

Order

Michigan Supreme Court
Lansing, Michigan

January 11, 2016

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2015-27

Stephen J. Markman
Brian K. Zahra

Administrative Order No. 2016-XX

Bridget M. McCormack
David F. Viviano

Proposed Minimum Standards for
Appointed Counsel (as submitted by the
Michigan Indigent Defense Commission)

Richard H. Bernstein
Joan L. Larsen,
Justices

On order of the Court, this is to advise that the Court is considering adoption of an administrative order that would establish minimum standards for appointed counsel as proposed by the Michigan Indigent Defense Commission. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Note that each proposed standard includes a prefatory paragraph that describes the legal authority on which the standard is based, staff comments provided by the MIDC, and a list of sources and authority is appended at the end of the standards. These materials would not necessarily be included in a final order adopting the standards, but are included for purposes of publication to provide the legal context in which the proposed standards were drafted and submitted.

Publication of this proposal does not mean that the court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that “[d]efense counsel is required to attend continuing legal education relevant to counsel’s indigent defense clients.” MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to

counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial “is not enough to satisfy the constitutional command.” *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association’s *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that “Defense counsel is provided with and required to attend continuing legal education.”

The MIDC proposes a minimum standard for the education and training of defense counsel:

A. Knowledge of the law. Counsel shall know substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to know the changes and developments in the law.

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

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

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education.

Staff comments:

1. Training should be funded through compliance plans submitted by the local delivery system. This standard is not designed to place any financial burden on assigned counsel.

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

3. Data will be collected as to the amount of hours offered to and attended by assigned counsel. The quality of the training should be analyzed through evaluations, and the effectiveness of the training shall be measurable and validated.

Standard 2

Initial Interview

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

The MIDC proposes a minimum standard for the initial client interview:

A. Timing of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel’s representation and the case proceedings. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days of 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.

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

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

D. Client status:

1. Counsel shall evaluate whether the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.
2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Staff comments:

1. *The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.*
2. *The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).*
3. *Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.*
4. *In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.*
5. *Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment. Even without these reforms and timely provision of discovery, the MIDC still requires prompt*

in-custody client interviews to (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; (6) advise that clients should not discuss the circumstances of the arrest or allegations to cellmates, law enforcement, family or anybody else without counsel present.

6. The three business day requirement is specific to clients in “local” custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense. In these situations, counsel should arrange for confidential client visits in advance of the first pre-trial hearing.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might setup visits through confidential videoconferencing. Counsel for indigent criminal appellants have facilities for confidential videoconferencing. If similar facilities are made available for trial attorneys, visits should at least be scheduled within three business days.

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

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

Standard 3

Investigation and Experts

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

The MIDC proposes a minimum standard for investigations and experts:

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

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

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

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

Staff comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation cannot be made merely on the basis of discovery or representations made by the government, and must take into consideration the client's wishes and the client's version of the facts.

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

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

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

Standard 4

Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) "...counsel continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added). The United States Supreme Court has held that assistance of counsel is required at critical stages of proceedings, and

that the right to counsel attaches when a defendant's liberty is subject to restriction by the court. *Rothgery v Gillespie County*, 554 US 191; 128 S Ct 2578; 171 L Ed 2d 366 (2008).

The MIDC proposes a minimum standard on counsel at first appearance and other critical stages:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

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

Staff comments:

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

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

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

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

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes

that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment.

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

Sources and Authority

Standard 1 - Education and Training of Defense Counsel

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principles 6 and 9)
Florida Performance Guidelines for Criminal Defense Representation (Section 1.2)

Authority:

MCL 780.991(2)(c) and (2)(e)

Standard 2 - Initial Interview

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principle 4)
Florida Performance Guidelines for Criminal Defense Representation (Section 2.1)
Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures
(Part IIB)
Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-4)

Authority:

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)
United States v Morris, 470 F3d 596 (CA6, 2006)

MCL 780.991(2)(a)
 MCR 1.111
 MCR 6.125
 MRPC 1.6

Standard 3 - Investigation and Expert Witnesses

Sources:

Florida Performance Guidelines for Criminal Defense Representation (Section 4.2)
 Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures
 (Parts IVA, VIA)
 Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-7)

Authority:

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)
Harrington v Richter, 562 US 86; 131 S Ct 770; 178 L Ed 2d 624 (2011)
Ake v Oklahoma, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985)
Hinton v Alabama, ___ US ___; 134 S Ct 1081; 188 L Ed 2d 1 (2014)
People v Ackley, 497 Mich 381; 870 NW2d 858 (2015)
People v Trakhtenberg, 493 Mich 38; 826 NW2d 136 (2012)
Wiggins v Smith, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003)
Avery v Prelesnik, 548 F3d 434 (CA 6, 2008)
 MCL 780.985(3)

Standard 4 - Counsel at First Appearance

Sources:

ABA Ten Principles of a Public Defense Delivery System - Principle 3

Authority:

Rothgery v Gillespie County, 554 US 191; 128 S Ct 2578; 171 L Ed 2d 366 (2008)
United States v Cronin, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)
Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932)
United States v Morris, 470 F3d 596 (CA6, 2006)
Lafler v Cooper, ___ US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012)
 MCL 780.991(1)(c), (2)(d), (3)(a)

MCR 6.005(A)

Staff Comment: As noted in the introductory paragraphs of this order, the content of this proposal was submitted to the Michigan Supreme Court in its entirety by the Michigan Indigent Defense Commission. The staff comments following each proposed Standard were also supplied by the MIDC.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by May 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 11, 2016

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk