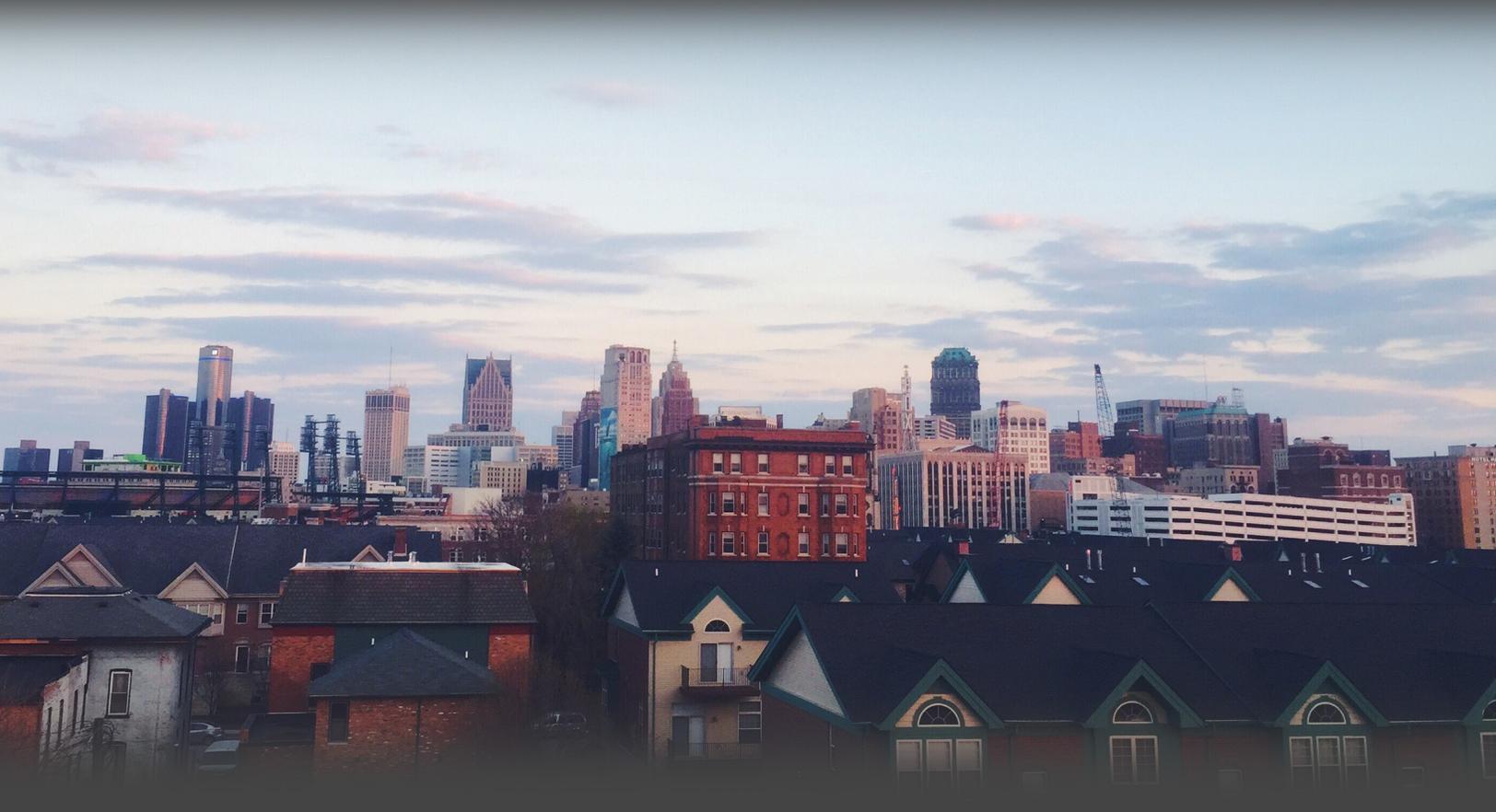


THE RIGHT TO COUNSEL IN WAYNE COUNTY, MICHIGAN

EVALUATION OF ASSIGNED COUNSEL SERVICES IN THE THIRD JUDICIAL CIRCUIT



AUGUST 2019



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The Right to Counsel in Wayne County, Michigan: Evaluation of Assigned Counsel Services in the Third Judicial Circuit
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Prepared by

The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing the potential loss of liberty in a criminal or delinquency proceeding.

Prepared for

Wayne County commissioned this evaluation under a grant from the Michigan Indigent Defense Commission. This report can be read as a companion to *The Right to Counsel in Wayne County, Michigan: Evaluation of the State Defender Office of the Metropolitan Justice Center of Southeast Michigan*, published by the Sixth Amendment Center, in collaboration with the Fred T. Korematsu Center for Law and Equality, Defender Initiative of the Seattle University School of Law, *available at* <http://sixthamendment.org/wp-content/uploads/2018/04/WAYNE-COUNTY-REPORT-APRIL-2018.pdf>.

The report solely reflects the opinions of the authors and does not necessarily reflect the views of Wayne County, the Third Judicial Circuit Court, or the Michigan Indigent Defense Commission.

EXECUTIVE SUMMARY

In *Gideon v. Wainwright*, the U.S. Supreme Court declared it an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” Subsequent caselaw establishes that the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” The U.S. Supreme Court held in *Gideon* that providing an attorney and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.

The Michigan Indigent Defense Commission (MIDC) is a state-level body statutorily authorized to develop and oversee 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.” MIDC’s principal power to carry out its mission rests with its authority to promulgate and enforce binding standards and to make grants of state funding to local governments to aid them in complying with the standards. However, Michigan makes its trial courts responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and makes makes local funding units (counties, cities, villages, and townships) responsible at the outset for funding the right to counsel in felony cases in the trial courts.

The Third Judicial Circuit Court is the general jurisdiction court with authority over all felony cases originating in Wayne County (including Detroit). MIDC made a planning grant to Wayne County to, among other things, conduct an assessment of the Third Judicial Circuit’s provision of felony indigent defense services through private attorneys, known locally as the assigned counsel system. Wayne County contracted the Sixth Amendment Center (6AC) to conduct the evaluation.

Chapter I (pp. 5 to 12) provides introductory information on the right to counsel in Michigan. It also explains the study methodology and assessment criteria. Chapter II (pp. 13 to 21) discusses the limited role that the State of Michigan has in oversight and funding of indigent defense representation. It also touches upon the delegation of most program oversight to the trial courts and most funding responsibility to the counties.

Chapter III (pp. 22 to 26) begins the formal assessment of the felony assigned counsel services in the Third Judicial Circuit Court by considering the extent to which the defense function is independent of undue governmental interference. In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” In the 1979 case of *Ferri v. Ackerman*, the Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” The MIDC Act requires that “[t]he delivery of indigent criminal defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.” MIDC proposed *Standard 5* is entitled “Independence from the Judiciary,” and, if approved, it will remove from judges the responsibility for selecting, appointing, and compensating attorneys who are provided to represent indigent defendants.

FINDING 1: The Third Judicial Circuit Court’s assigned counsel services lack independence.

Although the specifics of the court’s assigned counsel plan have slowly evolved over the past two decades, nearly every aspect of assigned counsel services is subject to judicial influence, because:

- the court sets the qualifications and training required of attorneys to be appointed in felony cases;
- the court selects the attorneys eligible to be appointed in felony cases, and individual judges directly choose the attorney who is appointed in each specific case;
- to the extent any supervision occurs in the representation provided by private attorneys appointed in felony cases, the judges are the supervisors;
- the court determines whether and when attorneys are removed from eligibility to be appointed in felony cases;
- the court sets the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by Wayne County;
- the court determines whether experts and investigators are allowed in each specific felony case and sets the compensation paid to experts and investigators in the felony cases of indigent defendants; and
- the court has established a system that permits assigned counsel to “stand-in” for one another at court proceedings in critical stages of the felony cases of indigent defendants.

To be clear, it is not that the Third Judicial Circuit judges who oversee the indigent defense services are malicious or consciously trying to undermine the basic constitutional right to counsel. Instead, the judges are working within a legal and financial construct that presents them with a series of impossible choices.

The next four chapters explain in detail how the assigned counsel system's lack of independence in the Third Judicial Circuit negatively affects: the qualifications, training, and supervision of assigned counsel (Chapter IV, pp. 27 to 38); the early appointment of and continuous representation by counsel (Chapter V, pp. 39 to 56); the willingness of attorneys to accept appointed felony cases and the adequacy of resources necessary for effective representation (Chapter VI, pp. 57 to 70); and the sufficiency of time necessary to provide effective representation (Chapter VII, pp. 71 to 77).

FINDING 2: The qualifications, training, and supervision required for assigned counsel representing indigent defendants charged with felonies in Wayne County are insufficient to ensure effective assistance of counsel.

Attorneys who are “newly admitted to the Bar” are paired with a mentor and, before being appointed to a case, must “provide written verification” of having: accompanied the mentor “to a pre-exam hearing, an arraignment on information, a plea, sentencing and jail visit,” all within the Third Judicial Circuit; accompanied the mentor “to observe and thoroughly discuss at least two preliminary examinations; and “observed at least one completed Third Circuit Court jury trial.” The only formal continuing education required by the Third Judicial Circuit Court for attorneys who are appointed to represent indigent felony defendants is that they obtain annual CLE certification from the Detroit-Wayne County Criminal Advocacy Program (CAP), by attending six training sessions each year (a total of 12 hours) for attorneys licensed to practice less than 10 years, reducing to four training sessions (a total of 8 hours) for attorneys licensed for 10 years or more. “ This must be completed prior to the application for all attorneys. Failure to complete this function requires removal from the appointed counsel list.

In short, under the Third Judicial Circuit's qualification requirements, an attorney who has just recently been admitted to practice law can be appointed to represent indigent defendants in any and every non-capital felony case as soon as the attorney can complete the necessary observations (all of which are capable of being completed in a single week) and complete 12 hours of CAP training (which can be completed in approximately three months). The Third Judicial Circuit Court does not require any monitoring or regular assessment of the representation provided by private attorneys appointed to represent indigent felony defendants in Wayne County.

FINDING 3: Although indigent defendants charged with felonies in Wayne County are appointed counsel typically within 24 hours of their first appearance before a magistrate, the attorney appointed following first appearance does not always represent an indigent defendant from appointment through disposition of the case, and, in some instances, an indigent felony defendant may be represented by a series of different attorneys at each proceeding in the case. When inconsistent representation occurs, it creates the potential to deny an indigent felony defendant the right to effective assistance of counsel.

If a defense attorney is appointed early in the criminal process, that attorney can effectively represent a client if given the time, training, and resources to do so. Yet, early appointment of counsel will not result in effective representation if a different lawyer shows up to represent the defendant during each of the various critical stages of the case.

In theory, once an attorney is appointed to represent a felony defendant, that same attorney should continue to represent that defendant through disposition of the defendant's case. However, given the size and multiple courts involved in criminal case processing throughout Wayne County, scheduling conflicts caused by a given attorney being appointed to represent defendants whose cases are pending in up to 20 district courts and four municipal courts and up to 23 circuit courtrooms mean that attorneys not infrequently fail to appear in court on behalf of the defendants they are appointed to represent. Sometimes appointed attorneys make arrangements with another attorney to "stand-in" for them at a court proceeding. Sometimes appointed attorneys simply fail to appear at scheduled court proceedings for indigent defendants, resulting in the court appointing a different attorney to begin representing the defendant.

Further, judicial control of which attorney is appointed to represent each defendant creates conflict between the appointed attorneys' fiscal interests and the case-related interests of the defendants whom they are appointed to represent. Under the Third Judicial Circuit Court's procedures for appointing attorneys to represent indigent felony defendants in Wayne County, an attorney can be on the list of attorneys who are eligible to be appointed and yet never be appointed in a single case. There is nothing in the court's procedures that requires each attorney to receive a certain or any number of case appointments. Instead, whether and how many case appointments are made to each attorney is almost entirely within the control of the judges, with few limitations, resulting in assigned counsel attorneys being beholden for their livelihood to the judges.

FINDING 4: The Third Judicial Circuit's assigned counsel compensation plan creates economic disincentives or incentives that impair defense counsel's ability to provide effective representation.

The Third Judicial Circuit Court pays assigned counsel on a per-event basis for their work on all felony cases. For example, attorneys are paid a set amount for a jail visit, for a preliminary examination, and for an arraignment on the information.

To understand why compensating attorneys by event rather than by reasonable hourly rate is problematic, consider the payment structure for jail visits. To visit a client in jail, attorneys report that it can take three to six hours to drive to the jail and get through security, wait for the client to be brought up by jail staff, sit and review body camera footage with the client, and get back out of the jail and drive home. There could be a dozen officers on a case who each have body camera footage to review. For all this work, the attorney is paid \$50. Compounding the situation, the Third Judicial Circuit fee schedule only authorizes an attorney to be paid for one jail visit for felonies carrying a potential sentence of 20 years or less, and a max of two jail visits per capital felony case.

Furthermore, because attorney compensation fees are almost exclusively paid for events that occur inside the courtroom, attorneys are not compensated at all for much of the work that is necessary to provide effective representation. For example, an attorney is not compensated for meeting with a defendant in the office or at the courthouse, or anywhere outside of the jail. The attorney is not compensated for speaking to the defendant's family to inform them about the case. Other than the extremely limited flat fee of \$110 to \$270 for "investigation & preparation," attorneys are not compensated for reviewing discovery produced by the prosecution, interviewing witnesses, conducting legal research, seeking out sentencing alternatives and social services, or for any time spent in trial preparation, no matter that an attorney can easily spend 10 to 15 hours just to prepare for a trial.

Although an assigned counsel attorney may petition the Third Judicial Circuit for extraordinary fees in cases in which the attorney feels the work on a particular case significantly exceeded the allowable compensation under the existing fee schedule, few attorneys ever do so. The average fee paid for felony cases in Wayne County is excessively low. The average per-case compensation, excluding probation violations, for all assigned counsel in the Third Judicial Circuit from 2014 through 2018 was \$453.53.

Because attorneys are paid exactly the same amount for an event, no matter how few or how many hours they devote to carrying out that event, and because attorneys are not paid for most time outside of court that they devote to providing effective assistance of counsel, it is in the attorney's own financial interest to spend as little time as possible on each individual defendant's case. The low compensation attorneys receive creates an incentive for attorneys to handle too many cases.

FINDING 5: The Third Judicial Circuit’s assigned counsel system has no workload controls. A significant number of attorneys work in excess of national public defense workload standards.

The data provided by the court shows that many of the private attorneys who are appointed to represent indigent felony defendants in the Third Judicial Circuit carry an appointed felony caseload (without considering appointed probation violations) that is far in excess of national standards. In 2016 for example, one attorney was paid for 459 felony cases, while national standards set an absolute annual maximum of 150 felony cases for an attorney who does nothing else and assuming that attorney has adequate support staff.

Even if these attorneys worked nowhere else other than in the Third Judicial Circuit, their caseloads would be cause for concern. But most attorneys on the assigned counsel list either accept appointed cases in other circuits, take appointed cases in district courts, maintain a private practice of retained cases, or most commonly do some combination of all of the above.

The 6AC concludes in Chapter VIII (pp. 78 to 84) that the Third Judicial Circuit’s felony assigned counsel system lacks independence from the judiciary and does not provide meaningful oversight of funding or of the effectiveness of representation. Attorneys work for unreasonably low compensation that creates a financial incentive for them to handle too many cases, provide non-continuous representation, and dispose of cases quickly to the possible detriment of the indigent accused. The system lacks checks and balances to ensure that all appointed attorneys are qualified and trained to handle the cases to which they are appointed. To remedy the systemic deficiencies, the 6AC makes two recommendations.

RECOMMENDATION 1: Terminate the current compensation structure for felony indigent defense representation in the Third Judicial Circuit Court because it creates conflicts between the financial interests of appointed private attorneys and the case-related interests of indigent defendants they represent. Wayne County should apply for adequate compensation from MIDC to create a new compensation plan that: (a) pays private attorneys appointed to felony cases for all reasonably necessary in-court and out-of-court work at an hourly rate of \$110 for non-life felonies and \$120 for life felonies; (b) provides for annual review of the hourly rates to increase for cost of living; and (c) reimburses counsel for out-of-pocket case-related expenses without judicial interference.

RECOMMENDATION 2: The MIDC Act should be amended to allow for MIDC to administer and fund felony indigent representation in Wayne County.

State funding is called for by national standards in part because local jurisdictions most in need of indigent defense services are often the ones least able to afford them.

In many instances, the circumstances that limit a county's revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates. In high poverty areas, more people accused of crime are indigent and entitled to public defense services. Further, these counties typically spend more on social services such as public health needs, unemployment compensation, or housing assistance, leaving fewer resources available for protecting people's rights under the Sixth Amendment. Wayne County fits this profile squarely.

Michigan state law places significant limitations on how counties can raise revenue. This restricts Wayne County's ability to make the substantial investment required to ensure effective representation under the Sixth Amendment. At the same time, Wayne County generates a very high percentage of the felony prosecutions in the state, and its people live with a significantly higher crime rate than that in the rest of Michigan and in the nation.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.” The proposed MIDC *Standard 8* on attorney compensation states that felony assigned should be paid: “at least . . . \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees' salaries. Counsel must also be reimbursed for case-related expenses”

The total estimated cost in the Third Judicial Circuit of paying assigned counsel \$110 per hour in non-life felony cases and \$120 per hour in life felony cases, based on the number of 2017 felony cases and probation violations, is at least \$34,844,480. In 2017, Wayne County spent \$5,588,984 to compensate private attorneys handling appointed felony cases and probation violations in the Third Judicial Circuit, meaning that the new compensation plan based on the most conservative interpretation of the available caseload data represents more than a 523% increase in funding. Under existing national standards, the state should bear this obligation.

There are several compelling reasons for the state to administer and fund indigent defense in Wayne County. First, the Fourteenth Amendment requires Michigan, as it does all states, to enforce Sixth Amendment case law. Second, MIDC has the capability to monitor the total workload of Third Judicial Circuit assigned counsel attorneys, including the total number of public cases assigned in all courts at all levels throughout Michigan, whereas Wayne County only has the ability to track cases appointed in the Third Judicial Circuit. Third, under the MIDC Act, the State of Michigan will of necessity appropriate significant funding to the provision of indigent defense services in Wayne County, and such an investment merits direct state oversight.

Moreover, U.S. Supreme Court caselaw makes clear that the Sixth Amendment right to counsel must be independent of undue political and judicial influence. To carry out the constitutional requirement, national standards state that the defense function must be insulated from outside political or judicial interference by a board or commission, whose members are appointed by diverse authorities so that no one branch of government can exert more control over the system than any others. The makeup of the MIDC already satisfies national recommendations for an independent defense commission, negating the financial costs and bureaucratic redundancies of creating an intermediary local commission.

That said, MIDC does not currently have statutory authority to serve as the independent defense commission in Wayne County. This will require statutory amendments to the MIDC Act and other statutes. Michigan statutes still require its trial courts to be responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and the trial courts do this through local administrative orders. Similarly, Michigan continues to make its counties responsible at the outset for funding the right to counsel in felony cases in the trial courts.

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EVALUATION OF ASSIGNED COUNSEL SERVICES
IN THE THIRD JUDICIAL CIRCUIT

AUGUST 2019

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CHAPTER I

INTRODUCTION

THE CONSTITUTIONAL RIGHT TO COUNSEL

The Sixth Amendment to the U.S. Constitution reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹

While the Sixth Amendment guarantees many of the rights held by individuals in criminal cases, the right to counsel is paramount. As the U.S. Supreme Court has noted, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”²

In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”³ Moreover, the appointed lawyer needs to be

¹ U.S. CONST. amend. VI.

² *United States v. Cronin*, 466 U.S. 648, 654 (1984). *See also* *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

more than merely a warm body with a bar card.⁴ The attorney must also be effective,⁵ subjecting the prosecution's case to "the crucible of meaningful adversarial testing."⁶

MICHIGAN INDIGENT DEFENSE COMMISSION

On February 22, 2007, the American Civil Liberties Union (ACLU) filed a class action lawsuit on behalf of all current and future indigent defendants charged with felonies in three Michigan counties.⁷ Though the named counties were the focus of the complaint, the ACLU explained that the types of harms suffered by indigent defendants were "by no means limited or unique" to just those three Michigan counties.⁸ The complaint alleged that the State of Michigan had done "nothing to ensure that any county ha[d] the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation."⁹

The state and counties tried to get the suit dismissed. At stake was the question of whether indigent people charged with crimes and being deprived of their right to counsel have to wait until after conviction and sentence to seek help from a court, or whether they can ask a court to step in and ensure they receive effective assistance of counsel from the outset of a prosecution. On June 11, 2009, the Michigan Court of Appeals affirmed the trial court's decision that the case could go forward, stating:

[T]he role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct. For state and federal constitutional provisions to have any meaning, we may and must engage in this role even where litigation encompasses conduct by the executive and legislative branches. We cannot accept the proposition that the constitutional rights of our citizens, even those

⁴ *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

⁵ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

⁶ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

⁷ See Complaint, *Duncan v. Michigan*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County, filed Feb. 22, 2007). Those counties are Berrien County, Genesee County, and Muskegon County.

⁸ Complaint at 5, *Duncan v. Michigan*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County, filed Feb. 22, 2007).

⁹ Complaint at 3, *Duncan v. Michigan*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County, filed Feb. 22, 2007).

accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not [by the] courts, then by whom? . . . Constitutional compliance is our only concern; matters regarding the method and manner by which the executive and legislative branches effectuate constitutional demands are not our concern, nor can they be, as long as the branches abide by the state and federal constitutions. In that same vein, and with respect to the particular issues raised in this action, concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to prevail over constitutional compliance, despite any visceral reaction to the contrary.¹⁰

The ACLU dismissed its lawsuit as moot when the Michigan Indigent Defense Commission Act was signed into law in July 2013.¹¹ The legislation created the Michigan Indigent Defense Commission (MIDC) as a state-level body to develop and oversee 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.”¹²

MIDC’s principal power to carry out its mission rests with its authority to promulgate and enforce binding standards and to make grants of state funding to local governments to aid them in complying with the standards. As new standards are adopted, each local government that is responsible for the provision of counsel¹³ submits a plan to MIDC for how it will meet the standards and the projected cost of doing so.¹⁴ Local governments are required by statute to maintain their local share of funding for indigent criminal defense services,¹⁵ defined as the “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

¹⁰ *Duncan v. Michigan*, 774 N.W.2d 89, 98 (Mich. Ct. App. 2009). The Michigan Supreme Court affirmed as well. *Duncan v. Michigan*, 780 N.W.2d 843 (Mich. 2010), *vacated*, No. 139345-7(108)(109) (Mich. July 16, 2010), *and reinstated*, No. 139345-7(113) (Mich. Nov. 30, 2010).

¹¹ Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Act 93 (codified as subsequently amended at MICH. COMP. LAWS §§ 780.981-780.1003).

¹² MICH. COMP. LAWS § 780.989(1)(a) (2019).

¹³ The MIDC Act conflates an indigent defense system with the funding of a trial court. The local unit or units of government that fund a trial court are defined, under the Act, to *be* the indigent criminal defense system. MICH. COMP. LAWS § 780.983(h) (2019). The county or counties within the geographic area of a judicial circuit are responsible for funding the operations of the circuit court. MICH. COMP. LAWS § 600.591 (2019).

¹⁴ MICH. COMP. LAWS § 780.993 (2019).

¹⁵ MICH. COMP. LAWS § 780.993(7)-(9) (2019).

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.”¹⁶ “If the MIDC determines that funding in excess of the [local government] 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 the State of Michigan.¹⁷

THE CURRENT ASSESSMENT

On May 22, 2017, MIDC’s first four standards were approved statewide.¹⁸ Those standards govern: attorney education and training; initial client interviews; use of investigators and experts; and the presence of appointed counsel at first appearance and other critical stages.¹⁹ (*See Appendix A for full text of approved MIDC standards 1 through 4, at p. 85.*) In accordance with the statutory requirements,²⁰ MIDC required each unit of local government that operates an indigent defense system to submit their plan by November 20, 2017, showing how its indigent defense system would meet these standards and the cost of doing so.

The Third Judicial Circuit Court is the general jurisdiction court with authority over all felony cases originating in Wayne County.²¹ To represent indigent adults in felony cases, the court appoints a non-profit public defender office (at the time of this evaluation, the State Defender Office) in approximately 25% of cases and appoints private attorneys in the other approximately 75% of cases.²² Wayne County is the local

¹⁶ MICH. COMP. LAWS § 780.983(i) (2019).

¹⁷ MICH. COMP. LAWS § 780.993(7) (2019).

¹⁸ Notice and Order Approving Standards, In re Mich. Indigent Defense Comm’n Proposed Minimum Standards, Mich. Dep’t of Licensing and Regulatory Affairs (May 22, 2017), *available at* https://www.michigan.gov/documents/lara/MIDC_Proposed_Minimum_Standards_571613_7.pdf.

¹⁹ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Stds. 1-4 (2018).

²⁰ MICH. COMP. LAWS § 780.993(3) (2019).

²¹ MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

²² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017).

The requirement that the State Defender Office be appointed in 25% of Third Judicial Circuit indigent cases is imposed by the Michigan Supreme Court, although the Michigan Supreme Court has proposed rescission of the 25% order. Admin. Order 2018-27, Proposed Rescission of Admin. Order No. 1997-5 (Defenders – Third Circuit Court) (Mich. Apr. 18, 2019), *available at* https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2018-27_2019-04-18_FormattedOrder_PropRescofAO1997-5.pdf. In May 1972, the Michigan Supreme Court ordered that the defender division of the Legal Aid and Defender Association, Inc. be appointed on a weekly basis to 25% of all indigent cases in the Detroit Recorder’s Court, to encourage the “efficient administration of criminal justice” through partial reliance on full-time public defenders rather than solely on appointed private attorneys. Admin. Order No. 1972-2, Assignment of Counsel in the Recorder’s Court (Mich. May 11, 1972). As part of court reorganization in 1997, the Michigan

unit of government responsible for funding the Third Judicial Circuit Court, including the cost of providing representation to indigent felony defendants.²³

In considering how to most effectively deliver representation to indigent defendants charged with felonies in Wayne County and to comply with the MIDC standards, Wayne County sought an objective assessment of the State Defender Office's strengths and weaknesses. MIDC provided grant funds to Wayne County for the evaluation.²⁴ The Sixth Amendment Center,²⁵ in cooperation with the Defender Initiative at Seattle University School of Law,²⁶ conducted the assessment.

The April 2018 report found that: the State Defender Office attorneys are unable to put each and every prosecution to the "crucible of meaningful adversarial testing," as is their ethical duty and constitutional obligation; and the State Defender Office attorneys are prevented from providing effective representation because they lack sufficient time, resources, and support staff to properly prepare cases.²⁷ The report recommended that: the Michigan Indigent Defense Commission and Wayne County should work together, in consultation with the Third Judicial Circuit Court, to determine the most effective methods of providing counsel to represent indigent defendants; Sixth Amendment indigent defense services in Wayne County must be adequately funded to provide effective representation; and the State of Michigan must share the financial burden for providing representation in the Third Judicial Circuit.

On April 6, 2018, Wayne County submitted an amended plan for how it intends to comply with the MIDC standards 1 through 4 and its estimated cost of doing so.²⁸

Supreme Court extended the order appointing the public defender office in 25% of indigent cases to the Third Judicial Circuit Court "until further order." Admin. Order No. 1997-5, Defenders – Third Circuit Court (Mich. July 25, 1997). A written contract between Wayne County, the Third Judicial Circuit, and the State Defender Office's parent organization governs the services provided and the compensation paid. Professional Services Contract between Wayne County and the Metropolitan Justice Center of Southeast Michigan, State Defender Office (date of execution unk.) (for term of Oct. 1, 2018 through Sept. 30, 2019).

²³ MICH. COMP. LAWS §§ 600.151e(9)(a), 600.591, 600.593, 600.593a, 600.595, 600.596, 780.993(6) (2019).

²⁴ The amount of this grant was \$80,000. Email from Marcela Westrate, Mich. Indigent Defense Comm'n, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 30, 2019).

²⁵ The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing the potential loss of liberty in a criminal or delinquency proceeding.

²⁶ The Defender Initiative of the Seattle University School of Law is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

²⁷ SIXTH AMENDMENT CENTER, THE RIGHT TO COUNSEL IN WAYNE COUNTY, MICHIGAN: EVALUATION OF THE STATE DEFENDER OFFICE OF THE METROPOLITAN JUSTICE CENTER OF SOUTHEAST MICHIGAN (Apr. 2018), available at <http://sixthamendment.org/wp-content/uploads/2018/04/WAYNE-COUNTY-REPORT-APRIL-2018.pdf>.

²⁸ Charter County of Wayne, Michigan Indigent Defense Commission Revised Compliance Plan and

MIDC made a planning grant to Wayne County to implement components of the amended compliance plan.²⁹ As part of that planning, Wayne County contracted with the Sixth Amendment Center to conduct an assessment of the Third Judicial Circuit's provision of felony indigent defense services through private attorneys, known locally as the assigned counsel system.

In November 2018 while this evaluation was being conducted, MIDC formally proposed four additional standards regarding: independence of the defense function from the judiciary; indigent defense workloads; review of attorney qualifications; and attorney compensation.³⁰ (See Appendix B for full text of proposed MIDC standards 5 through 8, at p. 88.) As of the publication of this report, these standards are awaiting formal approval. If and when these standards are approved, Wayne County (and all other local governments operating indigent defense systems) will have 180 days to submit its plan to MIDC for compliance with these additional standards.³¹

Methodology. The Sixth Amendment Center (6AC) independently and objectively evaluates indigent defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The 6AC's evaluation of the felony assigned counsel services in Wayne County has been carried out through three basic components.

Data collection and analysis. Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. 6AC obtained and analyzed relevant hard copy and electronic information

Cost Analysis for Standards 1-4 (am. Apr. 6, 2018). During the course of this assessment, the 6AC was told by Wayne County representatives that a different plan for the assignment of counsel (Local Admin. Order 2017-04, Plan for Assignment of Counsel in the Third Circuit Court – Criminal Division (Mich. 3rd Jud. Cir. Apr. 19, 2017)) than the one being followed at the time of this evaluation (Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017)) was attached to the compliance plan and that MIDC's subsequent approval of the compliance plan meant that MIDC also approved the different plan for assignment of counsel. The 6AC sought clarification from the MIDC. The MIDC Executive Director stated: "The Commission has not considered or taken a position with regard to the LAO. Per the statute, the Commission approved the compliance plan and cost analysis. I wouldn't assume that the approval extends to the LAO as an attachment." Email from Loren Kohgari, Mich. Indigent Defense Comm'n, to David Carroll, Executive Director of Sixth Amendment Center (May 28, 2019).

²⁹ The funding for the current assessment comes as part of a grant of \$901,371 that MIDC made to Wayne County to implement components of its compliance plan for MIDC standards 1 through 4. See Email from Marcela Westrate, Mich. Indigent Defense Comm'n, to David Carroll, Executive Director of Sixth Amendment Center (Mar. 30, 2019).

³⁰ See Mich. Dep't of Licensing and Regulatory Affairs, Michigan Indigent Defense Commission Seeking Public Comment on Minimum Standards (Nov. 14, 2018), available at <https://www.michigan.gov/lara/0,4601,7-154-11472-483063--,00.html>; MICHIGAN INDIGENT DEFENSE COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Stds. 5-8 (2018).

³¹ MICH. COMP. LAWS § 780.993(3) (2019).

at both the local and state levels. The Third Judicial Circuit provided data showing the number of case assignments made to each attorney appointed in a felony case or probation violation during calendar years 2014 through 2017. The 6AC gathered criminal case disposition data from the annual reports of the Third Judicial Circuit. The Third Judicial Circuit provided extensive information detailing every voucher payment made to felony assigned counsel attorneys during fiscal years 2014 through 2018.

Court observations. Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individual defendants experience as their cases advance from arrest or summons through disposition; (2) the process the defense attorney experiences while representing each defendant at the various stages of a case; and (3) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. The 6AC conducted courtroom observations in Wayne County circuit and district courts to clarify these processes, travelling to Wayne County for three separate site visits between November 2018 and February 2019.

Interviews. No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, the 6AC conducted interviews orally and in writing with a broad cross-section of stakeholders before, during, and after site visits to Wayne County, including judges, prosecutors, defense attorneys, court personnel, and law enforcement and corrections administrators.

Assessment criteria. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come principally from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronin*³² and *Strickland v. Washington*.³³ *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel, applying the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur.

Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys, who have sufficient time to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

³² 466 U.S. 648 (1984).

³³ 466 U.S. 668 (1984).

Understanding *Cronic* through the American Bar Association's *ABA Ten Principles of a Public Defense Delivery System*

Adopted by the ABA House of Delegates in 2002, the *ABA Ten Principles*^a are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronic* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

^a AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

CHAPTER II

THE STATE OF MICHIGAN'S RESPONSIBILITY TO INDIGENT FELONY DEFENDANTS IN WAYNE COUNTY

The U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.³⁴ Every state in the nation must have a system for providing an attorney to represent an indigent defendant who is charged with a crime and facing the possible loss of their liberty, and attorneys provide representation to indigent people within the structures of the systems states create.

In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.³⁵ The Court explains further in *Cronin* that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer

³⁴ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. The Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, . . . we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

³⁵ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

is presumptively ineffective.³⁶ When a system is determined to be constructively deficient, the government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government's burden to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”³⁷

MICHIGAN'S DELEGATION OF RIGHT TO COUNSEL RESPONSIBILITIES TO COUNTIES AND CITIES

When a state chooses to delegate its right to counsel responsibilities to its counties and cities, the state must guarantee not only that those local governments are capable of providing effective representation but also that they are in fact doing so.³⁸ Because the “responsibility to provide defense services rests with the state,” national standards unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”³⁹

Until the implementation of the Michigan Indigent Defense Commission Act,⁴⁰ the State of Michigan delegated to its counties and trial court judges all responsibility for the trial level provision of counsel to the indigent in felony cases.⁴¹ With the

³⁶ *United States v. Cronin*, 466 U.S. 648, 657-62 (1984).

³⁷ *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

³⁸ *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (holding that, although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (holding that, where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and White Paper from American Civil Liberties Union Foundation et al. to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), available at http://nvcourts.gov/AOC/Committees_and_Commissions/Indigent_Defense/Documents/Miscellaneous/Letter_White_Paper_Regarding_the_Delegation_of_Indigent_Defense_Duties_to_the_Counties/.

³⁹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 cmt. (2002).

⁴⁰ Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Act 93 (codified as subsequently amended at MICH. COMP. LAWS §§ 780.981-780.1003).

⁴¹ MICH. COMP. LAWS § 775.16 (prior to July 1, 2013 amendment by 2013 Mich. Pub. Act 94) (“When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived examination on the charge upon which the person appears, the person shall be advised

implementation of the MIDC Act, the state took its first step toward providing some state funding for and some state level oversight of the right to counsel in felony cases in the trial courts. As one judge observed at the time: “Think of Michigan’s approach to indigent defense as a large ship going the wrong direction for 50 years. This bill, when it becomes law, represents the ship turning around. We still have a long journey back to a sensible system.”⁴²

The role that the State of Michigan has allocated to itself, in overseeing and funding the trial level right to counsel, commences for all practical purposes only when standards promulgated by the MIDC are formally approved to take effect statewide.⁴³ As explained in Chapter I, as new standards are adopted, each local government that is responsible for providing the right to counsel submits a plan to MIDC for how it will meet the standards and the projected cost of doing so.⁴⁴ Local governments are required by statute to maintain their local share of funding for indigent criminal defense services,⁴⁵ defined as the “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.”⁴⁶ “If the MIDC determines that funding in excess of the [local government] 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 the State of Michigan.⁴⁷

Once MIDC approves a local plan and makes any necessary grant of state funds to the local government, then the local indigent defense system is required by the MIDC Act

of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder’s court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused’s examination and to conduct the accused’s defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.”). *See* *Duncan v. Michigan*, 774 N.W.2d 89, 104-05 (Mich. Ct. App. 2009) (“[T]here can be no reasonable dispute that the state was engaged in a governmental function when it delegated the representation of indigent defendants to the various counties. Moreover, it is the state that is ultimately mandated to ensure that indigent defendants are provided their constitutional right to counsel.”).

⁴² District Judge Thomas Boyd, quoted in David Carroll, Michigan passes public defense reform legislation, SIXTH AMENDMENT CENTER (June 19, 2013).

⁴³ MICH. COMP. LAWS § 780.993 (2019).

⁴⁴ MICH. COMP. LAWS § 780.993 (2019).

⁴⁵ MICH. COMP. LAWS § 780.993(7)-(9) (2019).

⁴⁶ MICH. COMP. LAWS § 780.983(i) (2019).

⁴⁷ MICH. COMP. LAWS § 780.993(7) (2019).

to comply with that plan.⁴⁸ If a local indigent defense system then fails to comply with its MIDC approved plan, following a process of first mediation and then litigation, a court “may order the MIDC to provide indigent criminal defense on behalf of that system.”⁴⁹

STATE OVERSIGHT OF THE PROVISION OF EFFECTIVE ASSISTANCE OF COUNSEL

Michigan continues to make its trial courts responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and the trial courts do this through local administrative orders.⁵⁰ The Third Judicial Circuit Court is the general jurisdiction court with authority over all felony cases originating in Wayne County (including Detroit).⁵¹ To represent indigent adults in felony cases, the court appoints a non-profit public defender office (at the time of this evaluation, the State Defender Office) in approximately 25% of cases and appoints private attorneys in the other approximately 75% of cases.⁵²

The State of Michigan remains responsible under the U.S. Constitution for ensuring that the Third Judicial Circuit Court is both capable of and in fact providing effective representation to indigent defendants in felony cases. The balance of this report addresses the assigned counsel system adopted by the Third Judicial Circuit to provide the right to counsel through private attorneys.

⁴⁸ MICH. COMP. LAWS § 780.997 (2019). The MIDC does not have authority to require any court, county, or city to comply with MIDC standards unless MIDC makes a grant of state funds “in the amount sufficient to cover that particular standard or standards contained in the plan and cost analysis approved by the MIDC.” *Id.* at § 780.997(2). The local indigent defense system must comply with the MIDC approved plan within 180 days of receiving any necessary grant of state funds, unless MIDC authorizes a longer period for the local system to come into compliance. MICH. COMP. LAWS § 780.993(11) (2019).

⁴⁹ MICH. COMP. LAWS § 780.995(6) (2019). *See* MICH. COMP. LAWS §§ 780.995, 780.997 (2019). At that point, the local government becomes responsible for funding a portion of the state’s costs incurred to bring the local indigent criminal defense system into compliance with its MIDC approved plan. MICH. COMP. LAWS § 780.995(7)-(8) (2019).

⁵⁰ MICH. CT. R. 8.123.

⁵¹ MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

⁵² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017). The requirement that the State Defender Office be appointed in 25% of Third Judicial Circuit indigent cases is imposed by the Michigan Supreme Court, although the Michigan Supreme Court has proposed rescission of the 25% order. Admin. Order 2018-27, Proposed Rescission of Admin. Order No. 1997-5 (Defenders – Third Circuit Court) (Mich. Apr. 18, 2019), *available at* https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2018-27_2019-04-18_FormattedOrder_PropRescofAO1997-5.pdf.

STATE FUNDING FOR THE RIGHT TO COUNSEL

Similarly, Michigan continues to make its counties responsible at the outset for funding the right to counsel in felony cases in the trial courts.⁵³ For the Third Judicial Circuit, Wayne County is responsible for funding the cost of representation provided to indigent felony defendants.⁵⁴

The State of Michigan remains responsible under the U.S. Constitution for ensuring that Wayne County is both capable of and in fact providing adequate funding for the right to counsel of indigent defendants in felony cases. Chapter VI discusses fiscal aspects of the assigned counsel system adopted by the Third Judicial Circuit to provide the right to counsel through private attorneys. Unique circumstances currently existing in Wayne County warrant further discussion about its ability to adequately fund the right to counsel.

State funding is called for by national standards in part because local jurisdictions most in need of indigent defense services are often the ones least able to afford them. In many instances, the circumstances that limit a county's revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates. In high poverty areas, more people accused of crime are indigent and entitled to public defense services. Further, these counties typically spend more on social services such as public health needs,⁵⁵ unemployment compensation, or housing assistance, leaving fewer resources available for protecting people's rights under the Sixth Amendment. Wayne County fits this profile squarely.

Michigan state law places significant limitations on how counties can raise revenue,⁵⁶ restricting Wayne County's ability to make the substantial investment required to

⁵³ The MIDC Act conflates the funding of an indigent defense system with the funding of a trial court. The local unit or units of government that fund a trial court are defined, under the Act, to *be* the indigent criminal defense system. MICH. COMP. LAWS § 780.983(h) (2019). The county or counties within the geographic area of a judicial circuit are responsible for funding the operations of the circuit court. MICH. COMP. LAWS § 600.591 (2019).

⁵⁴ See MICH. COMP. LAWS §§ 600.151e(9)(a), 600.591, 600.593, 600.593a, 600.595, 600.596, 780.983(h), 780.993(6) (2019).

⁵⁵ Email from Marianne Talon, Wayne County Corporation Counsel, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 29, 2018) (“[F]or Wayne County, our main expense other than the court and law enforcement, is for physical and mental health services for our low income and detained adults and juveniles. For instance, we have administered over 1000 hepatitis A vaccinations in our clinics and 400 in our jails in the last 3 months.”).

⁵⁶ See CITIZENS RESEARCH COUNCIL OF MICH., REPORT 399: DIVERSIFYING LOCAL-SOURCE REVENUE OPTIONS IN MICHIGAN (2018) (explaining the intricacies of Michigan tax laws), *available at* https://crecmich.org/PUBLICAT/2010s/2018/rpt399_Local_Option_Taxes.pdf. Among the seven Great Lakes states (Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania, and Wisconsin), Michigan limits its local governments to the fewest methods of raising revenue locally. *Id.* at 31-32 (2018).

ensure effective representation under the Sixth Amendment. The primary source of revenue for Michigan's counties is the local property tax.⁵⁷ In 2008, Wayne County collected \$378 million in property taxes, but that number fell by approximately \$100 million between 2008 and 2015.⁵⁸ Property tax revenue for Wayne County is not expected to return to pre-2008 levels until 2028.⁵⁹ Even as Wayne County's local revenues have declined, the state has also cut the amount of revenue that it shares with local governments.⁶⁰

Wayne County generates a very high percentage of the felony prosecutions in the state, and its people live with a significantly higher crime rate than that in the rest of Michigan and in the nation. In 2017, Wayne County produced about one-third of all life sentence felony cases and one-fifth of all non-life felony cases in Michigan.⁶¹ Wayne County's 2017 population was estimated at 1,753,616, with Detroit making up

⁵⁷ CITIZENS RESEARCH COUNCIL OF MICH., REPORT 399: DIVERSIFYING LOCAL-SOURCE REVENUE OPTIONS IN MICHIGAN 2 (2018). The Citizens Research Council of Michigan finds that Michigan only allows its local units of government to assess a small number of other taxes, including city income taxes, city and county tourism-related taxes, and in Detroit a utility users' excise tax and casino gambling tax. *Id.* at vi. "Before any new local tax can be levied by any local government in Michigan, the state must enact a law authorizing local units to levy the tax; allowing for a local-option sales tax may require amending the Michigan Constitution. If a state law is passed, then the legislative body of the local unit would need to pass a resolution or ordinance to levy the tax at whatever rate is desired by the local unit and allowed for in state law. Finally, no new tax could be levied unless approved by local voters." *Id.*

⁵⁸ Email from Marianne Talon, Wayne County Corporation Counsel, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 2, 2018). "From Fiscal Year (FY) 2008 to FY2012, the taxable value of all cities in Michigan fell 17.9 percent . . . The declines have been largest in Michigan's bigger cities and in Southeast Michigan (which is home to many of Michigan's bigger cities)." CITIZENS RESEARCH COUNCIL OF MICH., REPORT 399: DIVERSIFYING LOCAL-SOURCE REVENUE OPTIONS IN MICHIGAN 2 (2018).

⁵⁹ Email from Marianne Talon, Wayne County Corporation Counsel, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 2, 2018). "[F]rom FY2012 to FY2017, taxable value [of all cities in Michigan] has increased 6.2 percent. . . . If taxable value in a hypothetical city increased at an annual rate of two percent beginning in FY2012, it would take a city that suffered a 20 percent decline 12 years to recover its lost property values, not adjusted for inflation; in real terms, the city will never recover their property tax losses under the current system." CITIZENS RESEARCH COUNCIL OF MICH., REPORT 399: DIVERSIFYING LOCAL-SOURCE REVENUE OPTIONS IN MICHIGAN 2 (2018).

⁶⁰ CITIZENS RESEARCH COUNCIL OF MICH., REPORT 399: DIVERSIFYING LOCAL-SOURCE REVENUE OPTIONS IN MICHIGAN 3-4 (2018). "The problem with [Michigan's system of state revenue sharing] is that, though it works well when state revenues are strong, it has proven an easy funding source to cut when state revenues are declining so that state policymakers can use those revenue sharing dollars to fill state budget holes, leaving local governments scrambling to make up for their revenue shortfalls." *Id.* at 3.

⁶¹ *Compare* MICHIGAN COURTS, 3RD CIRCUIT COURT OF WAYNE COUNTY SUMMARY, 2017 COURT CASELOAD REPORT (2017) (showing 10,343 new non-capital filings and 1,001 new capital filings) *with* MICHIGAN COURTS, STATEWIDE CIRCUIT COURT SUMMARY, 2017 COURT CASELOAD REPORT (2017) (showing 48,755 new non-capital filings and 3,026 new capital filings). The administrative reporting requirements for the Michigan trial courts divide felony cases into: capital felonies, defined as "cases in which life sentence is possible and a larger number of peremptory jury challenges is provided;" and non-capital felonies. *See* MICH. SUPREME COURT, STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 78 (Sept. 2017).

a little less than 40% at 673,104.⁶² For Detroit alone without taking into consideration the rest of the county,⁶³ the number of violent crimes reported to the Detroit Police Department in 2016⁶⁴ was 1,908.66 per 100,000 inhabitants, or almost five times the national rate.⁶⁵ For property crimes, Detroit's 2016 rate of 4,733.74 per 100,000 inhabitants is close to double the national rate of 2,450.7.⁶⁶

As of July 2017, nearly one in four people in Wayne County live in poverty (compared to just 12.3% of people across the United States),⁶⁷ making it likely that most by far of the felony prosecutions in Wayne County require appointed counsel. Although Wayne County's civilian unemployment rate has been improving in recent years,⁶⁸ as of 2016 it was still nearly four percentage points higher than the national average.⁶⁹ The median household income in Wayne County is just \$43,702 per year, compared to the national median of \$57,652.⁷⁰ A smaller percentage of people in Wayne County own their homes than across the country,⁷¹ and for those who do the median value of homeowner occupied units in Wayne County is over \$100,000 less than the national median.⁷²

⁶² *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/waynecountymichigan/PST045217> with *Quick Facts: Detroit City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan/PST045217>.

⁶³ Comparable 2016 information is not readily available for the entirety of Wayne County.

⁶⁴ 2016 is the most recent year for which this information is available.

⁶⁵ The F.B.I. defines the crime rate as the number of crimes per 100,000 inhabitants. *Compare Reported Crimes Through December 31, 2016*, DETROIT POLICE (Jan. 5, 2017), <https://detroitmi.gov/document/reported-crimes-2016> (12,842 reported violent crimes ÷ population of 672,829 = 0.01908657 × 100,000 = 1908.66) with *2016 Crime in the United States*, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (national violent crime rate 386.3).

⁶⁶ *Compare Reported Crimes Through December 31, 2016*, DETROIT POLICE (Jan. 5, 2017), <https://detroitmi.gov/document/reported-crimes-2016> (31,850 reported property crimes ÷ population of 672,829 = 0.04733744 × 100,000 = 4733.74) with *2016 Crime in the United States*, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (national property crime rate 2450.7).

⁶⁷ *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/waynecountymichigan/PST045217> with *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

⁶⁸ *Local Area Unemployment Statistics – Detroit-Dearborn-Livonia, MI Metropolitan Division*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, https://data.bls.gov/timeseries/LAUDV261980400000003?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Apr. 5, 2019).

⁶⁹ *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/waynecountymichigan/PST045217> with *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

⁷⁰ *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/waynecountymichigan/PST045217> with *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

⁷¹ *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/waynecountymichigan/PST045217> with *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (Wayne County 62.2%; national 63.8%).

⁷² *Compare Quick Facts: Wayne County, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/>

Given these facts, Michigan's decision to delegate funding of felony indigent defense services in the Third Judicial Circuit in the first instance to Wayne County derogates from its obligation to ensure effective Sixth Amendment right to counsel services.

quickfacts/fact/table/waynecountymichigan/PST045217 with *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217>. (Wayne County \$92,400; national \$193,500).

A day in a courtroom at the Frank J. Murphy Hall of Justice

Although “arraignment on information” courtrooms generally open at 9:00 a.m., very little occurs in this courtroom during a court observation until 10:30 a.m., when one defense attorney emerges from lockup with a stack of files in her arms and calls out four different names, one by one, with no response.

A different defense attorney discusses a case with the prosecutor, but the prosecutor has not yet produced discovery, so the prosecutor tells the defense attorney they will need to continue the case to another date. The defense attorney walks into lockup to meet with the client in that case. When the clerk calls the case, the defense attorney reports that she is not the attorney of record on the case but is standing in for that attorney who “just got into town last night” and is unavailable to appear. The defendant immediately announces to the judge that he has never before seen the attorney standing in court with him this morning. The defendant tells the judge that the attorney actually appointed to represent him has not provided him with discovery or any other information about his case during the two months he has been sitting in jail, and he wants a new attorney. The defendant says his attorney of record told him he can “get out his wallet and pay for someone else” if he is dissatisfied with the representation provided.

The judge turns to the clerk and asks “where are we” in the case. The clerk responds that this is the second docket conference. The judge, realizing that this case has now hit its time limit in his court, blind draws the case for assignment to a trial court. The defendant adamantly protests that he did not want a blind draw; “y’all are forcing me to do it.” The judge denies the defendant’s request for new counsel, stating that the trial court can consider that motion when it hears the case three days later. The defendant, yelling, is taken out of court and back to the lockup. The judge

remarks to the courtroom that the defendant is “nuts” for not wanting his appointed counsel and that he should have given the defendant 30 days in jail for contempt (but it made no difference because the defendant was in jail anyway). The defense attorney walks out of the courtroom into the hallway to explain to the defendant’s wife what just happened (all still audible to people in the courtroom).

When the defense attorney re-enters the courtroom to gather her belongings, the judge asks if she would like to serve as “house counsel” for the day, because the person he assigned as house counsel did not show up. The defense attorney says she would love to but she has not met the eligibility criteria for joining the list of assigned counsel (though she had just stood in for a felony case without having indicated that to the judge). The judge asks his clerk if he can designate this attorney as house counsel regardless, and the clerk says he can so designate her, but she will not be paid.

The judge turns to another defense attorney, who has been walking in and out of the courtroom talking with clients, and appoints him house counsel for the day. The attorney who had called out the four names from the stack of files at the beginning of the morning walks to the newly appointed house counsel and hands him the stack of files. The newly appointed house counsel immediately begins reading the names on the files and calls out for the same four individuals.

By 11:00 a.m., the originally-assigned house counsel appears in court. The judge admonishes her, telling her he has been waiting since 10:00 a.m. The just-previously-assigned house counsel hands her the stack of files and leaves the courtroom. The originally-assigned house counsel again calls the names of the four defendants.

CHAPTER III

INDEPENDENCE OF THE DEFENSE FUNCTION

In *United States v. Cronin*, the U.S. Supreme Court pointed to the deficient representation received by the defendants known as the “Scottsboro Boys” in the case of *Powell v. Alabama* as exemplifying the constructive denial of the right to counsel.⁷³ Perhaps the most noted critique of the Scottsboro Boys’ defense is that it lacked independence from governmental interference, specifically from the judge presiding over the case. Regarding judicial interference, the *Powell* Court observed that the right to counsel rejects the notion that a judge should direct the defense:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.⁷⁴

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”⁷⁵

Other U.S. Supreme Court decisions confirm the constitutional requirement that defense counsel be independent of both the judicial and political arms of government. In the 1979 case of *Ferri v. Ackerman*, the Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.”⁷⁶ Two years later, the Court observed in *Polk County v. Dodson* that a state has the “constitutional obligation to respect the professional independence of

⁷³ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

⁷⁴ *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

⁷⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁷⁶ *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

the public defenders whom it engages.”⁷⁷ Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court notes in *Dodson* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”⁷⁸

Reflecting these constitutional commands, national standards compiled in the American Bar Association’s *ABA Ten Principles of a Public Defense Delivery System* require that, for an indigent defense system to be effective, the “public defense function, including the selection, funding, and payment of the defense counsel, is independent.”⁷⁹ The public defense system, including the defense attorneys it provides, “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel,” and the ABA standards note specifically that “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”⁸⁰ To carry out the constitutional requirement, national standards state that the defense function must be insulated from outside political or judicial interference by a board or commission, whose members are appointed by diverse authorities so that no one branch of government can exert more control over the system than any others.⁸¹

FINDING 1: The Third Judicial Circuit Court’s assigned counsel services lack independence.

Under Michigan law today, the judges of the Third Judicial Circuit Court are responsible for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties” in all felony cases arising within Wayne County.⁸² The MIDC Act requires that “[t]he delivery of indigent criminal defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.”⁸³ MIDC proposed *Standard 5* is entitled “Independence from the Judiciary,” and, if approved, it will remove from judges the responsibility for selecting, appointing, and compensating attorneys who are provided to represent indigent defendants.⁸⁴ Upon formal approval of this standard,

⁷⁷ *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

⁷⁸ *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

⁷⁹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002).

⁸⁰ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1 (2002).

⁸¹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1 (2002).

⁸² MICH. CT. R. 8.123. *See* MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

⁸³ MICH. COMP. LAWS § 780.991(1)(a) (2019).

⁸⁴ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES,

Wayne County will have not more than 180 days to submit to MIDC its plan for how its indigent defense system will meet this standard.⁸⁵

In Wayne County, there is no independent board or commission to oversee the defense function in the felony cases of indigent defendants. The Third Judicial Circuit Court's procedures for the selection, appointment, and compensation of private attorneys to represent approximately 75% of all felony defendants in Wayne County are established by the court's local administrative order.⁸⁶ Although the specifics of the court's assigned counsel plan have slowly evolved over the past two decades, nearly every aspect of assigned counsel services is subject to judicial influence, because:

- the court sets the qualifications and training required of attorneys to be appointed in felony cases;
- the court selects the attorneys eligible to be appointed in felony cases, and individual judges directly choose the attorney who is appointed in each specific case;
- to the extent any supervision occurs in the representation provided by private attorneys appointed in felony cases, the judges are the supervisors;
- the court determines whether and when attorneys are removed from eligibility to be appointed in felony cases;
- the court sets the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by Wayne County;
- the court determines whether experts and investigators are allowed in each specific felony case and sets the compensation paid to experts and investigators in the felony cases of indigent defendants; and
- the court has established a system that permits assigned counsel to “stand-in” for one another at court proceedings in critical stages of the felony cases of indigent defendants.

proposed Std. 5 (2018). For full text of proposed Standard 5, currently awaiting formal approval, *see* Appendix B.

⁸⁵ MICH. COMP. LAWS § 780.993(3) (2019).

⁸⁶ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017). During the course of this assessment, the 6AC was told by Wayne County representatives that a different plan for the assignment of counsel (Local Admin. Order 2017-04, Plan for Assignment of Counsel in the Third Circuit Court – Criminal Division (Mich. 3rd Jud. Cir. Apr. 19, 2017)) than the one being followed at the time of this evaluation (Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017)) was attached to April 2017 amended compliance plan and that MIDC's subsequent approval of the compliance plan meant that MIDC also approved the different plan for assignment of counsel. The 6AC sought clarification from the MIDC. The MIDC Executive Director stated: “The Commission has not considered or taken a position with regard to the LAO. Per the statute, the Commission approved the compliance plan and cost analysis. I wouldn't assume that the approval extends to the LAO as an attachment.” Email from Loren Kohgari, Mich. Indigent Defense Comm'n, to David Carroll, Executive Director of Sixth Amendment Center (May 28, 2019).

To be clear, it is not that the Third Judicial Circuit judges who oversee the indigent defense services are malicious or consciously trying to undermine the basic constitutional right to counsel. Instead, the judges are working within a legal and financial construct that presents them with a series of impossible choices. When public defense attorneys are provided through a system overseen by judges, the appointed attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant they are appointed to represent as is their ethical and constitutional duty. Public defense attorneys in judicially controlled systems understand that their personal compensation along with the resources needed to properly defend an indigent person require the approval of the judges. So, it does not take a judge to say overtly, for example: “Do not file motions in my courtroom.” Fearing the loss of income that can result from displeasing the judge, appointed attorneys often take on more cases than they can ethically handle, triage their available working hours in favor of some clients but to the detriment of others, and agree to work without resources necessary to effective representation, thereby failing to meet the parameters of ethical representation owed to all clients. This is precisely why independence of the defense function is required by all national standards and is the first of the *ABA Ten Principles*; because without independence, the other components necessary in an indigent defense system capable of ensuring effective assistance of counsel are unobtainable.

Over 75 years ago, the U.S. Supreme Court stated in *Glasser v. United States*, “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”⁸⁷ Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where their own interests conflict with those of the defendants whom they are appointed to represent. Appointed attorneys should not be impeded in advocating solely for the stated legal interests of their clients by concerns about staying in favor with the judge who hires them and should not be in a position of weighing their own financial interests against the legal needs of their appointed clients.

The next four chapters explain in detail how the assigned counsel system’s lack of independence in the Third Judicial Circuit negatively affects: the qualifications, training, and supervision of assigned counsel (Chapter IV); the early appointment of and continuous representation by counsel (Chapter V); the willingness of attorneys to accept appointed felony cases and the adequacy of resources necessary for effective representation (Chapter VI); and the sufficiency of time necessary to provide effective representation (Chapter VII).

⁸⁷ *Glasser v. United States*, 315 U.S. 60, 70 (1942).

One judicial interview

Under the United States Constitution, the indigent accused are presumed innocent when they stand in court before the judge. During 6AC's interviews, one of the judges repeatedly referred to indigent defendants appearing in his court as "crooks." The judge said, for example, that the "crooks" are always trying to game the court system to their advantage.

This judge, who is directly and indirectly responsible for appointing attorneys to represent hundreds of indigent felony defendants annually in Wayne County, displays a stunning lack of sympathy – bordering on contempt – for the men and women who appear in court needing appointed counsel. The judge's attitude toward the indigent accused is amplified by the judge's seniority on the bench, because some of the more recently appointed Wayne County judges reportedly have no experience practicing criminal law and seek advice from more senior judges such as this one as to which attorneys they should appoint.

CHAPTER IV

ATTORNEY QUALIFICATIONS, TRAINING & SUPERVISION

In *Powell v. Alabama* – the case the U.S. Supreme Court points to in *United States v. Cronin* as representative of the constructive denial of the right to counsel⁸⁸ – the judge overseeing the Scottsboro Boys’ Alabama trial appointed as defense counsel a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.⁸⁹ The *Powell* Court concluded that defendants require the “guiding hand” of counsel;⁹⁰ that is, the attorneys a government provides to represent indigent defendants must be qualified and trained to help those defendants advocate for their stated legal interests.

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be a criminal defense lawyer.⁹¹ Specialties must be developed. Just as you would not go to a dermatologist

⁸⁸ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

⁸⁹ *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

⁹⁰ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

⁹¹ Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 *Geo. J. Legal Ethics* 915, 915 (2001-2002) (“The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment.

for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. As the American Bar Association explained more than 20 years ago, “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”⁹²

For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific case to which they are appointed.⁹³ Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them. As national standards explain, an attorney’s ability to provide effective representation depends on his familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”⁹⁴

To ensure that attorneys continue to be competent from year to year to handle the cases to which they are appointed, national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,⁹⁵ at which attorney attendance is compulsory.⁹⁶ Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider lacks the “knowledge and experience to offer quality representation to a defendant in a particular matter,” the attorney is obligated

However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”)

⁹² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Standard 5-1.5 & cmt. (3d ed. 1992).

⁹³ See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (2002) (“Defense counsel’s ability, training, and experience match the complexity of the case.”). The commentary explains further that: “Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 cmt. (2002).

⁹⁴ NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2(a) (1995).

⁹⁵ NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

⁹⁶ See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (Feb. 2002) (“Defense counsel is provided with and required to attend continuing legal education”). The commentary explains: “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 9 (Feb. 2002).

to move to withdraw from the case, or better yet refuse the appointment at the outset.⁹⁷ Ongoing training, therefore, is an active part of the job of being an indigent defense attorney. To ensure ongoing competence, public defense attorneys must be supervised and regularly evaluated.⁹⁸

The *Michigan Rules of Professional Conduct* require all Michigan lawyers to be “competent” in carrying out their duties to clients.⁹⁹ Those rules explain that, “[i]n determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to . . . associate or consult with[] a lawyer of established competence in the field in question.”¹⁰⁰ Failure to adhere to the state’s *Rules of Professional Conduct* may result in disciplinary action against the attorney.¹⁰¹

FINDING 2: The qualifications, training, and supervision required for assigned counsel representing indigent defendants charged with felonies in Wayne County are insufficient to ensure effective assistance of counsel.

The MIDC Act requires that the MIDC “adhere to the following principles” in establishing standards for the qualifications, training, and supervision of appointed counsel:

- “[d]efense counsel’s ability, training, and experience match the nature and complexity of the case to which he or she is appointed;”
- “[i]ndigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels’ indigent defense clients;” and

⁹⁷ NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973); *see also* NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guidelines 1.2(b), 1.3(a) (1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and “[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”).

⁹⁸ *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002) (“Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards”). The commentary adds: “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.”

⁹⁹ MICH. R. PROF. CONDUCT 1.1 (“A lawyer shall provide competent representation to a client.”).

¹⁰⁰ MICH. R. PROF. CONDUCT 1.1 cmt.

¹⁰¹ MICH. R. PROF. CONDUCT 8.4(a) (“It is professional misconduct for a lawyer to: (1) violate the Rules of Professional Conduct . . .”); *see also* MICH. CT. R. 9.100 *et seq.*

- “[i]ndigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards.”¹⁰²

ATTORNEY QUALIFICATIONS

MIDC proposed *Standard 7* establishes the minimum qualifications that attorneys must meet in order to be eligible for appointment to represent indigent defendants.¹⁰³ The proposed standard, if approved, will require increasing amounts of experience based on the severity of the case:¹⁰⁴

- For low-severity¹⁰⁵ felony cases, an attorney must: have “practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice);” *and* either have been “trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have reached a verdict, one of which having been submitted to a jury” *or* “have equivalent experience and ability to demonstrate similar skills.”
- For high-severity¹⁰⁶ felony cases, an attorney must: have “practiced criminal law for two full years;” *and* either have been “trial counsel alone or with other trial counsel and handled a significant portion of the trial in four criminal cases that have been submitted to a jury” *or* have “a significant record of consistently high quality criminal trial court representation and the ability to handle a high-severity felony case.”

¹⁰² MICH. COMP. LAWS § 780.991(2)(c),(e),(f) (2019).

¹⁰³ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7 (2018). For full text of proposed Standard 7, currently awaiting formal approval, *see* Appendix B.

¹⁰⁴ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7.B. (2018). The proposed standard also contains minimum qualifications for misdemeanors.

¹⁰⁵ The MIDC uses the definition of low severity contained in the Michigan Legislative Sentencing Guidelines, of class E through H felonies and unclassified crimes punishable by a maximum term of less than 10 years. MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7 (2018); MICHIGAN JUDICIAL INSTITUTE, STATE OF MICHIGAN SENTENCING GUIDELINES MANUAL, Step I.C. (Mar. 20, 2019).

¹⁰⁶ The MIDC uses the definition of high severity contained in the Michigan Legislative Sentencing Guidelines, of second-degree murder and class A through D felonies and unclassified crimes punishable by a maximum term of 10 years or more imprisonment. MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7 (2018); MICHIGAN JUDICIAL INSTITUTE, STATE OF MICHIGAN SENTENCING GUIDELINES MANUAL, Step I.C. (Mar. 20, 2019).

- For life offense¹⁰⁷ felony cases, an attorney must:
 - have “practiced criminal law for five full years;” *and* either
 - have “prior experience as lead counsel in no fewer than seven felony jury trials that have been submitted to a jury” *or*
 - have “a significant record of consistently high quality criminal trial court representation and the ability to handle a life offense case.”

Upon formal approval of this standard, Wayne County will have not more than 180 days to submit to MIDC its plan for how its indigent defense system will meet this standard.¹⁰⁸

The judges of the Third Judicial Circuit Court are responsible for establishing the “procedures for selecting” the attorneys who are eligible to be appointed to represent indigent felony defendants in Wayne County.¹⁰⁹ The court’s plan provides that attorneys “shall qualify” to be appointed to represent indigent felony defendants by “demonstrating the following:”

- for all felony cases:¹¹⁰
 - a. completion of an online application;
 - b. membership in good standing with the State Bar;
 - c. annual CLE certification from the Detroit-Wayne County Criminal Advocacy Program (*see* discussion of attorney training at p. 33), and membership in good standing with the Wayne County Criminal Defense Bar Association;
 - d. residence or office in Wayne County;
 - e. valid email address; and
 - f. valid phone number with voicemail capability.

¹⁰⁷ For purposes of this proposed standard, the MIDC defines life offense as “any case where the offense charged or enhancement sought subjects the accused defendant in a criminal case to life in prison.” MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7 cmt. 3 (2018).

¹⁰⁸ MICH. COMP. LAWS § 780.993(3) (2019).

¹⁰⁹ MICH. CT. R. 8.123. *See* MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

¹¹⁰ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.2, 3 (Mich. 3rd Jud. Cir. June 16, 2017).

The online application is submitted to the court’s assigned counsel services office. The application asks the attorney about: general contact and bar association information; whether the attorney is CAP certified; the nature and percentage of the attorney’s practice (criminal, civil, juvenile, and domestic); languages spoken other than English; disciplinary history; and criminal defense practice experience. The application asks attorneys who desire appointments in life sentence felony cases to list their five most recent jury trials. *See* Third Circuit Court Criminal Division Attorney Assignment Application (rev’d May 2016), available at <https://www.3rdcc.org/docs/default-source/divisions/criminal/attorney-assignment-application.pdf?sfvrsn=2>. Although the application requests all of this information from the attorney, the court’s plan does not require that the attorney meet any particular qualifications beyond merely completing the application.

- for felony cases in which a life sentence is possible,¹¹¹ additionally “[m]ust be approved by a majority of the Judges sitting on the Attorney Review Committee.”

The Third Judicial Circuit’s assigned counsel services office maintains the list of attorneys who are eligible to be appointed to represent indigent defendants in felony cases.¹¹²

Attorneys who are “newly admitted to the Bar” are paired with a mentor and, before being appointed to a case, must “provide written verification” of having: accompanied the mentor “to a pre-exam hearing, an arraignment on information, a plea, sentencing and jail visit,” all within the Third Judicial Circuit; accompanied the mentor “to observe and thoroughly discuss at least two preliminary examinations; and “observed at least one completed Third Circuit Court jury trial.” The only formal continuing education required by the Third Judicial Circuit Court for attorneys who are appointed to represent indigent felony defendants is that they obtain annual CLE certification from the Detroit-Wayne County Criminal Advocacy Program (CAP), by attending six training sessions each year (a total of 12 hours) for attorneys licensed to practice less than 10 years, reducing to four training sessions (a total of 8 hours) for attorneys licensed for 10 years or more. This must be completed prior to the application for all attorneys. Failure to complete this function requires removal from the appointed counsel list.

In short, under the Third Judicial Circuit’s qualification requirements, an attorney who has just recently been admitted to practice law can be appointed to represent indigent defendants in any and every non-capital felony case as soon as the attorney can complete the necessary observations (all of which are capable of being completed in a single week) and complete 12 hours of CAP training (which can be completed in approximately three months). The Third Judicial Circuit Court does not require any monitoring or regular assessment of the representation provided by private attorneys appointed to represent indigent felony defendants in Wayne County.

¹¹¹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.3 (Mich. 3rd Jud. Cir. June 16, 2017). The court’s LAO uses the phrase “capital cases.” The administrative reporting requirements for the Michigan trial courts divide felony cases into: capital felonies, defined as “cases in which life sentence is possible and a larger number of peremptory jury challenges is provided;” and non-capital felonies. *See* MICH. SUPREME COURT, STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 78 (Sept. 2017). The attorney review committee consists of the presiding judge of the criminal division, deputy court administrator (or designee), and at least two judges from the criminal division who are selected by the presiding judge. *Id.* at ¶ I.C.

¹¹² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.5.a. (Mich. 3rd Jud. Cir. June 16, 2017).

ATTORNEY TRAINING

MIDC *Standard 1* sets out the ongoing training and education requirements for attorneys appointed to represent indigent defendants.¹¹³ The standard requires that all attorneys appointed to represent indigent defendants:

- complete at least 12 hours of continuing legal education each year, including “courses relevant to the representation of the criminally accused;”
- have reasonable knowledge of law (“substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices”), forensic & scientific issues arising in criminal cases, legal defenses to crimes, and technology commonly used in the legal community and court systems; and
- if having less than two years of experience practicing criminal defense, complete one basic skills acquisition class.¹¹⁴

The required training must be funded through the indigent defense “system or other mechanism that does not place a financial burden on assigned counsel.” *Standard 1* was approved statewide on May 22, 2017 and applies to all indigent defense systems in Michigan including that of Wayne County.¹¹⁵

The only training required by the Third Judicial Circuit Court for attorneys who are appointed to represent indigent felony defendants is that they obtain annual CLE certification from the Detroit-Wayne County Criminal Advocacy Program (CAP).¹¹⁶ To receive certification from CAP, attorneys licensed to practice for less than 10 years must attend six training sessions (a total of 12 hours) each year, and attorneys licensed to practice for 10 years or more must attend four training sessions (a total of 8 hours) each year.¹¹⁷ CAP typically offers 13 two-hour programs during each year on topics such as trial skills, evidence, cross-examination, and homicide cases.¹¹⁸

¹¹³ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 1 (2018). For full text of approved Standard 1, *see* Appendix A.

¹¹⁴ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 1 (2018). For full text of approved Standard 1, *see* Appendix A.

¹¹⁵ Notice and Order Approving Standards, *In re* Mich. Indigent Defense Comm’n Proposed Minimum Standards, Mich. Dep’t of Licensing and Regulatory Affairs (May 22, 2017), *available at* https://www.michigan.gov/documents/lara/MIDC_Proposed_Minimum_Standards_571613_7.pdf.

¹¹⁶ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.1.c. (Mich. 3rd Jud. Cir. June 16, 2017).

¹¹⁷ *CAP Policies*, CRIMINAL ADVOCACY PROGRAM, <http://capwayne.org/cap-information/policies-bylaws/> (last visited Apr. 22, 2019).

¹¹⁸ *See, e.g., Past Seminars*, CRIMINAL ADVOCACY PROGRAM, <http://capwayne.org/schedule/past-seminars/> (last visited Apr. 22, 2019) (showing topics and materials for 13 two-hour seminars provided between September 2018 and March 2019).

ATTORNEY SUPERVISION

MIDC proposed *Standard 7*, if approved, will require that the “representation provided by indigent defense providers must be monitored and regularly assessed . . . to evaluate the quality of the representation” provided by attorneys, and “the evaluation of attorneys must be made by peers in the criminal defense community, allowing for input from other stakeholders in the criminal justice system including judges, prosecutors and clients.”¹¹⁹ Upon formal approval of this standard, Wayne County will have not more than 180 days to submit to MIDC its plan for how its indigent defense system will meet this standard.¹²⁰

The Third Judicial Circuit Court does not require any monitoring or regular assessment of the representation provided by private attorneys appointed to represent indigent felony defendants in Wayne County. Under the court’s plan, there are two mechanisms by which an attorney can be removed from eligibility for felony appointments:

- On an annual basis, attorneys who are not members in good standing with the State Bar of Michigan (i.e., because of having been suspended or disbarred) or who are not certified by CAP as having completed required CLE, are removed from eligibility for appointment until they fulfill the required qualification.¹²¹
- Attorneys can be removed from eligibility for appointment on the basis of a complaint, in the sole discretion of the attorney review committee.¹²² The only stated limitation on the discretion of the attorney review committee is that if, within a five-year period, two incidents of ineffective assistance of counsel are filed against an attorney and the attorney admits to having provided ineffective assistance of counsel, then “that attorney will be removed from the Assigned Counsel List for a period to be determined by the Attorney Review Committee.”¹²³

The judges report that there is very little to no control over the quality of representation provided by private attorneys appointed to represent indigent defendants in felony cases. Anyone (including judges) can make a complaint about an assigned counsel attorney, but the criminal division judges report that this happens very rarely. The judges admit that, even when people submit these complaint forms, they pay little

¹¹⁹ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 7 (2018). For full text of proposed Standard 7, currently awaiting formal approval, *see* Appendix B.

¹²⁰ MICH. COMP. LAWS § 780.993(3) (2019).

¹²¹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶¶ I.B.5.a., I.B.6.c. (Mich. 3rd Jud. Cir. June 16, 2017).

¹²² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.6.a. (Mich. 3rd Jud. Cir. June 16, 2017).

¹²³ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.6.a.1. (Mich. 3rd Jud. Cir. June 16, 2017).

attention to them. If a judge is unhappy with assigned counsel's performance, the judge just reduces the number of assignments going to that attorney. (*See* discussion of method of appointing counsel at p. 44.) Because of the make-up of the attorney review committee, this places the judges in control of the attorneys' continued ability to receive appointments.

An attorney who is removed from eligibility to receive appointments can get back on the list by once again applying and meeting the same qualification requirements imposed from the outset.¹²⁴ It is unclear whether any attorneys have been removed from eligibility to be appointed to represent indigent felony defendants in recent years.

¹²⁴ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.6.b. (Mich. 3rd Jud. Cir. June 16, 2017).

Best practices: What a robust system of attorney qualifications, training, and supervision looks like

To fully understand the limitations of the Third Judicial Circuit Court's assigned counsel system and how an independent indigent defense system can better provide for the qualifications, training, and supervision of appointed attorneys, it is useful to look at another jurisdiction that relies in large part on private attorneys to provide indigent legal services: Massachusetts. The Massachusetts Committee for Public Counsel Services (CPCS) is an independent committee overseeing the delivery of indigent defense services in all courts across the State of Massachusetts.

Attorney qualifications. Private attorneys in Massachusetts who desire to be appointed to represent indigent people must apply and be certified – not by judges, but by CPCS. Attorneys are never automatically certified based on attendance at a training program or meeting a certain set of criteria; there is always a role for discretion when approving attorneys to serve the client population who cannot choose their lawyers. Attorneys can only be certified to receive appointments in a maximum of two counties, and they must apply separately in each county.

For lesser felonies, attorneys submit their application to a county-based CPCS-authorized assignment program. The leadership of the local assignment program interviews the applicant, checks their references, and determines whether they meet the CPCS criteria demonstrating competence and commitment to the needs of the client population. Attorneys selected by the local assignment program must attend the Zealous Advocacy training program (or obtain a waiver; a waiver is rarely granted to an attorney seeking lesser felony appointments who has not tried at least five criminal defense jury trials to verdict within the preceding

five years). Zealous Advocacy training is a seven-day program including both lectures and small group skills exercises each day, with substantial reading and presentation preparation every night. An attorney either passes or fails the training program. Once an attorney is both selected by the local assignment program and successfully completes the training program, the attorney is provisionally certified to represent indigent adults in lesser felonies in that county. The attorney can only be fully certified after a performance evaluation conducted within 12 to 24 months of provisional certification.

For major felonies or murder cases, attorneys must apply directly to the CPCS deputy chief counsel. The application must include a list of complex cases the attorney has tried to a jury verdict as lead counsel within the preceding five years; at least six for major felonies certification and at least 10 for murder certification. Additional materials like original memoranda of law may also be required. The applications are circulated to a blue-ribbon panel of leading senior private criminal defense lawyers for confidential input before CPCS makes a certification decision.

CPCS's electronic billing system enforces the certification requirements. The billing system automatically rejects any assignments for which an attorney is not certified and generates a contemporaneous notice to the attorney, the local assignment program, and the court that the case must be reassigned.

Attorney recertification. Because attorneys in private practice are free to change the areas of law in which they concentrate based on their own interests or market conditions, their qualifications to handle criminal cases may change over time. To assure that public funds are used efficiently to retain qualified

attorneys, all attorneys must apply for recertification every five years.

The criteria for recertification are evidence of substantial recent criminal defense litigation experience, including appropriately vigorous motion and trial practice. Data to support the decision-making process comes from the attorney's recertification application, records maintained by CPCS of performance assessments, complaints, and electronic billing records that show what actions the attorney has taken in assigned cases. The amount of data available from detailed electronic billing records to which the attorney has attested assures that these decisions have a solid basis in facts that the attorney can understand.

CPCS will not recertify attorneys who have not vigorously defended their assigned cases (evidenced by filing original pleadings, using investigators, summoning witnesses, litigating evidentiary motions, and conducting trials) or who have been the subject of substantial verified complaints of substandard representation. If an attorney's performance in assigned cases needs improvement, CPCS may conditionally recertify the attorney for one or two years, with conditions, as an opportunity for the attorney to correct identified problems but with appropriate supervision or caseload limitations to protect clients. The Massachusetts experience is that about 20% of applicants for recertification for adult criminal case assignments do not qualify for full recertification, but in almost all instances these attorneys are given a one-year conditional recertification to correct deficiencies. Of that group, about 80% have corrected the deficiencies when they reapply at the end of the one-year period, while the other 20% tend not to reapply.

Attorney training. All attorneys who are appointed to represent the indigent must annually complete eight hours of continuing

legal education approved by CPCS as relevant to the panel on which the attorney receives assignments. An attorney who receives assignments in more than one practice area must satisfy the CLE requirement for each panel.

All attorneys who lack the recent experience required for the certification (or recertification) level they seek may be required to attend the Zealous Advocacy training program, described above.

Attorney supervision. In Massachusetts, the private attorneys who handle criminal case assignments are organized in every county into groups. These groups contract with CPCS to perform various functions, including scheduling attorneys to appear in the courts where they receive case assignments. CPCS selects from the most experienced members of these groups the attorneys who CPCS pays to be mentors. CPCS assigns a mentor to all attorneys until such time as they obtain certification for major felonies.

Attorneys who are certified for major felonies or murder are eligible to apply to CPCS for a one-year contract position as a county supervising attorney. CPCS vigorously recruits potential supervising attorneys and publicly honors those who serve in the role. CPCS and the local assignment program leadership jointly select supervising attorneys, and both state and local leaders must support the candidate for a contract to be awarded. Supervising attorney contracts are for relatively few hours per week, so that highly respected successful lawyers can be recruited to take on the role while maintaining their private practices. Supervising attorneys participate in selecting attorneys who have applied for certification, lead local training events, conduct in-depth performance evaluations of every assigned counsel in their county every two years (or in neighboring counties in case of conflicts

due to local relationships), and investigate complaints by clients or court personnel about the performance of assigned counsel. The supervising attorneys also provide a trusted point of contact for judges and consistent advice to CPCS about the myriad local issues that arise in the courts.

The number of supervising attorneys needed for a county depends on the number of courts and attorneys receiving assignments in the county, as well as the geography of the county. Currently there are about 30 supervising attorneys across Massachusetts, each serving 10 hours per week.

CHAPTER V

EARLY APPOINTMENT OF COUNSEL AND CONTINUOUS REPRESENTATION

As the U.S. Supreme Court states in *Cronic*, there are circumstances “that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel.”¹²⁶ All felonies in Michigan are punishable by incarceration,¹²⁷ so every adult and juvenile charged with a felony, and who cannot afford to hire their own attorney, is entitled under the Sixth and Fourteenth Amendments to have counsel provided at public expense for trial.¹²⁸

In 2008, the Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”¹²⁹ For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”¹³⁰ without regard to whether a prosecutor is aware of the arrest.¹³¹ For all defendants, the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.¹³²

The Court in *Rothgery* carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.¹³³ “Once attachment occurs, the accused at least is entitled to the presence of appointed

¹²⁶ U.S. v. *Cronic*, 466 U.S. 648, 658-59 (1984).

¹²⁷ MICH. COMP. LAWS § 750.7 (2019).

¹²⁸ *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹²⁹ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

¹³⁰ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

¹³¹ *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

¹³² *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

¹³³ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

counsel during any ‘critical stage’ of the postattachment proceedings . . .”¹³⁴ In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.¹³⁵

The Court stated in *Cronic* that “a trial is unfair if the accused is denied counsel at a critical stage of his trial.”¹³⁶ Over the decades, the Supreme Court has inch-by-inch delineated many case events as being critical stages, although it has never purported to have capped the list of events that may fall into this category.¹³⁷ Events that are definitely critical stages are: custodial interrogations both before and after commencement of prosecution;¹³⁸ preliminary hearings prior to commencement of prosecution where “potential substantial prejudice to defendant[s]’ rights inheres in the . . . confrontation”;¹³⁹ lineups and show-ups at or after commencement of prosecution;¹⁴⁰ during plea negotiations and at the entry of a guilty plea;¹⁴¹ arraignments;¹⁴² during the pre-trial period between arraignment and the beginning of trial;¹⁴³ trials;¹⁴⁴ during sentencing;¹⁴⁵ direct appeals as of right;¹⁴⁶ probation revocation proceedings to some extent;¹⁴⁷ and parole revocation proceedings to some extent.¹⁴⁸

¹³⁴ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

¹³⁵ No critical stage can occur unless counsel is present or has been waived because, as the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.” *United States v. Cronic*, 466 U.S. 648, 654 (1984) (citing Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

¹³⁶ *U.S. v. Cronic*, 466 U.S. 648, 659 (1984).

¹³⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008) (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)) (noting that the critical stages in a case are the moments when the defendant has to make choices – when “counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary’”).

¹³⁸ *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

¹³⁹ *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

¹⁴⁰ *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-38 (1967).

¹⁴¹ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

¹⁴² *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

¹⁴³ *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

¹⁴⁴ *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *In re Gault*, 387 U.S. 1, 36-37 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

¹⁴⁵ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

¹⁴⁶ *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963).

¹⁴⁷ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

¹⁴⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question “whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent”).

If a defense attorney is appointed early in the criminal process, that attorney can effectively represent a client if given the time, training, and resources to do so. Time is especially important to develop a level of trust between counsel and the accused that the U.S. Supreme Court describes in *Powell v. Alabama* as partaking of the “inviolable character of the confessional.”¹⁴⁹ Yet, early appointment of counsel will not result in effective representation if that trust is breached. It is of no benefit to a defendant if a lawyer is appointed early in the case, but then a different lawyer shows up to represent the defendant during the various critical stages of the case. The “confessional” is not some article, like a docket sheet, that can be passed from one attorney to another.

The nexus between the early appointment of trial counsel and the provision of effective assistance of counsel occurs when the advocacy necessary to mount a meaningful defense commences as soon as possible and continues without break through to the disposition of the case. For this reason, national standards as summarized in ABA *Principle 7* require that the same attorney initially appointed to a case must continuously represent the client until the completion of a defendant’s case.¹⁵⁰ In explaining why the lack of continuous representation by a single attorney is so harmful to defendants, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been ‘processed by the system.’ This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be reinterviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased.¹⁵¹

FINDING 3: Although indigent defendants charged with felonies in Wayne County are appointed counsel typically within 24 hours of their first appearance before a magistrate, the attorney appointed following first appearance does not always represent an indigent defendant from appointment through disposition of the case, and, in some instances, an indigent felony defendant may be represented by a series of different attorneys at each proceeding in the case. When inconsistent representation occurs, it creates the potential to deny an indigent felony defendant the right to effective assistance of counsel.

¹⁴⁹ *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

¹⁵⁰ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 (2002).

¹⁵¹ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, commentary to Standard 5-6.2 (3d ed., July 1992), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.pdf.

The MIDC Act requires that:

- “[a] preliminary inquiry regarding, and the determination of, the indigency of any defendant . . . must be made . . . not later than at the defendant’s first appearance in court;”¹⁵²
- “counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services;”¹⁵³ and
- the MIDC, in establishing standards, “adhere to the . . . principle[.]” that “[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case.”¹⁵⁴

MIDC *Standard 4* requires that:¹⁵⁵

- “[t]he 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” and “[c]ounsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services;” and
- appointed counsel is responsible for providing representation both in and out of court for: the arraignment on the complaint, including making an argument about appropriate bond; at pre-trial proceedings; during plea negotiations; and at other critical stages.

Standard 4 was approved statewide on May 22, 2017 and applies to all indigent defense systems in Michigan including that of Wayne County.¹⁵⁶

MIDC has yet to propose a standard related to the MIDC Act requirement that the same appointed attorney continuously represent the defendant from appointment through disposition of the case, although it has indicated its intention to do so.¹⁵⁷

The Third Judicial Circuit Court is responsible for establishing the “procedures for . . . appointing” an attorney to represent each indigent felony defendant in Wayne County.¹⁵⁸ The court’s methods for appointing an attorney to represent each indigent felony defendant¹⁵⁹ can only be understood in conjunction with the Third Judicial Circuit’s method of allocating felony cases among the criminal division judges of the

¹⁵² MICH. COMP. LAWS § 780.991(3)(a) (2019).

¹⁵³ MICH. COMP. LAWS § 780.991(1)(c) (2019).

¹⁵⁴ MICH. COMP. LAWS § 780.991(2)(d) (2019).

¹⁵⁵ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 4 (2018). For full text of approved Standard 4, *see* Appendix A.

¹⁵⁶ Notice and Order Approving Standards, *In re* Mich. Indigent Defense Comm’n Proposed Minimum Standards, Mich. Dep’t of Licensing and Regulatory Affairs (May 22, 2017), *available at* https://www.michigan.gov/documents/lara/MIDC_Proposed_Minimum_Standards_571613_7.pdf.

¹⁵⁷ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 4 cmt. 1 (2018).

¹⁵⁸ MICH. CT. R. 8.123. *See* MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

¹⁵⁹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶¶ I.D. – I.M. (Mich. 3rd Jud. Cir. June 16, 2017).

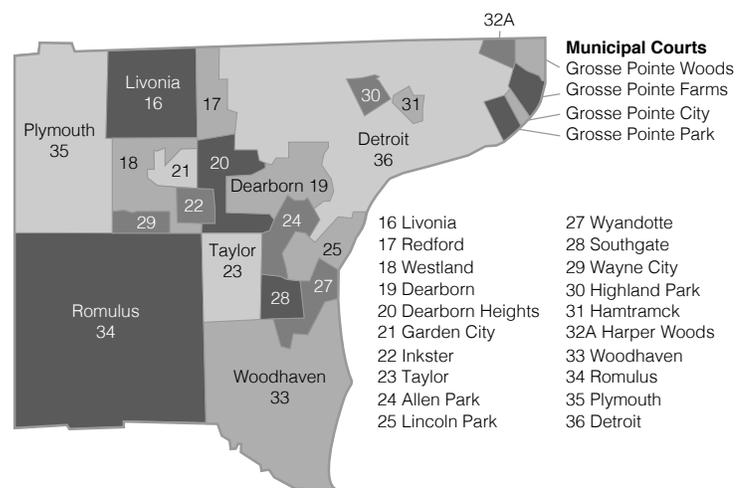
circuit court¹⁶⁰ and in light of the statutes and court rules that govern the process of a felony case in Michigan. The Third Judicial Circuit’s assigned counsel services office maintains the list of attorneys who are eligible to be appointed to represent indigent defendants in felony cases and distributes that list annually to the circuit court criminal division judges and the district judges.¹⁶¹

THE FELONY COURT SYSTEM IN WAYNE COUNTY

The Third Judicial Circuit Court is the general jurisdiction court with authority over all felony cases originating in Wayne County.¹⁶² The court’s criminal division has 23 judges who are housed at the Frank Murphy Hall of Justice in Detroit.¹⁶³ These criminal division judges handle all of the felony cases that are bound over from the district and municipal courts.¹⁶⁴

All felony cases in Wayne County begin in one of 20 district courts or four municipal courts (*see map*), each of which has limited jurisdiction over felony cases arising within its own limited geography.¹⁶⁵ The 36th District Court serves Detroit, and the other 19 district courts within the Third Judicial Circuit are referred to in the local vernacular as “out-county districts” because they are located in various towns outside of Detroit but within Wayne County. The four municipal courts serve the Grosse Pointe communities.

Wayne County district and municipal courts



Source: Michigan Courts, courts.mi.gov/administration/scao/resources/documents/maps/courtsbycountyanddistrictcourtdetail.pdf

¹⁶⁰ Local Admin. Order 2019-01, Criminal Division Case Assignment (Mich. 3rd Jud. Cir. Mar. 4, 2019).

¹⁶¹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.B.5.a. (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁶² MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601(2019).

¹⁶³ *See Criminal*, THIRD JUDICIAL CIRCUIT OF MICHIGAN, <https://www.3rdcc.org/divisions/criminal#/list> (last visited Apr. 2, 2019).

¹⁶⁴ MICH. CT. R. 6.008(B).

¹⁶⁵ MICH. COMP. LAWS §§ 600.8311 (district court), § 774.49 (municipal court) (2019); MICH. CT. R. 6.008(A).

THE FELONY CASE PROCESS & METHODS OF APPOINTING COUNSEL RESULT IN LACK OF CONTINUOUS REPRESENTATION FOR INDIGENT FELONY DEFENDANTS

Custodial interrogations and law enforcement lineups. The earliest possible point in a felony case when appointment of counsel can be required is when a person invokes their right to counsel during custodial interrogation or during a lineup conducted by law enforcement.¹⁶⁶ Periodically, the Third Judicial Circuit’s assigned counsel services office posts a notice of the date when attorneys can sign-up for “show-up” duty to provide representation as needed during these interrogations and line-ups.¹⁶⁷ By signing up on the “show-up” duty list for a given day, an attorney indicates they are available to be on stand-by for a full 24-hour period beginning at 8:00 a.m. to represent a defendant at any law enforcement location in the county.¹⁶⁸ If a defendant invokes their right to counsel during a custodial interrogation or lineup, the chief judge or presiding judge assigns a particular attorney, from among the attorneys on the “show-up” duty list for that day, to represent the defendant.¹⁶⁹ In theory, once an attorney is appointed to represent a defendant at a custodial interrogation or lineup, that same attorney should continue to represent that defendant throughout any ensuing prosecution.

Arraignment on the complaint (or warrant).¹⁷⁰ When a person is arrested on a felony charge, the arresting officer must take the person “without unnecessary delay” to the appropriate district or municipal court, where the judge conducts an arraignment on the complaint.¹⁷¹ In many district courts in Wayne County, including the 36th

¹⁶⁶ The United States Supreme Court has held that these are critical stages at which an indigent defendant is entitled to have counsel both appointed and present. *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (custodial interrogations both before and after commencement of prosecution are critical stage). *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-38 (1967) (lineups and show-ups at or after commencement of prosecution are critical stage).

¹⁶⁷ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.I.4 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁶⁸ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.I.4 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁶⁹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.H.2 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁷⁰ A defendant can be arrested with or without a warrant. When a defendant is arrested without a warrant, the law enforcement office makes a “complaint” explaining the basis for the arrest, and so the proceeding before the judge is referred to as an “arraignment on the complaint.” When a defendant is arrested with a warrant, that warrant serves as the basis for the arrest, and so the proceeding before the judge is an “arraignment on the warrant.” For the sake of brevity, the phrase “arraignment on the complaint” is used throughout this report to refer to both an arraignment on the complaint and an arraignment on the warrant.

¹⁷¹ MICH. COMP. LAWS § 764.1b (2019) (arrest with warrant); MICH. COMP. LAWS § 764.13 (2019) (arrest

District, the arraignment on the complaint is conducted by videoconference,¹⁷² with the defendant physically standing in a room at the jail and the judge physically located at the courthouse. Neither prosecutors nor defense attorneys are present at the arraignment on the complaint.¹⁷³

This is the proceeding at which the right to counsel attaches under *Rothgery*¹⁷⁴ and is when an indigent defendant will have the opportunity to request appointed counsel. As noted, there are not any assigned counsel attorneys present during these proceedings, and so no critical stage activities should be allowed to take place in the case of an indigent defendant who requests appointed counsel.¹⁷⁵ And indeed felony defendants never enter a plea at the arraignment on the complaint. While MIDC *Standard 4* states that “[r]epresentation includes but is not limited to the arraignment on the complaint and warrant,”¹⁷⁶ it is possible this provision is intended to apply to misdemeanor cases where defendants are called upon to enter a plea¹⁷⁷ at the arraignment on the complaint.

At the arraignment on the complaint, the judge: advises the defendant of the charge upon which they have been arrested and the possible sentence if convicted,¹⁷⁸ sets conditions of pretrial release if any,¹⁷⁹ and advises the defendant of their constitutional

without warrant); MICH. CT. R. 6.104(A).

¹⁷² All district courts and circuit courts are expressly authorized to use videoconferencing to conduct “initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.” MICH. CT. R. 6.006.

¹⁷³ MIDC *Standard 2* require appointed counsel at first appearance in district court. Effective October 1, 2018, MIDC approved funding for “house counsel” to staff district courts in Wayne County. At the time of the assessment, the district courts were at various stages of implementing this standard.

¹⁷⁴ As explained in the introduction to this chapter, the Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.” *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,” *id.* at 213, without regard to whether a prosecutor is aware of the arrest, *id.* at 194.

¹⁷⁵ “Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings” *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

¹⁷⁶ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 4 (2018). For full text of approved Standard 4, see Appendix A.

¹⁷⁷ The United States Supreme Court has held that arraignments, plea negotiations, and the entry of a guilty plea are all critical stages at which an indigent defendant is entitled to have counsel both appointed and present. *Laffer v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970) (plea negotiations and entry of a plea). *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (arraignments).

¹⁷⁸ MICH. CT. R. 6.104(E).

¹⁷⁹ MICH. CT. R. 6.106. Because no defense attorney is present during this arraignment on the complaint, there is no attorney to advocate or present evidence on behalf of an indigent defendant about pretrial release or detention.

rights including the right to an appointed lawyer for an indigent defendant.¹⁸⁰ In courts within Wayne County, if a defendant says he cannot afford to hire his own attorney and requests appointed counsel, the defendant fills out an application for appointed counsel. The district courts transmit those applications to the Third Judicial Circuit's assigned counsel services office on a daily basis, for the Third Judicial Circuit Court judges to appoint counsel.¹⁸¹

From among the applications for appointed counsel received as a result of district court arraignments on the complaint, the assigned counsel services office identifies 10 cases each week that are set aside for the chief judge or presiding judge to appoint counsel.¹⁸² For the rest of the applications, each Third Judicial Circuit criminal division judge is responsible, on a rotational period for two weeks at a time (referred to locally as the "two-week rotation"),¹⁸³ for appointing counsel to all indigent defendants who requested counsel at their arraignment on the complaint.¹⁸⁴

The judges estimate that they appoint counsel in approximately 300 felony cases during each two-week rotation (roughly 30 appointments per day) and that the appointment responsibility typically takes no more than an hour of their time each day. The two-week rotation judge is expected to appoint counsel in each case within 24 hours, and failure to do so "may result in those assignments being made by the Presiding Judge."¹⁸⁵ With only a few limitations,¹⁸⁶ the two-week rotation judge may appoint any of the hundreds of attorneys on the certified list to represent any defendant. The judge hand-selects the attorney for each case,¹⁸⁷ and some judges report that they

¹⁸⁰ MICH. CT. R. 6.005, 6.104(E).

¹⁸¹ The Third Judicial Circuit Court appoints counsel to every defendant who completes the application. The judges conduct indigency evaluations following judgment, as only defendants who are convicted may be required to contribute to the cost of their defense. MICH. CT. R. 6.005(C).

¹⁸² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.H.1 (Mich. 3rd Jud. Cir. June 16, 2017). The assignments "are to be given to newly CAP certified attorneys, attorneys returning from extended medical leave and certified attorney who have not received assignments for an extended period of time." *Id.* at ¶ I.H.1.a.

¹⁸³ The schedule for which criminal division judge is assigned to each two-week period is based on random assignment. Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.E.1 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁸⁴ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.E.1 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁸⁵ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.E.1 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁸⁶ In a given two-week rotation period, the judge may not appoint the same attorney to more than eight cases. Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶¶ I.E.1., I.M.1. (Mich. 3rd Jud. Cir. June 16, 2017). A judge cannot appoint any attorney when the "judge was a partner of the attorney or a member in the same law firm as the assigned attorney within the preceding two years, or the "judge is the attorney's spouse, parent or child, a person within third degree of relationship to the attorney, or has a relationship with the attorney that creates an appearance of impropriety or partiality, or which would otherwise lead to the disqualification of a judge under MCR 2.003." *Id.* at ¶ II.

¹⁸⁷ If a defendant has more than one case in the Third Judicial Circuit, the same attorney "shall be

routinely assign more cases to certain attorneys whom they particularly trust. The Third Judicial Circuit Court's assigned counsel services office notifies attorneys that they have been appointed to a case by email, typically within one day of the district court arraignment on the complaint.

During any two-week rotation period, an individual attorney may be appointed to represent up to eight defendants who requested counsel at their arraignment on the complaint,¹⁸⁸ and those defendants' cases may be pending in any of up to 20 district courts and four municipal courts spread across the county and may be ultimately bound over into any of up to 23 circuit courtrooms. In theory, once the attorney is appointed to represent a defendant, that same attorney should continue to represent that defendant through disposition of the defendant's case. However, given the size and multiple courts involved in criminal case processing throughout Wayne County, scheduling conflicts caused by a given attorney being appointed to represent defendants whose cases are pending in up to 20 district courts and four municipal courts and up to 23 circuit courtrooms mean that attorneys not infrequently fail to appear in court on behalf of the defendants they are appointed to represent. Sometimes appointed attorneys make arrangements with another attorney to "stand-in" for them at a court proceeding,¹⁸⁹ sometimes appointed attorneys simply fail to appear at scheduled court proceedings for indigent defendants, resulting in the court appointing a different attorney to begin representing the defendant. The Third Judicial Circuit Court's plan for appointing counsel states: "A judge may remove an attorney who fails to appear at a scheduled hearing Accepting the assigned attorney's designated stand-in shall be at the discretion of the judge. Designated stand-ins must be CAP certified."¹⁹⁰

Probable cause conference. At the arraignment on the complaint proceeding, the district court sets a date for a probable cause conference to be held within 7 to 14 days.¹⁹¹ The purpose of the probable cause conference is to allow the prosecutor, defense attorney, and defendant to meet and determine whether they can reach a plea agreement, whether the defendant will waive or conduct a preliminary examination,

assigned all additional cases involving that defendant," referred to locally as "case packaging." Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.K.1 (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁸⁸ In a given two-week rotation period, the judge may not appoint the same attorney to more than eight cases. Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶¶ I.E.1., I.M.1. (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁸⁹ When attorneys submit their online application to the Third Judicial Circuit Court's assigned counsel services office, seeking to become eligible to represent indigent felony defendants, they certify that, if they are unable to attend a hearing on behalf of an appointed client, they will secure substitute counsel "who is deemed certified by the Assigned Counsel Services department." See Third Circuit Court Criminal Division Attorney Assignment Application (rev'd May 2016), available at <https://www.3rdcc.org/docs/default-source/divisions/criminal/attorney-assignment-application.pdf?sfvrsn=2>.

¹⁹⁰ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.K.2.b. (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁹¹ MICH. COMP. LAWS § 766.4(1) (2019); MICH. CT. R. 6.104(E)(4).

and whether bail should be modified for the defendant.¹⁹² The United States Supreme Court has held that plea negotiations and the entry of a guilty plea are critical stages at which an indigent defendant is entitled to have counsel both appointed and present.¹⁹³ MIDC *Standard 4* requires that indigent defendants “shall . . . have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages.”¹⁹⁴ The probable cause conference is the first proceeding at which the appointed attorney appears in court on behalf of an indigent felony defendant, however as explained, it is not uncommon for the appointed attorney to fail to appear or send stand-in counsel.

Preliminary examination. Unless the defendant pleads guilty or waives the preliminary examination,¹⁹⁵ the preliminary examination is held in the same district court, usually within five to seven days after the probable cause conference.¹⁹⁶ Some defendants believe, at the time of their arraignment on the complaint, that they will be able to hire a private attorney, but then find themselves unable to do so and appear for preliminary examination and request an appointed attorney. When this occurs in the out-county district courts, and also if the appointed attorney fails to appear for the preliminary examination, the manager of the assigned counsel services office designates the attorney to represent the indigent defendant.¹⁹⁷ For the 36th District Court in Detroit, a notice is posted of the date when attorneys can sign-up to be “house counsel,” available for appointment to a defendant newly requesting counsel or if the appointed attorney fails to appear, and attorneys are appointed as needed in the order of their arrival on sign up day (limited to one day per quarter for each attorney).¹⁹⁸ All district court judges can, in extenuating circumstances, make what is known as an “on-the spot” appointment of an attorney to represent an indigent felony defendant whose case is pending in their court, with the limitation that each district court judge cannot appoint a single attorney to more than 12 spot assignments each year.¹⁹⁹

In all district courts, the defendant is usually physically present in the courtroom during the preliminary examination, which is a hearing where witnesses (most often

¹⁹² MICH. COMP. LAWS § 766.4 (2019); MICH. CT. R. 6.108.

¹⁹³ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970) (plea negotiations and entry of a plea).

¹⁹⁴ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, Std. 4 (2018). For full text of approved Standard 4, *see* Appendix A.

¹⁹⁵ If the preliminary examination is waived, the defendant is bound over to the circuit court. MICH. CT. R. 6.110(A). 6AC requested but was unable to obtain data showing the numbers of defendants who waive preliminary examinations.

¹⁹⁶ MICH. COMP. LAWS § 766.4(4) (2019); MICH. CT. R. 6.104(E)(4).

¹⁹⁷ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.J.1. (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁹⁸ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.I.3. (Mich. 3rd Jud. Cir. June 16, 2017).

¹⁹⁹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.J.1. (Mich. 3rd Jud. Cir. June 16, 2017).

law enforcement) testify.²⁰⁰ The purpose of the preliminary examination is for the court to determine whether probable cause exists to believe that a felony offense occurred and that the defendant committed it.²⁰¹ If the court finds no probable cause, the court dismisses the charge against the defendant.²⁰² If the court finds that there is probable cause, then the court binds the defendant's case over to the circuit court.²⁰³

In theory, an attorney appointed to represent a defendant at the preliminary examination should continue to represent that defendant through disposition of the defendant's case. Once again though, because these same attorneys may be representing indigent felony defendants whose cases are pending across Wayne County in up to 20 district courts and four municipal courts and up to 23 circuit courtrooms, attorneys not infrequently fail to appear in subsequent court proceedings on behalf of the defendants they are appointed to represent.

Bind over and allotment to circuit court docket. Some felony cases are resolved at the district court, either through a guilty plea or a finding of no probable cause. All of the felony cases that are not disposed in the lower courts are bound over to the Third Judicial Circuit for an arraignment on the information within 14 days of the bind-over,²⁰⁴ conducted in one of 23 circuit court criminal division dockets, depending on the type and circumstances of the case and the defendant.²⁰⁵

First, if a defendant whose case is bound over to the circuit court already has another case in the circuit court, then the defendant's new case must be assigned to the judge who has the already existing case.²⁰⁶ These cases remain in their allotted court through the conclusion of the case.

²⁰⁰ MICH. COMP. LAWS § 766.4(6) (2019); MICH. CT. R. 6.110(C).

²⁰¹ MICH. CT. R. 6.110(E).

²⁰² MICH. COMP. LAWS § 766.13 (2019); MICH. CT. R. 6.110(F).

²⁰³ MICH. COMP. LAWS § 766.13 (2019); MICH. CT. R. 6.110(F).

²⁰⁴ MICH. COMP. LAWS § 766.13 (2019); MICH. CT. R. 6.113. In all district courts located within Wayne County *except* the 25th District and the 35th District, the district court judges may, with consent of the parties, conduct the felony arraignment on the information in the district court immediately after bind-over. Joint Local Administrative Orders 2013-08J through 2013-25J, Circuit Court Arraignments in District Court (Mich. 3rd Jud. Cir. Dec. 10, 2013); *see also* MICH. CT. R. 6.111.

²⁰⁵ Local Admin. Order 2019-01, Criminal Division Case Assignment (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²⁰⁶ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 2 (Mich. 3rd Jud. Cir. Mar. 4, 2019). Similarly, if a case bound over to the circuit court has multiple defendants and any of those defendants already have another case in the circuit court, then the new case must be assigned to the judge who has the oldest existing case. *Id.* at ¶ 3.

Otherwise, all cases bound over to the circuit court are assigned to a criminal division docket using what the circuit court refers to as a “two-tier assignment system.”²⁰⁷

- All felonies that carry a possible life sentence and all other cases that include a felony firearm charge are allotted directly to one of the “second tier” court dockets, referred to as “trial dockets.”²⁰⁸ These cases remain in their allotted court through the conclusion of the case.²⁰⁹
- All other cases are allotted to one of the “first tier” court dockets, referred to as “AOI dockets”.²¹⁰
 - Failure to pay child support cases²¹¹ arising out of the 36th District are allotted to the “felony non-support docket.”²¹² Cases can be resolved in this court by a guilty plea within 35 days of bind-over.²¹³ If a case is not resolved within that time or if the defendant requests a jury trial, it is allotted to a particular trial docket court.²¹⁴
 - Auto theft offenses, as designated by a court docket directive,²¹⁵ are for the most part allotted to the “felony auto theft docket.”²¹⁶ Cases can be resolved in this court by a guilty plea within 28 days of bind-over.²¹⁷ If a case is not resolved within that time or if the defendant requests a jury trial, it is allotted to a particular trial docket court.²¹⁸
 - Certain domestic violence cases, identified by the prosecutor’s office as fitting the appropriate definition, are allotted to the “non-capital domestic

²⁰⁷ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 5 (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²⁰⁸ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶¶ 6.d., 8 (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²⁰⁹ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 8(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹⁰ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6 (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹¹ MICH. COMP. LAWS §§ 750.161, 750.165 (2019).

²¹² Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(a) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹³ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(a) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹⁴ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(a) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹⁵ Docket Directive 2007-06, Felony Auto Theft Docket (Mich. 3rd Jud. Cir. May 1, 2007).

²¹⁶ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019). If a defendant charged with auto theft has an open or pending case, the auto theft case will be assigned directly to the judge overseeing the open or pending case, rather than being assigned to the felony auto theft docket. Local Admin. Order 2019-01, Criminal Division Case Assignment ¶¶ 2, 6(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019). If a defendant charged with auto theft is charged in a complaint that includes a second offense carrying more than 10 years as a penalty, the case is assigned to a regular AOI docket. Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹⁷ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²¹⁸ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(b) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

violence” docket.²¹⁹ Cases can be resolved in this court by a guilty plea within 28 days of bind-over.²²⁰ If a case is not resolved within that time or if the defendant requests a jury trial, it is randomly allotted to a trial docket court.²²¹

- All of the other cases arising out of all of the district and municipal courts are randomly allotted to one of the other “arraignment on the information dockets.”²²² Cases can be resolved in these courts by plea agreement within 28 days of bind-over.²²³ If a case is not resolved within that time or if the defendant requests a jury trial, it is randomly allotted to a trial docket court.²²⁴

Arraignment on the information (or indictment).²²⁵ The first court proceeding in circuit court is the arraignment on the information, conducted on the criminal division docket to which the case was allotted following bind-over (as explained in the preceding section). Twenty-three circuit court judges can each be conducting arraignments on the information every day of the week.

In theory, the attorney who was originally appointed to represent an indigent felony defendant during the proceedings held below in the district court before bind-over should be present on behalf of that defendant at the circuit court arraignment on the information and continue to represent that defendant through disposition of the defendant’s case in the circuit court. In practice though, because these same attorneys may be representing indigent felony defendants whose cases are pending across

²¹⁹ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(c) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²⁰ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(c) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²¹ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(c) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²² Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(d) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²³ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(d) (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²⁴ Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 6(d) (Mich. 3rd Jud. Cir. Mar. 4, 2019). There is one exception: the AOI courts retain cases where the defendant has waived his right to a jury trial and is charged with carrying a concealed weapon with a maximum 5-year penalty or drug offenses with a maximum 4-year penalty. Local Admin. Order 2019-01, Criminal Division Case Assignment ¶ 7 (Mich. 3rd Jud. Cir. Mar. 4, 2019).

²²⁵ A felony prosecution in the circuit court can be based on either an information or an indictment. When the prosecutor files an information, the proceeding before the judge in the circuit court is referred to as an “arraignment on the information.” When a grand jury returns an indictment, the proceeding before the judge in the circuit court is referred to as an “arraignment on the indictment.” For the sake of brevity, the phrase “arraignment on the information” is used throughout this report to refer to both an arraignment on the information and an arraignment on the indictment.

Wayne County in up to 20 district courts and four municipal courts and up to 23 circuit courtrooms, attorneys not infrequently fail to appear in circuit court proceedings on behalf of the defendants they are appointed to represent.

Some defendants believe, during the time their case is pending in the lower court, that they will be able to hire a private attorney, but then find themselves unable to do so and appear for the arraignment on the information and request an appointed attorney. When this occurs in one of the second tier trial docket courtrooms, and also if the previously appointed attorney fails to appear at the arraignment on the information, the circuit court judge makes what is known as an “on-the spot” appointment of an attorney to represent an indigent felony defendant whose case is pending in their court, with the limitation that each judge cannot appoint a single attorney to more than 12 spot assignments each year.²²⁶ When this occurs in one of the first tier AOI docket courtrooms, an attorney is appointed to represent the defendant using what is known as the “house counsel assignment system.”

Every first tier AOI docket judge designates one attorney each day to serve as AOI house counsel in their courtroom. Approximately six weeks in advance of each calendar quarter, attorneys have one week during which to sign up to serve as AOI house counsel.²²⁷ Each attorney can sign up for a maximum of ten days per month, and they “are encouraged to sign up for an entire week if possible.”²²⁸ Approximately one month in advance of the calendar quarter, each first tier AOI docket judge selects from the sign-up sheet one attorney for each day of the upcoming calendar quarter to serve as AOI house counsel in their courtroom, with the limitation that each judge cannot appoint a single attorney to more than five AOI house counsel days per quarter.²²⁹ If the designated AOI house counsel for a given first tier AOI docket fails to appear, the judge is supposed to contact the assigned counsel services office to obtain a replacement.²³⁰

The AOI house counsel attorney is physically present and available in the first tier AOI docket courtroom to which they have been selected on a given day. The AOI house counsel attorney is appointed to represent any defendant who for the first time requests appointed counsel and is also appointed to replace any previously appointed attorney who fails to appear at the arraignment on the information.²³¹ In theory, when

²²⁶ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.K.2. (Mich. 3rd Jud. Cir. June 16, 2017).

²²⁷ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.D.2. (Mich. 3rd Jud. Cir. June 16, 2017).

²²⁸ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.D.2. (Mich. 3rd Jud. Cir. June 16, 2017).

²²⁹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.D.4., 6. (Mich. 3rd Jud. Cir. June 16, 2017).

²³⁰ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.D.6.-7. (Mich. 3rd Jud. Cir. June 16, 2017).

²³¹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit –

the attorney serving as AOI house counsel is appointed to represent an indigent felony defendant, that attorney should continue to represent that defendant through disposition of the defendant's case in the circuit court.

All assigned counsel attorneys in Wayne County are aware that AOI house counsel attorneys are present daily in every first tier AOI docket courtroom. As a result, attorneys who have been appointed to represent defendants who are scheduled for arraignment on the information in an AOI docket courtroom frequently ask the AOI house counsel attorney to stand-in for them during their client's arraignment on the information. As previously noted, it is in the discretion of each circuit court judge as to whether to accept the appointed attorney's designated stand-in or to remove that attorney from a defendant's case and appoint a new attorney to begin representing the defendant.²³² For example, on the door of more than one AOI courtroom is a "Notice of Courtroom Policies" stating that all attorneys must check in with the clerk upon arrival, and if assigned counsel fails to check in by 9:30 a.m. (the courtroom opens at 9:00 a.m.) the attorney will lose previously assigned cases for failure to appear and new counsel will be appointed to represent the defendant.

JUDICIAL CONTROL OF APPOINTMENTS CREATES CONFLICT BETWEEN ATTORNEYS' FISCAL INTERESTS AND DEFENDANTS' CASE-RELATED INTERESTS

Under the Third Judicial Circuit Court's procedures for appointing attorneys to represent indigent felony defendants in Wayne County,²³³ an attorney can be on the list of attorneys who are eligible to be appointed and yet never be appointed in a single case. There is nothing in the court's procedures that requires each attorney to receive a certain or any number of case appointments. The only provision in the court's procedures that directly evidences any concern for a distribution of appointments among eligible attorneys is the 10 cases each week that are set aside for the chief judge

Criminal Division ¶ I.D.1. (Mich. 3rd Jud. Cir. June 16, 2017). In addition, the AOI house counsel is appointed to represent defendants who appear in the particular courtroom for probation violations and capias warrants and is also appointed to represent a defendant to whom the judge grants a request for new counsel. *Id.*

²³² Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.K.2.b. (Mich. 3rd Jud. Cir. June 16, 2017).

²³³ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017).

or presiding judge to appoint counsel, which “are to be given to newly CAP certified attorneys, attorneys returning from extended medical leave and certified attorneys who have not received assignments for an extended period of time.”²³⁴

Instead, whether and how many case appointments are made to each attorney is almost entirely within the control of the judges, with few limitations,²³⁵ resulting in assigned counsel attorneys being beholden for their livelihood to the judges. Third Judicial Circuit Court judges report that some of their colleagues have a tendency to give the vast majority of their appointments to the same lawyers, time and time again. The judges recognize that there are substantial disparities in the numbers of appointments between the 30 to 50 top-earning attorneys and all of the other attorneys on the assigned counsel list.

The data from the Third Judicial Circuit Court bears this out. Below is a table of the 15 top-earning assigned counsel, in descending order of total compensation earned, showing the numbers of felony and probation violation cases they vouchered over a five-year period (2014 through 2018). In a system in which appointments do not experience undue judicial interference, one would expect that the numbers of cases would be similar from one attorney to the next. That is, so long as each attorney signs up for similar numbers of house counsel days, spot assignments, etc., and assuming the judges on appointment rotations assign cases somewhat evenhandedly, there should not be wildly variant case totals. Instead, the top earner over the five-year period (Attorney 1) had 1,787 felony cases and 2,015 probation violations, for a total of 3,802 cases. The fifth highest earning attorney (Attorney 5) had only 736 felonies and 368 probation violations, for a total of 1,104 cases. Similar differences occur on a year by year basis.

²³⁴ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.H.1. (Mich. 3rd Jud. Cir. June 16, 2017).

²³⁵ The limits placed on a specific judge appointing a specific attorney are:

8 chief/presiding judge assignments in a year, ¶ I.H.3;

8 case appointments in a two-week assignment period, ¶¶ I.E.1, I.M.1;

5 AOI house counsel days in a quarter, ¶ I.D.6;

12 out-county district court spot assignments (in extenuating circumstances) in a year, ¶ I.J.1;

12 “on-the-spot” assignments to replace original attorney in a year, ¶ I.K.2.a;

26 probation violation assignments in a year, ¶¶ I.F.1, I.M.1.

Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017).

	2014			2015			2016			2017			2018			5-Year Total		
	Fel	PV	Total	Fel	PV	Total												
Attorney 1	284	370	654	402	554	956	459	424	883	370	330	700	272	337	609	1787	2015	3802
Attorney 2	67	5	72	48	1	49	58	14	72	57	3	60	61	1	62	291	24	315
Attorney 3	212	313	525	248	364	612	319	237	556	238	191	429	187	145	332	1204	1250	2454
Attorney 4	145	81	226	142	82	224	144	115	259	182	138	320	152	116	268	765	532	1297
Attorney 5	134	84	218	142	56	198	133	43	176	196	88	284	131	97	228	736	368	1104
Attorney 6	48	13	61	25	9	34	70	10	80	94	25	119	80	14	94	317	71	388
Attorney 7	74	22	96	91	8	99	100	15	115	87	8	95	136	47	183	488	100	588
Attorney 8	67	15	82	65	15	80	84	25	109	89	22	111	84	35	119	389	112	501
Attorney 9	96	47	143	69	22	91	89	38	127	101	28	129	99	65	164	454	200	654
Attorney 10	98	25	123	113	25	138	130	43	173	159	41	200	141	46	187	641	180	821
Attorney 11	122	67	189	160	35	195	179	43	222	130	25	155	82	29	111	673	199	872
Attorney 12	116	114	230	142	156	298	218	181	399	215	121	336	185	159	344	876	731	1607
Attorney 13	113	98	211	93	79	172	100	93	193	84	90	174	108	150	258	498	510	1008
Attorney 14	44	25	69	46	20	66	68	62	130	112	28	140	77	41	118	347	176	523
Attorney 15	176	129	305	160	178	338	138	104	242	148	109	257	129	135	264	751	655	1406

Moreover, judges and attorneys reported that there are some top earning attorneys on the assigned counsel list who “almost never go above the third floor” – meaning that they almost never take a case to trial, as the trial courts are not located on the first three floors. These appointed attorneys are referred to locally as “churn and burners,” because they dispose of cases as quickly as possible. Judges say almost all of these attorneys resolve their cases by plea in the AOI docket courtrooms and, if their clients do not plead before the case is transferred to a trial docket, often seek to withdraw from cases citing irreconcilable differences with their clients.

Again, the data bears this out. For example, Attorney 1, while earning \$682,052 over the five-year period for handling 1,787 felony cases (excluding probation violations), earned only \$2,200 for bench and jury trials during that same five-year period. Similarly, Attorney 3 earned \$451,878 over the five-year period for 1,204 felonies and earned only \$1,525 for bench and jury trials.

The harm to defendants from “stand-in” counsel

In one AOI docket courtroom, although the court unlocked its doors to the general public at 9:00 a.m., little happened during the next hour. During that hour, 6AC observed one criminal defense lawyer in the courtroom gallery speaking with the father of a pre-trial detainee. The lawyer explained that he had spoken with the prosecutor and had good news. Because the defendant (the gentleman’s daughter) was under 21 and had a previously clean record, the court would accept a guilty plea and sentence the young woman under the Holmes Youthful Trainee Act (HYTA), which allows a conviction to be held in abeyance and wiped clean upon successful completion of probation.²³⁶ Moreover, the man’s daughter would be released to his supervision that day, the attorney said. The father expressed his thanks.

At the end of the conversation, the lawyer mentioned that he had other cases demanding his attention in other courts, but that he had explained everything to the “house counsel” who would handle the necessary proceedings in court that day. The father did not understand, but the lawyer told him that it was common practice for attorneys to fill in for one another and everything would be fine.

When the defendant was brought up from lock-up and her case was called, things started off as if there would be no problems. The house counsel stated that the defendant would plead guilty to the charges of being in possession of a stolen car and that the prosecution and defense were recommending HYTA and home supervision.

The judge asked if one of the defendant’s parents was in the courtroom. The father identified himself. The judge explained that, under the terms of the probation, the father had the responsibility to set curfew, to advocate for further schooling, and to notify

the court immediately if his daughter broke curfew or violated any of the other terms of the home supervision. Finally, the judge asked the father to confirm that the defendant would be living with him.

The father informed the court that he was currently living in an all-male halfway house and his daughter could not live with him. The judge said she could not authorize the defendant’s release from jail unless the defendant was living with a parent or guardian. The judge inquired about the defendant’s mother, but the defendant said they had not spoken in a while; she said she thought an aunt might be willing to house her. The judge stated that was all well and good, but she could not agree to the release until a parent or guardian who would confirm living arrangements appeared in court.

Assuming that arrangements would be made quickly, the court went on toward taking the defendant’s guilty plea. The prosecutor began to state the facts of the case, including when and where the defendant had received the stolen car. The defendant interrupted to say that the facts as detailed in court were not correct in her opinion. The prosecutor then stated the address from where the car allegedly was stolen and where the defendant allegedly was present at the time, but the defendant again interjected to say that she was picked up by friends after the car was stolen and did not know it was stolen until she was arrested – a potential defense against the charges.

The judge turned to the “house counsel” to ask if she knew what was going on. The “house counsel” said she was simply standing in and knew nothing about the facts of the case. With that, the defendant – who by all accounts was to be released under home monitoring – was returned to jail at taxpayer expense to wait for another court date five to seven days later.

²³⁶ MICH. COMP. LAWS §§ 762.11 through 762.16 (2019).

CHAPTER VI

SUFFICIENT RESOURCES & COMPENSATION

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”²³⁷ For this to occur, states must ensure that both the prosecution and the defense have the resources they need at the level their respective roles demand. “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”²³⁸ If a defense attorney is either incapable of or barred from challenging the state’s case because of a structural impediment – “if the process loses its character as a confrontation between adversaries”²³⁹ – a constructive denial of counsel occurs.

The Court in *Cronic* clearly advises that governmental interference that infringes on a lawyer’s independence to act in the stated interests of defendants, or that places the lawyer in a conflict of interest causes a constructive denial of counsel.²⁴⁰ An attorney cannot represent a client if the attorney’s own personal interests are likely to be at odds with the client’s case-related interests.²⁴¹ For example, if an attorney’s take home pay is premised on the need to dispose of as many cases as possible, as quickly as possible, then a conflict of interest exists between the attorney and the indigent accused. In short, any structure of services that places the attorney’s personal financial wellbeing in direct competition with the stated legal interests of a defendant creates a constructive denial of counsel. The Michigan *Rules of Professional Conduct* expressly prohibit all lawyers from representing a client whenever a conflict of interest exists, unless the client enters a valid waiver of the conflict.²⁴² The *Rules* note, “[f]or example, a

²³⁷ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

²³⁸ United States v. *Cronic*, 466 U.S. 648, 657 (1984) (citing United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

²³⁹ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984).

²⁴⁰ United States v. *Cronic*, 466 U.S. 648, 658-61 (1984).

²⁴¹ MICH. R. PROF. CONDUCT 1.7(b) (“a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities . . . or by the lawyer’s own interests”).

²⁴² MICH. R. PROF. CONDUCT 1.7.

lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee."²⁴³ The State of Michigan, therefore, has a constitutional obligation to ensure the systems established for providing Sixth Amendment services are free from financial conflicts that interfere with counsel's ability to render effective representation to each defendant.²⁴⁴

To prevent financial conflicts of interests, all national standards require that: "Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative, and other litigation support services."²⁴⁵ The American Bar Association's *Standards for Criminal Justice* explain that attorneys must have adequate resources and support staff (including secretarial, investigative, and expert services, for assistance at pre-trial release hearings and sentencing) and adequate facilities and equipment (such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations).²⁴⁶

Therefore, an attorney needs at least three types of resources to effectively defend each client: law office overhead; case-related expenses; and fair lawyer compensation.

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, the attorney must pay certain expenses. These include: office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. Attorneys must incur all of these expenses, commonly referred to as "overhead," before representing a single client.²⁴⁷

²⁴³ MICH. R. PROF. CONDUCT 1.7 cmt.

²⁴⁴ See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("[A]ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.").

²⁴⁵ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (2002).

²⁴⁶ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to Standard 5-1.4 (3d ed. 1992).

²⁴⁷ "The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses," NAT'L ASSN. OF CRIM. DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar.

- *Case-related expenses.* Once an attorney is designated to represent a client in a given case, additional expenses inevitably arise. These are expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case; some cases requiring very little in the way of expense, other cases costing quite a lot.
- *Fair lawyer compensation.* This is the attorney's pay. National standards require that "counsel should be paid a reasonable fee in addition to actual overhead and expenses."²⁴⁸

In a case from over a quarter century ago challenging the fixed fee compensation paid to attorneys assigned to represent indigent defendants in Recorder's Court,²⁴⁹ the Michigan Supreme Court rejected a mechanical calculation of what might be a reasonable fee.²⁵⁰ Instead, the court held that, "whatever the system or method of compensation utilized, the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform."²⁵¹ Further, the court found that "the fixed fee system creates a situation in which attorneys whose clients plead guilty earlier in the criminal process are relatively overcompensated for their efforts when compared to the compensation provided to attorneys whose clients do not."²⁵² Because the court lacked any procedures to balance appointments among attorneys, "[t]here [was] no assurance whatsoever that the fixed fees operate to reasonably compensate individual assigned counsel for the services they perform."²⁵³

2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCER, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

²⁴⁸ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

²⁴⁹ The Recorder's Court was then the criminal court for the City of Detroit and the Third Judicial Circuit Court presided over felony cases arising out of the rest of Wayne County. The Recorder's Court was eliminated as part of Michigan's court reorganization.

²⁵⁰ *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 128-29, 503 N.W.2d 885 (Mich. 1993).

²⁵¹ *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 131, 503 N.W.2d 885 (Mich. 1993) (emphasis added).

²⁵² *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 132, 503 N.W.2d 885 (Mich. 1993).

²⁵³ *In re Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110, 132-33, 503 N.W.2d 885 (Mich. 1993).

FINDING 4: The Third Judicial Circuit’s assigned counsel compensation plan creates economic disincentives or incentives that impair defense counsel’s ability to provide effective representation.

The Third Judicial Circuit Court is responsible for establishing the “procedures for . . . compensating counsel who represent indigent parties” in all felony cases arising within Wayne County.²⁵⁴ The MIDC Act requires that, in establishing standards for compensation of appointed counsel, the MIDC “adhere to the . . . principle[]” that “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation must be avoided.”²⁵⁵ MIDC proposed *Standard 8*,²⁵⁶ if approved, will require that:

- attorneys be promptly paid a reasonable rate of compensation for all in-court and out-of-court work necessary to provide effective representation;
- “[e]vent based, capped hourly rates, and flat fee payment schemes” be eliminated and instead attorneys be paid an hourly rate of “at least \$100 per hour for misdemeanors, \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies,” with the rates adjusted annually for cost of living; and
- attorneys be reimbursed for reasonable out-of-pocket and case-related expenses.

Upon formal approval of this standard, Wayne County will have not more than 180 days to submit to MIDC its plan for how its indigent defense system will meet this standard.²⁵⁷

REASONABLE FEE

The Third Judicial Circuit Court pays assigned counsel on a per-event basis for their work on all felony cases.²⁵⁸ For example (*see* table below), attorneys are paid a set amount for a jail visit, for a preliminary examination, and for an arraignment on the information. For most events, the amount the attorney is paid varies depending on the potential sentence available for the defendant’s charge at the time of the arraignment.²⁵⁹

²⁵⁴ MICH. CT. R. 8.123. *See* MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.504, 600.601 (2019).

²⁵⁵ MICH. COMP. LAWS § 780.991(2)(b) (2019).

²⁵⁶ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 8 (2018). For full text of proposed Standard 8, *see* Appendix B.

²⁵⁷ MICH. COMP. LAWS § 780.993(3) (2019).

²⁵⁸ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.N.1. (Mich. 3rd Jud. Cir. June 16, 2017); Wayne County Circuit Court – Criminal Division, Fee Schedule for Assigned Counsel (rev’d Oct. 16, 2014).

²⁵⁹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.N.1. (Mich. 3rd Jud. Cir. June 16, 2017); Wayne County Circuit Court – Criminal Division, Fee Schedule for Assigned Counsel (rev’d Oct. 16, 2014).

Third Judicial Circuit policy is to appoint the same attorney to represent a defendant in all cases of that defendant that are ongoing at the same time.²⁶⁰ The attorney is paid the amounts shown in the fee schedule for the defendant's case with the most serious charge, but is only paid half of those amounts for representing the defendant in each of the other ongoing cases.²⁶¹

Event	Sentence (Months)				
	24-60	84-120	168-240	Life/Max	Natural Life
Preliminary examination	\$90	\$110	\$130	\$190	\$250
Arraignment on information	\$40	\$50	\$60	\$80	\$100
Investigation & preparation	\$110	\$140	\$170	\$210	\$270
Plea	\$110	\$140	\$170	\$210	\$260
Motion	\$60	\$70	\$90	\$110	\$140
Calendar conference				\$60	\$60
Hearings, half day				\$100	\$100
Hearings, full day				\$200	\$200
Final conference	\$40	\$50	\$60	\$80	\$100
Trial, half day	\$90	\$110	\$130	\$160	\$210
Trial, full day	\$180	\$220	\$260	\$320	\$420
Sentence	\$60	\$70	\$90	\$110	\$140
Miscellaneous Events					
Jail visits			\$50		
			(one per non-capital and two per capital case unless more are approved by the Chief Judge)		
Calendar conference			\$50		
Evidentiary & Walker hearings			\$80 - half		
			\$160 - full		
All adjourned hearings			one-half of regular fee (unless adjourned by Defense)		
The rates in the above table will be paid in all cases except under those circumstances listed below:					
Exceptions					
Multiple cases with same defendant			100% of event fee for case with most serious charge 50% of event fee for each other case		
Probation violation or extradition hearing			\$75		

Here is an example of how this works based on a charge where the potential sentence is between 84 and 120 months. In such a case, the attorney is paid \$140 for all investigation and preparation for the entire case – regardless of complexity. The attorney is paid \$110 for appearing at the preliminary examination in district court,

²⁶⁰ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit – Criminal Division ¶ I.K.1. (Mich. 3rd Jud. Cir. June 16, 2017).

²⁶¹ Wayne County Circuit Court – Criminal Division, Fee Schedule for Assigned Counsel (rev'd Oct. 16, 2014).

even if the attorney just appears to enter a waiver of the client's right to a preliminary examination. The attorney is paid \$50 for appearing at the arraignment on information in circuit court and another \$50 for appearing at the final pretrial conference. The attorney is paid another \$50 if the attorney visits the client in jail. Finally, assuming the case resolves by plea agreement, the attorney is paid \$140 and an additional \$70 for sentencing. This is a total of \$610 for a rather standard felony case.

If other factors come into play, an attorney might be paid more for a given case. For example, if the attorney in our hypothetical case files a motion, the attorney might earn from \$0 to \$230 in connection with that motion.²⁶² If the case goes to trial, (instead of the compensation paid for a plea) the attorney earns \$110 for every half day of trial or \$220 per full day. If the defendant is convicted, the attorney earns \$70 for sentencing.

To understand why compensating attorneys by event rather than by reasonable hourly rate is problematic, consider the payment structure for jail visits. To visit a client in jail, attorneys report that it can take three to six hours to drive to the jail and get through security, wait for the client to be brought up by jail staff, sit and review body camera footage with the client, and get back out of the jail and drive home. There could be a dozen officers on a case who each have body camera footage to review. For all this work, the attorney is paid \$50. And the attorney is not paid for any of the time spent in reviewing the discovery before going to the jail to meet with the client. Compounding the situation, the Third Judicial Circuit fee schedule only authorizes an attorney to be paid for one jail visit for felonies carrying a potential sentence of 20 years or less, and a max of two jail visits per capital felony case.

Furthermore, because attorney compensation fees are almost exclusively paid for events that occur inside the courtroom,²⁶³ attorneys are not compensated at all for much of the work that is necessary to provide effective representation. For example, an attorney is not compensated for meeting with a defendant in the office or at

²⁶² There are four potential compensation outcomes when an assigned counsel attorney files a motion:

- If an assigned counsel attorney files a motion that is denied without a hearing, the attorney receives no compensation;
- If an assigned counsel attorney files a motion that is granted without a hearing, the attorney receives \$70 compensation (84-120 month case);
- If an assigned counsel attorney files a motion that is granted a hearing, they receive \$80 compensation (half day hearing) or \$160 (full day hearing), but if that motion is subsequently denied, the attorney receives no more compensation; or
- If an assigned counsel attorney files a motion that is granted a hearing, they receive \$80 compensation (half day hearing) or \$160 (full day hearing), and if that motion is subsequently granted, the attorney receives \$70 compensation (84-120 month case).

So, at most, an attorney in an 84-120 month case can earn \$230 for a successful motion granted after a full-day hearing; and regardless of the amount of time required to conduct necessary legal research and prepare a motion, the attorney will earn nothing for that time if the motion is denied without a hearing.

²⁶³ The only exceptions are: a one-time fee automatically paid for "investigation & preparation" in every case, ranging from \$110 to \$270 depending on the seriousness of the case; and a fee of \$50 for a jail visit.

the courthouse, or anywhere outside of the jail. The attorney is not compensated for speaking to the defendant's family to inform them about the case. Other than the extremely limited flat fee of \$110 to \$270 for "investigation & preparation," attorneys are not compensated for reviewing discovery produced by the prosecution, interviewing witnesses, conducting legal research, seeking out sentencing alternatives and social services, or for any time spent in trial preparation, no matter that an attorney can easily spend 10 to 15 hours just to prepare for a trial.

Additionally, many things can happen on the eve or day of trial obviating the need to hold the trial. For example, the police or alleged victim may not show up to court. When this happens, the case may be dismissed, and the attorney is not paid for any of the trial preparation, despite having done a lot of work. The event-based compensation scheme means that two attorneys can be paid the exact same amount, while one attorney does absolutely no work other than appearing in court and finalizing a plea deal, and the other attorney works well over 50 hours reviewing discovery and preparing legal defenses.

An assigned counsel attorney may petition the Third Judicial Circuit for extraordinary fees in cases in which the attorney feels the work on a particular case significantly exceeded the allowable compensation under the existing fee schedule.²⁶⁴ The presiding judge of the court's criminal division holds the power to approve or deny the petitions.²⁶⁵ The Third Judicial Circuit was not able to share records of how many petitions for extraordinary fees are filed annually nor the number of petitions denied.²⁶⁶

²⁶⁴ Docket Directive 2011-11, Assigned Counsel Petitions for Extraordinary Fees (Mich. 3rd Jud. Cir. July 18, 2011).

²⁶⁵ Docket Directive 2011-11, Assigned Counsel Petitions for Extraordinary Fees (Mich. 3rd Jud. Cir. July 18, 2011).

²⁶⁶ The Third Judicial Court reviewed extraordinary fee requests for calendar year 2018 and the first quarter of 2019. "Based upon the data that I have, which encompasses requests for extraordinary fees from counsel representing individuals before a grand jury, representing witnesses in criminal proceedings, at the trial level, and on appeal, I have isolated 74 cases in which trial counsel requested extraordinary fees. In each case, the Court granted the motions. There was one trial level case in which counsel withdrew the motion without ruling. Unfortunately, as this is an internal working document, I cannot share the spreadsheet with you. However, in reviewing the motions, I learned that the motions varied greatly and I will offer a broad summary of the trial level motions. Some requests sought compensation for additional jail visits. In these instances, the fees varied by a multiple of \$50.00. In other instances, counsel sought compensation for additional time, effort, preparation required for complex cases. Requests addressed issues like a second trial that required additional preparation, review of the transcripts from the earlier trial, and multiple jail visits to work with the client, voluminous discovery was a recurrent theme in the requests, reviewing taped discovery – be it police body cams, security systems, or other sources – led to a number of requests, in one case, counsel successfully petitioned the court to permit the client to withdraw a plea and during a second trial negotiated a better plea deal for the client, some cases involved working with deaf or limited English proficient clients through an interpreter. In short, the Court considers the request pursuant to its obligation under statute, court rule, and local administrative order/docket directive within the context of competent representation." Email from Richard Lynch, Third Judicial Circuit Court General Counsel, to David Carroll, Executive Director of Sixth Amendment Center (June 3, 2019).

6AC reviewed the data provided by the Third Judicial Circuit reflecting all fees paid to assigned counsel. Over the five-year period of FY 2014 through FY 2018, assigned counsel attorneys were paid extraordinary fees in only 0.13% of cases (or 375 of 292,538 felony cases²⁶⁷). During that period, the Third Judicial Circuit paid \$1,136,122 in extraordinary fees, constituting 4.42% of the total \$25,677,666 fees paid to assigned counsel.

Extraordinary Fees	2014	2015	2016	2017	2018
Total Felony Cases	52,312	52,351	63,044	66,363	58,468
# of cases w/ extraordinary fees	33	68	72	84	118
% of cases w/ extraordinary fees	0.06%	0.13%	0.11%	0.13%	0.20%
Total fees paid	\$5,079,663	\$5,323,095	\$5,243,632	\$5,243,632	\$4,787,644
Total extraordinary fees paid	\$83,186	\$346,635	\$203,020	\$203,020	\$300,261
% of total fees paid	1.64%	6.51%	3.87%	3.87%	6.27%

Looking at the same 15 top earners from the previous chapter, there is a wide range in the amount that Wayne County pays each attorney on average for handling a felony case²⁶⁸ (excluding probation violations).

	5-Year Total		
	Number of Felony Cases	Total Felony Case Fees	Average Fee Per Felony Case
Attorney 1	1787	\$518,658	\$290.24
Attorney 2	291	\$457,755	\$1,573.04
Attorney 3	1204	\$352,210	\$292.53
Attorney 4	765	\$365,003	\$477.13
Attorney 5	736	\$369,089	\$501.48
Attorney 6	317	\$384,281	\$1,212.24
Attorney 7	488	\$359,107	\$735.88
Attorney 8	389	\$331,899	\$853.21
Attorney 9	454	\$314,936	\$693.69
Attorney 10	641	\$302,475	\$471.88
Attorney 11	673	\$298,397	\$443.38
Attorney 12	876	\$246,730	\$281.66

²⁶⁷ The 6AC does not include probation violations in the count of total cases. The data provided by the court does not allow for separating extraordinary fees paid in probation violation cases from extraordinary fees paid in all other felony cases. Though it is possible that some of the extraordinary fees paid were in probation violation cases, the 6AC suspects, but does not know, that attorneys are unlikely to seek extraordinary fees in probation violation cases.

²⁶⁸ The compensation data provided by the Third Judicial Circuit does not distinguish the cases by severity, making it impossible to determine whether, for example, the disparity in cost per case between the attorneys is due to the types of cases they are assigned or due to the way the attorneys practice or bill for their cases.

Attorney 13	498	\$261,276	\$524.65
Attorney 14	347	\$266,188	\$767.11
Attorney 15	751	\$223,845	\$298.06

Because attorneys are paid exactly the same amount for an event, no matter how few or how many hours they devote to carrying out that event, and because attorneys are not paid for most time outside of court that they devote to providing effective assistance of counsel, it is in the attorney's own financial interest to spend as little time as possible on each individual defendant's case.²⁶⁹ For example, if an attorney earns \$24,000 per year to represent indigent felony defendants at various events, and if the attorney's indigent felony cases take up all of his available working hours, then this attorney cannot earn more than \$24,000 in a year. On the other hand, if the attorney devotes only half of his working hours to indigent clients, then he can spend the other half of his working year on more lucrative paying cases or other employment, thereby greatly increasing his annual income. A fixed fee for almost exclusively in-court events creates incentives for the attorney to rush a client to plead guilty without regard to the facts of the case, avoid conducting investigation or legal research, and avoid preparing for hearings or preparing for trial. The attorney has incentive to favor the legal interests of paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

The low compensation attorneys receive creates an incentive for attorneys to handle too many cases, so that they can earn enough money to support their legal practices and their lives. Assigned counsel routinely say words to the effect of "My compensation [in the Third Judicial Circuit] wouldn't support my family, loans and mortgage" without private work. One assigned counsel attorney estimates that he earns more per hour on appointed misdemeanor cases in the district courts than on appointed felony cases in the Third Judicial Circuit, because the district court pays \$250 per misdemeanor case that take far less time than most felonies. "For a retained felony, I could charge \$5,000. If I'm appointed to that same case, I'm lucky to get \$500."

The average fee paid for felony cases in Wayne County is excessively low. The average per-case compensation, excluding probation violations, for all assigned counsel in the Third Judicial Circuit from 2014 through 2018 was \$453.53.

²⁶⁹ See MICH. INDIGENT DEFENSE COMM'N, INCENTIVIZING QUALITY INDIGENT DEFENSE REPRESENTATION 11-12 (2017) ("Per event plans are those in which attorneys are paid according to the tasks they accomplish. Each tangible task is coupled with a value. The more tasks that an attorney completes, the more valuable their basket becomes. . . . Per event payment plans are challenging because they encourage attorneys to engage in activities that provide high returns for minimal effort. The quicker an attorney can complete a task, the greater the return. Those tasks that have the potential of consuming a great deal of time become less desirable to attorneys. One example is the decision to negotiate a plea deal or take a case to trial. Trials are time consuming and compensation for trials is usually low, which means the monetary return on effort is minimal. Plea deals can generally be negotiated fairly quickly and the compensation per plea deal is not much lower than the compensation for a trial.")

OVERHEAD COSTS

In all felony cases in which the potential sentence is 20 years or less, attorneys still earn the same amount of money as they did in 1998 for each case event.²⁷⁰ This, despite the fact that the costs of maintaining a law practice have increased in the intervening 21 years.

The low, fixed, event-based fees do not reimburse attorneys for any of the overhead necessary to provide effective representation on behalf of their appointed clients. When attorneys are not reimbursed for overhead costs, and must pay for overhead out of a fixed, event-based fee, this creates a disincentive for the attorney to incur any costs on behalf an indigent defendant. For example, some attorneys do not accept toll calls from the jail or incur overhead costs that benefit indigent defendants (even such as secretarial time, legal research capability through books or online, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation.

Maintaining a private practice in Wayne County is expensive. Office rent in or around Detroit typically runs between \$500 to \$1,000 per month, depending on location. Parking – either daily in the cash lots around the court or in a monthly garage – can be \$120 to \$150 per month, and then there are the ongoing costs of supplies, utilities, and salaries for any support staff.

One attorney explained: “If I would come downtown for just one case, I’d lose money.” The lawyer reports that it costs him \$10 to park, at least \$5 for gas, plus more for transportation and office expenses, to even put himself in a position to go into court. He might spend two or three hours at the court, mostly waiting for the case to be called, when he will spend about 15 to 20 minutes standing before the court. Yet, the

²⁷⁰ Compensation rates in potential life sentence cases were modified in October 2014, although the Third Judicial Circuit’s own website does not list an administrative order changing assigned counsel compensation rates since 1998 (Local Administrative Order 1998-03). Email from Richard Lynch, Third Judicial Circuit Court General Counsel, to David Carroll, Executive Director of Sixth Amendment Center (May 24, 2019). When the 6AC noted the discrepancy between the email and the public record, the Third Judicial Circuit explained: “At this point, I suspect that an oversight occurred in one of two ways. Either LAO 2014-12 was intended to encompass both family and criminal fees or the fees were adjusted, but an LAO memorializing the fact was not adopted.” Email from Richard Lynch, Third Judicial Circuit Court General Counsel, to David Carroll, Executive Director of Sixth Amendment Center (May 28, 2019). The next day, the Third Judicial Circuit sent a document showing the increased rates for potential life cases. Email from Richard Lynch, General Counsel, to David Carroll, Executive Director of Sixth Amendment Center (May 29, 2019) (providing Wayne County Circuit Court – Criminal Division, Fee Schedule for Assigned Counsel (rev’d Oct. 16, 2014)). Although the document provided by the court states on its face that the rates went into effect for all cases assigned on or after December 1, 1998, this appears to be a clerical error.

attorney is only paid \$50 for appearing at a calendar conference, for example. “I need several things scheduled each day, just to get by.”

Attorneys who accept felony appointments in the Third Judicial Circuit Court report a wide range in overhead costs. Some estimate their monthly overhead to be a little over \$200, while others estimate that they spend upwards of \$5,000 to \$6,000 each month. One attorney provided data showing that he spends an average of \$74,500 on overhead expenses each year, including salaries for support staff totaling \$33,000.

CASE-RELATED EXPENSES FOR EXPERTS AND INVESTIGATORS

Under Michigan law, the determination of whether an expert is needed is within the province of the court.²⁷¹ The Third Judicial Circuit Court provides funding for experts and investigators on a case-by-case basis, and attorneys must petition the court for these services.

Fees to Parties Other than Assigned Counsel

Psychiatric cases in which the maximum penalty is life imprisonment: interview and written evaluation	\$300
Psychiatric cases in which the maximum penalty is life imprisonment: attendance in court	\$150
Other experts: interview and written evaluation	\$200
Other experts: attendance in court	\$150
Interpreters: per day	\$150
Interpreters: half day	\$75

The Third Judicial Circuit maintains a list of pre-approved investigative agencies that assigned counsel can use in their cases.²⁷² Eighteen investigators, spread among eight agencies, are on the approved list.²⁷³ Assigned counsel report that if they want to use an agency or investigator not on the list, that investigator will not be paid for their work on the case. That is, the investigators on the list are pre-approved for payment, and the court would have to approve any new investigator to the list. None of the assigned counsel we spoke with had approached the court about appointing an investigator not on the list.²⁷⁴ The Third Judicial Court could not share information on the number

²⁷¹ MICH. COMP. LAWS §§ 775.13a, 775.15 (2019).

²⁷² 2019 State and Court Approved Private Investigation Agencies on File with the Third Judicial Circuit of Michigan, <https://www.3rdcc.org/docs/defaultsource/divisions/criminal/2019-court-approved-pi-list-udated-keith-kirby-phone-2-19-19.pdf> (last visited Apr. 1, 2019).

²⁷³ 2019 State and Court Approved Private Investigation Agencies on File with the Third Judicial Circuit of Michigan, <https://www.3rdcc.org/docs/defaultsource/divisions/criminal/2019-court-approved-pi-list-udated-keith-kirby-phone-2-19-19.pdf> (last visited Apr. 1, 2019).

²⁷⁴ The system for providing investigators and expert witnesses will undergo a significant change during a pilot project, with MIDC funding, that will remove the approval of experts and investigators from the court. “The Pilot Project will place management of assignments of investigators and experts in the hands of an attorney/administrator who reports to Wayne County, through the Office of Management

of petitions for case-related expenses or the total amount expended on experts and investigators.²⁷⁵

MECHANICS OF THE VOUCHER SYSTEM CAN LEAD TO PROBLEMS

The Third Judicial Circuit uses an online billing system to create a voucher when an attorney is appointed to a case. Along with creation of the voucher, the attorney is automatically paid a one-time fee for “preparation & investigation.” The court adds other in-court events for which an attorney can be paid, as they occur, into the voucher. Assigned counsel can review the data online to verify its accuracy before submitting a request for the court to pay the voucher.

The Third Judicial Circuit voucher system relies to a large extent on the assigned counsel themselves to correct any errors in the system. This leaves open the possibility that an error that is in the attorney’s financial favor may go uncorrected.

If a voucher is missing an event for which the attorney should be paid, this places the attorney in the unenviable position of having to convince the court that its own system created the error. This is especially problematic because the process to correct errors is itself difficult to navigate. For example, the Third Judicial Circuit staff does not have access to the district courts’ databases. For an attorney to prove they were present in district court when a case resolved there, the attorney must obtain docket sheets from the district court to prove it. Some attorneys report that certain judges refuse to turn over docket sheets to attorneys (claiming the sheets are not matters of public record), leaving attorneys to argue first with district court judges or clerks to get the information that will allow them to be paid in accordance with the fee schedule. As one attorney told us, “I feel like I’m Don Quixote,” always chasing people down to try to get things verified for the payment system. Even when assigned counsel are able to obtain docket sheets, the court’s financial staff must manually enter information from those sheets into the voucher system – a process that can lead to errors in transcription.

and Budget. The administrator will work full time from a location in Frank Murphy Hall of Justice. Assigned counsel will submit requests for investigators and experts to the administrator, including case descriptions, deadlines, and objectives. These requests, and any discussions taking place between counsel and the administrator, will be privileged and protected from disclosure except in anonymous, summary form. The administrator will apply the fee schedule approved by the MIDC for defense use of investigators and experts.” Mich. Indigent Defense Comm’n, Draft Pilot Project Proposal (Dec. 2018). MIDC has allocated \$5 million for the pilot project.

²⁷⁵ “For the expert witness fees, I reviewed another spread sheet for 2018 and the first quarter of 2019. It appears that the Court pays the experts directly. At this time, I continue to work to gain a greater understanding of the process and I will supplement this information as well.” Email from Richard Lynch, Third Judicial Circuit Court General Counsel, to David Carroll, Executive Director of Sixth Amendment Center (June 3, 2019).

Another assigned counsel attorney told the 6AC about a case in which a defendant was charged with leaving the scene of an automobile accident that had caused serious injury or impairment. The lawyer stated that the case involved large amounts of discovery, including voluminous medical records and reports of accident reconstruction experts. Upon review, counsel noticed that none of the three persons involved in the car crash were listed as injured persons and that the medical records included in the case file were from a different accident. Counsel raised the issues at a preliminary examination, and the case was adjourned for further investigation. At the subsequent hearing, the case was dismissed upon motion by the prosecution.

Under the Third Judicial Circuit's compensation schedule, the attorney was to be paid \$45 for the preliminary hearing²⁷⁶ plus the standard \$110 for investigation and prep. The attorney planned on requesting extraordinary expenses due to the time to review the significant amounts of discovery, only to find that the voucher system had erroneously attached the case to a different attorney. After numerous emails and visits to the clerk's office, the error was still not resolved and the attorney still had not been paid. "I have a stack of cases where I should be requesting extraordinary expenses," this attorney said, "but it's just not worth it."

²⁷⁶ Leaving the scene of an accident resulting in serious injury is a felony punishable by "imprisonment for not more than 5 years or a fine of not more than \$1,000.00, or both." MICH. COMP. LAWS § 257.602a (2019). The Third Judicial Circuit pays \$90 for a preliminary exam on felonies with potential punishments of up to 60 months in prison. Since the preliminary examination hearing ended in adjournment, the assigned counsel attorney is compensated for half the amount of that event. Therefore, the above scenario resulted in only \$45 for the preliminary hearing.

Best practices: What a robust system of financial oversight looks like

To best describe the absence of financial oversight of the Third Judicial Circuit Court's assigned counsel system, it is again useful to look toward Massachusetts. All private attorneys who accept CPCS case assignments to represent the indigent in Massachusetts do so subject to certain overall fiscal controls as well as audit procedures in particular cases.

Private assigned counsel must use the CPCS electronic billing system (known as "EBill 2.0") to be paid for their work. To be registered by CPCS as a vendor able to access that system, every attorney must sign and submit to CPCS an EBill Access Agreement which includes the following provision:

I certify under pains and penalties of perjury that for all my bills filed with CPCS through the "EBill2.0" system, I have been assigned to each case indicated on my EBill; I have provided the services described on the dates and for the times listed; I have provided representation consistent with CPCS Performance Guidelines and Standards; and all charges for legal services reflected on the EBill are based on my contemporaneous time records maintained in accordance with CPCS Assigned Counsel Manual's policies and procedures.²⁷⁷

In all cases assigned by CPCS, private attorneys must maintain contemporaneous time records by tenths of an hour, with sufficient detail to show the need for the task.²⁷⁸ Although Massachusetts does not

limit the number of hours attorneys may bill for particular case types, CPCS does set a waivable cap on the number of hours an attorney can bill each day. This presumptive cap is 10 hours per day, except during trials when the maximum rises to 12 hours. The electronic billing system enforces the cap, unless a waiver is allowed.

CPCS conducts random prepayment audits, requiring attorneys to provide sanitized versions of their contemporaneous time records to support their billing. CPCS also conducts prepayment billing inquiries when interim billing in individual cases reaches certain thresholds that are unusually high for that type of case. Finally, when indicated, CPCS conducts full audits of the billing practices of individual attorneys, with procedural safeguards including a hearing before a CPCS Committee member.

CPCS is required by statute to enforce other billing controls. CPCS cannot pay a private attorney for more than 1,650 hours in a fiscal year,²⁷⁹ nor may a private attorney accept any new case assignments (except murder cases) after billing CPCS 1,350 hours in a fiscal year.²⁸⁰

CPCS is required to reduce payment for late bills. Pursuant to statute,²⁸¹ attorneys must submit bills within 60 days of the conclusion of the case or 30 days of the end of the fiscal year. Late bills must be reduced by 10%, and the statute provides that bills more than 30 days late shall not be paid unless the chief counsel finds that the delay is due to extraordinary circumstances beyond the attorney's control.

²⁷⁷ *Private Attorney Ebill 2.0 Access Agreement*, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, https://www.publlicounsel.net/cfo/wp-content/uploads/sites/8/2016/11/EBill-2.0-Access-Agreement_Final.pdf (last visited Mar. 9, 2019).

²⁷⁸ For example, "legal research" would not be sufficiently descriptive, but "legal research on voluntariness

of statement for memorandum on suppression motion" would be adequate.

²⁷⁹ MASS. GEN. LAWS C. 211D § 11(b) (2018).

²⁸⁰ MASS. GEN. LAWS C. 211D § 11(c) (2018).

²⁸¹ MASS. GEN. LAWS C. 211D § 12 (2018).

CHAPTER VII

SUFFICIENT TIME & CASELOADS

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel.²⁸² Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”²⁸³ Insufficient time is, therefore, a marker of the constructive denial of counsel. The inadequate time may itself be caused by any number of things, including but not limited to excessive workload, or contractual arrangements that create fiscal incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients. One state supreme court observed over 20 years ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”²⁸⁴

Principle 5 of the *ABA Ten Principles* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.”²⁸⁵ Commentary to *Principle 5* cites to the numerical caseload standards established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), with the admonition that under no circumstances should they be exceeded.

The NAC created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.²⁸⁶ *NAC Standard 13.12* prescribes absolute

²⁸² *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

²⁸³ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

²⁸⁴ *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

²⁸⁵ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 5 (2002).

²⁸⁶ Building on the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *REPORT OF THE TASK FORCE ON THE COURTS*, ch.13 (The Defense) (1973).

maximum numerical caseload limits of:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health cases per attorney per year; or
- 25 appeals per attorney per year.²⁸⁷

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with the NAC caseload standards. The NAC caseload limits assume that the lawyer does not have any other duties, such as management or supervisory responsibilities, and that the attorney has access to adequate support staff, such as a secretary and an investigator.²⁸⁸

The NAC caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards. Localized standards are able to consider unique demands made on defense attorneys in each case, such as the travel distance between the court and the local jail, or the prosecution's charging practices, or increased complexity of forensic sciences and criminal justice technology. Demands of these types increase the amount of time, beyond that contemplated by the NAC standards, that is necessary for the lawyer to provide effective representation. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.²⁸⁹ The NAC guidelines are employed in the analysis of Third Judicial Circuit assigned counsel caseloads for illustrative purposes, but reflect workloads that are likely higher than what would be manageable for assigned counsel handling felony cases in the Third Judicial Circuit.

The time an attorney has available to devote to the defense of appointed cases is inextricably linked to the total amount of work that attorney has to do. When considering how much time appointed defense attorneys have to devote to case-related tasks, the discussion is often framed in terms of "caseloads" or "workloads." An

²⁸⁷ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), Standard 13.12 (1973).

²⁸⁸ See NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) ("Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.").

²⁸⁹ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) ("In many jurisdictions, caseload limits should be lower than the NAC standards.").

important distinction must be made between these terms. Caseload refers to the raw, quantifiable data concerning the number of cases an attorney takes. While caseload can be a valuable component of understanding the amount of work a given attorney takes on, in a vacuum it is insufficient to describe the extent of the work that attorney must perform. Commentary to the *ABA Ten Principles* helps to clarify the importance of considering workload, as opposed to simply caseload, as a more robust measurement of an attorney's ability to adequately represent her clients.

Counsel's workload, *including appointed and other work*, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁹⁰

The ABA's standards directly address appropriate workloads for defense attorneys and their relationship to providing effective representation. *Standard 4-1.8* directs that "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations."²⁹¹ The standard further clarifies that defense counsel should refuse new case appointments when those appointments would create a conflict of interest because the attorney would have insufficient time to dedicate to cases given the workload.

Thus, workload acts as a more descriptive, if less concrete, measure of the amount of time an attorney devotes to legal work. The concept of workload encompasses variations in types of cases, as well as the innumerable tasks and responsibilities that comprise effective representation. The U.S. Department of Justice has advised that "caseload limits are no replacement for a careful analysis of a public defender's workload, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties."²⁹² Academicians have observed that:

²⁹⁰ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt. (2002) (emphasis added).

²⁹¹ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Std. 4-1.8(a) (4th ed. 2015).

²⁹² Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, ECF No. 322 (W.D. Wash. filed Dec. 4, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

Lower current caseload recommendations reflect a criminal law practice that has changed dramatically over the past 40-plus years. Factors driving higher attorney time include:

- Increased criminalization of minor offenses requires legal counsel for cases that once were simply deemed undesirable behavior or punished by fine;
- Tougher sentencing policies make some categories of cases more costly and time-consuming to defend (e.g., DWI, drug, and domestic violence charges);
- De-institutionalization of people with mental illness increase both case volume and time commitments required to defend complex cases;
- Growing prevalence of specialty courts create new dockets for public defenders to cover with cases that endure over a longer period of time;
- Use of forensics and experts increases responsibility of defense attorneys to understand and integrate technical and scientific considerations into the defense;
- Collateral consequences of conviction raise the stakes for defendants – especially in a state with a large immigrant population, many of whom may be undocumented.²⁹³

For example, an attorney with a caseload of 300 cases per year may seem, at first blush, to have an overwhelming amount of work. But if each of these cases is a misdemeanor, the attorney may in fact have adequate time and resources to devote to these cases. Conversely, an attorney with only 75 cases per year may not appear to be overwhelmed by her responsibilities. However, if the majority of these cases are serious felonies, or even worse include a capital case, the amount of work required can easily becoming overwhelming for even an experienced attorney.

Michigan – like most other states – has never created any ethical guidance specifically for public defenders. However, ethical rules applicable to all attorneys provide at least an outline of the scope of duties owed to indigent clients. After all, public defenders are bound by the same ethical obligations as attorneys whose clients pay them a fee. And all defendants have a Sixth Amendment right to competent representation, regardless of their ability to pay. The very first rule of professional conduct, applicable to all attorneys in Michigan, directs that “[a] lawyer shall provide competent representation to a client. A lawyer shall not . . . handle a legal matter without preparation adequate in the circumstances.”²⁹⁴ The commentary to this rule further emphasizes the importance of an attorney being thoroughly prepared to represent a client. Similarly, Rule 1.3 directs that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”²⁹⁵ Commentary to this rule specifically states

²⁹³ PUBLIC POLICY RESEARCH INSTITUTE, TEXAS A&M UNIV. & TEXAS INDIGENT DEFENSE COMM’N, GUIDELINES FOR INDIGENT DEFENSE CASELOADS 32-33 (2015) (citations omitted), available at http://www.ospd.ms.gov/Task%20Force/150114_WCL-Final_Reduced-file-size.pdf.

²⁹⁴ MICH. R. PROF’L CONDUCT 1.1.

²⁹⁵ MICH. R. PROF’L CONDUCT 1.3.

that “[a] lawyer’s workload should be controlled so that each matter can be handled adequately.”²⁹⁶ Rule 1.7, governing conflicts of interests, directs that “[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests.”²⁹⁷ This is a broad and very common articulation of the rule governing conflicts of interest, but its application in the circumstances assigned counsel often face can help define the scope of an acceptable workload. Rule 1.16 requires lawyers to decline or withdraw from representing a client if the representation would cause the lawyer to violate the law or ethical rules.²⁹⁸ Thus, attorneys in Michigan have the power, and duty, to decline representing indigent defendants when, due to their workloads, they would not be able to provide competent representation.

FINDING 5: The Third Judicial Circuit’s assigned counsel system has no workload controls. A significant number of attorneys work in excess of national public defense workload standards.

The MIDC Act requires that, in establishing standards for workload of appointed counsel, the MIDC “adhere to the . . . principle[]” that “[d]efense counsel’s workload is controlled to permit effective representation.”²⁹⁹ MIDC proposed *Standard 6*,³⁰⁰ if approved, will require that:

- until such time as MIDC conducts “Michigan specific weighted caseload studies,” attorneys appointed to represent indigent defendants “should not exceed the caseload levels adopted by the American Council of Chief Defenders – 150 felonies or 400 non-traffic misdemeanors per attorney per year;” and
- “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.”

Upon formal approval of this standard, Wayne County will have not more than 180 days to submit to MIDC its plan for how its indigent defense system will meet this standard.³⁰¹

Based on data provided by the court (*see* table below), many of the private attorneys who are appointed to represent indigent felony defendants in the Third Judicial Circuit carry an appointed felony caseload (without considering appointed probation violations) that is far in excess of the NAC standards. In 2016 for example, Attorney 1 was paid for 459 felony cases, while the NAC standards set an absolute annual

²⁹⁶ MICH. R. PROF’L CONDUCT 1.3 cmt.

²⁹⁷ MICH. R. PROF’L CONDUCT 1.7(b).

²⁹⁸ MICH. R. PROF’L CONDUCT 1.16.

²⁹⁹ MICH. COMP. LAWS § 780.991(2)(b) (2019).

³⁰⁰ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 6 (2018). For full text of proposed Standard 6, *see* Appendix B.

³⁰¹ MICH. COMP. LAWS § 780.993(3) (2019).

maximum of 150 felony cases for an attorney who does nothing else and assuming that attorney has adequate support staff.

	2014		2015		2016		2017		2018	
	Felony	% of NAC								
Attorney 1	284	189%	402	268%	459	306%	370	247%	272	181%
Attorney 2	67	45%	48	32%	58	39%	57	38%	61	41%
Attorney 3	212	141%	248	165%	319	213%	238	159%	187	125%
Attorney 4	145	97%	142	95%	144	96%	182	121%	152	101%
Attorney 5	134	89%	142	95%	133	89%	196	131%	131	87%
Attorney 6	48	32%	25	17%	70	47%	94	63%	80	53%
Attorney 7	74	49%	91	61%	100	67%	87	58%	136	91%
Attorney 8	67	45%	65	43%	84	56%	89	59%	84	56%
Attorney 9	96	64%	69	46%	89	59%	101	67%	99	66%
Attorney 10	98	65%	113	75%	130	87%	159	106%	141	94%
Attorney 11	122	81%	160	107%	179	119%	130	87%	82	55%
Attorney 12	116	77%	142	95%	218	145%	215	143%	185	123%
Attorney 13	113	75%	93	62%	100	67%	84	56%	108	72%
Attorney 14	44	29%	46	31%	68	45%	112	75%	77	51%
Attorney 15	176	117%	160	107%	138	92%	148	99%	129	86%

Most assigned counsel system attorneys report that they open, on average, about four to seven new cases per month in the Third Judicial Circuit. The attorneys report that they also close about this many or slightly fewer – typically closing no less than 80% of the number of cases that they open. In other words, assigned counsel are never able to decrease their caseload, only keep it balanced, and a few have Third Judicial Circuit caseloads that are slowly but steadily growing.

Even if these attorneys worked nowhere else other than in the Third Judicial Circuit, their caseloads would be cause for concern. But most attorneys on the assigned counsel list either accept appointed cases in other circuits, take appointed cases in district courts, maintain a private practice of retained cases, or most commonly do some combination of all of the above.

Further complicating matters in Wayne County, the ultimate responsibility for supervising assigned counsel and, theoretically, managing their workloads falls to the circuit court judges. While judges all do their best to ensure every defendant's Sixth Amendment rights are protected, the role of supervising defender workloads is an inappropriate one for the courts. Judges have far too many other obligations in the administration of their courts to be reasonably expected to monitor defenders' workloads or identify when a workload might exceed an attorney's capacity. And even if judges could perform this function, the circuit judges can only see the cases that the assigned counsel take in the Third Judicial Circuit. The judges have no access to data

showing how many cases the attorneys are appointed to in other circuit courts or in the district courts or in appellate cases, and they also do not know the numbers or types of cases that the assigned counsel attorneys handle in their private practices.

EFFECTS OF LOW COMPENSATION AND HIGH CASELOAD

The consequences of overwhelming workloads for assigned counsel are myriad, resulting almost without exception in some sacrifice that harms clients' interests. Overworked attorneys may not investigate a case or follow up with witnesses. They may not fully review discovery. They cut short or completely fail to schedule client meetings that could prove critical to case preparation. They lack time to evaluate forensic reports or request their own expert witnesses. Often, the attorneys prioritize clients' well-being over their own, sacrificing their personal time and suffering substantial personal stress. The end result of each of these consequences, alone or in unison, is a deficiency in services rendered to indigent defendants, who rely on these appointed attorneys to protect them from the power of the state.

The time and extent of client communications required inevitably varies with each case according to complexity, client needs, and a host of other factors. The majority of assigned counsel attorneys in the Third Judicial Circuit say they communicate with clients, on average, at least five to eight times in a felony case. Others say they might speak with a client ten times or more during the course of a case. A small minority report that they regularly communicate between zero and three times with clients.

As a result in part of high caseloads and low compensation paid to assigned counsel who handle those caseloads, the felony indigent defense system in the Third Judicial Circuit fails to function properly for defendants, and cases are rarely subjected to the "crucible of meaningful adversarial testing" envisioned by the U.S. Supreme Court.³⁰² When attorneys appointed to represent indigent defendants have little time to prepare, too many cases to defend, and too little time or inclination to keep challenging the state, they are less likely to push for trial and more apt to plead cases out for faster resolutions. This is a natural, and even understandable, reaction to overwhelming demand. Unfortunately, many indigent defendants are left saddled with the weight of the system, as their rights are not vindicated in the manner envisioned by the Sixth Amendment. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."³⁰³

³⁰² See, *United States v. Cronin*, 466 U.S. 648, 656 (1984).

³⁰³ *United States v. Cronin*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

CHAPTER VIII

RECOMMENDATIONS

The Third Judicial Circuit’s felony assigned counsel system lacks independence from the judiciary and does not provide meaningful oversight of funding or of the effectiveness of representation. Attorneys work for unreasonably low compensation that creates a financial incentive for them to handle too many cases, provide non-continuous representation, and dispose of cases quickly to the possible detriment of the indigent accused. The system lacks checks and balances to ensure that all appointed attorneys are qualified and trained to handle the cases to which they are appointed.

RECOMMENDATION 1: Terminate the current compensation structure for felony indigent defense representation in the Third Judicial Circuit Court because it creates conflicts between the financial interests of appointed private attorneys and the case-related interests of indigent defendants they represent. Wayne County should apply for adequate compensation from MIDC to create a new compensation plan that: (a) pays private attorneys appointed to felony cases for all reasonably necessary in-court and out-of-court work at an hourly rate of \$110 for non-life felonies and \$120 for life felonies; (b) provides for annual review of the hourly rates to increase for cost of living; and (c) reimburses counsel for out-of-pocket case-related expenses without judicial interference.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”³⁰⁴ The proposed MIDC *Standard 8* on attorney compensation states that felony assigned counsel should be paid: “at least . . . \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees’ salaries. Counsel must also be reimbursed for case-related expenses . . .”³⁰⁵

South Dakota, for example, increases fees for appointed attorneys “annually in an amount equal to the cost of living increase that state employees receive each year

³⁰⁴ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

³⁰⁵ MICHIGAN INDIGENT DEFENSE COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, proposed Std. 8.B. (2018). For full text of proposed Standard 8, currently awaiting formal approval, see Appendix B.

from the legislature.”³⁰⁶ In 2009, the South Dakota Supreme Court set public counsel compensation hourly rates at \$82 per hour.³⁰⁷ For 2019, assigned counsel compensation in South Dakota stands at \$95 per hour.³⁰⁸ For comparison purposes, a \$95 hourly fee in South Dakota in 2019 is equivalent to \$97.85 in Wayne County.³⁰⁹

As of February 15, 2019, the federal government pays attorneys (other than those in federal public defender offices) \$148 per hour in non-capital cases³¹⁰ and \$190 per hour in capital cases³¹¹ to represent the indigent accused in federal courts,³¹² including those federal courts geographically located within Wayne County. This creates a financial incentive for qualified criminal defense attorneys to prefer federal case appointments over Third Judicial Circuit appointments.

The 6AC estimates the financial impact of this recommendation based on studies conducted by the American Bar Association in Colorado, Louisiana, Missouri, and Rhode Island.³¹³ Each study determined, for the relevant jurisdiction, the average

³⁰⁶ Memorandum from Kim Allison, 1st Circuit Court Administrator, to 1st Circuit Attorneys and County Commissioners (Dec. 19, 2017) (attaching S.D. Unified Judicial System Policy 1-PJ-10), available at https://ujs.sd.gov/uploads/firstcircuit/Court_Appointed_Attorney_Rules_Memo.pdf.

³⁰⁷ Memorandum from Kim Allison, 1st Circuit Court Administrator, to 1st Circuit Attorneys and County Commissioners (Dec. 19, 2017) (attaching S.D. Unified Judicial System Policy 1-PJ-10), available at https://ujs.sd.gov/uploads/firstcircuit/Court_Appointed_Attorney_Rules_Memo.pdf.

³⁰⁸ See Letter from Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System, to Andrew Fergel, State Bar of South Dakota (Nov. 15, 2018), available at <https://ujs.sd.gov/uploads/docs/2019CourtAppointedAttorneyFees.pdf>.

³⁰⁹ The cost of living in Detroit, Michigan, is 3% higher than in Sioux Falls, South Dakota. See *Attorney/Lawyer Cost of Living Detroit, Michigan vs. Sioux Falls, South Dakota*, Payscale, <https://www.payscale.com/cost-of-living-calculator/Michigan-Detroit/South-Dakota-Sioux-Falls/Attorney-Lawyer> (last visited Apr. 16, 2019).

³¹⁰ JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY, VOL. 7 - DEFENDER SERVICES, Part A § 230.16 (rev'd Feb. 6, 2019), available at https://www.uscourts.gov/sites/default/files/vol_07.pdf. There are presumptive caps on the fees in non-capital cases, based on type of case (e.g., \$3,300 for misdemeanors, \$11,500 for felonies, \$8,200 for appeals), which may be exceeded if certified by the judge overseeing the case and approved by the chief judge of the circuit. *Id.* at Part A §§ 230.23.20, 230.23.40.

³¹¹ JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY, VOL. 7 - DEFENDER SERVICES, Part A § 630.10.10 (rev'd Feb. 6, 2019), available at https://www.uscourts.gov/sites/default/files/vol_07.pdf.

³¹² Congress has made the Judicial Conference responsible for setting the hourly rates paid to appointed attorneys in the federal courts. See 18 U.S.C. § 3006A(d) (2018). The hourly rates are “adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds.” JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY, VOL. 7 - DEFENDER SERVICES, Part A §§ 230.20, 630.10.10(b)(2) (rev'd Feb. 6, 2019), available at https://www.uscourts.gov/sites/default/files/vol_07.pdf. The rates are intended “to cover appointed counsel’s general office overhead and to ensure adequate compensation for representation provided.” *Id.* at Part A §§ 630.20, 230.66.10(a). Attorneys are separately reimbursed for out-of-pocket case-related expenses, *id.* at Part A §§ 230.63, 230.66, and the courts pay directly for investigative, expert, or other services necessary to adequate representation, *id.* at Part A §§ 310, 660.

³¹³ AMERICAN BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & RUBINBROWN, THE COLORADO PROJECT: A STUDY OF THE COLORADO PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD

amount of time an attorney needs to devote to particular types of cases in order to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.³¹⁴ Because no such study has been conducted in Michigan, 6AC averaged the results of the four ABA studies to serve as a reasonable estimate for felony representation in Wayne County.

The ABA studies recognize that the amount of time required for an attorney to provide reasonably effective assistance of counsel varies in felony cases based on (at least) the specific conditions in the jurisdiction, the facts and complexity of the case, and the severity of the potential penalty. In each of the four states, the ABA determined the average number of hours required for categories of felonies appropriate to the jurisdiction.³¹⁵

STANDARDS 22 (2017); AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & POSTLETHWAITE & NETTERVILLE, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 1 (2017); AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & RUBINBROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2014); AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, NATIONAL ASS'N OF CRIMINAL DEFENSE LAWYERS & BLUMSHAPIRO, THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2017).

³¹⁴ Similar studies have been conducted in other states in recent years, but the methodology differs among the studies and not all studies determined the average time required for particular case types, rendering the results inappropriate for comparison. *See, e.g.*, IDAHO POLICY INSTITUTE, BOISE STATE UNIVERSITY, IDAHO PUBLIC DEFENSE WORKLOAD STUDY (2018); NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES, A DETERMINATION OF CASELOAD STANDARDS PURSUANT TO § IV OF THE *HURRELL-HARRING v. THE STATE OF NEW YORK* SETTLEMENT (2016); PUBLIC POLICY RESEARCH INSTITUTE, TEXAS A&M UNIV. & TEXAS INDIGENT DEFENSE COMM'N, GUIDELINES FOR INDIGENT DEFENSE CASELOADS (2015).

³¹⁵ The elements of and potential sentence imposed for various felonies are different from state to state, and even crimes that carry the same name in any two states may be markedly different. The table below reflects the felony case type categories used in the study for each state.

State	Average Hours Required for Effective Assistance of Counsel							
Colo.	28.3 Fel 5-6	28.6 Drug Fel 1-4	29.9 DUI Fel 4	47.0 Non-Viol Fel 3-4	87.1 Viol Fel 3-4	98.9 Sex Aslt Fel 2-6	134.5 Fel 2	427.3 Fel 1
La. ^a	21.00 Low-Lev Fel			41.11 Mid-Lev Fel	69.79 High-Lev Fel			200.67 LWOP Fel
Mo. ^b	25.0 C/D Fel			47.6 A/B Fel		63.8 Sex Fel		106.6 Mur/Hom Fel
R.I.	28.3 Class I Fel			51.9 Class I Fel			108.1 Non-Mur Life Max Fel	181.6 Mur Fel
4-state average	25.65	Lowest Level Fel						229.94 Highest Level Non-DP Fel

^a Although Louisiana also has capital cases that carry the death penalty, those cases were not included in the study and no estimate was determined for the average number of hours required to provide effective assistance of counsel in a death penalty case in Louisiana. AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & POSTLETHWAITE & NETTERVILLE, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 8 & n.16 (2017).

^b Although Missouri also has capital cases that carry the death penalty, those cases were not included in the study and no estimate was determined for the average number of hours required to provide effective assistance of counsel in a death penalty case in Missouri. AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS & RUBINBROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 13 & n.41 (2014).

As determined in the ABA studies, the average number of hours across the four states that is needed to provide reasonably effective assistance of counsel ranges from a low of 25.65 hours in the least serious felony cases to a high of 229.94 hours in the most serious felony cases (excluding death penalty cases). In 2017, the Third Judicial Circuit paid appointed private attorneys in approximately 10,400 felony cases, but the data provided by the court does not differentiate the seriousness of the cases.

- The estimated number of hours needed for attorneys to provide reasonably effective assistance of counsel in 10,400 felony cases in the Third Judicial Circuit ranges from a low of 266,760 hours (if all were the least serious) to a high of 2,391,376 hours (if all were the most serious).

The court's data also does not distinguish between non-life felony cases and life felony cases.

- The estimated cost of providing representation in 10,400 felony cases (if all were non-life felony cases paid at \$110 per hour) in the Third Judicial Circuit ranges from a low of \$29,343,600 to a high of \$263,051,360.
- The estimated cost of providing representation in 10,400 felony cases (if all were life felony cases paid at \$120 per hour) in the Third Judicial Circuit would be \$286,965,120.

As determined in the ABA studies, the average number of hours across the four states that is needed to provide reasonably effective assistance of counsel in a probation violation is 10.64 hours.³¹⁶ In 2017, the Third Judicial Circuit paid appointed private attorneys in approximately 4,700 probation violations.

- The estimated number of hours needed for attorneys to provide reasonably effective assistance of counsel in 4,700 probation violations in the Third Judicial Circuit is 50,008 hours.
- The estimated cost of providing representation in 4,700 probation violations in the Third Judicial Circuit paid at \$110 per hour is \$5,500,880.

The total estimated cost in the Third Judicial Circuit of paying assigned counsel \$110 per hour in non-life felony cases and \$120 per hour in life felony cases, based on the number of 2017 felony cases and probation violations, is at least \$34,844,480.³¹⁷ This is a conservative estimate because the cost projection does not include:

³¹⁶ Colorado - 7.4 hours; Louisiana - 8.47 hours; Missouri - 9.8 hours; and Rhode Island - 16.9 hours.

³¹⁷ This lowest possible cost is based on 10,400 felony cases where all are paid at \$110 per hour and all are the least serious felony cases requiring only 25.65 hours per case on average, plus the cost of 4,700 probation violations. The highest possible cost of \$292,466,000 is based on 10,400 felony cases where all are paid at \$120 per hour and all are the most serious felony cases requiring 229.94 hours per case on average, plus the cost of 4,700 probation violations.

The felony indigent defense system in the Third Judicial Circuit has no control over the number or type of cases it is required to handle each year. Those decisions are made by law enforcement officers as they make arrests and by prosecutors as they institute cases. A reduction in the number of felony arrests or felony prosecutions in Wayne County would correspondingly result in a reduction in the number of felony cases and probation violations for which assigned counsel must be appointed and paid.

- the cost of reimbursing appointed private attorneys for out-of-pocket case-related expenses;
- the cost of experts and investigators in appointed cases handled by private attorneys;
- the cost of providing representation to former assigned counsel defendants that absconded and who are returned to court on bench warrants in years subsequent to when the case was initially assigned;³¹⁸ or,
- the costs of the central office to administer a coordinated assigned counsel system.³¹⁹

In 2017, Wayne County spent \$5,588,984 to compensate private attorneys handling appointed felony cases and probation violations in the Third Judicial Circuit, meaning that the new compensation plan based on the most conservative interpretation of the available caseload data represents more than a 523% increase in funding.

RECOMMENDATION 2: The MIDC Act should be amended to allow for MIDC to administer and fund felony indigent representation in Wayne County.

There are several compelling reasons for the state to administer and fund indigent defense in Wayne County. First, the Fourteenth Amendment requires Michigan, as it does all states, to enforce Sixth Amendment case law.³²⁰ Second, MIDC has the capability to monitor the total workload of Third Judicial Circuit assigned counsel attorneys, including the total number of public cases assigned in all courts at all levels throughout Michigan, whereas Wayne County only has the ability to track cases appointed in the Third Judicial District. Third, under the MIDC Act, the State of Michigan will of necessity appropriate significant funding to the provision of indigent defense services in Wayne County, and such an investment merits direct state oversight.

³¹⁸ This lowest possible cost is based on 10,400 felony cases where all are paid at \$110 per hour and all are the least serious felony cases requiring only 25.65 hours per case on average, plus the cost of 4,700 probation violations. The highest possible cost of \$292,466,000 is based on 10,400 felony cases where all are paid at \$120 per hour and all are the most serious felony cases requiring 229.94 hours per case on average, plus the cost of 4,700 probation violations.

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This is not an insignificant number of cases. The “2017 Court Caseload Report” for Wayne County indicates that there were 1,331 re-opened felony cases in the Third Judicial Circuit Court in that year. MICHIGAN COURTS, 3RD CIRCUIT COURT OF WAYNE COUNTY SUMMARY, 2017 COURT CASELOAD REPORT (2017), *available at*: <https://courts.michigan.gov/education/stats/Caseload/2017/Wayne-3rdCircuitCourt.pdf>.

³¹⁹ This is explained in Recommendation 2 (below).

³²⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Moreover, as explained in Chapter III, U.S. Supreme Court caselaw makes clear that the Sixth Amendment right to counsel must be independent of undue political and judicial influence.

Reflecting these constitutional commands, national standards compiled in the American Bar Association's *ABA Ten Principles of a Public Defense Delivery System* require that, for an indigent defense system to be effective, the "public defense function, including the selection, funding, and payment of the defense counsel, is independent."³²¹ To carry out the constitutional requirement, national standards state that the defense function must be insulated from outside political or judicial interference by a board or commission, whose members are appointed by diverse authorities so that no one branch of government can exert more control over the system than any others.³²² The makeup of the MIDC already satisfies national recommendations for an independent defense commission,³²³ negating the financial

³²¹ AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 1 (2002).

³²² AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, commentary to Principle 1 (2002).

³²³ The National Study Commission on Defense Services' Guidelines for Legal Defense Systems in the United States, created in consultation with the United States Department of Justice under a Law Enforcement Assistance Administration grant, state:

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics;
- (c) No single branch of government should have a majority of votes on the Commission;
- (d) Organizations concerned with the problems of the client community should be represented on the Commission;
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

NATIONAL STUDY COMM'N ON DEFENSE SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* § 2.10 (1976), available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf. In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government (for example: Connecticut, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Carolina, Texas, Utah, and Virginia). To fill out the remainder of appointments, governments often give responsibility for one or two positions to the state bar association. Additionally, many jurisdictions try to have a voice from communities impacted by the indigent defense function represented on the commission (for example, Native American interests in Montana). Jurisdictions

costs and bureaucratic redundancies of creating an intermediary local commission.³²⁴

That said, MIDC does not currently have statutory authority to serve as the independent defense commission in Wayne County. This will require statutory amendments to the MIDC Act and other statutes. Michigan statutes still require its trial courts to be responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and the trial courts do this through local administrative orders.³²⁵ Similarly, Michigan continues to make its local funding units (counties, cities, villages and townships) responsible at the outset for funding the right to counsel in felony cases in the trial courts.³²⁶

(for example, Kentucky and New Mexico) have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commissions (for example, law schools can help with drafting standards, providing training facilities, etc.). Appointments by such non-governmental organizations generally must go through a confirmation process by an official branch of state government.

³²⁴ Should Wayne County decide to create a local indigent defense commission, the county will have to determine: the number of members; the criteria for members to serve on the commission and any prohibitions on members; which entities in which branches of government will make appointments; whether the commission will oversee only assigned counsel services or both assigned counsel services and the non-profit public defender office; and, to the extent that assigned counsel services and the non-profit public defender office share services such as training, information technology, human resources, etc., should those services be overseen and provided through the commission or through the non-profit public defender office.

An independent commission established solely to oversee the assigned counsel system for felony indigent defense services in the Third Judicial Circuit must oversee an office with, at a minimum, the following staff positions: executive director; deputy director; training director (supported by two staff); four adult trial resource attorneys (each to provide direct supervision, conduct performance reviews, and act as help desk assistance to attorneys in the field); a financial director (supported by three professional staff); an information technology director; and four assignment clerks.

³²⁵ MICH. CT. R. 8.123.

³²⁶ The MIDC Act conflates the funding of an indigent defense system with the funding of a trial court. The local unit or units of government that fund a trial court are defined, under the Act, to *be* the indigent criminal defense system. MICH. COMP. LAWS § 780.983(h) (2019). The county or counties within the geographic area of a judicial circuit are responsible for funding the operations of the circuit court. MICH. COMP. LAWS § 600.591 (2019).

APPENDIX A

MIDC STANDARDS APPROVED MAY 22, 2017

Standard 1 Education and Training of Defense Counsel

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

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

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

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

Standard 2 Initial Interview

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

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

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

D. Client status:

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

where there are any questions about a client's competency.

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

Standard 3 Investigation 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. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Standard 4 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. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

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

APPENDIX B

MIDC STANDARDS PROPOSED IN 2018

Standard 5 Independence from the Judiciary

A. The indigent criminal defense system (“the system”) should be designed to guarantee the integrity of the relationship between lawyer and client. The system and the lawyers serving under it should be free from political and undue budgetary influence. Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution. The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary.

B. The court’s role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; and, if deemed eligible for counsel and absent a valid waiver, referring the defendant to the appropriate agency. 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 6 Indigent Defense Workloads

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

These workloads will be determined over time through special Michigan specific weighted caseload studies.² Until the completion of such studies, defender

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

² See e.g. *Guidelines for Indigent Defense Caseloads*, Texas Indigent Defense Commission, January 2015; *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload*

organizations, county offices, public defenders, assigned counsel, and contract attorneys should not exceed the caseload levels adopted by the American Council of Chief Defenders – 150 felonies or 400 non-traffic misdemeanors³ per attorney per year.⁴ If an attorney is carrying a mixed caseload which includes cases from felonies and misdemeanors, or non-criminal cases, these standards should be applied proportionally.⁵

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

Standard 7 Qualification and Review

A. Basic Requirements. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications (hereafter “basic requirements”):

1. Satisfy the minimum requirements for practicing law in Michigan as determined by the Michigan Supreme Court and the State Bar of Michigan; and
2. Comply with the requirements of MIDC Standard 1, relating to the Training and Education of Defense Counsel.

B. Qualifications. Eligibility for particular case assignments shall be based on counsel’s ability, training and experience. Attorneys shall meet the following case-type qualifications:

1. Misdemeanor Cases
 - a. Satisfaction of all Basic Requirements; and
 - b. Serve as co-counsel or second chair in a prior trial (misdemeanor, felony, bench or jury); or
 - c. equivalent experience and ability to demonstrate similar skills.
2. Low-severity Felony Cases
 - a. Satisfaction of all Basic Requirements; and
 - i. Has practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice); and
 - ii. Has been trial counsel alone or with other trial counsel and handled a

Standards, American Bar Association, June 2014. The MIDC has issued a Request for Proposals for a Michigan study.

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

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

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

outside of court appearances, such as directing an investigation, negotiating, or tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are equally important to quality representation.

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

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

Event based, capped hourly rates, and flat fee payment schemes are discouraged unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate. If utilized, these alternative schemes must be based on a compensation system that realistically assesses the cost of providing competent representation, including the costs of trial, investigation, expert assistance, and extraordinary expenses, and should take into consideration objective standards of representation consistent with those set forth in other minimum standards for indigent defense. They should also follow all expense reimbursement guidelines in Section E.

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

- (1) They are based on reliable caseload data, and in conjunction with a method, specified in the contract, for compensation to account for increases or decreases in caseload size;
- (2) They are based on a compensation system that realistically assesses the cost of providing competent representation as described above in Section B;
- (3) They provide for regular, periodic payments to the indigent defense organization or attorney;
- (4) They include a mechanism to seek reimbursement for case-related expenses;
- (5) They include a provision allowing for counsel to petition for additional compensation for the assignment of co-counsel in any case where the offense charged or enhancement sought subjects the indigent defendant to life in prison;

- (6) They implement the MIDC required hourly rates; when hourly schemes are not utilized, local systems must demonstrate that compensation is at least equivalent to these rates.

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

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

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

Expenditure of public dollars should be subject to control mechanisms and audits that verify expenditure accuracy. This should be accomplished by following generally accepted procedures that separate staff duties; establish billing policies; and ensure thorough review of vouchers, including benchmark setting and investigation where necessary. The approval process should be supported by an efficient dispute resolution procedure.

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