to an indigent defense function.” MCL §780.993(4) (emphasis added).

Duty of Compliance with Approved Plan

“Within 180 days after receiving funds from the MIDC ... an indigent criminal defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel. The terms of a grant may allow an indigent criminal defense system to exceed 180 days for compliance with a specific item needed to meet minimum standards if necessity is demonstrated in the indigent criminal defense system's compliance plan. The MIDC has the authority to allow an indigent criminal defense system to exceed 180 days for implementation of items if an unforeseeable condition prohibits timely compliance.” MCL §780.993(11).

Collection of Data

MCL 780.989 (1) The MIDC has the following authority and duties:

(f) Establishing procedures for the mandatory collection of data concerning the operation of the MIDC, each indigent criminal defense system, and the operation of indigent criminal defense services.

(2) Upon the appropriation of sufficient funds, the MIDC shall establish minimum standards to carry out the purpose of this act, and collect data from all indigent criminal defense systems. The MIDC shall propose goals for compliance with the minimum standards established under this act consistent with the metrics established under this section and appropriations by this state.

“All indigent criminal defense systems and, at the direction of the supreme court, attorneys engaged in providing indigent criminal defense services shall cooperate and participate with the MIDC in the investigation, audit, and review of their indigent criminal defense services.” MCL 780.993 (1).

“This state shall appropriate funds to the MIDC for grants to the local units of government for the reasonable costs associated with data

required to be collected under this act that is over and above the local unit of government's data costs for other purposes.” MCL 780.993 (10).

The MIDC Reviews Systems for Compliance

The MIDC will be “[i]nvestigating, auditing, and reviewing the operation of indigent criminal defense services to assure compliance with the commission's minimum standards, rules, and procedures.” MCL §780.989(1)(b).

Expert and Investigator Clearinghouse

The MIDC Act states that “[a]n indigent criminal defense system may include in its compliance plan a request that the MIDC serve as a clearinghouse for experts and investigators. If an indigent criminal defense system makes a request under this subsection, the MIDC may develop and operate a system for determining the need and availability for an expert or investigator in individual cases.” M.C.L. 780.991(5).

Financial Reporting

“The MIDC shall ensure proper financial protocols in administering and overseeing funds utilized by indigent criminal defense systems, including, but not limited to, all of the following:

- a) Requiring documentation of expenditures.
- b) Requiring each indigent criminal defense system to hold all grant funds in a fund that is separate from other funds held by the indigent criminal defense system.
- c) Requiring each indigent criminal defense system to comply with the standards promulgated by the governmental accounting standards board.” MCL §780.993(14).

Unexpended Grant Funds

“If an indigent criminal defense system does not fully expend a grant toward its costs of compliance, its grant in the second succeeding fiscal year must be reduced by the amount equal to the unexpended funds. Identified unexpended grant funds must be reported by indigent criminal defense systems on or before October 31 of each year. Funds

subject to extension under subsection (11) must be reported but not included in the reductions described in this subsection. Any grant money that is determined to have been used for a purpose outside of the compliance plan must be repaid to the MIDC, or if not repaid, must be deducted from future grant amounts.” MCL §780.993(15) (emphasis added).

Overspending on Services

“If an indigent criminal defense system expends funds in excess of its local share and the approved MIDC grant to meet unexpected needs in the provision of indigent criminal defense services, the MIDC shall recommend the inclusion of the funds in a subsequent year's grant if all expenditures were reasonably and directly related to indigent criminal defense functions.” MCL §780.993(16).

Compliance Planning by Indigent Defense Systems

Resources Available on the MIDC’s Website

- The MIDC Standards
- A link to the MIDC’s grant management program, EGrAMS
- Training for technical support with grant management system as well as substantive compliance planning topics
- White papers for MIDC Standards 1-4
- Answers to Frequently Asked Questions about the standards covering independence from the judiciary and indigency, contribution and reimbursement
- *Delivery System Reform Models: Planning Improvements in Public Defense* (MIDC, December 2016)
- Department of Treasury correspondence regarding adult indigent criminal defense funds

Compliance Plan Components

Identification of System and Stakeholders

The following users must create a username and profile with the MIDC's Grant Management System (EGrAMS) for submission of the compliance plan, cost analysis, and all reporting documents:

- ✓ The authorizing official submitting the plan and signing the contract terms of the funding consistent with the approved plan
- ✓ The point(s) of contact for the submitted plan
- ✓ A local financial contact for the post award fiscal administration

Funding unit representatives should notify the MIDC when an EGrAMS user has separated from employment. All EGrAMS users will be reviewed by MIDC Staff for eligibility to access the system quarterly.

All compliance plans will need to address the following general information:

- ✓ The delivery model(s) used to provide public defense services
- ✓ The trial court funding unit(s) and court(s) included in the plan
- ✓ The identification of stakeholders or committee members involved in the planning process
- ✓ Collaborative plans must list all systems and trial courts associated with the plan

Compliance with Approved Standards

The submitted plan will address each standard individually. A statement is required to identify and expand on the current or existing state of the system's process or work in subject the area of the standard. The submission will then need to highlight the changes or enhancements needed to achieve the standard, if any.

Cost Analysis

A cost analysis (budget) for the compliance plan must be submitted with the compliance plan through the MIDC's grant management program, EGrAMS, including the detail of costs associated with a non-

profit/vendor model defender office. Reasonableness will be stressed and a list or guidelines for permissible costs is included in this manual. To minimize rejections after official submission, systems should contact their MIDC Regional Manager, before submissions, to discuss compliance plan costs that pose situations not addressed in guidelines.

Local Share

The MIDC Act requires maintenance of a certain level of funding by the local system(s), defined as the local share. The calculation of the local share involves the capture of expenditures for adult indigent defense costs for the three fiscal years preceding enactment of Public Act 93 of 2013. The costs are then offset by the corresponding collections or payments for court appointed counsel services in the same time period on behalf of defendants made by either an individual or an agency.

Beginning in FY2019, all systems calculated and certified their local share. A certification of the local share calculation, acknowledged through local official authorization, was a requirement of the original compliance plan and cost analysis. The local share will be adjusted each year in accordance with the statutory requirement. MIDC grant funds are calculated as the approved cost analysis offset by the local share. Any system seeking to modify its local share due to errors in the original calculation must contact its Regional Manager. Modifications are subject to review of the methodology by the Grants Director and approval by the Commission.

Fund Established

A condition of award to the local system(s) shall include the grantee securing and supplying to the MIDC a resolution from the local legislative branch (board of commissioners, city council) for the creation of a new fund within the local chart of accounts. The sole purpose of this fund shall be for accepting the grants funds from the MIDC and charging all plan-related costs to this fund. As a condition or assurance upon accepting the award, this fund will allow for better management of the grant funds and monitoring by the local and state interested parties. All adult indigent criminal defense funding (local

share and MIDC grant award) must be deposited into the fund. The local fund description shall allow for any fund balance not to revert to the general fund at the close of a fiscal year. Rollover funds will be used for expenditures that cross fiscal years as well as unexpended funds to be used for future compliance expenditures. **M.C.L. §780.993(14)(15).**

Guidelines for Drafting Compliance Plans

The following information captures decisions that the Commission has made through action on prior plans and costs for compliance with the standards. In reviewing compliance plans, the Commission will generally limit approval of costs to those necessary to implement the MIDC's standards. Novel questions will be brought to the Commission for decision.

General Principles

Prosecutors, Judges, Magistrates

The MIDC Act charges the Michigan Indigent Defense Commission with the authority to develop, oversee implementation, enforcement and modification of minimum standards, rules and procedures to ensure that *indigent criminal defense services* providing effective assistance of counsel are delivered to all indigent adults in the State of Michigan. The Commission will not provide funding for prosecutors, judges, or magistrates to perform their duties. The Commission remains mindful that “defense attorneys who provide indigent criminal defense services are partners with the prosecution, law enforcement, and the judiciary in the criminal justice system.” MCL 780.989(4).

Administrator for Delivery Systems

A funding unit considering the use of a managed assigned counsel system or public defender administrator must use a licensed attorney in good standing with the State Bar of Michigan for all duties involving management or oversight of attorneys or cases within the system.¹

¹ See MIDC meeting minutes, June 2017; MRPC 5.4(c).

Defense Attorneys – Direct Service Providers

All attorneys identified by the funding unit to provide direct representation to indigent defendants must be licensed attorneys in good standing with the State Bar of Michigan and are bound by the Michigan Rules of Professional Conduct.

Non-Lawyers – Direct Service Providers and Interdisciplinary Defense Teams

Provided they are used to comply with minimum standards, MIDC grant funds can be used to hire employees or independently contract with paralegals, **social workers**², licensed private investigators, or experts in any field recognized in the criminal justice community, to assist the defense. Funding units may employ or contract with student interns in any field to support public defense. Interns may be compensated for their time and reasonable expenses.

Public Defender and Managed Assigned Counsel Systems

Systems may choose to set up regional or local delivery system reform models such as public defender offices or managed assigned counsel programs to meet the minimum standards.³ Set-up and operational costs of the office should be included. Lease or rent payments for offices of funding unit employees providing direct services and their staff are permissible expenses. Systems seeking to change models (i.e., move from an assigned counsel system to a public defender office) should include a feasibility study, including a caseload analysis, sufficiently detailed to allow staff and Commission to review anticipated system impacts.⁴ Please consult with a Regional Manager for samples of these studies.

Increased staffing for direct service providers to ensure compliance with new MIDC Standards are allowable, and time studies to support

² Any provider using the title of “social worker” should be a licensed graduate of a social work program.

³ MIDC staff members are able to assist systems with hiring considerations, but cannot serve as a voting member in any employment decision-making process.

⁴ The costs associated with a feasibility study may be reimbursed pursuant to MCL §780.993(2).

those requests are encouraged. Any time study should clearly state the duties that are being tracked. Case management systems can be purchased by a funding unit for use by contract attorneys, including a Managed Assigned Counsel Administrator.

Outreach efforts to support recruitment and retention are permissible expenses and should be consistent with local policies (e.g., employment opportunities, travel by staff to internship fairs, etc.).

A compliance plan may include the cost of the State of Michigan's basic bar dues for attorneys employed full time by the system. Systems can also include the cost of a license for full time employees with positions requiring a license (i.e. social worker) and any annual training costs required to maintain the full time employee's license. MIDC grant funding is not permitted for membership in local bar associations or any optional professional organizations, with the exception of funding for eligible training resources indicated by MIDC Standard 1.⁵

A compliance plan may include the cost of malpractice insurance for attorneys employed full time by the system.⁶ Rates should be commensurate with those offered by the National Legal Aid and Defender Association's preferred carrier.

Hiring of Ancillary Staff

Many systems will hire indirect or ancillary service providers to implement the standards. Ancillary staff refers to personnel outside of assigned counsel and their support staff. Most often these positions include jail staff to facilitate attorney-client communication pursuant to Standards 2 and 4. Other positions include clerks or court staff. These positions must be reasonably and directly related to implementation of the standards to qualify for MIDC grant funding. Local systems are

⁵ See MIDC meeting minutes, October 2019.

⁶ See MIDC meeting minutes, July 2019.

encouraged to submit time studies with any request to fund these positions. Supplanting⁷ of existing positions is not permitted.

Cost Allocation

Systems seeking to include cost allocation or indirect costs for employees are allowed. Funding that exceeds 10% of the personnel and fringe benefit (total) is subject to additional scrutiny and must include any methodology for determining the costs.⁸

Reimbursement for Overspending

A system that spends in excess of the prior year's total system cost can seek reimbursement as a separate line item in the subsequent cost analysis for services. MCL 780.993(16).

Regional Cooperation

The Commission urges efficient models of providing indigent defense. In some communities, multiple funding units may collaborate to deliver indigent defense services. The statutory authority for multiple counties cooperating in a regional delivery system model can be found in the Urban Cooperation Act of 1967, at MCL §124.501 et seq.

Travel

Unless local rates apply, any travel related expenses requested for compliance planning shall not exceed the rates provided by the "Schedule of Travel Rates" and the general policies for reimbursement of travel adopted by the State of Michigan.

Absent extraordinary circumstances, no grant funds for out-of-state travel will be allowed in any compliance plans. Travel to visit a client housed in custody in another state constitutes an extraordinary circumstance.

Travel for training out of state will only constitute an extraordinary circumstances if it is necessary to secure specialized training for public

⁷ Supplanting refers to the local funding unit's reduction of local funds for an activity specifically because state funds are available to fund that same activity.

⁸ See MIDC meeting minutes, June 2019.

defender staff that is not available in Michigan.⁹ Systems must pursue any financial aid available to fund attendance for an employee's attendance at an out of state training program.

MIDC grant funding is not permitted for purchasing or leasing automobiles.

MIDC grant funding is not permitted for the cost of parking at an assigned work station unless reimbursement is required by the funding unit's established local employment policies.

Supplies and Services

Systems can include funding for supplies needed for trial, including demonstrative exhibits and clothing for defendants to wear during court proceedings. **To facilitate a client's access to the justice system, a cost analysis can also include funding for transportation, lodging, and meals for a client consistent with MRPC 1.8(e).**

Transcripts of proceedings prepared at the request of an indigent defendant can be included in the cost analysis.

Interpreter services sought by the defense to facilitate some out-of-court meetings between assigned counsel and clients or witnesses can be included in the cost analysis.

Funding needed by the defense to obtain documents through the Freedom of Information Act, or school or medical records, or similar materials, can be included in the cost analysis if it is directly related to representation in a pending criminal case in the trial court.

Systems using a nonprofit model for delivering indigent defense services can include funding for any required audit in the nonprofit cost analysis.

No funding shall be used to pay for restraints or monitoring services of an accused defendant.

⁹ See State of Michigan LARA Out of State Travel Request Authorization form C-100.

Planning for Compliance with MIDC Approved Standards

Standard 1 – Training and Education

General Requirements

Michigan Indigent Defense Commission (MIDC) Standard 1 requires that attorneys shall annually complete at least twelve hours of continuing legal education. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic multi-day (minimum of 16 hours) skills acquisition class. Time spent in a basic skills acquisition course (skills training) counts towards, and can satisfy, the annual CLE requirement.

Pursuant to MIDC Standard 1.D, system practices that require assigned counsel to subsidize mandatory training will not be approved. 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.

Standard 1 is an annual training requirement for every attorney each calendar year.

In the grant management system, provide the names and P#s of all attorneys who will provide indigent defense in the year covered by the compliance plan. Further identify in that category those attorneys who have practiced criminal defense for two years or less.

All attorneys providing services in the system should be included in the compliance plan, regardless of whether the attorney practices in other systems. Funding for training and individual training requirements may vary by system. In the event of duplicate registration for a single event, the source of payment should default to the funding unit based on the address listed for the attorney in the bar journal. Deviation from the default is allowed if doing so is necessary to meet the requirements of the standard.

In the plan and cost analysis, describe whether the training is part of the 12 hours of annual continuing legal education (CLE) and/or skills training for new lawyers.

Please see the MIDC's website at <https://michiganidc.gov/cle/> for more information.

Permissible Costs

For new training programs, identify the cost of set-up and implementation including personnel, contractors, equipment, supplies, and operating expenses including meals at a group rate. For existing training programs, identify the number of attorneys to be trained, the courses or programs that will be attended with a cost of registration/tuition (using a rate of \$50 per credit hour), travel, and other expenses incurred by the trainees. Attorneys will not be reimbursed at any rate for their time spent in or traveling to training sessions.

No printed materials will be funded if digital materials are provided for training purposes.

Memberships

For webinars, such as the National Association for Public Defense, use an annual rate of \$40/per criminal defense attorney for membership and access to programming.

For the Michigan State Appellate Defender Office's (Criminal Defense Resource Center) online resources, use an annual rate of \$75/per criminal defense attorney for membership and access to programming.

MIDC Grant funding will not be awarded for membership to the National Legal Aid and Defender Association (NLADA), the National Association for Criminal Defense Lawyers (NACDL), the Criminal Defense Attorneys of Michigan (CDAM), the Institute for Continuing Legal Education (ICLE), or local bar associations.

Communication and Plans for Reporting

Attorneys identified by the funding unit to represent adults charged with crimes in the particular system may receive communications from the MIDC's staff regarding training opportunities and requirements for compliance with Standard 1. The MIDC staff will work to efficiently coordinate the statewide roster of attorneys and assist with communicating progress towards compliance with the standard. All attorneys must complete their training and education requirements by December 31 of each calendar year to remain eligible to continue to receive assignments in the following compliance plan year.

Each system must provide a plan for reporting CLE attendance to the MIDC for data collection purposes. Documentation of attendance must be submitted to the MIDC no later than 30 days after completion of the course(s). This documentation can be sent to LARA-MIDC-CLE@michigan.gov. Funding units are encouraged to have attorneys report their time spent in training directly through the MIDC's continuing legal education database provider, CE Broker. All attorneys accepting adult criminal case assignments in Michigan have access to a free basic account in CE Broker for reporting purposes.

Standard 2 – Initial Interview

General Requirements

This standard requires that 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. Attorneys should be prepared to complete a voucher form for all assigned cases indicating time spent on the assignment, including when and where the initial interview occurred. Alternatively, systems must indicate a method for verifying timely interviews. Sample vouchers are available on the MIDC's website.

This standard further requires a confidential setting for these interviews in both the courthouse and jail. Upon request by an attorney, the system must accommodate the ability to pass legal materials between an attorney and an in-custody client.

Permissible Costs

If it is necessary to create or alter building space to provide a confidential setting for attorneys and their clients, renovation expenses are allowed up to a maximum of **\$50,000** per location. Requests exceeding **\$50,000** will be reviewed with higher due diligence and considered with accompanying documentation for justification.

For all systems undergoing construction to create confidential space, details regarding progress on the project will be required quarterly.

If public defender offices need additional attorneys to comply with the initial interview standard, funding units may seek grant funds for personnel.

Other systems may need to change contracting or assigned counsel compensation policies. Funding units, using a contract or rotating assignment system, shall pay attorneys for the initial interview in all assigned criminal cases. Attorneys shall be compensated a reasonable fee for the initial interview, including mileage and travel expenses for

clients who are not in local custody. Confidential video visits are permissible for initial interviews with in-custody defendants.

Efficient use of technology and existing space in courthouses and jails in lieu of construction projects is encouraged to ensure and facilitate confidential interview space. **Items valued over \$5,000 can be included in the “equipment” section of the cost analysis; individual items valued under \$5,000 should be included in the “supplies” category of the cost analysis.**

Standard 3 – Investigation and Experts

General Requirements

This standard requires counsel to conduct an independent investigation. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

Funding units may seek grant funds to employ licensed investigators as needed to comply with Standard 3, and/or seek grant funds to contract with investigators or any expert witness identified as necessary to assist with the defense of an indigent client.

Non-assigned (i.e., retained, *pro bono*) counsel representing adult clients who become indigent during the course of the representation and who are in need of expert or investigative services may seek use of indigent defense funding for these resources from the system pursuant to case law¹⁰ and/or the local system's policy.

Permissible Costs

Expenses for investigators will be considered at hourly rates not to exceed \$100. Expenses for expert witnesses **should** follow a tiered level of compensation based on education level and type of expert. **Suggested rates are posted on the MIDC's website.**

A funding unit may include in its compliance plan a request that the MIDC serve as a clearinghouse for experts and investigators. Upon request, the MIDC will identify funding necessary to allocate sufficient staffing for this purpose.

All funding units must have an approved line item for using experts and investigators in the local court system. The funding unit should reimburse these service providers directly based upon a proper accounting of time spent during the grant reporting period, **including**

¹⁰ See, e.g., *People v. Kennedy*, 502 Mich. 206 (2018).

documentation of hours spent using a retainer agreement for services to be provided. Systems should report whether an expert or investigator was requested, approved, or denied in a particular case to ensure compliance with the standard. The MIDC rates should serve as guidance unless a higher rate is authorized by the local system for a particular type of expert or case. Experts and investigators should be reimbursed for travel related to their work on a case, including time spent traveling if local experts or investigators are unavailable.

Standard 4 – Counsel at First Appearance and Other Critical Stages

General Requirements

Every system in Michigan is required to make an attorney available for an adult charged with a crime facing the loss of his or her liberty. 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. A “critical stage” is any proceeding involving the potential for loss of liberty.

This Standard does not prevent an adult charged with a crime from representing themselves during any proceeding, including the arraignment. All defendants should be given an opportunity to meet with counsel prior to an arraignment where liberty is at stake. Information about waiving counsel should be provided by the court system, preferably by counsel employed to meet this standard.

In virtually all systems, the attorney at the first appearance is not necessarily going to be the attorney appointed to the case. Attorneys providing this service should be paid consistent with the approved costs for these services.

Systems will be required to report specific information about every arraignment including the number of total arraignments and breakdown of representation in any of the following categories: retained counsel, assigned counsel, waiver of counsel by defendant, or counsel not present. Guilty pleas submitted to courts outside of the arraignment process (“counter” pleas or “plea by mail”) must be tracked and reported by the system. Systems that will not accept a guilty plea at arraignment and will issue personal bonds do not need to make an attorney available at the initial appearance before a magistrate or judge.

Permissible Costs

Funding Units with public defender systems may seek grant funds to hire defense attorneys to comply with the standard for counsel at first appearance.

Funding units using a contract or rotating assignment system shall pay attorneys for the first appearance in a criminal case. A flat-rate can be paid to an attorney to be available on an on-call basis. For all services, counsel shall be paid a reasonable fee.

Where appropriate and where it will not unreasonably degrade the quality of representation, technology should be used to ensure the effective representation of indigent defendants. Attorneys may use telephone or video services to facilitate the appearance at arraignment.

In addition to all trial proceedings, funding under this standard can include defense attorney representation or participation in the following matters:

- Criminal contempt and/or show-cause hearings
- District to Circuit Court appeals
- Problem Solving Courts and Swift and Sure Sanctions Probation Programs
- Restitution Hearings
- Pre-Sentence Investigation Interviews
- Early Probation Discharge

MIDC grant funding shall not be used to compensate standby (or “advisory”) counsel when the defendant has invoked the constitutional right of self-representation.

Services Outside of Adult Criminal Case Representation

The MIDC is cognizant that other legal concerns often exist for indigent clients outside of the criminal trial court and supports local decisions to develop and use best-practice defense services for all those in need.

For example, a few local funding units employ attorneys within their public defender offices to represent youth in delinquency or other probate hearings; some employ administrators to manage the rosters of juvenile defense attorneys; others have considered partnering with local civil legal services to provide increased holistic defense.

Local systems should identify and delineate those costs if they have expanded their legal services to indigent clients outside of the scope of the MIDC Act or are considering such an expansion to ensure they are meeting their current grant contract agreements. The MIDC regional manager team can help systems implement best-practices while ensuring all contract agreements are upheld.

Standard 5 – Independence from the Judiciary

A managed assigned counsel system (hereafter, “MAC”) is a model that can be used either in coordination with the public defender office or alone to provide indigent defense services in communities at the trial level. This system has independence with oversight by a government-appointed or non-profit agency commission, or by the Executive Branch. MAC is an ideal system to guarantee participation of a vibrant private bar in the delivery of indigent defense.

As with a public defender office, a county or regional MAC can be a very good way to comply with the MIDC standards and best practices:

- MAC can coordinate a program to train attorneys to work on assigned cases;
- MAC can provide resources for prompt meetings with clients and condition participation on these meetings;
- MAC can coordinate contracting of investigators or experts, and even retain investigators on staff;
- MAC can specifically assign counsel at first appearance.

MAC could also comply with many proposed standards including qualifications and evaluations of assigned counsel by having a framework for evaluating the attorneys on the roster and setting requirements for different sorts of cases. MAC can enforce caseload limitations on roster attorneys and establish fair compensation if properly resourced.

As a best practice, systems using a MAC administration model should create a process for reviewing or appealing decisions of the MAC administrator or appointing authority.

The MIDC has approved answers to Frequently Asked Questions about the standard requiring independence from the judiciary attached as an appendix.

Standard 6 – Indigent Defense Workloads

General Requirements

The caseload of indigent defense attorneys must allow each lawyer to give each client the time and effort necessary to ensure effective representation. Defender organizations, county offices, contract attorneys, and assigned counsel should not be assigned workloads that, by reason of their excessive size, interfere with the rendering of quality representation.

This standard further states that defender organizations, county offices, public defenders, assigned counsel, and contract attorneys should not be assigned in excess of 150 felony cases or 400 non-traffic misdemeanor cases per attorney per year.¹¹ For attorneys carrying a mixed caseload which includes cases from felonies and misdemeanors, or non-criminal cases, these standards should be applied proportionally.

The workload standard will be revised periodically as necessary and dictated by collection of data during initial implementation.

Definitions and Calculations

A case is a charge or set of charges filed against a defendant in a court arising from the same transaction and/or that are being handled together, regardless of how the court assigns case numbers.

Where multiple attorneys serve as co-counsel in any capacity, the case counts for each attorney assigned.

Reassignments do not count as a case for an attorney where reassignment is requested before significant work is performed (i.e., early identification of a conflict of interest).

Traffic misdemeanor cases count as ½ of a misdemeanor case assignment.

¹¹ As defined by the State Court Administrative Office's publication, Michigan Trial Court Records Management Standards – Case Type Codes (MCR 8.117).

Probation violation representation counts as ½ of a misdemeanor case assignment.

For systems that use house counsel models or shift coverage for any docket including for arraignments or problem solving courts, each hour worked on a shift proportionally reduces the number of hours available for case assignments, using an 1856¹² hour annual limit.

In cases where the final charges are reduced through plea negotiations, the case counts according to the original charge.

The caseload limitation will be assessed for compliance on an annual basis. Attorneys should not exceed caseload limits during any four rolling or consecutive quarters.

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. Decisions to increase case-weight assignments may be made locally by the appointing authority in extraordinary circumstances.¹³

Permissible Costs

Travel time, mileage, and expenses should be reimbursed to non-local attorneys employed by the funding unit when necessary to maintain compliance with the standard.

Compliance plans should include a means to account for and audit caseload calculations.

¹² *Caseload Standards for Indigent Defenders in Michigan*, RAND, at p.72 (2019).

¹³ For example, if an attorney has a case with extraordinary circumstances, they may request that their system administrator count it as two cases instead of one. An administrator should not alter case weighting without a request from the attorney. Under no circumstances should a case weight be decreased.

As a best practice, systems should create a process for reviewing or appealing decisions when there is a dispute as to whether an attorney's caseload capacity has been reached.

Standard 7 – Qualification and Review

General Requirements

Defense counsel's ability, training, and experience must match the nature and complexity of the cases they are assigned. Attorneys should have their performance reviewed regularly by local system stakeholders to ensure effective assistance of counsel is provided to indigent defendants.

Funding units may only employ attorneys licensed in the State of Michigan as determined by the Michigan Supreme Court and State Bar of Michigan.¹⁴ All attorneys appointed to provide representation in adult criminal cases must complete annual requirements of continuing legal education described in MIDC Standard 1.

Qualification of Counsel

A tier-based system of experiences is described in the Standard for all case types. The minimum years of service and basic qualifications must not be substituted to qualify counsel in any case.

For misdemeanor and low severity felony cases, equivalent experience and ability to demonstrate similar skills is acceptable in lieu of specific events described in 7.B.1.b and 7.B.2.a.ii. Such experience may include training programs, supervised assignments, and second chair opportunities. Each activity on the following list may count as one substituting event:

- Mock trial preparation in a criminal case
- Preliminary Examinations

¹⁴ Funding units may use local policies for provisional practice pursuant to the Michigan Court Rules. See e.g. MCR 8.120. This practice can be considered in evaluating counsel's qualification and during counsel's review.

- Contested suppression hearing with testimony taken from witnesses
- *Miller* Hearing
- Simulated skills course constituting a complete trial (voir dire, opening statement, cross-examination of a witness, direct examination of a witness, closing argument). Attendance does not have to be in person and must be verified by course provider.

Civil trial experience may constitute equivalent experience on a case-by-case analysis (e.g., parental rights termination, delinquency proceedings, jury trials.)

There is no limit to the substituting events allowable to qualify for misdemeanor or low severity felony assignments.

For high severity felony cases and life offenses, counsel may qualify by demonstrating a significant record of consistently high quality criminal trial court representation and the ability to handle the assignment type.¹⁵

The local appointing authority is the decision maker when determining counsel's quality of representation and ability and is encouraged to seek input from system stakeholders with knowledge of the attorney's work.

An attorney's qualification level should be recognized consistently across funding units. As a best practice, systems should create a process for reviewing or appealing decisions when there is a dispute as to an attorney's qualification level.

Review of Counsel

Attorneys accepting adult criminal case assignments must be reviewed to evaluate the quality of the representation after an attorney has established the minimum requirements for eligibility. The review should be conducted by the attorney's supervisor, the local appointing

¹⁵ In lieu of the events listed in MIDC Standard 7.B.3.a.ii or 7.B.4.a.ii. The exception to event-based experience should be used in limited circumstances.

authority, or someone working at the request of the appointing authority for this purpose. 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.

Reviews must be done periodically at a predetermined schedule and occur at least once every three years. New attorneys and attorneys needing improvement as determined during a review process should occur more frequently.

There should be no significant difference in the substantive review of employees or contractors. Surveys of individuals impacted by the criminal legal system are encouraged.

Permissible Costs

Travel related expenses including time spent traveling may be included in a cost analysis to reimburse assigned attorneys when the appointing authority reaches outside of the list of locally qualified attorneys in order to assign counsel consistent with the qualification standard.

When non-local attorneys are employed to assist with qualification opportunities for local attorneys, the local funding unit is responsible for the costs associated with the non-local attorney's employment and travel (i.e., serving as a case mentor, second chair, etc.) unless other arrangements are in place for full time employees.

Funding for administrator consultation or an external review process may be included in the cost analysis.

Standard 8 – Attorney Compensation

Reasonable compensation and resources must be provided to all attorneys representing indigent clients. Funding units may use any method of employment, including hiring salaried employees and/or a managed assigned counsel system overseeing a roster of private attorneys. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized.

Systems using event based pay, capped hourly rates, or flat fee payment schemes must be able to demonstrate that the compensation is equivalent to the MIDC minimum hourly rates.

- For salaried attorneys, the rates paid by the Michigan Attorney General for Assistant Attorneys General, or other state offices, serve as guidance for reasonable compensation. The rates set by the Michigan Attorney General positions for Assistant Defenders would be level 15 position, and Senior or Management level positions would be levels 16-18 for Chief Public Defenders and Deputy Public Defenders. **The MIDC will review salaries proposed below these levels on a case-by-case basis.**
- For attorneys paid hourly, **systems must** ensure that the rates meet the minimum set in Standard 8. The Standard contemplates **office overhead, local travel, and annual** cost of living increases. Funding units must implement the following increases to the Standard rates since proposed in 2018:

	Misdemeanors	Felonies	Life Offenses
FY 2025 ¹⁶ (eff 10-1- 24)	\$124.12	\$136.53	\$148.91

¹⁶ The **FY2025** rate represents compounded cost of living increases for State of Michigan salaried employees since FY2019. These rates will adjust annually each year.

Hourly rates should not exceed the rates paid for defender services by the United States Courts, absent demonstration of comparable local practice or extraordinary circumstances.

- For any attorneys paid through an event-based schedule or other sort of contract, ensure that payment is equivalent to Standard 8 hourly rates. For example, if a contract attorney covers a three-hour morning docket, **Standard 8 would require minimum compensation of \$372.36**. If a contract attorney is being paid monthly, their hours will need to be tracked in order to ensure that they are being paid the equivalent of Standard 8 hourly rates, at the minimum.

Sample invoices for time tracking are **available on the MIDC's website**.

In cases where the final charges are reduced through plea negotiations, the hourly rate should be paid according to the original charge.

Standard for Determining Indigency and Contribution

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.

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.

The Indigency Standard does not require funding units to seek contribution or reimbursement.

The MIDC has approved answers to Frequently Asked Questions about indigency, contribution, and reimbursement attached as an appendix.

Compliance Plan Submission

Step 1

- Compliance Plans submitted to the MIDC through EGrAMS.

Step 2

- Plan submission date tracked for compliance with statutory timeline for action by MIDC.

Step 3

- Plans reviewed by Regional Manager

Step 4

- Plans reviewed by Grants Director

Step 5

- Plans reviewed by Senior Staff
 - Plans that require no additional review are forwarded to the Commission
 - Plans that require additional review are forwarded to a committee of Commissioners

Step 6

- Plans reviewed by the Commission
 - Plans disapproved shall be resubmitted within 60 days
 - After three submissions, dispute resolved by mediation

Compliance Reporting by Indigent Defense Systems

The contract executed between the MIDC and the local system is the primary source of information about specific reporting obligations. This portion of the guide is provided for the convenience of stakeholders seeking information about reporting.

Resources

Please consult the MIDC's website at <https://michiganidc.gov/grants/> for regularly updated information about reporting, webinars, checklists, and templates.

Distribution of Funding

The Department of Treasury has established a new fund within the local chart of accounts. The sole purpose of this fund shall be for accepting the grants funds from the MIDC and charging all plan-related costs to this fund. The system's "local share" must also be deposited in this fund during the course of the grant contract period, and no later than the end of the contract term.

Systems will work with the MIDC staff to finalize a budget consistent with the cost analysis approved by the MIDC. This process may require assignment of spending between state and local funding sources. Funding must only be used as set forth in the approved plan and cost analysis.

Systems will receive a contract from the MIDC upon approval of the system's compliance plan *and* cost analysis by the Commission. Once the contract is fully executed, the MIDC will distribute grants to the system consistent with the approved budget and as set forth in the system's approved plan. Unless the contract provides otherwise, the MIDC will distribute 25% of the approved state grant within 15 days of the contract being executed by all parties. The timeframe for compliance with the approved plan will begin on the date of the initial distribution. Each system will submit a progress report describing compliance with the plan on a quarterly basis, together with a financial status report detailing expenses incurred that quarter and a list of attorneys

providing services for the local system. If it is determined that the total amount of funding awarded in the previous year's grant was not fully expended or that grant money was used for a purpose outside of the compliance plan, those funds must be repaid to the MIDC, or if not repaid, must be deducted from future grant amounts. MCL 780.993(15).

Reporting Required

Financial Status Report (FSR)

Each system is required to provide a report on the expenses incurred for implementing the plan for indigent defense delivery. This reporting should be completed and/or submitted by an employee of the indigent defenses system's funding unit who can certify to the correctness and accuracy of the reporting and supporting documentation, including the funding unit's general ledger for the local grant fund. The funding unit must use the MIDC's grant management system, EGrAMS, for reporting. The FSR must be supported with documentation for the expenses to be eligible for reimbursement. Receipts for purchases, payroll, documentation, and vouchers from direct service providers should be attached to the FSR. Systems with personnel must submit time sheet(s), time certification(s), or a time study with quarterly reporting when requested by MIDC staff or with any request by the system to modify the personnel position(s).

Expenses are eligible for payment if incurred during the grant contract period (on or after October 1 of the grant contract year).

Systems should track all funding collected from defendants for the purpose of reimbursement of assigned counsel.

Collection of any program income must be reported in the unexpended balance form.

Compliance Plan Progress Report (PR)

A short program report detailing in narrative form the system's progress towards fully implementing the compliance plan is required quarterly. This report should complement the FSR and offer context about the expenses incurred during the specified timeframe.

Approved compliance plans addressed each standard individually, and reporting should track compliance with the standards according to the plan. The progress report will mirror this approach and collect information regarding new case filings and compliance with MIDC Standards as set forth in the approved plan.

Attorney List

The funding units will be asked for a list of all attorneys with P#s assigned by the system to represent indigent adults charged with crimes along with the number of assignments to each attorney, and payments made to each attorney quarterly.

Due Dates for Reporting

- Initial FSR and compliance reports for October 1 – December 31 due on January 31st
- 2nd FSR and compliance reports for January 1 – March 31 due on April 30th
- 3rd FSR and compliance reports for April 1 – June 30 – due on July 31st
- Final FSR and compliance reports for July 1 – September 30 – due no later than October 31, together with a report of the unexpended balance in the account used for adult indigent criminal defense services.

Every system is required to annually submit a plan for compliance for the next state fiscal year during the timeframe and in the manner established by the MIDC. **M.C.L. §780.993(3).**

Adjustments to Approved Plans or Budgets

The MIDC is mindful that many systems submitted a plan for compliance and cost analysis nearly one year prior to funding distribution. While adjustments to the cost analysis will be necessary in many instances, there should be no substantial changes to the delivery system method set forth in the plan itself without prior approval from the Michigan Indigent Defense Commission. A “substantial change” is one that alters the method of meeting the objectives of the standard(s) in the approved

plan. For example, a system with an approved plan for a public defender office that would instead prefer to maintain a contract system would constitute a “substantial change” to the approved plan.

Any system seeking a substantial change to their compliance plan must contact their Regional Manager for guidance on that process, which will require a written request, justification for the change, and multi-level staff review prior to consideration by the Commission. Substantial changes to a compliance plan will not be recommended for approval to the Commission absent extraordinary circumstances.

Adjustments to a system’s approved contract budget must be communicated promptly to the Regional Manager. Once a cost analysis has been approved by the MIDC, the award total cannot increase, but adjustments within the award total can be allowed. Please contact your Regional Manager for guidance with budget adjustments. Budget adjustments will be processed with other quarterly reporting documents unless extraordinary circumstances require action sooner.

- Deviation allowance: If the adjustment involves redistributing less than 5% of the budget category total, (e.g., “equipment”), then the adjustment must be reported in the next quarterly FSA.
- A budget adjustment involving greater than 5% of the aggregate of all funding within a budget category requires prior written approval by the MIDC Staff and must be reported to the MIDC as soon after the Grantee is aware of the necessity of the Budget adjustment and reported in the Grantee’s quarterly report.

Funding units are required to use the MIDC’s grant management system for any budget adjustment request and must obtain approval of MIDC staff prior to making any changes to the contract budget.

All adjustments to the approved cost analysis will be reported to the MIDC during regularly scheduled meetings, or as requested by the Commission.

Evaluation of Plans

All systems will be reviewed for compliance with the MIDC's standards, the approved plan and the approved cost analysis. A sample rubric for evaluation is attached.

FUNDING UNIT: _____

Date of Required _____

Compliance: _____

Date(s) of Evaluation: _____

STANDARD 1	TOTAL POSSIBLE POINTS	TOTAL POINTS AWARDED	COMMENTS
Has the attorney list been updated and submitted in the most recent quarter?	3		
Has a process been established and implemented to pay for and confirm attorney training (including for new attorneys to complete skills training)?	3		
<i>Is the system tracking and verifying CLE hours and discontinuing case assignments for attorneys who have not completed their CLE hours?</i>	<i>non-point question</i>		
STANDARD 2			
Have confidential meeting spaces been established or have sufficient steps been taken toward this end?	--		
• In holding facilities/jails	3		
• In courtrooms: out-of-custody clients	3		
• In courtrooms: in-custody clients	3		
Are defense attorneys using the confidential meeting space?	3		
Are attorneys being appointed and notified in a timely and effective fashion?	3		
Is the system verifying invoices/other documents to ensure timely client interviews?	3		
Are attorneys being paid for initial interviews?	3		
Does the system have a process to manage attorney non-compliance?	3		
STANDARD 3			
Is there a formal process for attorneys to seek funding for experts and investigators?	3		
Have attorneys been notified of the process?	3		
<i>Have any attorneys utilized this process?</i>	<i>non-point question</i>		
Is a system in place to track requests, approvals and denials?	3		
STANDARD 4			
Is there a process in place to ensure that every client has counsel or a valid waiver?	3		

Is counsel being offered at all arraignments where an MCR 6.104(A) exception does not apply?	3	
Is there a process in place to have counsel at all other critical stages?	3	
Is counsel being offered at all other critical stages?	3	
<i>Who is conducting the waiver of counsel for arraignment?</i>	<i>non-point</i>	
<i>Have you observed the system encouraging waiver of counsel?</i>	<i>non-point</i>	
<i>Is there an advice of rights for counterpleas and pleas by mail, and is the system collecting information on these?</i>	<i>non-point</i>	
<i>Is there a process to provide contact information to the appointed attorney and the client after arraignment?</i>	<i>non-point</i>	
STANDARD 5		
Are all case and docket assignments being managed by people who operate independently from the court?	3	
Is the approval of requests for experts and investigators made independently from the court?	3	
Is the approval of attorney payments made independently from the court?	3	
STANDARD 8		
Are all attorneys being paid consistent with Standard 8 rates?	3	
INDIGENCY STANDARD		
<i>Are people being screened for indigency?</i>	<i>non-point</i>	
<i>Is the system screening in a way that is consistent with their compliance plan?</i>	<i>non-point</i>	
REPORTING & FINANCIAL COMPLIANCE		
Have quarterly reports been submitted and approved?		
• Program Reports	3	
• FSRs	3	
• Attorney Lists	3	
List any areas of concern regarding contract compliance outside of the above.		

Scores	Raw Score	Rank Score
Std. 1	0	Red
Std. 2	0	Red
Std. 3	0	Red

Std. 4	0	Red	
Std. 5	0	Red	
Std. 8	0	Red	
Program Reports	0	Red	
Financial Reports	0	Red	
Attorney Lists	0	Red	
Overall (pass/fail)			Non Compliant

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 judiciary¹ 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.

¹ 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

For more information about planning for compliance with the MIDC Standards, contact a regional manager at 517-657-3066 or LARA-MIDC-Info@michigan.gov.

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?

For more information about planning for compliance with the MIDC Standards, contact a regional manager at 517-657-3066 or LARA-MIDC-Info@michigan.gov.

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.



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.

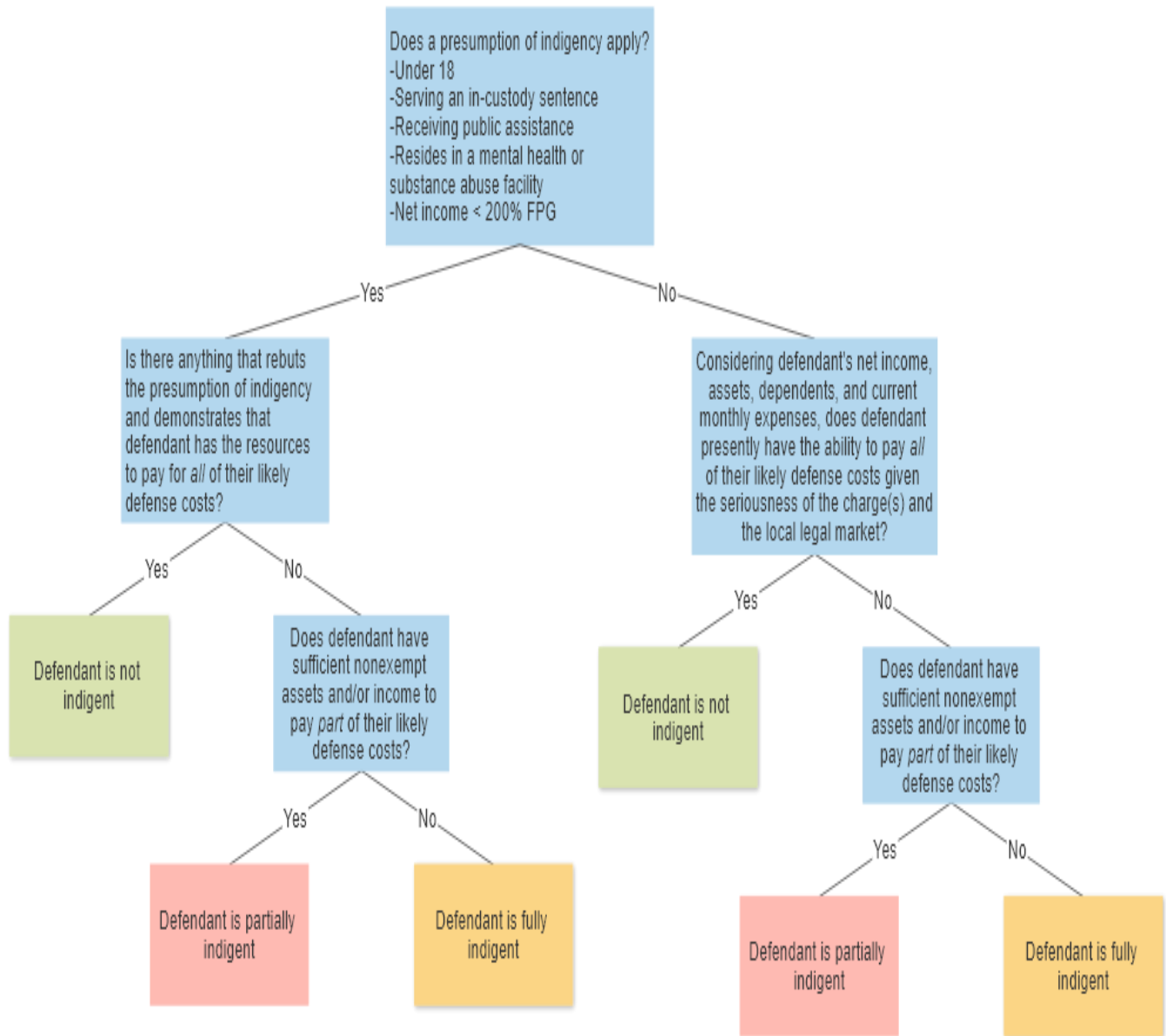
Challenging Indigency and Contribution Determinations

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?

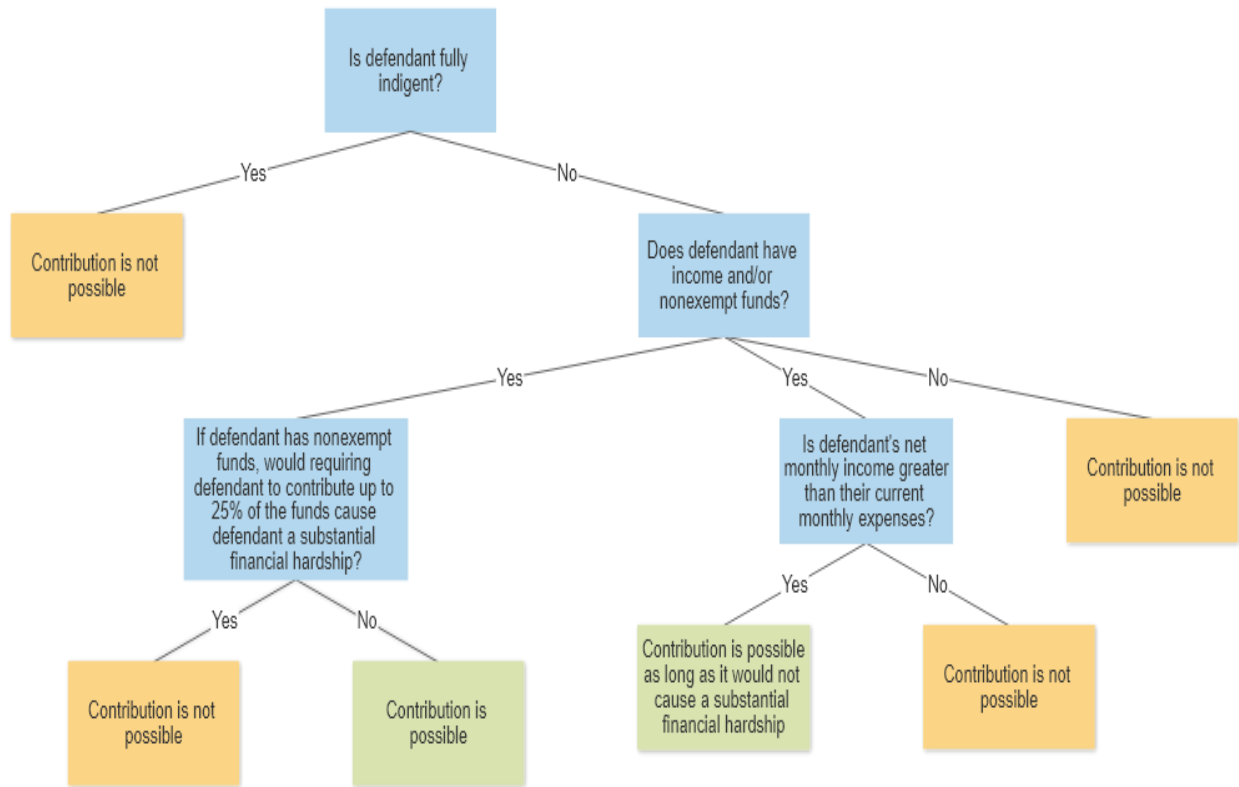
Although some decisions by an appointing authority are subject to administrative review, decisions concerning whether a person is fully or partially indigent and whether a person should pay contribution are subject to "prompt judicial review." MCL 780.991(3)(e) and (f). If an appointing authority is 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>.

Indigency Determination Decision Tree



Contribution Decision Tree



Reimbursement Decision Tree

