

THE RIGHT TO COUNSEL IN OAKLAND COUNTY, MICHIGAN

EVALUATION OF
TRIAL-LEVEL INDIGENT DEFENSE SERVICES
IN ADULT CRIMINAL CASES

OCTOBER 2022



SIXTH
AMENDMENT
CENTER

The Right to Counsel in Oakland County, Michigan: Evaluation of Trial-Level Indigent Defense Services in Adult Criminal Cases

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Prepared by

The Sixth Amendment Center (6AC) 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 a potential loss of liberty in a criminal or delinquency proceeding. *See* SIXTH AMENDMENT CENTER, <https://sixthamendment.org/>.

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EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for indigent people accused of crimes in state trial courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment. Today, the State of Michigan delegates to its counties, cities, townships, and villages the responsibility for establishing and administering indigent defense systems to effectively represent indigent adult defendants who face possible incarceration for crimes in the trial courts.

The state has accepted a portion of the responsibility for funding the right to counsel of those defendants, while continuing to delegate a portion of the funding responsibility to its local governments. The State of Michigan created the Michigan Indigent Defense Commission (MIDC) to promulgate and oversee the implementation of statewide standards, rules, and procedures to meet the requirements of the Sixth Amendment for adult criminal indigent defense representation in the trial courts and to distribute state funds to local governments to comply with those standards.

The State of Michigan is not the focus of this report. This study, funded through MIDC at the request of Oakland County, evaluated Oakland County's system for providing the right to counsel in those trial courts for which the county government is fiscally responsible – the Sixth Judicial Circuit Court and the 52nd District Court – to aid the county in determining the feasibility of creating a public defender office. The findings and recommendations of this report are addressed to Oakland County.

Indigent defense services in Michigan were created to service individual courts. Within Oakland County, there are 12 separate indigent defense systems, administered and funded by at least 11 different county and municipal governments, providing right to counsel services in 31 courtrooms at 14 separate court locations. This decentralization of right to counsel services impedes the ability of any of the 12 indigent defense systems within Oakland County to ensure the effective representation of indigent adult criminal defendants in the trial courts. For example:

- Each of the 12 indigent defense systems within Oakland County maintains its own list of private attorneys whom they appoint to represent indigent defendants. An individual private attorney may be available for appointment through more than one of these lists. Of the 287 attorneys who accept appointed cases in trial courts in the county at the time of this study, 217 of them are appointed by multiple indigent defense systems. Yet there is no means for the heads of those indigent defense systems to know how much work each attorney is appointed to do by the other indigent defense systems within the county.
- The same private attorneys who are appointed in the trial courts within Oakland County are frequently also appointed through indigent defense systems in other Michigan counties (most notably, in Macomb and Wayne counties), as well as accepting appointments to represent indigent defendants for state appeals and in the federal courts. Additionally, each private attorney is also free to represent privately retained clients.

There is no way for the manager of each indigent defense system within Oakland County to know how much work these attorneys are trying to handle.

MIDC is required by state law to promulgate standards addressing many aspects of indigent defense representation, and it has not yet completed that work. Of the nine standards proposed by MIDC as of October 2021, six have been approved by LARA and funded by the state thus far. There are not yet any statewide standards, for example, regarding reasonable indigent defense caseloads, preventing conflicts between the financial interests of attorneys and the legal interests of their appointed clients, and the need for continuous representation of a defendant by a single attorney, among others. Because the State of Michigan has delegated its constitutional responsibilities to local governments, the local governments – including Oakland County – have exposure to liability for structuring their indigent defense systems in ways that currently violate defendants’ rights to effective assistance of counsel, as discussed in the first three findings of this report.

FINDING 1: Oakland County’s assigned counsel compensation method creates economic disincentives that impair defense counsel’s ability to provide effective representation.

The Oakland County indigent defense system compensates attorneys according to a fee schedule that pays a flat fee per half-day in misdemeanor cases and a flat fee per event in felonies. Both payment methods pit the lawyer’s financial interests against the client’s legal interests. To understand how, consider the following hypothetical. Shortly after being appointed to represent a felony defendant at the preliminary stages of the case in district court, the appointed lawyer sees that one or more elements of the crime cannot be proven and points that out to the assistant prosecuting attorney handling the case. If the prosecutor offers a plea to a reduced misdemeanor offense and if the defendant accepts the offer and pleads guilty, the appointed attorney is paid \$375 (the standard fee for entering a plea to a misdemeanor in district court). However, if the attorney convinces the prosecutor to dismiss the felony charge altogether in district court – a better outcome for the defendant, which may require several more hours and several rounds of discussion between the appointed attorney and the prosecutor – the attorney earns only \$275 (the standard fee for a felony dismissal in district court).

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, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case. Furthermore, because attorneys are paid almost exclusively 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, aside from the initial client interview (a fee of \$100), 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. Attorneys receive no pay for any investigation, 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 the number of hours spent preparing for trial.

Compensating attorneys with a fixed rate for mostly in-court lawyer activities creates economic disincentives that impair defense counsel's ability to provide effective representation. Being paid the same amount whether an attorney does an effective job or not incentivizes the attorney to dispose of cases with as little work as possible. Although MIDC has promulgated a standard that will rectify this, it has not yet been adopted or funded. The absence of a statewide standard does not relieve local governments from the constitutional obligation to provide representation free from financial conflicts of interest.

FINDING 2: Oakland County indigent defense attorneys' workloads are not controlled to permit effective representation.

Oakland County has taken no steps to limit the number of cases that an attorney representing indigent clients may handle in a year. From October 1, 2021 through June 30, 2022, Oakland County's indigent defense services office appointed 190 different private attorneys to represent indigent defendants in the Sixth Judicial Circuit Court and 52nd District Court. A significant portion of those appointed attorneys have caseloads far above the proposed Michigan-specific caseload standards and many attorney caseloads also exceed the national caseload limits. Of the 50 attorneys with the largest caseloads, 39 of them have caseloads in excess of the proposed MIDC annual caseload maximums. In fact, those 39 attorneys are handling a caseload requiring *more than 52 full time attorneys* under the proposed MIDC standard.

For example, one attorney's total annual caseload is 211% of the recommended, but not yet approved, MIDC caseload maximums even before factoring in cases handled as "house counsel" (Oakland County schedules attorneys as "house counsel" for arraignment dockets and pretrial conference dockets in district court, where the house counsel attorney represents all defendants who are scheduled for their initial appearance or pretrial conferences during that house counsel shift). That is, the attorney is handling the work of more than two full time attorneys from cases assigned by the Oakland County indigent defense services office alone, before considering that attorney's other appointed and retained work. Oakland County has no way of knowing the full caseload of an attorney who represents indigent clients because those attorneys can also handle cases outside of Oakland County's purview (i.e., privately retained clients, indigent clients with cases in other district courts in Oakland County, indigent clients with cases in courts outside of Oakland County) or may have other jobs in the criminal justice system (i.e., managed assigned counsel coordinator, magistrate, municipal prosecutor).

Additionally, indigent defense system attorneys in Oakland County do not have adequate support staff, such as secretaries, paralegals, and social workers. When an attorney lacks support resources, the attorney must personally perform work that is not only outside the attorney's expertise, but also takes up valuable time that should be devoted to developing legal arguments and preparing the client's case.

FINDING 3: Oakland County indigent defense attorneys do not continuously represent and personally appear at every court appearance throughout the pendency of the case.

In all case types, Oakland County uses “horizontal representation,” whereby appointed clients are represented by a series of attorneys, rather than a single attorney representing a client from appointment through disposition of the case. In felony cases, many defendants are represented at their arraignment by an attorney appointed by some other indigent defense system within the county and then by a different attorney who is assigned by the Oakland County government for preliminary stages in district court and the trial stage in circuit court. Indigent defense attorneys in Oakland County seem to operate from the belief that, because they are not individually appointed as trial counsel when staffing arraignment hearings, no confidential attorney-client relationship exists between the scheduled arraignment attorney and defendants at their initial court appearances, creating a systemwide constructive denial of the right to effective assistance of counsel at critical stages of the criminal case.

In systems that rely on horizontal representation, the delay in appointing the actual trial lawyer has negative consequences for the client as promising investigative leads can go cold, critical evidence can be destroyed if not timely preserved, witnesses can become harder and harder to track down, and memories can fade.

Two further findings are just as troubling.

FINDING 4: Oakland County’s indigent defense services office is not appropriately staffed and resourced to provide qualitative oversight of indigent defense services.

The Oakland County indigent defense services office is responsible for the oversight of the indigent defense system in the Sixth Judicial Circuit Court and the 52nd District Court. Yet, the indigent defense services office lacks sufficient staff members qualified to ensure proper oversight of indigent defense services. For example, the indigent defense services office currently has ten full-time staff members, of which the chief attorney is the only attorney position on staff. The majority of non-attorney staff time is devoted to coordinating coverage by panel attorneys at court hearings and reviewing attorney vouchers submitted for payment. These are important functions, but non-lawyers are ill-equipped to provide *qualitative* reviews of criminal defense lawyers.

Proper oversight also requires access to timely, comprehensive, and relevant information. Not only does Oakland County government lack access to centralized information regarding all indigent defense systems within Oakland County and the services provided by the attorneys handling cases in each system, but what data Oakland County currently collects does not permit county policymakers to make informed policy decisions.

FINDING 5: Oakland County chills the right to counsel in the 52nd District Court by publicly announcing that all misdemeanor defendants will be required to contribute a monetary amount towards their representation without considering an individual

defendant's ability to pay, and the practices of some 52nd District Court judges to deny some defendants' requests for appointed counsel may violate the right to counsel.

Misdemeanors matter. For most people, misdemeanor courts are the place of initial contact with the Oakland County justice system. Much of a citizenry's confidence in the courts as a whole – their faith in the county's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

Collectively, these five findings lead to two principal recommendations.

RECOMMENDATION A: Oakland County should advocate for statutory changes to allow the county to create a unified indigent defense system serving all of the courts within its geographic boundaries. In the meantime, Oakland County should seek to negotiate with the municipalities responsible for the other indigent defense systems in Oakland County and come to an agreement where all indigent defense services in the county are provided by Oakland County.

The people who work and reside in Oakland County would be best served by a single indigent defense system that can provide uniform administration and oversight of attorneys representing indigent defendants in adult criminal cases throughout all trial courts within the county. After all, the level of justice one receives should not be dependent on which side of a municipal line a crime is alleged to have been committed. The promulgation of MIDC standards made binding on all indigent defense systems starting in fiscal year 2019 sparked a years-long effort to “change the culture” among attorneys providing indigent defense services within Oakland County. But the absence of a single indigent defense system means the culture change being sought must be addressed separately within each indigent defense system within the county, each occurring at its own pace, and with Oakland County lacking power and authority to guarantee to its citizenry the creation of a uniform standard of practice that complies with constitutional commands. Unfortunately, Oakland County currently lacks the statutory authority to create such a unified indigent defense system without obtaining the consent of the various local governments within Oakland County.

Moreover, there is no longer any reason that indigent defense should remain attached to each trial court jurisdiction. The local share of indigent defense funding in many jurisdictions within the boundaries of Oakland County is less than 5% of total annual spending. In one system, the local government's share is less than 0.5% of total spending. Each year the State of Michigan comes closer and closer to providing 100% of all indigent defense funding, and yet the state gains no additional decision-making authority over each local system.

The policy choice to maintain local control of indigent defense services under the state's general supervision, made at the time the MIDC Act of 2013 was passed into law, was a legitimate choice in the aggregate to maintain local control until such time as the state began putting money into indigent defense services. But with judges now removed from responsibilities for the indigent defense systems, and with the state funding the majority of indigent defense costs in the trial courts, that decision warrants revisiting. The philosophy of local control can be maintained by moving the administration and local share funding of indigent defense services to the county level of government.

Therefore, Oakland County officials should advocate for the Michigan legislature to enact the following statutory changes:

- The consolidation of responsibility for providing indigent defense services under the auspices of county government in each county, thereby eliminating the district court-level indigent defense systems;
- The reformation of criminal procedure to make all felony prosecutions commence in the circuit courts, and to abolish horizontal representation within and/or across different indigent defense systems;
- A resolution of the conflict caused by the separate statutory provisions authorizing indigent defense systems to collect contribution only from defendants determined to be partially indigent, while also permitting trial courts to assess attorney fees at conviction regardless of the defendant's indigency status; and
- A requirement that court-generated revenue from attorneys fee assessments is counted as indigent defense system income that is reported annually to MIDC and that 100% of revenues collected locally from indigent defendants are disbursed to the State of Michigan in support of local indigent defense services through future MIDC grants.

While these statutory changes are being debated by state lawmakers, there is nothing that precludes Oakland County from pursuing a local memorandum of agreement with all the other local governments currently providing indigent defense services to create a unified countywide indigent defense system. Indeed, there is precedent already within Oakland County for such an effort. Since fiscal year 2019, the county and all district court funding units have agreed to share the administrative burden of providing training to indigent defense system attorneys through a coordinated method – a contract with the Oakland County Bar Association, funded by MIDC annual grants to the government of Oakland County – rather than each devising a training program of its own. Similarly, as permitted by Michigan law and MIDC policies, Oakland County should convene all necessary stakeholders to develop plans for creating a single indigent defense system providing the right to counsel in all criminal trial courts within Oakland County under a single annual compliance plan, with MIDC annual grant support to Oakland County directly.

RECOMMENDATION B: Oakland County should seek MIDC grant funding to redesign its indigent defense services office. Specifically:

- **The county should create a new position of executive director of indigent defense services.**

- **The executive director should be appointed to a four-year term of office, removable only for just cause and eligible for reappointment.**
- **The executive director should oversee a central office staff to provide centralized services that produce economies of scale (e.g., training, finance, information technology, etc.).**
- **Representation in adult criminal cases should be provided by a combination of:**
 - **a public defender office staffed by government employees, funded at a level to provide for a sufficient number of attorneys, support staff, and supervisors to meet MIDC proposed workload standards; and**
 - **a managed assigned counsel system in which private attorneys are paid at least \$100 per hour for misdemeanors, \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies.**
- **The executive director should be authorized to explore offsetting the costs of these higher assigned counsel rates by creating an alternate defender office to provide representation in a portion of conflict cases.**

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CHAPTER I.

THE RIGHT TO COUNSEL AND THIS EVALUATION

This report explains the right to counsel that is mandated by the Sixth Amendment, as it is provided to indigent adults in criminal cases at the trial level in the courts located within Oakland County.

The government of Oakland County requested this evaluation, but much of the representation of indigent adults in trial-level criminal cases is provided through indigent defense systems operated by the governments of cities, towns, and/or villages (collectively “municipal governments”) situated within the county. Those municipal governments that operate indigent defense systems in some courts were under no obligation to participate in this evaluation. To the extent that this report includes information about those municipal indigent defense systems, it is because the municipal governments voluntarily cooperated to provide it.

As a result, there are gaps in this report about particular aspects of indigent defense representation of adults in trial-level criminal cases in some courts within Oakland County. The report identifies wherever necessary information was not available for a complete evaluation. Importantly, much of this missing information is also not available to the government of Oakland County, to the Michigan Indigent Defense Commission, and to the people and criminal justice decision-makers of the State of Michigan.

A. The right to counsel in Michigan

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”¹ In 1963 in *Gideon v. Wainwright*, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”² 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.”³

¹ U.S. CONST. amend. VI.

² *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

³ *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.”).

Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend them in all federal and state courts whenever that person is facing the potential loss of their liberty and is unable to afford their own attorney.⁴ Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.⁵ The attorney must also be effective,⁶ subjecting the prosecution's case to "the crucible of meaningful adversarial testing."⁷

The U.S. Supreme Court has expressly held that the Sixth Amendment requires the appointment of counsel for those who cannot afford to hire their own attorney, upon their request, in not only felonies, but also when facing the possibility of jail time in misdemeanors and on direct appeals.⁸ Indigent children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of their liberty.⁹

The Michigan Constitution states that, "[i]n every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . ."¹⁰ At least until the mid-20th century, the Michigan courts held that this state constitutional provision does not guarantee a defendant the right to have counsel appointed by the court, but instead that it guarantees a defendant the right to have an attorney represent them if the defendant is able to provide that counsel on their own.¹¹ Several years in advance of the *Gideon* decision, Michigan statutes and

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felonies); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors); *Alabama v. Shelton*, 505 U.S. 654 (2002) (including misdemeanors with suspended sentences); *Halbert v. Michigan*, 545 U.S. 605 (2005) (including appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance).

⁵ As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

⁶ *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).

⁷ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

⁸ *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors); *Alabama v. Shelton*, 505 U.S. 654 (2002) (including misdemeanors with suspended sentences); *Halbert v. Michigan*, 545 U.S. 605 (2005) (including appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance).

⁹ *In re Gault*, 387 U.S. 1 (1967). "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21." *Id.* at 36.

¹⁰ MICH. CONST. art. I, § 20.

¹¹ *People v. Williams*, 195 N.W. 818, 819 (Mich. 1923) ("The State Constitution, art. 2, § 19, secures to an accused the right 'to have counsel for his defense.' This does not mean he shall have counsel at public expense. It is a guaranty of right to employ and have counsel . . ."); *People v. Crandell*, 258 N.W. 224, 226 (Mich. 1935) (reaffirming

court rules provided that indigent adults charged with any crime that carries the possibility of incarceration as a punishment are entitled to have counsel appointed to represent them,¹² and indigent children are entitled to have counsel appointed to represent them in juvenile delinquency proceedings.¹³

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”¹⁴ but they cannot provide less. Though the federal Constitution does not require it,¹⁵ Michigan guarantees appointed counsel to indigent defendants in some later stages of a criminal or delinquency case¹⁶ and to some parties in certain civil proceedings.¹⁷

B. This evaluation

As is explained in chapter II.C. of this report, the government of Oakland County is responsible for establishing, operating, and overseeing the indigent defense systems that provide counsel to indigent adults facing possible imprisonment for crimes in the 52nd District Court and the Sixth Judicial Circuit Court in Oakland County, and the county is also responsible for funding its “local share” of the cost of the appointed attorneys. Historically, Oakland County has provided those services through paying private attorneys.

and applying *Williams*); *People v. Harris*, 253 N.W. 312, 312 (Mich. 1934) (reaffirming *Williams*).

¹² See MICH. COMP. LAWS §§ 763.1, 775.16 (2020); MICH. CT. R. 6.005, 6.610(D).

¹³ MICH. COMP. LAWS § 712A.17c (2020); MICH. CT. R. 3.915(A).

¹⁴ *California v. Ramos*, 463 U.S. 992, 1014 (1983). See, e.g., *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

¹⁵ *Murray v. Giaratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

¹⁶ These stages occur after the criminal trial, and include:

- Adult probation violation proceedings. MICH. CT. R. 6.445(B).
- Certain post-disposition proceedings in delinquency cases. MICH. COMP. LAWS § 712A.18d(4) (2020); MICH. CT. R. 3.945, 3.956, 6.937, 6.938.

¹⁷ Including:

- Certain stages and types of involuntary commitment/treatment cases. MICH. COMP. LAWS § 330.1454 (2020).
- Certain stages of involuntary guardianship cases. MICH. COMP. LAWS §§ 330.1615, 700.5305(4) (2020); MICH. CT. R. 5.408(B)(2).
- A parent alleged to have neglected and/or abused their child. MICH. COMP. LAWS § 712A.17c(5) (2020); MICH. CT. R. 3.915.
- A child alleged to have been neglected and/or abused by their parent. MICH. COMP. LAWS § 712A.17c(7) (2020); MICH. CT. R. 3.915.
- Pregnant minors, without regard to indigency, in parental notification of abortion proceedings. MICH. COMP. LAWS § 722.904(2)(e) (2020); MICH. CT. R. 3.615.
- A person facing isolation or quarantine due to an alleged public health risk. MICH. COMP. LAWS § 333.3205(12) (2020).

USE OF THE TERM “FISCAL YEAR” IN THIS REPORT

The State of Michigan, the Michigan Indigent Defense Commission (MIDC), and Oakland County operate on a fiscal year that begins October 1 and ends September 30. The term “fiscal year” throughout this report means the fiscal

year that begins on October 1 and ends on September 30. For example, fiscal year 2021 is the fiscal year that runs from October 1, 2020, through September 30, 2021.

During fiscal year 2021, Oakland County government officials began discussions with MIDC about the possibility of either contracting with a non-profit organization to serve as a public defender office or creating a public defender office within county government, in order to provide more effective assistance of counsel at greater efficiency. MIDC policy recommends local indigent defense systems to conduct a feasibility study, paid by an MIDC grant, before establishing a public defender office.¹⁸ In response to Oakland County’s March 2021 request for proposals to conduct the necessary feasibility study, the Sixth Amendment Center was contracted to conduct this evaluation.

Methodology. The Sixth Amendment Center independently and objectively evaluates indigent representation systems. The Sixth Amendment Center’s evaluation in Oakland County has been carried out through four basic components.

Legal research and analysis. Every state in the country has its own substantive and procedural law – through its constitution, statutes, rules, regulations, and case law – that operates differently than that of every other state. In addition, counties, and municipalities, as well as the courts located within them, often have their own governing laws, rules, and policies. The Sixth Amendment Center independently researched the relevant law of Michigan, Oakland County, and the circuit and district courts operating within Oakland County, and analyzed its internal interactions and its interactions with federal law and national standards, in order to understand and explain the workings of the adult criminal trial-level indigent defense system within Oakland County.

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. The Sixth Amendment Center obtained and analyzed extensive amounts of hard copy and electronic information.

Court observations. Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individual people experience as their cases advance from accusation through disposition; (2) the process the appointed attorney experiences while representing each person 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.

¹⁸ See MICHIGAN INDIGENT DEF. COMM’N, MIDC GRANT MANUAL 9 (rev’d Feb. 2021).

Because travel during the course of this evaluation was not possible due to the Pandemic, the Sixth Amendment Center observed proceedings through videoconferencing technology in the circuit court and district courts in Oakland County.

Interviews. No individual component of the justice system operates in a vacuum. Rather, the decisions of one component necessarily affect another. Because of this, the Sixth Amendment Center conducted interviews orally and in writing with a broad cross-section of justice system stakeholders in Oakland County, including judges, court administrators, prosecutors, defense attorneys, and county officials and their staff, and state-level stakeholders from the Michigan Indigent Defense Commission and the Michigan State Court Administrative Office.

EVALUATING AN INDIGENT DEFENSE SYSTEM IN FLUX

Criminal justice systems are an interconnecting network of various parts (courts, prosecution, probation, etc.) that are constantly changing in response to each other's policies as well as in reaction to various political and efficiency needs, and other developments. This is especially true in Michigan regarding its various indigent defense systems that must respond to the adoption of various Michigan Indigent Defense Commission standards and policies. The Sixth Amendment Center conducted interviews

and court observations from October 2021 through April 2022 at a time where some MIDC standards were in effect and other standards were still being implemented, and where local systems' plans were being developed even as a new MIDC standard became effective. Where appropriate, the Sixth Amendment Center acknowledges in footnotes where a deficiency was observed but where state or local policymakers now believe the issue to be addressed.

Assessment criteria. The Sixth Amendment Center uses 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 state and local laws. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronin*¹⁹ and *Strickland v. Washington*.²⁰ *Strickland* looks at a case after it is final, to determine retrospectively whether the lawyer provided ineffective 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 a case, then a court should presume that ineffective assistance of counsel will occur.

¹⁹ 466 U.S. 648 (1984).

²⁰ 466 U.S. 668 (1984).

Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys, who have sufficient time and resources 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.

UNDERSTANDING *CRONIC* THROUGH THE AMERICAN BAR ASSOCIATION'S ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Adopted by the American Bar Association 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 *ABA 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 2, 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 (2002).

CHAPTER II.

THE CRIMINAL JUSTICE SYSTEM IN OAKLAND COUNTY

Criminal justice is often referred to metaphorically as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. Each leg of the stool has different responsibilities, but the structures, policy decisions, and procedures of each affect the others.

The right to counsel is carried out in the courts. Decisions about the number and type of cases in the courts are made by law enforcement officers as they make arrests and by prosecutors as they institute prosecution. The indigent defense systems have no control over the number and types of cases for which they must provide counsel, and each indigent defense system attorney must effectively represent each and every person to whom they are appointed.

All crimes in Michigan are designated as either a felony or a misdemeanor.²¹ A felony is enacted by the state legislature and is punishable by imprisonment in the state prison.²² A misdemeanor may be enacted by the state legislature (referred to colloquially as a “state-law misdemeanor”) or by a local government as a violation of its ordinances (referred to colloquially as “ordinance cases”), and all misdemeanors are punishable by imprisonment.²³ In Oakland County, the court in which an adult criminal case will proceed, by whom it will be prosecuted, and which indigent defense system will be responsible for providing counsel when necessary all vary based on these definitions.

A. The trial courts

In each of Michigan’s 83 counties, there can be three levels of trial courts that hear adult criminal cases: municipal courts; district courts; and one circuit court. For each of these trial courts, the state’s supreme court appoints a chief judge who is responsible for the administration of the trial court (or a group of trial courts consolidated under a single chief judge), including assignments of the judges and court personnel.²⁴

²¹ MICH. COMP. LAWS §§ 750.5, 750.6 (2020). Although a person charged with a civil infraction cannot be sentenced to jail and so is not entitled to appointed counsel, the failure to appear in court on a civil infraction constitutes a misdemeanor. MICH. COMP. LAWS §§ 600.113(1)(a), 600.8727(10), 600.8827(8) (2020).

²² MICH. COMP. LAWS §§ 750.7, 761.1(f) (2020). Although previously authorized, the death penalty is no longer an available punishment in Michigan. MICH. CONST. art. IV, § 46.

²³ MICH. CONST. art. VII, § 22; MICH. COMP. LAWS §§ 41.181, 42.15, 42.23, 45.514(1)(i), 45.556(b), 46.11(j), 67.1, 67.1a[1], 88.12, 91.1, 117.3, 117.4i, 750.8, 750.9, 761.1(n)-(o) (2020). Misdemeanor ordinances enacted by counties can be punishable by not more than 90 days imprisonment. MICH. COMP. LAWS § 46.10b(1) (2020). Misdemeanor ordinances enacted by townships, cities, or villages can be punishable by imprisonment of up to 90, 93, or 180 days, depending on the ordinance violated. MICH. COMP. LAWS §§ 41.181, 41.183, 42.21, 66.2, 66.4, 89.2, 117.3(k), 117.4i(k) (2020).

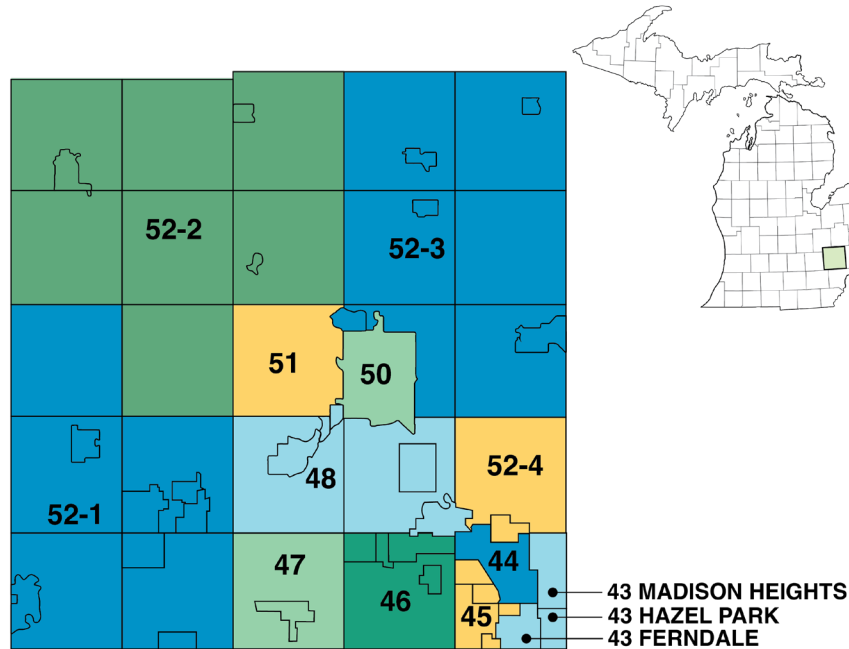
²⁴ MICH. CT. R. 8.110., 8.111, 8.112. Any judge can apply to be appointed as the chief judge of any trial court, and the chief judge of any trial court is not necessarily required to be a judge on that court. The chief judge of each trial court serves a two-year term but may be removed at the pleasure of the supreme court. MICH. CT. R. 8.110.

Either the chief judge of a trial court or the state’s supreme court appoints a chief judge pro tempore of the trial court and a presiding judge for each division within that trial court. The chief judge pro tempore and the division presiding judges are assigned their duties by the chief judge, and each serve a two-year term but may be removed at

There are no municipal courts within Oakland County.²⁵ The trial courts for adult criminal cases arising within the geographic boundaries of Oakland County are:

- nine district courts sitting in 14 separate locations, each having jurisdiction over the cases that arise within their geographic boundaries;²⁶ and
- the Sixth Judicial Circuit Court, with jurisdiction over all cases arising anywhere in the county.²⁷

The following map of Oakland County shows the geographic jurisdiction of each of the 14 district court locations operating within the county.



All adult criminal cases in Oakland County commence in one of the 14 district court locations, aside from the very rare situation where a defendant is indicted for a felony or “high misdemeanor”²⁸ prior to being arrested and whose case will then occur entirely in the circuit

the pleasure of the chief judge. MICH. CT. R. 8.110.

²⁵ Historically, local governments within Michigan operated a variety of courts under a variety of names (justice of the peace courts, circuit court commissioners courts, municipal courts, police courts, and recorders courts). *See* MICH. COMP. LAWS §§ 600.9921, 600.9928 (2020). During the 1960s and 1970s, these local courts were abolished or renamed as “municipal court,” and their jurisdiction and authority was redistributed to the three types of trial courts that exist in Michigan today. *See generally* MICH. COMP. LAWS §§ 600.9921 through 600.9948, 730.501 through 730.551 (2020). As of 2021, there are only four municipal courts in Michigan, all located within Wayne County. *See* MICHIGAN LEGIS. SERV. BUREAU, MICHIGAN MANUAL 2021-2022, at 554.

²⁶ MICH. COMP. LAWS §§ 600.8311, 600.8312 (2020). *See also* MICH. COMP. LAWS § 766.13 (2020); MICH. CT. R. 6.008(A).

²⁷ MICH. CONST. art. VI, §§ 1, 11, 13; MICH. COMP. LAWS §§ 600.501, 600.507(1), 600.601, 600.8311, 600.8342 (2020); MICH. CT. R. 6.008(B).

²⁸ There are some crimes under state law that are expressly designated as a misdemeanor but carry a punishment of up to two years in prison, for example criminal sexual conduct in the fourth degree. MICH. COMP. LAWS § 750.520e (2020). The district courts do not have jurisdiction over misdemeanors for which the punishment can exceed one year imprisonment. MICH. COMP. LAWS § 600.8311 (2020). For this reason, these state-law misdemeanors that carry up to two years in prison are treated as if they were felonies and are referred to colloquially as “high misdemeanors.”

court.²⁹ Trial-level misdemeanor cases (other than “high misdemeanors”) are disposed in the district courts,³⁰ while trial-level felony and “high misdemeanor” cases are disposed in the circuit court.³¹

1. The district courts

Michigan’s district courts are established and given limited jurisdiction by the legislature over the cases that arise within their geographic boundaries.³² In some Michigan counties there is only a single district court with county-wide jurisdiction, while in other counties there are multiple district courts that each have jurisdiction over only a designated portion of the county’s geography.³³

District courts have both civil and criminal trial-level jurisdiction.³⁴ In adult criminal cases, they have jurisdiction over:³⁵

- specified proceedings in felonies and “high misdemeanors” prior to the case being bound over for trial in the circuit court, and those proceedings are arraignments, probable cause conferences, and preliminary examinations; and
- all other misdemeanors (including violations of ordinances) that are punishable by imprisonment of not more than one year, throughout the proceedings at the trial-court level.

State law establishes the number of district court judges in each district, who are elected to six-year terms.³⁶ Some district courts also have one or more magistrates, who are judicial officers appointed by the district court judges with approval of the local government(s) that fund the court, and who are assigned certain specific duties in certain types of cases in the district court that they serve.³⁷ District court judges are paid by the state and can receive additional compensation from the local governments served by the district court (division) on which they sit, while magistrate compensation is paid entirely by the local governments.³⁸

²⁹ MICH. COMP. LAWS § 600.8311 (2020). *See also* MICH. COMP. LAWS § 766.13 (2020); MICH. CT. R. 6.008(A).

³⁰ MICH. COMP. LAWS § 600.8311 (2020).

³¹ MICH. CONST. art. VI, §§ 1, 11, 13; MICH. COMP. LAWS §§ 600.501, 600.507(1), 600.601, 600.8311, 600.8342, 766.13 (2020); MICH. CT. R. 6.008(A), (B).

³² MICH. CONST. art. VI, §§ 1, 26; MICH. COMP. LAWS §§ 600.151, 600.8101, 600.8301 through 600.8311 (2020). Michigan’s district courts were established in 1968, to begin functioning on January 1, 1969. Act 154 of 1968 (codified as amended at MICH. COMP. LAWS §§ 600.8101- 600.8396 (2020)). *See* MICHIGAN LEGIS. SERV. BUREAU, MICHIGAN MANUAL 2021-2022, at 540.

³³ MICH. COMP. LAWS §§ 600.8105 through 600.8180 (2020).

³⁴ MICH. CONST. art. VI, §§ 1, 26; MICH. COMP. LAWS §§ 600.151, 600.6501, 600.6502, 600.8101, 600.8301 through 600.8311 (2020).

³⁵ MICH. COMP. LAWS § 600.8311 (2020). *See also* MICH. COMP. LAWS § 766.13 (2020); MICH. CT. R. 6.008(A).

³⁶ MICH. COMP. LAWS §§ 600.8123, 600.8204, 600.8175(4) (2020). Each district court judge must have been licensed to practice law in Michigan for at least five years, must be a qualified registered voter in the district (and division) out of which elected, and cannot be elected or appointed to the position after reaching 70 years of age. MICH. CONST. art. VI, § 19; MICH. COMP. LAWS §§ 600.8101, 600.8201 (2020).

³⁷ MICH. COMP. LAWS §§ 600.8501, 600.8511, 600.8512a, 600.8513, 600.8541 (2020); MICH. CT. R. 4.401(b). Each magistrate must be a licensed attorney in Michigan, must be a qualified registered voter in the district (and division) to which appointed, and cannot be appointed to the position after reaching 70 years of age. MICH. CONST. art. VI, § 19; MICH. COMP. LAWS § 600.8501(2) (2020).

³⁸ MICH. COMP. LAWS §§ 600.8202 (district court judges), 600.8521 (magistrates) (2020).

Responsibility for funding the operations of each district court, including the cost of court facilities and the salaries and benefits of all court personnel except the judges, is delegated by the state to either the county or to one or more townships, villages, and/or cities served by that district court.³⁹

Within Oakland County, there are nine district courts sitting in 14 separate locations,⁴⁰ as illustrated by the map on page 21. The 52nd District Court (all four divisions) is funded by Oakland County.⁴¹ All other district courts within the county are each funded by one or more of their respective townships, villages, and/or cities.⁴² The table page 24-25 shows, for each district court and its divisions within Oakland County, the location of the court, the municipalities over which it has geographic jurisdiction as designated by state law, and the number of judges presiding in the court.

³⁹ MICH. COMP. LAWS §§ 600.8103, 600.8104 (2020). *See also* MICH. COMP. LAWS §§ 600.8251(4), 600.8261, 600.8262, 600.8263, 600.8271, 600.8379, 600.8521 (2020); MICH. CT. R. 8.201.

Generally, which local governments are responsible for funding the operations of a district court depends on whether state law designates the district as first class, second class, or third class. In third class districts, one or more of the townships, villages, and/or cities served by the district court are responsible for funding the district court; in both first-class districts (which have county-wide jurisdiction) and second-class districts (which have jurisdiction over only a specified portion of the geography within the county), the counties served by the district court are responsible for funding the district court. MICH. COMP. LAWS § 600.8103 (2020).

⁴⁰ MICH. COMP. LAWS § 600.8123 (2020). *See* MICH. CONST. art. VI, §§ 1, 26; MICH. COMP. LAWS §§ 600.151, 600.8101 (2020).

⁴¹ MICH. COMP. LAWS §§ 600.8103(2), 600.8123(9) (2020).

⁴² MICH. COMP. LAWS § 600.8123 (2020).

District Court	Physical Location	Geographic Jurisdiction⁴³	Number of Judges
43rd District – Ferndale	Ferndale	Ferndale	1
43rd District – Hazel Park	Hazel Park	Hazel Park	1
43rd District – Madison Heights	Madison Heights	Madison Heights	1
44th District	Royal Oak	Berkley, Royal Oak	2
45th District	Oak Park	Huntington Woods, Oak Park, Pleasant Ridge, Royal Oak township	2
46th District	Southfield	Lathrup Village, Southfield, Southfield township ⁴⁴	3
47th District	Farmington Hills	Farmington, Farmington Hills	2
48th District	Bloomfield Hills (Bloomfield township) ⁴⁵	Birmingham, Bloomfield township, Bloomfield Hills, Keego Harbor, The City of Orchard Lake Village, Sylvan Lake, West Bloomfield township	3
50th District	Pontiac	Pontiac	3
51st District	Waterford	Waterford township	2

⁴³ As a matter of local practice, some district courts located within Oakland County also hear criminal cases originating from municipalities that are not expressly designated by state law as being within the jurisdiction of that district court. For example:

- The 46th District Court hears cases arising from the villages of Beverly Hills, Bingham Farms, and Franklin.
- The 52nd District Court – division 1 hears cases arising from Milford Village and Wolverine Lake.
- The 52nd District Court – division 2 hears cases arising from the villages of Holly and Ortonville.
- The 52nd District Court – division 3 hears cases arising from the villages of Lake Orion, Leonard, and Oxford, and from arrests or referrals made by the Oakland University police.

⁴⁴ Southfield township is composed of the villages of Franklin, Bingham Farms, and Beverly Hills.

⁴⁵ The court is physically located in Bloomfield township but is most commonly known by its mailing address in Bloomfield Hills. See, e.g., Oakland County District Courts, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/courts/district-courts/Pages/default.aspx> (“48th District Court, Bloomfield Hills”). On rare occasions, the 48th District Court reportedly holds court in a local school in a municipality other than Bloomfield township.

District Court	Physical Location	Geographic jurisdiction	Number of Judges
52nd District (four divisions):		<i>all of the Oakland County geography not allocated to another district court</i>	
52nd District – Division 1	Novi	Commerce township, Highland township, Lyon township, Milford township, The Village of Milford Novi, Novi township, South Lyon, Walled Lake, Wixom	3
52nd District – Division 2	Clarkston (Independence township) ⁴⁶	Brandon township, Groveland township, Holly township, Village of Holly Independence township, Village of Ortonville Rose township, Springfield township, The City of the Village of Clarkston, White Lake township	2
52nd District – Division 3	Rochester Hills	Addison township, Auburn Hills, Village of Leonard Lake Angelus, Village of Lake Orion Oakland township, Orion township, Oxford township, Village of Oxford Rochester, Rochester Hills	3
52nd District – Division 4	Troy	Clawson, ⁴⁷ Troy	2

⁴⁶ The court is physically located in Independence township but is most commonly known by its mailing address in Clarkston. See, e.g., *Oakland County District Courts*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/courts/district-courts/Pages/default.aspx> (“52nd District Court, Division 2 - Clarkston”).

⁴⁷ A portion of the City of Northville is located in Oakland County, and is served by the 35th District Court, which is located in the City of Plymouth in Wayne County. Also, a very small portion of the City of Fenton is located in Oakland County and is served by the 67th District Court located in the City of Fenton in Genesee County. Any felony cases arising out of those areas will ultimately be heard in the Sixth Judicial Circuit Court (assuming bind over) and are also the responsibility of Oakland County.

2. The circuit court

The circuit court in Michigan is established by the state’s constitution.⁴⁸ The state’s 83 counties are divided into 57 judicial circuits, with some judicial circuit courts exercising jurisdiction over the cases arising out of a single county and others over multiple counties.⁴⁹

Circuit courts have both civil and criminal jurisdiction at both the trial and appellate levels.⁵⁰ In adult criminal trial-level cases, they have exclusive jurisdiction over felonies and “high misdemeanors” once the case is bound over for trial (and at all proceedings over which a district court does not have jurisdiction).⁵¹

State law establishes the number of circuit court judges in each judicial circuit, who are elected to six-year terms.⁵² Circuit court judges are paid by the state and can receive additional compensation from the counties served by the judicial circuit court on which they sit.⁵³

Responsibility for funding the operations of each judicial circuit court, including the cost of court facilities and the salaries and benefits of all court personnel except the judges, is delegated by the state to the counties served by that judicial circuit.⁵⁴

Oakland County is the only county in the sixth judicial circuit and is responsible for funding the operations of the Sixth Judicial Circuit Court.⁵⁵ The Sixth Judicial Circuit Court is located in the courthouse that is part of Oakland County’s government campus, in the county seat of Pontiac. There are 20 circuit court judges elected in the sixth judicial circuit, and during this evaluation 13 of those judges were assigned to preside over trial-level adult criminal cases.⁵⁶

⁴⁸ MICH. CONST. art. VI, §§ 1, 11, 13.

⁴⁹ MICH. CONST. art. VI, § 11; MICH. COMP. LAWS §§ 600.501 through 600.549i (2020).

⁵⁰ MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.401 through 600.425, 600.601, 600.605, 600.606, 600.611, 600.631, 600.1001, 600.1003, 600.1062, 600.1091, 600.1099c, 600.1201, 600.8033, 600.8035, 600.8342 (2020).

⁵¹ MICH. COMP. LAWS § 600.8311(f) (2020).

⁵² MICH. CONST. art. VI, §§ 11, 12. Circuit court judges must reside in the judicial circuit out of which they are elected, must have been licensed to practice law in Michigan for at least five years, and cannot be elected or appointed to the position after reaching 70 years of age. MICH. CONST. art. VI, §§ 12, 19. While they hold office, circuit court judges cannot practice law in any Michigan court, cannot be compensated for practicing law, and cannot have a law partner who practices in the judicial circuit out of which they are elected. MICH. COMP. LAWS § 600.562 (2020).

⁵³ MICH. CONST. art. VI, § 18; MICH. COMP. LAWS §§ 600.555, 600.591 (2020).

⁵⁴ MICH. COMP. LAWS § 600.591 (2020). *See also* MICH. COMP. LAWS §§ 45.16, 46.7, 46.11, 600.551 (2020).

⁵⁵ MICH. COMP. LAWS §§ 45.16, 46.7, 46.11, 600.507, 600.551, 600.591 (2020).

⁵⁶ MICH. COMP. LAWS § 600.507 (2020). The Sixth Judicial Circuit Court has three divisions and during this evaluation: eleven judges are assigned to the civil/criminal division, which hears criminal cases; two judges are assigned to the business division, which hears criminal and civil cases; and seven judges are assigned to the family division, which does not hear criminal cases. *See Judges*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/courts/circuit/judges/Pages/default.aspx>.

APPELLATE COURTS AND COURT ADMINISTRATION

The Michigan Supreme Court, with seven justices who are each elected to an eight-year term, is the court of last resort and primarily exercises discretionary review.^a The supreme court has general administrative and superintending control over all Michigan courts, exercised by the chief justice.^b

There is one Michigan Court of Appeals, with 24 elected judges who are each elected to a six-year term and from among whom a chief judge is selected by the chief justice of the Michigan Supreme

Court.^c The court of appeals hears appeals arising out of all of the judicial circuit courts throughout the state, sitting in rotating three-judge panels at locations as determined by the appellate court's chief judge (currently Detroit, Lansing, Grand Rapids, and Marquette).^d

Each of the 57 judicial circuit courts hears the direct appeals arising out of the district courts and municipal courts that are located within the counties served by that judicial circuit court.^e

^a MICH. CONST. art. VI, §§ 1, 2, 19; MICH. COMP. LAWS §§ 600.151, 600.215, 600.217 (2020).

^b MICH. CONST. art. VI, §§ 3, 4; MICH. COMP. LAWS §§ 600.152, 600.202, 600.203, 600.219, 600.221 (2020).

^c MICH. CONST. art. VI, §§ 8, 19; MICH. COMP. LAWS §§ 600.301 through 600.303a (2020); MICH. CT. R. 7.201.

^d MICH. CONST. art. VI, § 8; MICH. COMP. LAWS § 600.311 (2020); MICH. CT. R. 7.201.

^e MICH. CONST. art. VI, § 13; MICH. COMP. LAWS §§ 600.7701, 600.8342, 730.523, 730.523a (2020).

B. The prosecution

In each of Michigan's 83 counties, there can be three levels of prosecutors responsible for prosecuting adult defendants in criminal cases in the trial courts: the attorney general; the prosecuting attorney; and municipal prosecutors.

1. Attorney general, statewide

The attorney general is elected statewide to a four-year term as the head of the Michigan Department of Attorney General.⁵⁷ Among other duties, the attorney general represents the state in all cases in the Michigan Supreme Court, supervises the counties' prosecuting attorneys, and may intervene on behalf of the state in any court on any civil or criminal cause or matter.⁵⁸ The state pays the salaries and expenses of the Department of Attorney General.⁵⁹

⁵⁷ MICH. CONST. art. V, §§ 3, 21, 30; MICH. COMP. LAWS §§ 16.104, 16.150, 16.151 (2020). The attorney general cannot be elected more than twice and cannot engage in any other business or employment while holding the office. MICH. COMP. LAWS § 16.108 (2020).

⁵⁸ MICH. COMP. LAWS §§ 14.28, 14.30 14.101 (2020). If any county's prosecuting attorney is disqualified by reasons of a conflict or is otherwise unable to attend to the duties of his/her office, and that prosecuting attorney does not appoint an assistant prosecuting attorney to perform their duties during the period of disqualification, the attorney general can handle the matter or may appoint a consenting prosecuting attorney or assistant prosecuting attorney to act as a special prosecuting attorney. MICH. COMP. LAWS §§ 49.160, 776.18 (2020). The attorney general also provides opinions on questions of law submitted by the legislature (either branch, or as a whole), the governor, the auditor general, the treasurer, or any other state officer. MICH. COMP. LAWS § 14.32 (2020).

⁵⁹ MICH. COMP. LAWS § 14.42 (2020).

2. Prosecuting attorney, in each county

Each county is required to elect a prosecuting attorney to a four-year term.⁶⁰ Broadly, a county's prosecuting attorney is the county's trial lawyer, responsible to "appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested."⁶¹ Some counties choose to hire county corporation counsel, relieving their elected prosecuting attorney from the responsibility of representing the county and its elected county officers in civil matters.⁶²

The prosecuting attorney appoints the number of assistant prosecuting attorneys and support staff that the county board of commissioners deems necessary,⁶³ and all employees of the office serve at the pleasure of the elected prosecuting attorney.⁶⁴

The Oakland County prosecuting attorney's office does not represent the county or its elected county officers in civil matters. For adult criminal trial-level cases in Oakland County, the prosecuting attorney's office prosecutes all felony cases and all state-law misdemeanor cases in the circuit court and the district courts. Although Oakland County has enacted some misdemeanor ordinances⁶⁵ and the prosecuting attorney's office bears responsibility for prosecuting them in the district courts,⁶⁶ in practice there are no prosecutions of county ordinance misdemeanors in Oakland County.

The Oakland County board of commissioners sets the salary for all prosecuting attorney office employees, including the elected prosecuting attorney, and pays those salaries from county funds.⁶⁷ Employees in the prosecuting attorney's office also receive county government

⁶⁰ MICH. CONST. art VII, § 4. While in office, a prosecuting attorney is prohibited from defending or assisting in the defense of a person charged with a crime within the prosecuting attorney's county. MICH. COMP. LAWS § 776.14 (2020).

⁶¹ Mich. Comp. Laws §§ 49.153, 49.154 (2020).

⁶² MICH. COMP. LAWS §§ 45.563, 49.71, 49.72, 49.73, 49.155 (2020).

⁶³ MICH. COMP. LAWS §§ 49.31, 49.41 (2020). Though these statutes refer to the county board of supervisors, not the county board of commissioners, the county board of supervisors has been replaced in Michigan law by the county board of commissioners. *See* MICH. COMP. LAWS § 46.416 (2020) ("All references to county supervisors or county boards of supervisors in any other act shall be deemed to mean county commissioners and county boards of commissioners as established by this act and such county boards of commissioners shall be the county board of supervisors referred to in article 7 of the state constitution."). Accordingly, we use the term "county board of commissioners" throughout this report.

The prosecuting attorney must designate one assistant prosecuting attorney as chief assistant prosecuting attorney; the chief assistant prosecuting attorney is generally responsible for the duties of the prosecuting attorney if the prosecuting attorney is absent, disabled, or sick. MICH. COMP. LAWS § 49.33 (2020).

⁶⁴ MICH. COMP. LAWS §§ 49.31 through 49.35, 49.41 through 49.42 (2020).

⁶⁵ *See generally Local Ordinances*, OAKLAND COUNTY LEGAL RESOURCES CENTER, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/lrc/resources/statutes-ordinances-and-regulations/Pages/local-ordinances.aspx>.

⁶⁶ MICH. COMP. LAWS §§ 761.1(r), 600.8313 (2020).

⁶⁷ MICH. COMP. LAWS §§ 49.31 through 49.35, 49.41 through 49.42, 49.52, 49.159 (2020). *See also* MICH. COMP. LAWS § 45.451 (2020).

benefits.⁶⁸ Oakland County provides the prosecuting attorney’s office facilities located in the Oakland County courthouse and pays the expenses of the office.

3. Municipal prosecutors, in townships, villages, and cities

Each township, village, or city that has enacted local ordinance misdemeanors is responsible for prosecuting the violation of those ordinances in the district court.⁶⁹ The manner in which the local governments secure a municipal prosecutor varies, but all local governments have the authority to enact local ordinance misdemeanors and to designate a local official to prosecute those crimes.⁷⁰

Only limited information was available during this evaluation about which local governments within Oakland County have enacted local ordinance misdemeanors and about the manner in which those local governments secure a municipal prosecutor. Local ordinance misdemeanors prosecuted by municipal prosecutors are reported to make up the majority of misdemeanor prosecutions in the 52nd district – division 2 court. One attorney, who is the administrator of the indigent defense systems in the 43rd district – Ferndale court and in the 45th District Court, also serves as a municipal prosecutor for the City of Pontiac (prosecuting city ordinance misdemeanors in the 50th District Court) and for another municipality in Wayne County.

C. The indigent defense system

In 1963, 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.⁷¹ Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁷²

⁶⁸ County employee benefits include: medical insurance, prescription coverage, dental insurance, optical insurance, group life insurance, disability, tuition reimbursement, Social Security, workers’ compensation, unemployment, and pension through the county’s public employee retirement service (providing retirement, disability, and death benefits to plan members and their beneficiaries). See OAKLAND COUNTY MICHIGAN, COMPREHENSIVE ANNUAL FINANCIAL REPORT, FISCAL YEAR ENDING SEPTEMBER 30, 2020, at 100; see also OAKLAND COUNTY HUMAN RESOURCES BENEFIT UNIT, JANUARY 2021 BENEFIT GUIDE.

⁶⁹ MICH. COMP. LAWS §§ 600.8313, 761.1(r) (2020).

⁷⁰ MICH. COMP. LAWS §§ 41.181 through 41.187, 42.15, 42.21, 42.23 (2020) (townships). MICH. CONST. art. VII, § 22; MICH. COMP. LAWS §§ 66.2, 66.4, 66.6, 66.7, 66.9, 67.1, 67.1a[1], 78.22a, 78.23, 78.24 (2020) (villages). MICH. CONST. art. VII, § 22; MICH. COMP. LAWS §§ 85.3, 87.20, 88.12, 89.2, 90.1 through 90.18, 91.1, 117.3, 117.4i, 117.4j (2020) (cities).

⁷¹ *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. . . . [I]n 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.”).

⁷² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 2 cmt. (2002).

Today, the State of Michigan delegates to its county and municipal governments the responsibility for establishing and administering indigent defense systems to effectively represent indigent adult defendants who face possible incarceration for crimes in the trial courts. The state has accepted a portion of the responsibility for funding the right to counsel of those defendants, while continuing to delegate a portion of the funding responsibility to its county and municipal governments. The U.S. Supreme Court has never directly announced whether it is unconstitutional for a state to delegate its right to counsel responsibilities to its counties. However, when a state chooses to place this responsibility on local governments, the state must guarantee not only that those local governments are capable of providing adequate representation but also that they are in fact doing so.⁷³

1. The historical background of Michigan's indigent defense systems

Since becoming a state in 1835, Michigan's constitution has always said that defendants in criminal prosecutions have the right to "the assistance of counsel."⁷⁴ At least until the mid-20th century, the Michigan courts held that this state constitutional provision did not guarantee a defendant the right to have counsel appointed by the court, but instead that it guaranteed a defendant the right to have an attorney represent them if the defendant was able to provide that counsel on their own.⁷⁵ Beginning in 1857, if a judge exercised discretion and appointed an attorney to represent a defendant, state law required the county out of which the case arose to pay the attorney.⁷⁶

One hundred years later, in 1957, Michigan statutes for the first time required a judge to appoint counsel to represent indigent defendants in felony and misdemeanor cases.⁷⁷ The county out of

⁷³ Cf. *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (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) (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.'").

⁷⁴ MICH. CONST. of 1835, art. I, § 10; MICH. CONST. of 1850, art. VI, § 28; MICH. CONST. of 1908, art. II, § 19; MICH. CONST. of 1963, art. I, § 20 (in effect today).

⁷⁵ See *People v. Williams*, 195 N.W. 818, 819 (Mich. 1923) ("The State Constitution, art. 2, § 19, secures to an accused the right 'to have counsel for his defense.' This does not mean he shall have counsel at public expense. It is a guaranty of right to employ and have counsel . . ."); *People v. Crandell*, 258 N.W. 224, 226 (Mich. 1935) (reaffirming and applying *Williams*); *People v. Harris*, 253 N.W. 312, 312 (Mich. 1934) (reaffirming *Williams*).

⁷⁶ 1857 Mich. Pub. Acts 109; 1893 Mich. Pub. Acts 96; 1911 Mich. Pub. Acts 23; 1927 Mich. Pub. Acts 175, ch. XV, § 16.

⁷⁷ 1957 Mich. Pub. Act 256 ("Whenever any person charged with having committed any felony or misdemeanor shall be unable to procure counsel . . . the presiding judge shall appoint some attorney to conduct the . . . defense and the attorney so appointed shall be entitled to receive from the county treasurer . . . such an amount as the presiding judge shall in his discretion deem reasonable compensation for the services performed."). As the Michigan Supreme Court noted in 1993:

Appointed counsel had a statutory right to reasonable compensation for services provided to

which the case arose was responsible for paying the attorney “reasonable compensation for the services performed” as determined by the presiding judge.⁷⁸

Michigan’s district courts were established in 1968, to begin functioning on January 1, 1969, with jurisdiction over all misdemeanors that are punishable by imprisonment of not more than one year.⁷⁹ In 1985, the Michigan Supreme Court established by court rule that, for misdemeanor cases, “[t]he political subdivision or subdivision responsible for maintaining, financing, and operating the appointing court are responsible for paying assigned attorneys, regardless of whether the defendant is charged with violating a state law or an ordinance, and regardless of whether a fine or costs are actually assessed.”⁸⁰ Responsibility for funding the operations of each district court, including the cost of court facilities and the salaries and benefits of all court personnel except the judges, is delegated by the state to either the county or to one or more townships, villages, and/or cities served by that district court.⁸¹

Beginning January 1, 2004, the Michigan Supreme Court required every trial court in the state to “adopt a local administrative order that describes the court’s procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court” and to submit that plan to the state court administrator for approval.⁸² Each trial court was also required to annually compile and report the compensation paid to appointed attorneys from public funds.⁸³

In summary, until 2013, the State of Michigan delegated to the trial court judges all responsibility for providing attorneys to represent indigent adult defendants facing possible imprisonment for a crime in Michigan’s trial courts, and the State of Michigan delegated all responsibility for paying the cost of that appointed representation to the local governments that it requires to operate the trial courts.

criminal indigent defendants long before indigent criminal defendants had a right, statutory or otherwise, to appointed counsel. . . . Rather than granting *indigent defendants* the right to court-appointed counsel, the statute [enacted by 1857 Mich. Pub. Acts 109] granted *appointed counsel* the right to receive compensation for providing criminal defense services to the indigent. . . . Indeed, it was not until the enactment of 1957 P.A. 256 that the statute was amended to provide in mandatory terms for the appointment of counsel for indigents facing criminal charges.

Recorder’s Court Bar Ass’n v. Wayne Circuit Court, 503 N.W.2d 885, 892 (Mich. 1993).

⁷⁸ 1957 Mich. Pub. Act 256 and subsequent amendment by 1963 Mich. Pub. Act 132.

⁷⁹ Act 154 of 1968 (codified as amended at Mich. Comp. Laws §§ 600.8101 through 600.8396 (2020)). See MICHIGAN LEGIS. SERV. BUREAU, MICHIGAN MANUAL 2021-2022, at 540.

⁸⁰ MICH. CT. R. 8.202(A).

⁸¹ MICH. COMP. LAWS §§ 600.8103, 600.8104 (2020). See also MICH. COMP. LAWS §§ 600.8251(4), 600.8261, 600.8262, 600.8263, 600.8271, 600.8379, 600.8521 (2020); MICH. CT. R. 8.201.

Generally, which local governments are responsible for funding the operations of a district court depends on whether state law designates the district as first class, second class, or third class. In third class districts, one or more of the townships, villages, and/or cities served by the district court are responsible for funding the district court; in both first-class districts (which have county-wide jurisdiction) and second-class districts (which have jurisdiction over only a specified portion of the geography within the county), the counties served by the district court are responsible for funding the district court. MICH. COMP. LAWS § 600.8103 (2020).

⁸² MICH. CT. R. 8.123 (adopted Dec. 13, 2002, eff. Jan. 1, 2004; repealed Sept. 18, 2019, eff. Jan. 1, 2020). The state court administrator was to approve each trial court’s plan for appointing counsel “if its provisions will protect the integrity of the judiciary.” MICH. CT. R. 8.123(C) (adopted Dec. 13, 2002, eff. Jan. 1, 2004; repealed Sept. 18, 2019, eff. Jan. 1, 2020).

⁸³ MICH. CT. R. 8.123 (adopted Dec. 13, 2002, eff. Jan. 1, 2004; repealed Sept. 18, 2019, eff. Jan. 1, 2020).

2. County and municipal indigent defense systems today

Effective July 1, 2013, Michigan state law defines an indigent criminal defense system as the local governments that fund a trial court.⁸⁴ Under this definition, there is a separate indigent defense system for every judicial circuit court and every district court (and sometimes separate divisions of a district court) in the state.⁸⁵ Each indigent defense system continues to have the same responsibility it has always had for providing the right to counsel and ensuring constitutionally effective assistance of counsel to indigent defendants.

State law does not require indigent defense systems to use any particular method for providing indigent defense services. Each indigent defense system in Michigan determines for itself the method(s) it uses to provide representation to indigent adults charged with crimes in the trial courts.

The State of Michigan requires each indigent defense system (i.e., the local governments that operate them) to pay its “local share” of the cost of providing representation to indigent adult defendants in the trial courts who are charged with a crime that carries the possibility of imprisonment, and the indigent defense system “must not be required to provide funds in excess of its local share.”⁸⁶ For indigent defense systems where more than one municipality is responsible for funding a district court, the municipalities “may agree among themselves” about how to share the responsibility for the cost of providing counsel to indigent defendants, through interlocal agreements.⁸⁷ Local governments are, however, free to spend as much as they wish or determine is necessary to provide effective assistance of counsel to indigent people; it is just that the state cannot require them to spend more, nor can they spend less than their “local share.”

There are 12 separate indigent defense systems within Oakland County. The table below shows for each indigent defense system during fiscal year 2022, the name by which it is known and the local government that is responsible for administering and funding it (by interlocal agreement where they exist and by statute). Although Oakland County statutorily operates two separate indigent defense systems – one for the Sixth Judicial Circuit Court, and one for the 52nd District Court – it treats them as a single indigent defense system for planning and reporting requirements (as allowed by MIDC).

⁸⁴ MICH. COMP. LAWS § 780.983(h) (2020).

⁸⁵ This is because: responsibility for funding the operations of each district court is delegated by the state to either the county or to one or more townships, villages, and/or cities served by that district court, MICH. COMP. LAWS §§ 600.8103, 600.8104 (2020); and responsibility for funding the operations of each judicial circuit court is delegated by the state to the counties served by that judicial circuit, MICH. COMP. LAWS § 600.591 (2020).

⁸⁶ MICH. COMP. LAWS § 780.993(7), (8) (2020). *See* MICH. COMP. LAWS § 780.983(f), (h), (i) (2020).

An indigent defense system’s “local share” is its “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.” MICH. COMP. LAWS § 780.983(i) (2020).

⁸⁷ MICH. COMP. LAWS § 600.8104(3) (2020). *See* MICH. COMP. LAWS §§ 124.1, 124.2, 124.111 through 124.122, 124.501 through 124.512, 124.531 through 124.536 (2020).

Indigent Defense Systems within Oakland County, FY 2022		
Indigent Defense System	Local Government(s) Responsible for Funding	
	by agreement	by statute
43rd District – Ferndale		Ferndale
43rd District – Hazel Park		Hazel Park
43rd District – Madison Heights		Madison Heights
44th District	Royal Oak	Berkley, Royal Oak
45th District	Oak Park	Huntington Woods, Oak Park, Pleasant Ridge, Royal Oak township
46th District	Southfield	Lathrup Village, Southfield, Southfield township
47th District	Farmington, and Farmington Hills ⁸⁸	Farmington, Farmington Hills
48th District	Birmingham ⁸⁹	Birmingham, Bloomfield township, Bloomfield Hills, Keego Harbor, Orchard Lake Village, Sylvan Lake, West Bloomfield township
50th District		Pontiac
51st District		Waterford township
52nd District (four divisions): Division 1 – Novi Division 2 – Clarkston Division 3 – Rochester Hills Division 4 – Troy		Oakland County
6th Circuit		Oakland County

⁸⁸ Since FY 2019, the cities of Farmington and Farmington Hills have worked collectively, along with the 47th District Court in most years, to make decision regarding the indigent defense system. *See* Cities of Farmington and Farmington Hills, Compliance Plan for Indigent Defense Standards 1 – 4 at 3-6 (signed Feb. 20, 2018); City of Farmington, MIDC FY20 Compliance Plan and Cost Analysis Renewal at 1, 9 (undated); City of Farmington, MIDC FY21 Compliance Plan and Cost Analysis Renewal at 1 (May 21, 2020); City of Farmington, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 1-3 (Oct. 4, 2021).

⁸⁹ As of FY 2022, the City of Birmingham is the primary decision-maker regarding the indigent defense system for the 48th District Court. *See* City of Birmingham, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 1-3, 12 (May 27, 2021). In prior fiscal years however, the cities of Birmingham, Bloomfield Hills, and West Bloomfield, and Bloomfield township collectively shared responsibility for indigent defense system administration and funding, largely delegating day-to-day decision-making to the 48th District Court judges. *See* City of Birmingham, MIDC FY21 Compliance Plan and Cost Analysis Renewal at 1-2 (May 5, 2020); City of Birmingham, MIDC FY20 Compliance Plan and Cost Analysis Renewal at 1, 8 (undated); City of Birmingham, Compliance Plan for Indigent Defense Standards 1 – 4 at 3-4, 6 (signed Feb. 20, 2018).

All of the indigent defense systems operating within Oakland County pay private attorneys to represent indigent defendants, through some form of managed assigned counsel system. There are no public defender offices within Oakland County.

3. State-level Michigan Indigent Defense Commission (MIDC) today

The State of Michigan created the Michigan Indigent Defense Commission (MIDC) effective July 1, 2013,⁹⁰ as its first step toward providing some state funding for and some state-level oversight of the right to counsel of indigent adults in criminal cases in the trial courts. MIDC is an autonomous entity within the executive branch of state government, housed within the state's Department of Licensing and Regulatory Affairs (LARA).⁹¹ All funds used by the MIDC are held in the Michigan indigent defense fund within the state treasury.⁹²

MIDC is empowered by state law with three primary responsibilities:⁹³

- to promulgate and oversee implementation of statewide standards, rules, and procedures for indigent criminal defense representation in adult criminal cases in the trial courts;
- to make grants of appropriated state funds to indigent defense systems to comply with statewide standards; and
- to investigate, audit, and review the operations of indigent defense systems to assure their compliance with statewide standards, rules, and procedures.

MIDC does not have any authority over or responsibility for the other types of cases and defendants for which federal law provides a right to counsel (i.e., juvenile delinquency cases and adult criminal appeals) nor for which Michigan law provides a right to counsel (certain civil cases),⁹⁴ and MIDC does not provide direct representation to any persons in any court.

Commission members. As statutorily established, MIDC has 18 voting members and the supreme court chief justice (or their designee) as the one non-voting ex officio member.⁹⁵ All of the voting members are appointed by the governor to serve staggered four-year terms (and continuing until their successor is appointed).⁹⁶ Although the governor must appoint the commission members from among names submitted by a variety of people and groups, the governor may reject the submitted names and request other submissions.⁹⁷ The governor may

⁹⁰ Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Act 93 (codified as subsequently amended at MICH. COMP. LAWS §§ 780.981 through 780.1003).

⁹¹ MICH. COMP. LAWS §§ 780.983(c), 780.985(1)-(2) (2020).

⁹² MICH. COMP. LAWS § 780.1002 (2020).

⁹³ MICH. COMP. LAWS §§ 780.989(1)(a)-(b), (g); 780.993(8) (2020).

⁹⁴ MICH. COMP. LAWS § 780.983 (2020).

⁹⁵ MICH. COMP. LAWS § 780.987(1), (2) (2020).

⁹⁶ Mich. Comp. Laws § 780.987(1), (4) (2020).

⁹⁷ MICH. COMP. LAWS § 780.987(1), (4) (2020). The governor appoints members as follows:

- two members, submitted by the speaker of the house of representatives;
- two members, submitted by the senate majority leader;
- one member, from a list of three names submitted by the supreme court chief justice;
- one member, from a list of three names submitted by the Michigan Judges Association;
- one member, from a list of three names submitted by the Michigan District Judges Association;
- three members, from a list of nine names submitted by the Criminal Defense Attorneys of Michigan;
- one member from a list of three names submitted by the State Bar of Michigan;
- one member, from a list of names submitted by bar associations advocating for minority interest (with each

also remove any member from the commission at any time “for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or for any other good cause.”⁹⁸

MIDC generally meets every other month since December 2014, with additional special meetings as necessary.⁹⁹ Much of MIDC’s work during 2014 and 2015 was devoted to hiring its initial staff, information gathering from justice community stakeholders, establishing the policies and procedures for its operations, and beginning its primary work in developing standards for the delivery of indigent criminal defense services.¹⁰⁰ MIDC carries out its daily work primarily through its executive director and staff.

Executive director & staff. The commission hires an executive director to head MIDC’s central office.¹⁰¹ The executive director assists MIDC in, among other things, preparing the annual budget, developing and implementing standards, and ensuring compliance with MIDC standards.¹⁰² Subject to state appropriations, the executive director hires and supervises the number of staff that MIDC determines is needed.¹⁰³

MIDC’s central office opened in Lansing in February 2015, at the same time that MIDC’s first executive director began work.¹⁰⁴ By year-end MIDC had added three full-time staff: an office administrator and legislative director; a director of training, outreach and support; and a research director; with plans to increase the staff to 16 including the executive director by the fall of 2016.¹⁰⁵

relevant bar association providing one name);

- one member who is either a former county prosecuting attorney or former assistant county prosecuting attorney, from a list of three names submitted by the Prosecuting Attorneys Association of Michigan;
- two members representing the funding unit of a circuit court, from a list of six names submitted by the Michigan Association of Counties;
- one member representing the funding unit of a district court, from a list of three names submitted (in alternating submission) by the Michigan Townships Association or the Michigan Municipal League;
- one member, from a list of three names submitted by the state budget office; and
- one member selected to represent the general public.

People submitted for appointment “must have significant experience in the defense or prosecution of criminal proceedings or have demonstrated a strong commitment to providing effective representation in indigent criminal defense services.” People who are compensated by the state or an indigent defense system, for providing prosecution of or representation to indigent adults in state court, are ineligible. Among the 18 voting members, no more than three former or sitting judges can serve at the same time, and at least two members must be non-attorneys. MICH. COMP. LAWS § 780.987(3) (2020).

⁹⁸ MICH. COMP. LAWS § 780.987(3) (2020).

⁹⁹ *Commission Meetings and Minutes*, MICHIGAN INDIGENT DEF. COMM’N, <https://michiganidc.gov/michigan-indigent-defense-commission/commission-meetings/>.

During 2014, the governor made the first appointments of commission members, and MIDC began meeting regularly in September 2014. MICHIGAN INDIGENT DEF. COMM’N, IMPACT REPORT 7 (2015). At the end of 2015, 15 of 18 voting members were in place along with the one ex officio member. MICHIGAN INDIGENT DEF. COMM’N, IMPACT REPORT 3-7 (2015).

¹⁰⁰ MICHIGAN INDIGENT DEF. COMM’N, IMPACT REPORT 7, 16-21 (2015).

¹⁰¹ MICH. COMP. LAWS § 780.989(1)(c) (2020).

¹⁰² MICH. COMP. LAWS § 780.989(1)(d) (2020).

¹⁰³ MICH. COMP. LAWS § 780.989(1)(d) (2020).

¹⁰⁴ MICHIGAN INDIGENT DEF. COMM’N, IMPACT REPORT 7, 9, 12 (2015).

¹⁰⁵ MICHIGAN INDIGENT DEF. COMM’N, IMPACT REPORT 9-10 (2015).

During 2021, MIDC’s appropriated staffing allowed for 14 total full-time employees:¹⁰⁶

- executive director
- state office administrator / legislative director;
- research director; supported by one research associate;
- grants director; supported by one grants associate;
- training director (and outreach and support); supported by one training analyst; and
- six regional managers.

The six regional managers have the most direct and on-going contact with the approximately 120 local indigent defense systems currently operating throughout the state.¹⁰⁷ Each regional manager has primary responsibility for the indigent defense systems within a particular region of the state, designated by MIDC as: Lapeer, Macomb, Oakland and St. Clair counties; Middle Michigan; Northern Michigan; South Central Michigan; Wayne County; and Western Michigan.¹⁰⁸ At the time of this evaluation, Oakland County is in the Lapeer, Macomb, Oakland and St. Clair counties region that includes 21 indigent defense systems that serve 31 trial court locations across four counties. The regional managers assist indigent defense systems with completing, submitting, and amending compliance plans and cost analyses; observe trial proceedings and interview stakeholders and policymakers in the localities; and make presentations to the commissioners on issues relating to the indigent defense systems for which they are responsible.

Statewide standards. Michigan law requires MIDC to develop “minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and this act.”¹⁰⁹ The authorizing statute includes a lengthy list of types of substantive standards that MIDC is required to promulgate,¹¹⁰ including most broadly “to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the Constitution of the United States and section 20 of article I of the state constitution of 1963.”¹¹¹ Pursuant to this authority, as of October 2021, MIDC has promulgated nine standards.¹¹²

As part of its considerations in promulgating a standard, MIDC must conduct a public hearing, and after MIDC approves the standard, it must submit the proposed standard to the Department of Licensing and Regulatory Affairs (LARA) for approval or rejection.¹¹³ State law does not appear to prescribe any timeline within which LARA must act on MIDC’s submission. A standard approved by MIDC is not final and does not take effect until it is approved by LARA.¹¹⁴

¹⁰⁶ MICHIGAN INDIGENT DEF. COMM’N, ANNUAL IMPACT REPORT 3 (2021); MICHIGAN INDIGENT DEF. COMM’N, ANNUAL IMPACT REPORT 6 (2020).

¹⁰⁷ See MICHIGAN INDIGENT DEF. COMM’N, ANNUAL IMPACT REPORT 9 (2021).

¹⁰⁸ *Regional Manager Assignments*, MICHIGAN INDIGENT DEF. COMM’N (Spring 2022), <https://michiganidc.gov/wp-content/uploads/2022/03/Regional-Manager-Assignments-Spring-2022.pdf>.

¹⁰⁹ MICH. COMP. LAWS § 780.989(1)(a) (2020). See also MICH. COMP. LAWS § 780.985(3) (2020).

¹¹⁰ MICH. COMP. LAWS § 780.991 (2020).

¹¹¹ MICH. COMP. LAWS § 780.991(2) (2020).

¹¹² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES (Oct. 2021).

¹¹³ MICH. COMP. LAWS § 780.985(4) (2020).

¹¹⁴ MICH. COMP. LAWS § 780.985(4) (2020).

As of October 2021, LARA has approved six of the nine standards submitted by MIDC.¹¹⁵

The table below shows all MIDC standards and their approval status.¹¹⁶ These MIDC standards and their effect on indigent defense representation are explained in detail in the subsequent chapters where they have relevance.

In many instances, MIDC has produced additional materials to aid indigent defense system officials and criminal justice stakeholders in applying MIDC standards.¹¹⁷ For example: in conjunction with *Standard 1*, MIDC published a set of *Guidelines for Trainers and Training Providers*,¹¹⁸ and following approval of the *Standard for Determining Indigency and Contribution*, MIDC published answers to frequently asked questions about the indigency standard.¹¹⁹

MIDC standard	Status
Standard 1 - education and training of defense counsel	LARA approved, May 22, 2017
Standard 2 - initial interview	LARA approved, May 22, 2017
Standard 3 - investigation and experts	LARA approved, May 22, 2017
Standard 4 - counsel at first appearance and other critical stages	LARA approved, May 22, 2017
Standard 5 - independence from the judiciary	LARA approved, Oct. 29, 2020
Standard 6 - indigent defense workloads	MIDC submitted Sept. 2018 & amended June 2019
Standard 7 - qualification and review	MIDC submitted Sept. 2018 & amended June 2019
Standard 8 - attorney compensation (economic disincentives or incentives)	MIDC submitted Sept. 2018 & amended June 2019
Standard for determining indigency and contribution	LARA approved, Oct. 28, 2021

Grants of state funds. Michigan law requires MIDC to make grants of state funds to indigent defense systems “to assist in bringing the systems into compliance with minimum standards established by the MIDC.”¹²⁰

Each year, MIDC is required to submit a report requesting the state to appropriate the funds necessary for all indigent defense systems to comply with all final MIDC standards, taking into

¹¹⁵ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021).

¹¹⁶ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021).

¹¹⁷ MIDC notes that every fully approved standard has been accompanied by at least a full white paper or FAQ document explaining the details of implementation. MIDC also conducts webinars, and for the indigency standard MIDC created decision-trees and scenario examples.

¹¹⁸ MICHIGAN INDIGENT DEF. COMM’N, GUIDELINES FOR TRAINERS AND TRAINING PROVIDERS 1 (undated), <https://michiganidc.gov/wp-content/uploads/2022/02/Guidelines-for-Trainers-and-Training-Providers.pdf>.

¹¹⁹ MICHIGAN INDIGENT DEF. COMM’N, FREQUENTLY ASKED QUESTIONS ABOUT THE INDIGENCY STANDARD (Feb. 2022), <https://michiganidc.gov/wp-content/uploads/2022/02/Answers-to-FAQs-about-the-Indigency-Standard-Feb2022.pdf>.

¹²⁰ MICH. COMP. LAWS § 780.993(7), (8) (2020).

consideration the “local share” of funding that each indigent defense system remains required to fund.¹²¹ Then:

The legislature shall appropriate to the MIDC the additional funds necessary for a system to meet and maintain those minimum standards, which must be provided to indigent criminal defense systems through grants The legislature may appropriate funds that apply to less than all of the minimum standards and may provide less than the full amount of the funds requested [I]t is the intent of the legislature to fund all of the minimum standards contained in the [MIDC] report . . . within 3 years of the date on which the minimum standards were adopted.¹²²

MIDC must issue a grant to every indigent defense system every year, even if that is “a zero-grant reflecting that it will receive no grant funds.”¹²³ This can occur if, for example, the cost to an indigent defense system of complying with all final MIDC standards can be met within the limits of that system’s “local share.”¹²⁴

Since its creation, MIDC has made standards compliance grants of state funds to indigent defense systems in four fiscal years, as shown in the table below .¹²⁵

MIDC standards compliance grants & Local share spending, FY 2019 through FY 2022				
Fiscal Year	MIDC standards compliance grant	Lapsed MIDC standards compliance grant	Local share spending	Total indigent defense system spending
FY 2019	\$85,614,811	\$1,145,123	\$37,925,642	\$124,685,576
FY 2020	\$117,424,880		\$40,274,102	\$157,698,982
FY 2021	\$129,127,392		\$38,486,171	\$167,613,563
FY 2022	\$138,348,406		\$38,146,902	\$176,495,353

Monitoring and enforcement. Michigan law requires MIDC to monitor every indigent defense system within the state to ensure compliance with MIDC’s standards, rules, and procedures.¹²⁶

¹²¹ MICH. COMP. LAWS § 780.993(5), (6) (2020).

¹²² MICH. COMP. LAWS § 780.993(7) (2020).

¹²³ MICH. COMP. LAWS § 780.993(12) (2020).

¹²⁴ MICH. COMP. LAWS § 780.993(9) (2020).

¹²⁵ MICHIGAN INDIGENT DEF. COMM’N, 2019 IMPACT REPORT 13 (FY 2019 funding by indigent defense system, available at <https://michiganidc.gov/wp-content/uploads/2019/03/Approved-MIDC-grant-totals-FY19.pdf>); MICHIGAN INDIGENT DEF. COMM’N, 2020 ANNUAL IMPACT REPORT 8 (FY 2020 funding by indigent defense system expended through Apr. 21, 2020, available at <https://michiganidc.gov/wp-content/uploads/2020/04/MIDC-FY20-total-grant-funding-approved-for-website.pdf>); MICHIGAN INDIGENT DEF. COMM’N, ANNUAL IMPACT REPORT 2021 at 6 (FY 2021 funding by indigent defense system expended through Apr. 21, 2021, available at <https://michiganidc.gov/wp-content/uploads/2021/05/FY21-Approved-Totals-MIDC-website.pdf>); FY 2022 funding by indigent defense system as approved through Feb. 15, 2022, available at <https://michiganidc.gov/wp-content/uploads/2022/06/Final-FY22-approved-totals-including-mediation.pdf>.

¹²⁶ MICH. COMP. LAWS § 780.989(1)(b) (2020).

This is true without regard to whether an indigent defense system seeks or receives state grant funding through MIDC.

MIDC is required to collect and report data about every indigent defense system in the state and their operations,¹²⁷ and every indigent defense system “shall” comply with MIDC’s efforts.¹²⁸ Among other things, MIDC must require each indigent defense system to provide documentation of all expenditures.¹²⁹ As required, MIDC has publicly available policies and procedures that govern its collection of information from indigent defense systems,¹³⁰ which it conducts primarily through the receipt from each indigent defense system of an annual compliance plan and cost analysis, the contract for each annual grant, and quarterly compliance plan progress reports (PR) and financial status reports (FSR).¹³¹ Although MIDC typically does not make publicly available the information that each indigent defense system is required to report, the approved compliance plan and cost analysis for each indigent defense system in FY 2020 is available in MIDC’s annual report.¹³²

Michigan law authorizes MIDC to take court action to enforce compliance by an indigent defense system with its approved standards.¹³³ If a court finds that an indigent defense system is in breach of its statutory “duty to comply” with MIDC standards,¹³⁴ the court may “issue any orders necessary to obtain compliance.”¹³⁵ If the system still refuses or fails to comply, the court can order MIDC to take over the delivery of indigent defense services in that jurisdiction and to bill the local government for its costs.¹³⁶

4. Continually evolving interactions between local governments and the MIDC in providing indigent defense services

The process of shifting right to counsel responsibilities from each indigent defense system to the state occurs in steps under Michigan law, with each new step commencing only when a new MIDC standard is approved by LARA. Once a new MIDC standard is approved by LARA (which can occur at any time after MIDC submits a standard to LARA),¹³⁷ each indigent defense

¹²⁷ MICH. COMP. LAWS §§ 780.989(1)(f), 780.989(2) (2020).

¹²⁸ MICH. COMP. LAWS § 780.993(1) (2020).

¹²⁹ MICH. COMP. LAWS § 780.993(14)(a) (2020).

¹³⁰ MICH. COMP. LAWS §§ 780.989(1)(a), (f), (h), 780.989(5), (6) (2020); MICHIGAN INDIGENT DEF. COMM’N, GRANT MANUAL (rev’d Feb. 2021), <https://michiganidc.gov/wp-content/uploads/2021/02/Grant-Manual-Final-MIDC-Approved-February-2021.pdf>; MICHIGAN INDIGENT DEF. COMM’N, COMPLIANCE REPORTING INSTRUCTIONS (rev’d Jan. 2021), https://michiganidc.gov/wp-content/uploads/2021/01/Compliance-Reporting-Instructions_Revised-January-2021.pdf.

¹³¹ See MICHIGAN INDIGENT DEF. COMM’N, GUIDE FOR REPORTING COMPLIANCE WITH STANDARDS AND DISTRIBUTION OF GRANT FUNDS (rev’d Dec. 2018), <https://michiganidc.gov/wp-content/uploads/2018/12/MIDC-Guide-for-Reporting-REVISED-December-2018.pdf>.

¹³² MICHIGAN INDIGENT DEF. COMM’N, 2020 ANNUAL IMPACT REPORT 9 (FY 2020 approved compliance plans & cost analysis by indigent defense system, available at https://drive.google.com/drive/folders/1X8ln-Hsq73OXSKo_CR1PVwwFIR0_OqXQ).

¹³³ MICH. COMP. LAWS § 780.995(1)-(4) (2020).

¹³⁴ MICH. COMP. LAWS § 780.997(1) (2020).

¹³⁵ MICH. COMP. LAWS § 780.995(4) (2020).

¹³⁶ MICH. COMP. LAWS §§ 780.995(5)-(7), 780.997(3) (2020).

¹³⁷ MICH. COMP. LAWS §§ 780.985(4), 780.993(3) (2020).

system has 180 days to submit to MIDC a compliance plan, explaining how the system will comply with the new standard and its anticipated cost of doing so.¹³⁸ MIDC must approve or deny the compliance plan within 90 days of its submission, however there can be up to three rounds of submission (with the system having 60 days to resubmit each round), before the matter must be referred to a mediator.¹³⁹

MIDC then requests the state to appropriate the funds that MIDC, through approving each system's plan, determines are necessary for all indigent defense systems to comply with all final MIDC standards (that had been approved by LARA sufficiently in advance to allow the required process to occur¹⁴⁰), taking into consideration the "local share" of funding that each indigent defense system remains required to fund.¹⁴¹ The legislature makes its appropriation to MIDC each year on October 1, though MIDC generally learns its funding for the upcoming fiscal year by mid-summer. Assuming that the legislature allocates sufficient funding to MIDC,¹⁴² MIDC makes a grant of state funds to each indigent defense system to meet the terms of its approved plan, with the funding typically distributed in either three or four disbursements beginning on October 1.¹⁴³

Once an indigent defense system receives the necessary grant of state funds from MIDC, the indigent defense system must comply with the MIDC approved plan within 180 days, unless MIDC authorizes a longer period for the system to come into compliance.¹⁴⁴

An indigent defense system cannot be required to comply with any MIDC standard if the state does not appropriate adequate state funds and/or the MIDC does not distribute those funds through a grant to the system.¹⁴⁵ Although MIDC has wide-ranging authority and responsibilities to collect and report data about the operations of every indigent defense system and every indigent defense system must cooperate to provide that data to MIDC,¹⁴⁶ MIDC is prohibited from requiring any indigent defense system to provide services in excess of those mandated through MIDC's approved standards.¹⁴⁷

¹³⁸ MICH. COMP. LAWS § 780.993(2)-(3) (2020).

¹³⁹ MICH. COMP. LAWS §§ 780.993(4), 780.995 (2020).

¹⁴⁰ The MIDC funds requests that are "reasonably and directly related to an indigent defense function." MICH. COMP. LAWS § 780.993(4) (2020). There is no provision stating that MIDC must wait until a standard is fully approved by LARA to fund systems for other defense functions. In fact, the MIDC notes that it has never rejected a request to fund a system wanting to come into compliance with all nine promulgated standards or other best practices such as holistic defense, regionalization of services, etc.

¹⁴¹ MICH. COMP. LAWS § 780.993(5), (6) (2020).

¹⁴² MICH. COMP. LAWS § 780.993(7) (2020).

¹⁴³ MICH. COMP. LAWS § 780.993(7)-(10) (2020).

¹⁴⁴ MICH. COMP. LAWS § 780.993(11) (2020).

¹⁴⁵ MICH. COMP. LAWS §§ 780.993(7), (8), 780.997(2) (2020). MIDC notes that all local systems must adhere to all MIDC standards and must submit an annual plan of compliance, regardless of whether they accept state grant funds. *See* MICHIGAN INDIGENT DEF. COMM'N, GRANT MANUAL 2 (rev'd Feb. 2021) ("Indigent Criminal Defense System Creates Compliance Plan"), <https://michiganidc.gov/wp-content/uploads/2021/02/Grant-Manual-Final-MIDC-Approved-February-2021.pdf>; MICH. COMP. LAWS § 780.993 (2020).

¹⁴⁶ MICH. COMP. LAWS §§ 780.989(1)(f), 780.989(2), 780.993(1) (2020).

¹⁴⁷ MICH. COMP. LAWS § 780.989(1)(b) (2020).

This is a cumulative process for each indigent defense system because the system must continue to fulfill all MIDC standards approved in the past, and, theoretically at least, new MIDC standards and policies could alter the ways in which past standards must be implemented. Meanwhile, even as all these processes occur, each indigent defense system must continue to budget for and administer the provision of effective assistance of counsel and fulfill its on-going reporting duties to MIDC; and in some circumstances the indigent defense system must submit a compliance plan & cost analysis for a new standard even before it has been able to implement its current approved compliance plan.

The table on page 42-43 illustrates how these procedures have played out between MIDC and the indigent defense systems, beginning when MIDC's first four standards were approved by LARA on May 22, 2017, and continuing through the ensuing requirement deadlines for all MIDC standards presently in effect. It is against this backdrop that the right to counsel for indigent adults, facing possible imprisonment in criminal cases in the trial courts within Michigan, is provided by each indigent defense system.

FISCAL YEAR	YR/ MON	STD SUBMITTED BY MIDC	STD APPROVED BY LARA	ANN'L COMPL PLAN & COST ANALYSIS DUE	MIDC AP-PROVAL/ DENIAL DUE	LEGISLATIVE APPROPR	MIDC GRANT DISTRIB	STD COMPLIANCE EFFECTUATED	QRT PR & FSR DUE
FY2017	17 May		Stds 1 thru 4						
FY2018	17 Nov			for FY2019 - Stds 1 thru 4					
	18 Feb				for FY2019 - Stds 1 thru 4				
	18 July					for FY2019 - Stds 1 thru 4			
	18 Sept	Stds 5 thru 8							
FY2019	18 Oct						for FY2019, 1st disb - Stds 1 thru 4		
	19 Jan								for FY2019, Oct thru Dec - Stds 1 thru 4
	19 Apr			for FY2020 - Stds 1 thru 4			for FY2019, 2nd disb - Stds 1 thru 4	Stds 1 thru 4	for FY2019, Jan thru Mar - Stds 1 thru 4
	19 July				for FY2020 - Stds 1 thru 4	for FY2020 - Stds 1 thru 4	for FY2019, 3rd disb - Stds 1 thru 4		for FY2019, Apr thru June - Stds 1 thru 4
FY2020	19 Oct						for FY2020, 1st disb - Stds 1 thru 4		for FY2019, July thru Sept - Stds 1 thru 4
	20 Jan								for FY2020, Oct thru Dec - Stds 1 thru 4
	20 Apr							Stds 1 thru 4	for FY2020, Jan thru Mar - Stds 1 thru 4
	20 May						for FY2020, 2nd disb - Stds 1 thru 4		
	20 June			for FY2021 - Stds 1 thru 4					
	20 July					for FY2021 - Stds 1 thru 4			for FY2020, Apr thru June - Stds 1 thru 4
	20 Aug						for FY2020, 3rd disb - Stds 1 thru 4		
	20 Sept				for FY2021 - Stds 1 thru 4				

FISCAL YEAR	YR/ MON	STD SUBMITTED BY MIDC	STD APPROVED BY LARA	ANN'L COMPL PLAN & COST ANALYSIS DUE	MIDC APPROVAL/ DENIAL DUE	LEGISLATIVE APPROPR	MIDC GRANT DISTRIB	STD COMPLIANCE EFFECTUATED	QRT PR & FSR DUE
FY2021	20 Oct	Std indig	Std 5				for FY2021, 1st disb - Stds 1 thru 4		for FY2020, July thru Sept - Stds 1 thru 4
	21 Jan								for FY2021, Oct thru Dec - Stds 1 thru 4
	21 Apr			for FY2022 - Stds 1 thru 4 AND Std 5				Stds 1 thru 4	for FY2021, Jan thru Mar - Stds 1 thru 4
	21 May						for FY2021, 2nd disb - Stds 1 thru 4		
	21 July				for FY2022 - Stds 1 thru 4 AND Std 5	for FY2022 - Stds 1 thru 4 AND Std 5			for FY2021, Apr thru June - Stds 1 thru 4
	21 Aug						for FY2021, 3rd disb - Stds 1 thru 4		
FY2022	21 Oct		Std indig				for FY2022, 1st disb - Stds 1 thru 4 AND Std 5		for FY2021, July thru Sept - Stds 1 thru 4
	22 Jan						for FY2022, 2nd disb - Stds 1 thru 4 AND Std 5		for FY2022, Oct thru Dec - Stds 1 thru 4 AND Std 5
	22 Apr			for FY2023 - Stds 1 thru 5 AND Std indig			for FY2022, 3rd disb - Stds 1 thru 4 AND Std 5	Stds 1 thru 4 AND Std 5	for FY2022, Jan thru Mar - Stds 1 thru 4 AND Std 5
	22 July				for FY2023 - Stds 1 thru 5 AND Std indig	for FY2023 - Stds 1 thru 5 AND Std indig	for FY2022, 4th disb - Stds 1 thru 4 AND Std 5		for FY2022, Apr thru June - Stds 1 thru 4 AND Std 5
FY2023	22 Oct						for FY2023, 1st disb - Stds 1 thru 5 AND Std indig		for FY2022, July thru Sept - Stds 1 thru 4 AND Std 5
	23 Jan						for FY2023, 2nd disb - Stds 1 thru 5 AND Std indig		for FY2023, Oct thru Dec - Stds 1 thru 5 AND Std indig
	23 Apr						for FY2023, 3rd disb - Stds 1 thru 5 AND Std indig	Stds 1 thru 5 AND Std indig	for FY2023, Jan thru Mar - Stds 1 thru 5 AND Std indig
	23 July						for FY2023, 4th disb - Stds 1 thru 5 AND Std indig		for FY2023, Apr thru June - Stds 1 thru 5 AND Std indig
FY2024	23 Oct								for FY2023, July thru Sept - Stds 1 thru 5 AND Std indig

BARRIERS TO MEANINGFUL DISCUSSION AND DEBATE ON CRITICAL RIGHT TO COUNSEL POLICIES

As part of its responsibility for providing oversight of the right to counsel, MIDC is required make publicly available on its website its annual report,^a budget, and a listing of all grant disbursements to local governments.^b However, MIDC is not statutorily required to publish on its website all local indigent defense system compliance plans approved by MIDC. MIDC also does not collect, produce, and publish reports of relevant information about the provision of indigent defense services in each jurisdiction.^c

For example, although Michigan law establishes certain municipalities as responsible for administering and funding the indigent defense system in a particular judicial district, those local governments can agree to allocate that responsibility in a manner different than provided by statute,^d and MIDC does not require those governments to provide copies of their interlocal agreements (in jurisdictions where they exist) or otherwise explain how shared administrative and financial decisions are made.

Or take the 47th district court, which by statute consists of the cities of Farmington and Farmington Hills.^e As there is no interlocal agreement, the two cities are jointly responsible for administering and funding the indigent defense system. In cooperation with the district court, the cities jointly developed the indigent defense system's initial MIDC compliance plan for fiscal year 2019, placing day-to-day administration under the auspices of the court administration.^f The district court administrator remained primary point of contact with MIDC through October 2021, at which time that individual retired. However, the city of Farmington subsequently hired the former district court administrator on a part-time basis to continue serving as "primary contact" for compliance reporting purposes and to maintain the system day-to-day as "assigned counsel administrator."^g As of fiscal year 2022, only city of Farmington officials are listed on MIDC compliance planning documents for fiscal reporting purposes^h; there is no explanation given for why there are no representatives of Farmington Hills listed in the MIDC compliance materials.

^a MICH. COMP. LAWS § 780.985(7) (2020).

^b MICH. COMP. LAWS § 780.999 (2020).

^c By way of contrast to the practice in Michigan, consider the Texas Indigent Defense Commission (TIDC). Texas law requires the judges with jurisdiction over criminal cases in each county to adopt a countywide plan (including any rules, forms, plans, proposals, and contracts) for providing counsel to indigent defendants at trial and appeal for crimes punishable by incarceration, which the judges of each county must submit bi-annually to the TIDC. TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2021); TEX. GOV'T CODE ANN. § 79.036(a)-(d) (West 2021). TIDC publishes on its website the plans adopted by all 254 counties. See *Current Indigent Defense Plan, Indigent Defense Data for Texas*, TEXAS INDIGENT DEF. COMM'N, <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>.

Texas law also requires each county to report to TIDC among other things:

- all of the county's indigent defense spending for attorney fees and defense expenses in criminal cases and in juvenile cases, at both trial and appeal (broken down by the individual trial

courts that approved the spending),

- any costs the county incurs in administering the indigent defense system used in the cases arising out of the courts located within the county, and
- the number of payments made to appointed attorneys plus the number of cases disposed of by any public defender office (broken down by case type, and also broken down by the individual trial courts in which the payments were approved or the public defender office cases were disposed),

which TIDC makes freely available to the public on its website. See TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(4) (West 2021); TEX. GOV'T CODE ANN. § 79.036(a-1), (e) (West 2021); *Texas Counties*, TEXAS INDIGENT DEF. COMM'N, <http://tidc.tamu.edu/public.net/>.

^d In third class districts with two or more funding units, Michigan law permits one municipality to act as "district control unit" for that district court through interlocal agreement between its companion district funding units, in which the municipality holds primary (or even total) responsibility for maintaining, financing, and operating the district court physically located within the municipality. See MICH. COMP.

Because MIDC does not make the local governments' compliance plans publicly available, policymakers and citizens alike do not readily have access to information regarding which local government entity(ies) and local official(s) have day-to-day authority over each jurisdiction's indigent defense system. It is not possible for stakeholders to engage meaningfully (if at all) in local policy discussions on a core constitutional right without knowing *who has decision-making authority* in the jurisdiction.

Likewise, Michigan lawmakers and the general public have no way of easily accessing information about:

- each jurisdiction's method of providing right to counsel services;
- the number of attorneys providing services within the indigent defense system;
- the number and types of indigent defense trial-level cases being handled by that system;
- the indigent defense system's total expenditures, including spending on attorneys' fees, investigation, experts, and other case-related expenses or overhead; or

- the amount of funds collected from indigent defendants as attorneys' fees, how much of that revenue is remitted to the state and how much is kept by local government, and how those revenues are spent.

(Each of these topics are discussed in the remaining chapters of this report.)

To obtain this information, one must submit a Freedom of Information Act (FOIA) request to MIDC and/or LARA. MIDC assigns one staff attorney responsible for fulfilling all FOIA requests, which can take up significant resources and time. Given the resources involved in processing some FOIA requests, LARA sometimes passes onto the requesting party a portion of its production cost, and in some circumstances waives the statutory deadline of 3-10 business days for fulfilling individual requests.ⁱ The logistical and financial hurdles to obtain information regarding the delivery of indigent defense services across Michigan can have the effect of chilling public policy debate on the important issues raised in this report.

LAWS §§ 600.8104(2), 600.8251(4), 600.8261, 600.8262, 600.8263 (2020). Because the indigent defense system in each jurisdiction is defined as the "local unit of government that funds a trial court," MICH. COMP. LAWS § 780.983(h) (2020), these interlocal agreements establish which local government(s) actually is responsible for the indigent defense system in each judicial district.

^e MICH. COMP. LAWS § 600.8123(5) (2020).

^f Cities of Farmington and Farmington Hills, Compliance Plan for Indigent Defense Standards 1 – 4 at 3-6 (signed Feb. 20, 2018) (on file with 6AC).

^g City of Farmington, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 3, 13, 24-25 (Oct. 4, 2021).

^h City of Farmington, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 2 (Oct. 4, 2021).

ⁱ For example, in conducting this study, the Sixth Amendment Center submitted FOIA requests for documents showing

FY2019 through FY2022 income and expenditures 43rd District Court-Hazel Park, 48th District Court, 50th District Court, the 52nd District Court, and the Sixth Judicial Circuit Court. The request took eight weeks to process, for which LARA billed \$428.28. A second FOIA request for similar documents from 43rd District Court 43-Ferndale, the 43rd District Court-Madison Heights, the 44th District Court, the 45th District Court, the 46th District Court, the 47th District Court, and the 51st District Court took approximately six weeks to process, for which LARA billed \$323.60. That is a total of \$751.88 for only income and expenditure data (as opposed to all indigent defense system compliance plan materials) from indigent defense systems within a single county over three fiscal years. A FOIA request for complete indigent defense system information for all systems within all 83 counties statewide would cause enormous hardship on MIDC staff, and likely would be cost prohibitive for the average citizen making the request.

CHAPTER III.

PROVIDING QUALIFIED, TRAINED, AND SUPERVISED ATTORNEYS TO REPRESENT INDIGENT PEOPLE

Before any individual attorney can be appointed to represent any individual defendant, the indigent defense system must first select the attorneys who are available to be appointed. In *Powell v. Alabama* – the case the U.S. Supreme Court points to in *United States v. Cronic* as representative of the constructive denial of the right to counsel¹⁴⁸ – 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.¹⁴⁹ The *Powell* Court concluded that defendants require the “guiding hand” of counsel;¹⁵⁰ that is, the attorneys a government provides to represent indigent people must be qualified and trained to help those people advocate for their stated legal interests.

Although attorneys graduate from law school with a strong understanding of the principles of law and legal theory and generally how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be a criminal defense lawyer.¹⁵¹ Expertise and skill must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them.

To ensure that attorneys continue to be competent from year to year to represent indigent defendants in the types of cases they are assigned, national standards require that the indigent

¹⁴⁸ *United States v. Cronic*, 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.”).

¹⁴⁹ *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local Alabama attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

¹⁵⁰ *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.”).

¹⁵¹ 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) (“[B]ecause 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.”).

defense system provide attorneys with access to a “systematic and comprehensive” training program,¹⁵² at which attorney attendance is compulsory.¹⁵³ Training must be tailored to the types and levels of cases for which the attorney is appointed.¹⁵⁴ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Ongoing training, therefore, is an active part of the job of being an indigent defense system attorney.

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competency to handle cases over time, and indigent people do not get to choose which attorney is assigned to represent them. National standards require that all indigent defense system attorneys must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent client.¹⁵⁵ Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer appointed if they are no longer competent.

For all of these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.¹⁵⁶ As national standards explain, an attorney’s ability to provide effective representation in a criminal case depends on their familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”¹⁵⁷ The American Bar Association has observed that “[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.”¹⁵⁸

A. Selecting qualified indigent defense system attorneys

Michigan statutes and court rules do not establish any particular qualifications, skills, or level of expertise that an attorney must possess, other than being licensed to practice law in Michigan, before they are eligible to represent an indigent adult in any criminal case in the trial courts.

On May 22, 2017, LARA approved MIDC *Standard 1 – Education and Training of Defense Counsel*.¹⁵⁹ Every indigent defense system in the state has been required to comply with *Standard 1* since roughly April 2019, through state grant funds distributed for that purpose beginning

¹⁵² NATIONAL ADVISORY COMM’N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std. 13.16 (1973). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(b) (4th ed. 2017).

¹⁵³ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 9 & cmt. (2002).

¹⁵⁴ AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed. 2017).

¹⁵⁵ *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 10 (2002).

¹⁵⁶ *See, e.g.*, AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 6 & cmt. (2002).

¹⁵⁷ NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

¹⁵⁸ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992).

¹⁵⁹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(A)-(C) (Oct. 2021).

October 2018. MIDC’s *Standard 1* requires that, to be eligible to serve as appointed counsel, all indigent defense system attorneys shall:¹⁶⁰

- “have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices;”
- “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;” and
- “be reasonably able to use office technology commonly used in the legal community, and technology used within the applicable court system” and “be reasonably able to thoroughly review materials that are provided in an electronic format.”

Each indigent defense system is free to establish additional qualifications required for the attorneys it makes available to represent indigent people.¹⁶¹

On October 29, 2020, LARA approved MIDC *Standard 5 – Independence from the Judiciary*.¹⁶² This approval set in motion the process explained in chapter II by which every indigent defense system in the state is required to comply with *Standard 5* by roughly April 2022. *Standard 5* states explicitly that “[t]he selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary.”¹⁶³ *Standard 5* also requires that, while 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,” the judges’ role “shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver [of the right to counsel]).”¹⁶⁴

By April 2022, each indigent defense system is responsible for providing attorneys to represent indigent adult defendants facing possible imprisonment for a crime in each of the trial courts served by that system. To aid indigent defense systems in carrying out this responsibility, in February 2021 MIDC published a policy document – *Frequently Asked Questions about Standard 5* – which directs each indigent defense system to use a licensed Michigan attorney as an “independent appointing attorney” to oversee the selection, appointment, and compensation of appointed attorneys.¹⁶⁵

MIDC requires each indigent defense system to identify: by name and bar number each attorney intended to work within its indigent defense system; and for attorneys available to be appointed

¹⁶⁰ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(A)-(C) (Oct. 2021) (defining “[r]easonable knowledge” as meaning “knowledge of which a lawyer competent under [Michigan Rules of Professional Conduct] 1.1 would be aware”).

¹⁶¹ See, e.g., MICH. COMP. LAWS §§ 42.9, 45.515, 45.558, 45.563-.564, 62.2, 85.3, 117.4(j) (2020).

¹⁶² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 6, std. 5 (Oct. 2021).

¹⁶³ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 6, std. 5 (Oct. 2021).

¹⁶⁴ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 6, std. 5 (Oct. 2021).

¹⁶⁵ MICHIGAN INDIGENT DEF. COMM’N, FREQUENTLY ASKED QUESTIONS ABOUT STANDARD 5, question 1 (Feb. 2021). MIDC policy encourages indigent defense systems to “creat[e] an attorney selection panel or board with local criminal justice stakeholders” and to “craft[] application procedures and policies for approving and selecting eligible defense counsel.” *Id.*, question 2.

also their number of years of prior criminal defense experience.¹⁶⁶ Data provided by Oakland County shows that, as of July 2021, there are 287 attorneys who accept indigent defense system appointments in the trial courts located in Oakland County (all of whom may also accept indigent defense system appointments in the trial courts located in other counties):

- 83 attorneys accept appointments for both the circuit and one or more district courts;
- 70 attorneys accept appointments only for the circuit court;
- 134 attorneys accept appointments only for one or more district courts (on average, the attorneys appear as assigned counsel in three different district courts).

1. Attorneys in the indigent defense systems operated by Oakland County government

Prior to October 2021, three trial court clerks in the Sixth Judicial Circuit Court and four trial court clerks in the 52nd District Court (one in each of the four divisions) maintained the schedules and assignments of attorneys to represent indigent defendants in their respective trial courts. In October 2021, in response to MIDC *Standard 5* requiring independence from the judiciary, Oakland County created within the county executive's office an indigent defense services office to administer, select, and pay attorneys to represent indigent people in the Sixth Judicial Circuit Court and in the four divisions of the 52nd District Court.¹⁶⁷

The indigent defense services office is overseen by a chief attorney, who also serves as the independent appointing authority required by MIDC. The chief attorney is a full-time county employee who devotes 100% of his time to managing the indigent defense system in Oakland County and does not personally represent indigent defendants. The chief attorney reports to the Oakland County chief deputy county executive.

In its June 2021 job posting for the position of chief attorney, the only qualification Oakland County required was a valid license to practice law in the State of Michigan.¹⁶⁸ The person hired as chief attorney in 2021 was previously an assistant prosecuting attorney in Oakland County for nine years and then an attorney in the Oakland County corporation counsel's office for three years.

¹⁶⁶ See MICHIGAN INDIGENT DEF. COMM'N, COMPLIANCE PLAN FOR INDIGENT DEFENSE STANDARDS 1 – 4: COMPLIANCE PLAN NARRATIVE 5 (Aug. 2017). MIDC similarly requires all indigent defense systems to report annually the attorneys providing services (name and bar license number) in their jurisdictions.

¹⁶⁷ See OAKLAND COUNTY, MICHIGAN, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), Policy at 1 (eff. Dec 2, 2021), [https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf); *Indigent Defense Services Office: About the MIDC*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/idso/about/Pages/default.aspx>.

¹⁶⁸ See Oakland County, Michigan, Job Description: Chief Attorney Indigent Defense (June 9, 2021) (listing “additional desirable qualifications” as including: “1. Significant knowledge of Michigan criminal law and procedure. 2. Considerable knowledge of grant policies and procedures, and the ability to produce high-quality compliance plans for submissions to the Michigan Indigent Defense Commission. 3. The ability to produce a list of all criminal trials conducted by the candidate, including the nature of the charge(s) and whether the candidate represented an indigent criminal defendant, a retained criminal defendant, or the People of the State of Michigan during the trial. 4. Knowledge of principles and practices related to supervision, selection, hiring, work planning, performance review and evaluation, employee training, and discipline. 5. Excellent oral and written communication skills. 6. Demonstrated ability to exercise the appropriate techniques for dealing with a variety of individuals from various socio-economic, ethnic, and cultural backgrounds, in person and over the phone.”).

At the time the office was established, the seven trial court clerks who had previously managed the appointments of counsel were transferred to the indigent defense services office.¹⁶⁹ For fiscal year 2022, the office also has one indigent defense appointments specialist and one account clerk.¹⁷⁰

Selecting qualified attorneys for felonies and “high misdemeanors.” Prior to October 2021, the Sixth Judicial Circuit Court maintained a criminal assignment committee that selected the attorneys eligible to represent indigent adults charged with felonies in Oakland County.¹⁷¹ In October 2021, in response to MIDC *Standard 5* requiring independence from the judiciary, the criminal assignment committee was reconstituted under the auspices of the newly created Oakland County indigent defense services office.¹⁷² The indigent defense services office’s criminal assignment committee has 11 members: five voting members appointed by the Oakland County Bar Association president; five non-voting judges appointed by the Sixth Judicial Circuit Court; and the chief attorney of the indigent defense services office serving as chairperson.

All attorneys must complete a formal application advertised on the Oakland County website¹⁷³ indicating the highest level of felony case category for which the attorney seeks eligibility for appointment. Applicants are assigned points based on their prior experience – cases defended in state and federal courts over the past three years; numbers of trials conducted as prosecutor or defense counsel; civil trial experience; other relevant work experience in the criminal justice system; names of judges before whom the applicant has tried cases; attorney references; participation in criminal justice organizations, trainings, and publications; special knowledge and experience; and disciplinary history.¹⁷⁴ Using a “weighted scoring system,”¹⁷⁵ the criminal

¹⁶⁹ Oakland County, Facesheet FY 2022, Attachment A (“Oakland County Indigent Defense Program Office”).

¹⁷⁰ Oakland County, Facesheet FY 2022, Attachment A (“Oakland County Indigent Defense Program Office”).

¹⁷¹ Originally established in the early 1990s by the chief judge of the Sixth Judicial Circuit Court, the 10-member criminal assignment committee consisted of five circuit court judges and five appointees of the Oakland County Bar Association president, who were collectively responsible for accepting and reviewing applications from attorneys seeking appointment to felony cases and for surveying and considering periodic feedback from circuit court judges regarding individual attorney performance. *See generally* SIXTH JUDICIAL CIRCUIT COURT OF MICHIGAN, OAKLAND COUNTY CIRCUIT COURT INDIGENT DEFENSE COUNSEL APPOINTMENT – CIVIL/CRIMINAL DIVISION POLICY & PROCEDURES (eff. Sept. 18, 2019).

¹⁷² OAKLAND COUNTY INDIGENT DEFENSE SERVICES OFFICE, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), procedure I, [https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf).

¹⁷³ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), procedure II(2), [https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf).

¹⁷⁴ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, CRIMINAL ASSIGNMENT APPLICATION (OCIDSO – ATTORNEY APPLICATION – VERSION 22.03.20) 1-3, <https://www.oakgov.com/idso/Documents/Attorney%20Application.pdf>; OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, CAC POINT SCORING SYSTEM AND CATEGORY REQUIREMENTS (OCIDSO – CAC POINT SCORING SYSTEM – VERSION 22.06.13), <https://www.oakgov.com/idso/Documents/CAC%20Point%20Scoring.pdf>.

¹⁷⁵ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), Procedure II(2)(f), <https://www.oakgov.com/idso/Documents/CAC%20Point%20Scoring.pdf>.

assignment committee examines each applicant’s “criminal trial experience, criminal law education, participation in the Oakland County Mentor Program, second chair experience, and other relevant information” and their accumulated points total to determine eligibility to receive indigent defense appointments.¹⁷⁶ “Attorneys who do not meet the points requirements for categories 1 or 2 may be considered for placement in those categories if the [criminal assignment committee] determines that the attorney has a significant record of consistently high quality criminal trial court representation and the ability to handle cases in the applicable category.”¹⁷⁷ Attorneys seeking eligibility for handling category 3 and 4 felony cases must also complete a new attorney orientation and mentoring program,¹⁷⁸ receive “instruction on Adult Treatment Court qualifications and procedures,” and may otherwise receive additional requirements as determined by the Oakland County criminal assignment committee.¹⁷⁹

Attorneys placed in each category are eligible for appointment in felony cases up to and including their approved level. That is, attorneys approved to handle category 2 felonies (maximum sentence of more than 5 years but less than life in prison) are automatically eligible for appointment in category 3 (maximum sentence of more than 2 years, up to and including 5 years) and category 4 (maximum sentence up to and including 2 years) cases as well.

[oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf).

¹⁷⁶ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), Procedure II(2)(f), [https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf).

¹⁷⁷ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, CAC POINT SCORING SYSTEM AND CATEGORY REQUIREMENTS (OCIDSO – CAC POINT SCORING SYSTEM – VERSION 22.06.13), <https://www.oakgov.com/idso/Documents/CAC%20Point%20Scoring.pdf>.

¹⁷⁸ The mentorship program requires mentees to observe: two preliminary examinations in district court, three arraignments in circuit court, three pretrial conferences in circuit court, three pleas in circuit court, three sentencings in circuit court, three jail visits, and one jury trial in circuit court. *See* OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, EVENT CERTIFICATION FORM (OCIDSO – NEW ATTORNEY EVENT CERTIFICATION FORM – VERSION 22.03.24), <https://www.oakgov.com/idso/Documents/Event%20Certification%20Form.pdf>.

¹⁷⁹ OAKLAND COUNTY, INDIGENT DEFENSE SERVICES OFFICE, OAKLAND COUNTY INDIGENT DEFENSE PROGRAM POLICY AND PROCEDURES (CIRCUIT COURT CAC – POLICIES AND PROCEDURES – VERSION 12-2-21), Procedure II(2)(d), [https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20\(signed\).pdf](https://www.oakgov.com/idso/Documents/Criminal%20Assignment%20Committee%20Policy%20and%20Procedures%20FINAL%20(signed).pdf).

Category / Case Type	Points required and minimum qualifications
1. Capital Offenses maximum sentence of life	<ul style="list-style-type: none"> • 75 points, AND • 5 years of prior criminal law practice (prosecution and/or defense), AND EITHER <ul style="list-style-type: none"> ○ 3 jury trials (category 1 or 2) as lead trial attorney, OR ○ 4 felony jury trials (any category) as lead trial attorney AND 1 jury trial (category 1 or 2) as second chair attorney.
2. Major Felony maximum sentences of more than 5 years to less than life	<ul style="list-style-type: none"> • 25 points, AND • 2 years of prior criminal law practice (prosecution and/or defense), AND EITHER <ul style="list-style-type: none"> ○ 2 felony jury trials (any category) as lead trial attorney AND 2 add'l felony cases (any category) as second chair attorney, OR ○ 1 felony jury trial (any category) as lead trial attorney AND 3 misdemeanor jury trials as lead trial attorney.
3. Felony maximum sentence of more than 2 years up to 5 years	<ul style="list-style-type: none"> • 10 points, AND • 1 year of prior criminal law practice (prosecution and/or defense).
4. Felony / High Misdemeanor maximum sentence up to and including 2 years	<ul style="list-style-type: none"> • Participate in the mentorship program with an experienced roster attorney

In other words, a lawyer without any prior legal experience can qualify for felony appointments in category 4 cases, and immediately following completion of the mentorship program can begin representing clients facing up to two years of incarceration. Some attorneys like the low hurdle to qualify for felony appointments. One attorney feels there should be a way for newly licensed private attorneys to gain criminal practice experience. “Otherwise, the list just has a lot of old attorneys.” Other lawyers feel the qualification standards for assignments are far too low, however, believing that “there should be more scrutiny on who gets to be assigned counsel.” One private attorney advocates a requirement that attorneys demonstrate trial skills in order to get on *any* indigent defense system roster, and a required mentoring program plus obtaining trial experience *before* receiving assignments. Another lawyer suggests that lawyers should be required to do at least 20 hours of CLE per year (including 2 hours on use of technology) in order to stay on the list from year to year.

The criminal assignment committee maintains four rosters of private assigned counsel available for appointment. As of August 2021, each Oakland County criminal assignment committee roster had the following number of attorneys:

Category	Number of attorneys	Total attorneys available for appointment (cumulative)
Category 1	33	33
Category 2	37	70
Category 3	77	147
Category 4	1	148

MIDC'S PROPOSED STANDARD ON ATTORNEY QUALIFICATIONS AND REVIEW

As required by state law, in September 2018 MIDC submitted to LARA for approval and subsequently amended in June 2019 a proposed standard to ensure that “[d]efense counsel’s ability, training, and experience match the nature and complexity of the case to which he or she is appointed” and that “defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.”^a At the time of this evaluation, LARA has not yet approved the standard.

As proposed by MIDC, *Standard 7 – Qualification and Review* states:^b

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 significant portion of the trial in two criminal cases that have reached a verdict, one of which having been submitted to a jury; or
 - iii. Have equivalent experience and ability to demonstrate similar skills.
3. High-severity Felony Cases
 - a. Satisfaction of all Basic Requirements; and
 - i. Has practiced criminal law

^a MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021) (“This packet . . . contains the complete text of the . . . standards pending approval by LARA which were submitted in September 2018 (amended June 2019). Those standards address defender workload limitations, qualification and review of attorneys

accepting assignments in adult criminal cases, and attorney compensation.”); MICH. COMP. LAWS § 780.991(2)(c), (f) (2020); MICH. RULES OF PRO. CONDUCT 1.1, 1.3, 1.4.

^b MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 8-9, proposed std. 7 (Oct. 2021).

- for two full years (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 significant portion of the trial in four criminal cases that have been submitted to a jury; or
- iii. Has a significant record of consistently high-quality criminal trial court representation and the ability to handle a high-severity felony case.

4. Life Offense Cases

- a. Satisfaction of all Basic Requirements; and
- i. Has practiced criminal law for five full years (either as a prosecutor, public defender, or in private criminal defense practice); and
- ii. Has prior experience as lead counsel in no fewer than seven felony jury trials that have been submitted to a jury; or
- iii. Has a significant record of consistently high-quality criminal trial court representation and the ability to handle a life offense case.

C. **Review.** The quality of the representation provided by indigent defense providers must be monitored and regularly assessed. Productivity is a component of the review process. Review is a process to evaluate the quality of the representation after an attorney has established the minimum requirements for eligibility. For attorneys seeking qualification under sections B(1)(c) or B(2)(a)(iii), the review process can be used for that purpose. In some cases, the review will give notice to an attorney whose performance can be improved. In all cases, the evaluation of

attorneys must be made by peers in the criminal defense community, allowing for input from other stakeholders in the criminal justice system including judges, prosecutors, and clients.

The earliest possible time at which this attorney qualifications and supervision standard can be required of and implemented by all Michigan indigent defense systems is at least one full year away, and more likely 18 to 24 months or longer. If approved by LARA as proposed, each indigent defense system in Michigan will be required to submit a plan to MIDC within 180 days for how they will select attorneys available to provide representation only attorneys who have the qualifications as shown in the table on page 55 and the process they will use to supervise the work of the attorneys who are selected (including through regular assessments and evaluations by peers with input from criminal justice system stakeholders) to monitor and evaluate the quality of the representation provided and the attorney's productivity.^c

^c MICH. COMP. LAWS § 780.993(2)-(3) (2020).

Case-type	Qualification requirements
All cases	be a licensed Michigan attorney; AND obtain the ongoing training required by <i>MIDC Standard 1</i>
Misdemeanor	have served as co-counsel or second chair in one prior trial (misdemeanor, felony, bench or jury), OR has equivalent experience and ability to demonstrate similar skills
Low-severity Felony	have practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice), AND either: <ul style="list-style-type: none"> as trial counsel (alone or with other trial counsel) previously “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
High-severity Felony	have practiced criminal law for two full years (either as a prosecutor, public defender, or in private criminal defense practice), AND either: <ul style="list-style-type: none"> as trial counsel (alone or with other trial counsel) previously 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
Life Offense Felony	have practiced criminal law for five full years (either as a prosecutor, public defender, or in private criminal defense practice), AND either: <ul style="list-style-type: none"> as lead counsel, previously handled seven criminal 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

Then, assuming that the legislature provides sufficient funding at the next legislative budget cycle, MIDC will provide a grant to each indigent defense system to implement the plan as approved by MIDC.^d After receiving the necessary grant of state funds, each indigent defense system will have up to 180 days (or longer if authorized by MIDC) to bring their system into compliance with *Standard 7 – Qualification and Review*.^e

^d MICH. COMP. LAWS § 780.993(10) (2020).

^e MICH. COMP. LAWS § 780.993(11) (2020).

Selecting qualified attorneys for misdemeanors (other than “high misdemeanors”). The Oakland County indigent defense services office has no written criteria or application form for attorneys seeking eligibility for appointment in misdemeanor cases before the 52nd District Court. To be considered for selection, attorneys need only to send a letter and resume to the indigent defense services office, which the chief attorney reviews at his discretion.

2. Attorneys in the indigent defense systems operated by various municipal governments

As of fiscal year 2022, each indigent defense system serving the district courts other than the 52nd District contracts with a private attorney to serve as the system’s “attorney manager” (some jurisdictions give the contractor position a different name), who is responsible for maintaining and managing the system of appointing private attorneys. The managed assigned counsel (“MAC”) attorney manager in each jurisdiction serves as the system’s independent appointing authority. Some systems also have part-time non-attorney coordinators (usually city government employees assigned to the courthouse) who assist the MAC attorney manager.

All of the MAC attorney managers work part-time, and some serve as the MAC attorney manager for multiple indigent defense systems within Oakland County. For example: the same attorney is MAC administrator for the indigent defense systems in both the 43rd District Court - Hazel Park and the 43rd District Court - Madison Heights; and the same attorney is the MAC attorney manager for the indigent defense systems in both the 43rd District Court - Ferndale and the 45th District Court.

Most MAC attorney managers appoint themselves to some cases in the indigent defense systems they administer. Some also accept appointed cases in other indigent defense systems, including circuit court cases assigned by the Oakland County indigent defense services office. For many years, one attorney serving as MAC attorney manager in two different indigent defense systems routinely appointed cases to his private law firm, at which close relatives also are attorneys. MIDC reports that it was aware of the practice and has addressed it, because the MAC attorney manager, by appointing an outsize number of cases to his private law firm, failed to follow the procedure for appointing cases on a rotational basis to all roster attorneys in violation of the MIDC-approved compliance plan.¹⁸⁰ As per statute, MIDC brought the systems to mediation, and during mediation the systems agreed to revise their compliance plans whereby the two indigent defense systems can contract with the private law firm to handle individual case appointments, but the attorney and law firm may not also serve as the independent appointing authority.

The indigent defense systems serving the district courts other than the 52nd District have not established any formal qualifications for the attorneys they make available to represent indigent defendants, nor have they established any process for selecting those attorneys. Some systems – for example, those serving the 50th District Court and the 51st District Court – require attorneys newly added to the roster to observe court proceedings in each district court judges’ courtroom before receiving any appointments.

¹⁸⁰ MIDC does not have an anti-nepotism policy.

B. Training indigent defense system attorneys

Michigan statutes and court rules do not establish any training requirements for indigent defense system attorneys to ensure that they have the ongoing knowledge and skills necessary to effectively represent indigent defendants in the type of cases to which they are appointed. The MIDC Act does not directly set training requirements – numbers of hours, types of trainings – and instead it tells MIDC to set training standards.

On May 22, 2017, LARA approved MIDC *Standard 1 – Education and Training of Defense Counsel*.¹⁸¹ Every indigent defense system in the state has been required to comply with *Standard 1* since roughly April 2019, through state grant funds distributed for that purpose beginning October 2018. MIDC’s *Standard 1* establishes the minimum training requirements for every indigent defense system attorney, to ensure that “[d]efense counsel is required to attend continuing legal education relevant to counsel’s indigent defense clients.”¹⁸² Each year, every indigent defense system attorney must complete at least 12 hours of continuing legal education (CLE) “relevant to the representation of the criminally accused.”¹⁸³ Attorneys with less than two years of prior experience practicing criminal defense in the state of Michigan must additionally complete one “basic skills acquisition class.”¹⁸⁴ Indigent defense systems must provide the required training for their attorneys at no cost to the attorney.¹⁸⁵

Each indigent defense system is free to establish additional training requirements for the attorneys it appoints to represent indigent people.

Michigan law requires MIDC to “establish standards for trainers and organizations conducting training that receive MIDC funds for training and education. The standards established under

¹⁸¹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(A)-(C) (Oct. 2021).

¹⁸² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1 (Oct. 2021). The portion of the standard related to training states in full:

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.

¹⁸³ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(D) (Oct. 2021).

¹⁸⁴ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(D) (Oct. 2021).

¹⁸⁵ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 1, std. 1(D) (Oct. 2021).

this subsection must require that the MIDC analyze the quality of the training, and must require that the effectiveness of the training be capable of being measured and validated.”¹⁸⁶ In February 2022, MIDC published its *Guidelines for Trainers and Training Providers* that “serve as a supplement to Standard 1 and provide guidance for compliance with Standard 1.”¹⁸⁷ The *Guidelines for Trainers* direct indigent defense systems to develop training programs that include a two-day (minimum 16-hour) “basic skills acquisition” course on core advocacy skills for new trial attorneys, ongoing training seminars covering “topics including knowledge of the law, knowledge of scientific evidence and applicable defenses, knowledge of technology, and other topics relevant to practicing indigent criminal defense.”¹⁸⁸ Additionally, the *Guidelines for Trainers* call for indigent defense systems to record and report indigent defense system attorney attendance, and receive attendee evaluations of training programs.¹⁸⁹

All of the indigent defense systems within Oakland County have incorporated the minimum MIDC standard training requirements of 12 annual hours of CLE sessions, along with 16 hours of new attorney skills acquisition training for attorneys with less than two years of prior experience, into their annual compliance plans approved by MIDC; none has any additional training requirements beyond the MIDC minimum standard. To provide the minimum required training, every indigent defense system within Oakland County has entered into an agreement for the Oakland County government to administer a training program in conjunction with the Oakland County Bar Association, which Oakland County pays for using annual grant funding provided by MIDC.¹⁹⁰ Since fiscal year 2019, MIDC has provided \$175,000 per year in annual grant funding to Oakland County for the Oakland County Bar Association training (a flat \$25,000 administrative fee, plus a flat fee of \$150,000 to administer a training program for up to 500 indigent defense system attorneys).¹⁹¹

The Oakland County Bar Association, through its full-time professional development director, is responsible for ensuring that each indigent defense system attorney receives training in compliance with MIDC standards. The professional development director does so by: developing an in-house CLE curriculum for indigent defense attorneys; and reviewing and reporting credits earned by individual indigent defense system attorneys through the seminars put on by the Oakland County Bar Association or earned by attending out of county (or, occasionally, out of state) trainings approved by the professional development director.¹⁹² The Oakland County Bar Association training programs developed in compliance with MIDC standards are provided free of charge to all indigent defense system attorneys throughout Oakland County; private attorneys must pay their own way to attend external trainings approved for MIDC credit by

¹⁸⁶ MICH. COMP. LAWS § 780.991(4) (2020).

¹⁸⁷ MICHIGAN INDIGENT DEF. COMM’N, GUIDELINES FOR TRAINERS AND TRAINING PROVIDERS 1 (undated), <https://michigan-idc.gov/wp-content/uploads/2022/02/Guidelines-for-Trainers-and-Training-Providers.pdf>.

¹⁸⁸ MICHIGAN INDIGENT DEF. COMM’N, GUIDELINES FOR TRAINERS AND TRAINING PROVIDERS 1 (undated), <https://michigan-idc.gov/wp-content/uploads/2022/02/Guidelines-for-Trainers-and-Training-Providers.pdf>.

¹⁸⁹ MICHIGAN INDIGENT DEF. COMM’N, GUIDELINES FOR TRAINERS AND TRAINING PROVIDERS 2-4 (undated), <https://michigan-idc.gov/wp-content/uploads/2022/02/Guidelines-for-Trainers-and-Training-Providers.pdf>.

¹⁹⁰ See Contract between Oakland County and the 43rd District Court-Hazel Park, 43rd District Court-Ferndale, 43rd District Court-Madison Heights, 44th District Court, 45th District Court, 46th District Court, 47th District Court, 48th District Court, 50th District Court, and 51st District Court to provide for indigent defense system training (July 7, 2016).

¹⁹¹ See Oakland County, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 37 (Aug. 2, 2021).

¹⁹² For example, the Oakland County Bar Association presumptively approves trainings provided by the Wayne County Bar Association and the State Bar of Michigan.

the professional development director. The professional development director estimates that she dedicates 60% of her time each year to developing and approving attendance at training programs in compliance with MIDC minimum standards. Oakland County Bar Association support staff help to track attorneys' CLEs attendance and create quarterly reports of attorney attendance that are submitted to the circuit and district court funding units in Oakland County. "By January 15th of every year, attorneys who have not completed the required number of hours of continuing legal education in the previous calendar year or provided proof of same are removed" from the indigent defense system roster(s) of attorney eligible for appointment to represent indigent clients.¹⁹³

To assist in the substantive development of the trainings, the Oakland County Bar Association created a nine-member "MIDC committee,"¹⁹⁴ which, meeting three-to-four times per year, produces CLE programming for the coming year. The MIDC committee members are all criminal defense lawyers of varying levels of experience (two have been practicing attorneys approximately 30 years each), all in solo private practices, and most of whom handle indigent defense appointments within Oakland County. Although none of the MIDC committee members are prosecutors or judges, two committee members are part-time magistrates (the bar association's professional development director sees no conflict as the magistrates primarily handle district court traffic and parking matters).

The Oakland County Bar Association develops and provides 20 to 24 hours of training annually for indigent defense system attorneys, which includes a mixture of substantive criminal law, updates on case law, statutes, and MIDC policy, and knowledge of technology.¹⁹⁵ The bar association also subcontracts with the statewide criminal defense membership organization (Criminal Defense Attorneys of Michigan) to provide the MIDC-required two-day new attorney skills acquisition program. Since the start of the Pandemic, most training sessions are now held remotely using video (both live and on-demand).

Although the Oakland County Bar Association maintains a comprehensive training program, indigent defense system attorneys within Oakland County are not provided with regular access to ongoing skills training as required by MIDC *Standard 1*.¹⁹⁶ Criminal Defense Attorneys of Michigan provides attorney skills seminars, which attorneys can attend at their own expense,¹⁹⁷ but the Oakland County Bar Association does not provide ongoing legal skills trainings for attorneys with more than two years of experience.

¹⁹³ Oakland County, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 4 (Aug. 2, 2021).

¹⁹⁴ The Oakland County Bar Association membership includes attorneys in civil practice, the prosecution, and defense, with 30 practice area committees including a criminal law committee (which includes both prosecution and defense) and a professional development committee (which develops various training and mentorship programs). The MIDC committee is separate from all other practice area committees.

¹⁹⁵ See *Events*, OAKLAND COUNTY BAR ASSOCIATION, <https://www.ocba.org/?pg=events&evAction=viewMonth> (filter by "Seminar – MIDC" to view current and past sessions provided for criminal defense appointed counsel only); OAKLAND COUNTY BAR ASSOCIATION, OCBA INDIGENT COUNSEL TRAINING CALENDAR 2019-2020.

¹⁹⁶ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std. 1(D) (rev'd Oct. 2021) ("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").

¹⁹⁷ Oakland County Bar Association subcontracts with Criminal Defense Attorneys of Michigan to provide only the 16-hour new attorney skills training free of charge to indigent defense system attorneys within Oakland County.

C. Supervising indigent defense system attorneys

State statutes and court rules do not establish any standards that indigent defense system attorneys must meet, and against which they can be supervised and evaluated, in representing indigent adults charged with crimes in the trial courts. (*See* sidebar at pages 53-55 explaining MIDC’s proposed standard on attorney qualifications and review.)

Each indigent defense system is free to establish standards that the attorneys it appoints must meet in representing indigent defendants and against which to measure the representation they provide. Despite this, many of the independent appointing authorities within Oakland County do not believe they have the authority to supervise the attorneys in the indigent defense systems they oversee, and so generally no formal supervision occurs. The attorney administrators attribute the lack of supervision in part to a lack of authority and in part to a lack of resources.

For example, while the Oakland County indigent defense services office chief attorney believes part of his role is to perform oversight of panel attorneys, he does not have time to monitor the performance of counsel or take proactive oversight measures on a weekly basis. The indigent defense services office does not provide its contact information on the assignment notices sent to indigent defendants in felony and misdemeanor cases; the chief attorney says the office is open to receiving client complaints submitted through the county website¹⁹⁸ but does not proactively seek them. And, while the chief attorney would like to develop a small unit of ombudsmen or complaint investigators or performance monitors to address problems of attorney performance, the indigent defense services office lacks those resources and has not requested them of MIDC through its compliance grant for fiscal year 2023. Instead, currently the chief attorney’s monitoring of attorney performance is limited to passively receiving complaints from trial court judges. For example, upon receiving one complaint from a circuit court judge during fiscal year 2022, the chief attorney watched video of the incident involving the appointed private attorney and subsequently filed the complaint with the indigent defense services office’s criminal assignment committee. The committee voted to suspend the attorney for one year.

Some districts’ MAC attorney managers similarly rely on judges to bring complaints about specific attorneys’ performance. For example, one MAC attorney manager says if she ever receives a complaint, she will plan a meeting with the attorney to discuss the issue – but so far, she has not yet received any complaints. Other MAC attorney managers proactively conduct court observations to monitor the performance of attorneys on their rosters. For example, one administrator has removed three attorneys in recent years from receiving appointments: two who she had required to spend time watching court proceedings to learn from other lawyers, and who had refused; and a third who quit when confronted about failing to conduct initial client interviews.

But some local systems’ MAC attorney managers see their responsibility as strictly limited to fulfilling the jurisdiction’s duty of compliance with MIDC standards, which they accomplish

¹⁹⁸ *Attorney Complaint Form*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/idso/about/Documents/Attorney%20Complaint%20Form.pdf>.

almost exclusively through reviewing bills submitted by appointed attorneys. “I spend hours checking bills as a way of conducting oversight,” said one district court system MAC attorney manager. By way of example, the MAC attorney manager said that where he sees an attorney bill for a client interview occurring on the same day as a court date, the MAC attorney manager will not pay the fee for conducting the interview.¹⁹⁹ Similarly, while MIDC policy makes the administering attorneys responsible for “establishing and reviewing attorney qualifications” for eligibility to receive appointed cases, in most systems the review of attorney qualifications is limited to reviewing attendance reports to ensure each attorney has attended the minimum required annual CLE trainings. A few of the MAC attorney managers supplement their paper reviews of attorney billing and attendance at trainings with court observations of attorney performance – some at their own initiative and others only where they have received a complaint about a specific attorney.

One Oakland County prosecuting attorney expressed concern at the broad range of competence and zeal that attorneys bring when representing indigent defendants, “which is a real problem.” As an example, the prosecutor points to a felony trial postponed at the last moment because the defense attorney’s struggle to keep track of their schedule had become such an acute problem that it was starting to affect their appointed clients’ cases. While criminal justice system stakeholders believe that there are many great criminal defense attorneys working in Oakland County, the problem is that the multiple indigent defense systems lack structures to identify which attorneys need greater supervision, harming defendants in the process. “It really depends on the luck of the draw in terms of how well a defendant will be represented,” a county prosecutor said. A private attorney agreed, saying the quality of attorneys handling cases throughout Oakland County is “hit or miss.”

Criminal justice system stakeholders overwhelmingly agree that the recent, ongoing implementation of MIDC *Standard 5* on independence from the judiciary has been necessary and positive for the efficacy of the justice system as a whole. Stakeholders (private attorneys, prosecutors, and judges alike) believe their indigent defense systems benefit from having a single administrator to whom to address their attorney performance concerns. Further still, multiple judges are pleased that they are no longer responsible for administering the indigent defense function and they instead can concentrate on the work of being a judge. Similarly, several stakeholders view positively Oakland County’s creation of the indigent defense services office to administer and coordinate services across the Sixth Judicial Circuit Court and the four divisions of the 52nd District Court.

Yet, there is no corresponding MIDC standard providing sufficient guidance to indigent defense system administrators. As one judge put it: judges rightfully can no longer remove underperforming attorneys from handling indigent defense cases, but the problem is that the implementation of *Standard 5* now has “created a void” where no one is responsible for ensuring quality representation. Other stakeholders notice the inconsistency among the MAC attorney

¹⁹⁹ Because most court hearings in the system are scheduled out one week or more, and because an MIDC standard requires an initial client interview within 3 business days of being appointed, the MAC attorney manager infers that the lawyer’s failure to interview the client until the day of the client’s next court hearing is in violation of the MIDC standard.

managers regarding their interpretation of their roles and responsibilities. One private attorney stated that it is as if the whole point of creating MIDC is to oversee and supervise the appointed attorneys, but in the process the reforms forgot to ensure the oversight and supervision of the indigent defense system administrators.

Moreover, there is no MIDC standard providing guidance to local governments as to how they should recruit and select their indigent defense system administrators. Multiple private attorneys say that simply removing the trial courts from the day-to-day administration of indigent defense services, without more, achieved little. The attorneys note that, generally, how attorneys are appointed to cases and how they are paid fundamentally is the same as before. In fact, in some systems the same individuals are involved as before – as one attorney said, “it’s the same staff as before MIDC came along” (for example, Oakland County transferred indigent defense coordinator positions from reporting to circuit and district court judges into the county administration) – and those individuals’ responsibilities largely are the same. In both the circuit and district courts, “judges are removed, but not to the extent that MIDC thinks they are.” Moreover, attorneys believe most municipalities look to the trial courts to determine whom to hire as MAC attorney manager, and as a result some MAC attorney managers “do not want to rock the boat with the court or city” for fear of losing their contract. As evidence, attorneys observe the MAC attorney managers failing to advocate for systemic improvements, such as timely access to discovery, sufficient time to consult with clients, and confidential meeting space. “We think [the system is] independent,” said one attorney, but “it’s not independent at all. It’s not.”

Some criminal justice system stakeholders worry that the absence of adequate oversight (both of the individual appointed attorneys and of the indigent defense system administrators) threatens the overall fairness of the adversarial system of justice in Oakland County. As one county prosecutor stated: “The prosecutor’s office is generally well-funded and well-trained, which poses a problem when we are facing defense attorneys who are not well trained.” Moreover, stakeholders are concerned that the resulting lack of uniformity among the indigent defense systems within Oakland County further undercuts the effectiveness of the representation provided, as attorneys compare indigent defense systems’ policies, the personalities of their administrators, and compensation methods when deciding where to take indigent defense cases.

CHAPTER IV.

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.”²⁰⁰ For this to occur, an indigent person must be represented by an attorney who has the resources necessary to challenge the prosecution’s case. If the attorney lacks the necessary resources to challenge the state’s case – “if the process loses its character as a confrontation between adversaries”²⁰¹ – this is a structural impediment that results in the constructive denial of the right to counsel.

A. Understanding the fiscal resources necessary for effective representation

The American Bar Association’s *Standards for Criminal Justice* explain that attorneys must have adequate resources and support (including secretarial, investigative, and expert services) and adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) in order to render effective assistance of counsel.²⁰² All national standards require that: “Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.”²⁰³ Therefore, an attorney needs three types of resources to effectively represent each client.

- *Law office overhead.* For an attorney to be available to represent clients each day, certain expenses must be paid. 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. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer represents a single client.²⁰⁴
- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are expenses that the attorney would not incur but for representing that client, and they include, for example,

²⁰⁰ *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.”).

²⁰¹ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

²⁰² AMERICAN BAR ASS’N, STANDARDS FOR CRIM. JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

²⁰³ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

²⁰⁴ “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,” NATIONAL ASS’N OF CRIM. DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 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).

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, costs incurred in obtaining discovery, and 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. The individual expenses that are necessary, though, must be paid for in every client's case.

- *Fair lawyer compensation.* This is the attorney's pay.

The government is responsible for providing the resources needed in each indigent person's case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the appointed attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the appointed attorneys.²⁰⁵

B. The funding provided for the right to counsel of indigent adults in trial-level criminal cases in Michigan

The U.S. Constitution holds the State of Michigan responsible for ensuring adequate funding for the right to counsel of indigent defendants.²⁰⁶ As explained in chapter II, the State of Michigan

²⁰⁵ See, e.g., *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (concluding that "requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;" and that Alaska's constitution "does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden," because doing so would be taking "private property for a public purpose without just compensation"); *Kansas ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state "has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses"); *Louisiana v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that "in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs"); *Wilson v. Mississippi*, 574 So.2d 1338, 1340 (Miss. 1990) (holding indigent defense attorneys are entitled to "reimbursement of actual expenses" including "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," in addition to a reasonable sum); *Oklahoma v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that the state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses"); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (finding that, because compensation rates did not cover attorney overhead, court appointed attorneys were forced to "involuntarily subsidize the State with out-of-pocket cash," "[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial").

²⁰⁶ *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 right of one

historically delegated to its local governments (counties, cities, townships, and villages) all responsibility for funding the costs of providing the right to counsel to indigent criminal defendants in the trial courts. Under Michigan law today, a portion of the funding for the trial-level right to counsel in adult criminal cases is provided by the state and a portion known as the “local share” is provided by local governments (counties, cities, township, and villages).

The State of Michigan requires each indigent defense system (i.e., the local governments that operate them) to pay its “local share” of the cost of providing representation to indigent adult defendants in the trial courts who are charged with a crime that carries the possibility of imprisonment, and the indigent defense system “must not be required to provide funds in excess of its local share.”²⁰⁷ For indigent defense systems where more than one municipality is responsible for funding a district court, the municipalities “may agree among themselves” about how to share the responsibility for the cost of providing counsel to indigent defendants, through interlocal agreements.²⁰⁸ Indigent defense systems are, however, free to spend as much as they wish or determine is necessary to provide effective assistance of counsel to indigent people; it is just that the state cannot require them to spend more, nor can they spend less than their local share.

The state’s portion of the funding for indigent adults in trial-level criminal cases is through a state appropriation to the MIDC, in two parts: one part for the operations of the MIDC, and the other part for the MIDC to distribute to the indigent defense systems through standards compliance grants.

The following table shows the total funding expended by the state and local governments in Michigan, for fiscal years 2019 through 2021, to provide the right to counsel of indigent adults in trial-level criminal cases:²⁰⁹

charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

²⁰⁷ MICH. COMP. LAWS § 780.993(7), (8) (2020). *See* MICH. COMP. LAWS § 780.983(f), (h), (i) (2020).

An indigent defense system’s “local share” is its “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.” MICH. COMP. LAWS § 780.983(i) (2020).

²⁰⁸ MICH. COMP. LAWS § 600.8104(3) (2020). *See* MICH. COMP. LAWS §§ 124.1, 124.2, 124.111 through 124.122, 124.501 through 124.512, 124.531 through 124.536 (2020).

²⁰⁹ MICHIGAN INDIGENT DEF. COMM’N, 2019 IMPACT REPORT 9-10, 13 (FY 2019 funding by indigent defense system, available at <https://michiganidc.gov/wp-content/uploads/2019/03/Approved-MIDC-grant-totals-FY19.pdf>); MICHIGAN INDIGENT DEF. COMM’N, 2020 ANNUAL IMPACT REPORT 6-8 (FY 2020 funding by indigent defense system expended through Apr. 21, 2020, available at <https://michiganidc.gov/wp-content/uploads/2020/04/MIDC-FY20-total-grant-funding-approved-for-website.pdf>); MICHIGAN INDIGENT DEF. COMM’N, ANNUAL IMPACT REPORT 2021 at 5-6 (FY 2021 funding by indigent defense system expended through Apr. 21, 2021, available at <https://michiganidc.gov/wp-content/uploads/2021/05/FY21-Approved-Totals-MIDC-website.pdf>).

State and Local spending, FY 2019 through FY 2021				
	State funds		Local funds	
Fiscal Year	MIDC operations	MIDC standards compliance grants	Local share	Total indigent defense system spending
FY 2019	\$2,420,700	\$85,614,811	\$37,925,642	\$125,961,153
FY 2020	\$2,654,400	\$117,424,880	\$40,274,102	\$160,353,382
FY 2021	\$2,528,536	\$129,127,392	\$38,486,171	\$170,142,099

C. The expenditures for the right to counsel of indigent adults in trial-level criminal cases in Oakland County

As explained in chapter II, there are 12 separate indigent defense systems within Oakland County. State law requires every indigent defense system to cooperate with and participate in MIDC's statutorily mandated duty²¹⁰ to collect and report data about the operations of the indigent defense systems.²¹¹ Although Oakland County statutorily operates two separate indigent defense systems – one for the Sixth Judicial Circuit Court, and one for the 52nd District Court -- it treats them as a single indigent defense system for planning and reporting requirements (as allowed by MIDC).

Among other things, MIDC must require each indigent defense system to provide documentation of all expenditures.²¹² There are five primary forms in which the MIDC receives financial expenditure data from each indigent defense system: an annual compliance plan and cost analysis, the contract for each annual grant, quarterly compliance plan progress reports (PR) and financial status reports (FSR), and a report of the unexpended balance filed at year-end.²¹³

MIDC dictates the structure and content of each of these reports from the indigent defense systems. Each indigent defense system is required to report all of its indigent defense system spending, which includes the expenditures made from both the state funding it received through an MIDC grant and its own locally appropriated funding. The following table shows the total expenditures by each indigent defense system operating within Oakland County, for fiscal years 2019 through 2021.²¹⁴

²¹⁰ MICH. COMP. LAWS §§ 780.989(1)(f), 780.989(2) (2020).

²¹¹ MICH. COMP. LAWS § 780.993(1) (2020).

²¹² MICH. COMP. LAWS § 780.993(14)(a) (2020).

²¹³ See MICHIGAN INDIGENT DEF. COMM'N, GRANT MANUAL (rev'd Feb. 2021), <https://michiganidc.gov/wp-content/uploads/2021/02/Grant-Manual-Final-MIDC-Approved-February-2021.pdf>; MICHIGAN INDIGENT DEF. COMM'N, GUIDE FOR REPORTING COMPLIANCE WITH STANDARDS AND DISTRIBUTION OF GRANT FUNDS (rev'd Dec. 2018), <https://michiganidc.gov/wp-content/uploads/2018/12/MIDC-Guide-for-Reporting-REVISED-December-2018.pdf>.

²¹⁴ The data is primarily obtained from the year-end "report of unexpended funds" submitted by each jurisdiction to MIDC. In fiscal year 2019, MIDC did not receive a "report of unexpended funds" from the 43rd District Court-1 Hazel Park, 48th District Court, and 50th District Court, so the data for fiscal year 2019 for those jurisdictions is obtained instead from the fourth quarter "financial status report" submitted by each jurisdiction to MIDC.

Indigent Defense System Expenditures, FY 2019 through FY 2021			
Indigent Defense System	FY 2019	FY 2020	FY 2021
43-1 Hazel Park	\$652,571	\$815,704	\$793,389
43-2 Ferndale	\$368,205	\$426,611	\$346,861
43-3 Madison Heights	\$171,077	\$353,656	\$352,037
44 Royal Oak	\$314,876	\$459,436	\$462,699
45 Oak Park	\$231,509	\$270,672	\$310,859
46 Southfield	\$104,058	\$194,132	\$299,788
47 Farmington	\$57,233	\$198,315	\$201,548
48 Bloomfield Hills	\$160,646	\$246,664	\$260,092
50 Pontiac	\$281,495	\$582,881	\$499,327
51 Waterford	\$152,515	\$138,725	\$143,048
52/6 Oakland County	\$3,749,668	\$5,464,169	\$5,291,983

Each indigent defense system is also required to report the specific categories for which expenditures were made, and MIDC dictates the categories into which expenditures are divided.

- **Attorney compensation.** All of the indigent defense systems within Oakland County rely exclusively on private attorneys to handle court-appointed cases. Compensation to these appointed attorneys is reported under the MIDC category of “contracts – contract attorneys.”
- **Case-related expenses.** All of the indigent defense systems within Oakland County fund the costs of investigators and experts. These expenditures are reported under the MIDC category of “contracts – experts investigators.”²¹⁵
- **Indigent defense system overhead.** The remaining MIDC categories of expenditures all collectively represent the overhead cost of operating the indigent defense system.

1. Indigent defense system overhead

MIDC requires each indigent defense system to report expenditures for six categories:

- salaries fringes
- contracts – construction
- contracts – other
- equipment
- travel training
- supplies services.

Collectively, these are the expenditures that the indigent defense system incurs for its own operations, i.e., the system’s overhead costs.

For every system, the largest part of its overhead costs during FY 2019 through FY 2021 is for the salary and benefits paid to local government employees to administer the system and to other

²¹⁵ MICHIGAN INDIGENT DEF. COMM’N, MIDC GRANT MANUAL 19 (Feb. 2022).

local government personnel – such as law enforcement, clerks, or court staff – whose duties are “reasonably and directly related to implementation of the [MIDC] standards.”²¹⁶ During FY 2019, most of the systems made expenditures for construction and other contracts and equipment purchases or rentals. The indigent defense system operated by Oakland County (alone among the systems within the county) has significant expenditures for training each year (FY 2019 - \$175,000; FY 2020 - \$137,500; FY 2021 - \$183,900), as the result of its agreement to administer a training program on behalf of all of the indigent defense systems operating within the county (*see* discussion at page 57).

The following table shows the expenditures for each indigent defense system’s overhead for FY 2019 through FY 2021:²¹⁷

Indigent defense system expenditures for overhead, FY 2019 through FY 2021			
Indigent defense system	FY2019	FY2020	FY2021
District 43-1 Hazel Park	\$188,112	\$209,875	\$107,395
District 43-2 Ferndale	\$115,883	\$128,236	\$48,025
District 43-3 Madison Heights	\$46,747	\$96,852	\$93,945
District 44 Royal Oak	\$19,500	\$82,153	\$0
District 45 Oak Park	\$81,194	\$5,257	\$0
District 46 Southfield	\$4,564	\$8,700	\$5,200
District 47 Farmington	\$2,183	\$24,000	\$18,177
District 48 Birmingham	\$64,971	\$16,361	\$0
District 50 Pontiac	\$68,600	\$216,864	\$77,197
District 51 Waterford	\$51,461	\$17,654	\$29,837
District 52/Circuit 6 Oakland County*	\$528,121	\$1,055,410	\$1,225,093
* It is not possible to break out overhead expenditures between the circuit court and the 52nd District Court (nor expenditures in the four divisions of the 52nd District Court).			

2. Case-related expenses for investigation and experts

Some indigent defense systems permit attorneys to seek reimbursement for some of their discovery costs, but the payment is made directly to the attorney and so is reflected in the attorney’s compensation (*see* section D beginning at page 74).

All indigent defense systems directly fund the costs of providing investigation and experts on behalf of indigent defendants. On May 22, 2017, LARA approved MIDC *Standard 3* -

²¹⁶ MICHIGAN INDIGENT DEF. COMM’N, MIDC GRANT MANUAL 9-10 (rev’d Feb. 2021).

²¹⁷ Data is reported by each indigent defense system to MIDC through quarterly financial status reports (FSR). *See* MICHIGAN INDIGENT DEF. COMM’N, MIDC GRANT MANUAL 25 (rev’d Feb. 2021). The Sixth Amendment Center obtained the FSRs for all indigent defense systems within Oakland County for fiscal years 2019 through 2021.

*Investigation and Experts.*²¹⁸ Every indigent defense system in the state has been required to comply with *Standard 3* since roughly April 2019, through state grant funds distributed for that purpose beginning October 2018. *Standard 3* states:²¹⁹

- 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.

MIDC requires that investigator fees are not to exceed \$75 per hour and that maximum hourly fees for experts are set according to "education level and type of expert," for example capped at: \$30 per hour for an expert with a high school degree; and \$300 per hour for a psychiatrist, pathologist, or other MD with a specialty.²²⁰

MIDC advises indigent defense systems to address any increasing costs of investigation and experts through their annual compliance plan requests to the MIDC.²²¹ Despite the availability of MIDC grant funds since October 1, 2018, indigent defense system attorneys throughout Oakland County still make little use of experts and investigators in felonies and practically no use at all in misdemeanor cases. The following table shows indigent defense system expenditures on experts and investigation from FY 2019 through FY 2021.²²²

²¹⁸ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 4, std. 3 (Oct. 2021).

²¹⁹ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 4, std. 3 (Oct. 2021).

²²⁰ MIDC allows payments of higher rates if there is a documented need. It is done on a case-by-case basis. MICHIGAN INDIGENT DEF. COMM'N, MIDC GRANT MANUAL 18 (Feb. 2022).

²²¹ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 4, std. 3 cmt. 4 (Oct. 2021). "Unless there is a demonstrated need, each indigent defense system will be limited to a capped amount of funds for investigators and experts based on the total new circuit adult criminal filings within the jurisdiction in the most recent calendar year." MICHIGAN INDIGENT DEF. COMM'N, MIDC GRANT MANUAL 18 (Feb. 2022).

²²² Data is reported by each indigent defense system to MIDC through quarterly financial status reports (FSR). The Sixth Amendment Center obtained the FSRs for all indigent defense systems within Oakland County for fiscal years 2019 through 2021.

Indigent defense system expenditures for experts & investigators, FY 2019 through FY 2021			
Indigent defense system	FY2019	FY2020	FY2021
District 43-1 Hazel Park	\$0.00	\$0.00	\$0.00
District 43-2 Ferndale	\$0.00	\$0.00	\$0.00
District 43-3 Madison Heights	\$0.00	\$0.00	\$0.00
District 44 Royal Oak	\$0.00	\$0.00	\$0.00
District 45 Oak Park	\$0.00	\$0.00	\$883.50
District 46 Southfield	\$0.00	\$0.00	\$0.00
District 47 Farmington	\$0.00	\$0.00	\$1,875.00
District 48 Birmingham	\$0.00	\$0.00	\$0.00
District 50 Pontiac	\$0.00	\$0.00	\$0.00
District 51 Waterford	\$0.00	\$0.00	\$0.00
District 52/Circuit 6 Oakland County*	\$112,708.85	\$81,134.57	\$102,314.59
* It is not possible to break out expenditures on experts and investigators in the Sixth Judicial Circuit Court from expenditures on experts and investigators in the 52nd District Court (nor expenditures in the four divisions of the 52nd District Court).			

Although Oakland County data lumps together district court and circuit court indigent defense expenditures together, officials estimate 99% of the county's indigent defense system expenditures on experts and investigations are from felony cases in the sixth circuit court – i.e., approximately \$101,291.44 of the county's \$102,314.59 experts and investigators expenditure in circuit court appointments in FY2021, and approximately \$1,023.15 of expenditures from district court appointments that year.

And, while assigned counsel rarely request case-related funding, private attorneys handling cases throughout Oakland County report that, in the limited circumstances they request funding in felony cases, most often the request is for experts, not investigators. Starting fiscal year 2022, Oakland County has started tracking case-related expenditures more closely, and reports that between October 2021 and March 2022, in misdemeanor cases there were zero requests for investigators and one request for experts, as compared to 12 requests for an investigator and 28 requests for an expert in felony cases during that six-month period – and, even in felony cases, the indigent defense services office chief attorney believes use of case-related resources is inadequate.

3. Attorney compensation

The following table shows indigent defense system expenditures to compensate appointed attorneys from FY 2019 through FY 2021:²²³

²²³ Data is reported by each indigent defense system to MIDC through quarterly financial status reports (FSR). *See* MICHIGAN INDIGENT DEF. COMM'N, MIDC GRANT MANUAL 25 (rev'd Feb. 2021). The Sixth Amendment Center ob-

MIDC’S PROPOSED STANDARD ON ATTORNEY COMPENSATION

As required by state law, MIDC submitted to LARA for approval a proposed standard to ensure that “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation shall be avoided.”^a At the time of this evaluation, LARA has not yet approved the standard.

As proposed by MIDC, *Standard 8 – Attorney Compensation (Economic Disincentives or Incentives)* states:^b

A. Rates of Payment for Salaried Public Defenders.

Reasonable salaries and benefits and resources should be provided to indigent defense counsel. The rates paid by the Michigan Attorney General for Assistant Attorneys General, or other state offices serve as guidance for reasonable compensation.

B. Compensation and Expenses for Assigned Counsel. Assigned counsel should receive prompt compensation at a reasonable rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses. Assigned counsel should be compensated for all work necessary to provide quality legal representation. Activities 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.

^a MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021) (“This packet . . . contains the complete text of the . . . standards pending approval by LARA which were submitted in September 2018 (amended June 2019). Those standards address defender workload limitations, qualification and review of attorneys accepting

assignments in adult criminal cases, and attorney compensation.”); MICH. COMP. LAWS § 780.991(2)(b) (2020).

^b MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 10-12, proposed std. 8 (Oct. 2021).

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.

The earliest possible time at which this attorney compensation standard can be required of and implemented by all Michigan indigent defense systems is at least one full year away from the date of this report's release, and more likely 18 to 24 months or longer. If approved by LARA as proposed, each indigent defense system in Michigan will be required to submit a plan to MIDC within 180 days for how they will comply with *Standard 8* and their anticipated cost of doing so.^c Then, assuming that the legislature provides sufficient funding at the next legislative budget cycle, MIDC will provide a grant to each indigent defense system to implement the plan as approved by MIDC.^d After receiving the necessary grant of state funds, each indigent defense system will have up to 180 days (or longer if authorized by MIDC) to bring their system into compliance with *Standard 8 – Attorney Compensation (Economic Disincentives or Incentives)*.^e

^c MICH. COMP. LAWS § 780.993(2)-(3) (2020).

^d MICH. COMP. LAWS § 780.993(10) (2020).

^e MICH. COMP. LAWS § 780.993(11) (2020).

Indigent defense system expenditures for appointed attorneys, FY 2019 through FY 2021			
Indigent defense system	FY2019	FY2020	FY2021
District 43-1 Hazel Park	\$464,459	\$605,829	\$685,795
District 43-2 Ferndale	\$250,765	\$298,376	\$298,836
District 43-3 Madison Heights	\$124,330	\$256,804	\$258,092
District 44 Royal Oak	\$295,376	\$377,283	\$462,699
District 45 Oak Park	\$150,315	\$265,415	\$309,975
District 46 Southfield	\$99,495	\$185,432	\$294,588
District 47 Farmington	\$55,050	\$174,315	\$181,497
District 48 Birmingham	\$95,675	\$230,303	\$260,092
District 50 Pontiac	\$212,895	\$366,018	\$422,130
District 51 Waterford	\$101,054	\$121,071	\$113,211
District 52/Circuit 6 Oakland County*	\$3,108,839	\$3,114,901	\$3,964,575
* It is not possible to break out expenditures on attorney compensation between the circuit court and the 52nd District Court (nor expenditures in the four divisions of the 52nd District Court).			

The manner in which each indigent defense system compensates each appointed attorney is explained in detail in the next section.

D. How attorneys are paid within Oakland County

On October 29, 2020, LARA approved MIDC *Standard 5 – Independence from the Judiciary*, which states explicitly that “The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary.”²²⁴ This left every indigent defense system in the state responsible for determining how to compensate appointed attorneys in the compliance plans they submitted to MIDC in April 2021, with full compliance required by roughly April 2022, through state grant funds which will be distributed for that purpose beginning October 2022.

At the time of this evaluation, each of the indigent defense systems established by the Michigan Indigent Defense Act had appointed an administering attorney (the Oakland County chief attorney, and the MAC attorney managers in the other district court systems in Oakland County) to oversee all aspects of compensating appointed attorneys, and those administering attorneys largely inherited the policies and processes established by the trial court judges for compensating appointed attorneys.

MIDC requires each indigent defense system, in its annual compliance plan, to report the method(s) of attorney pay used in that system.²²⁵ No two indigent defense systems operating within Oakland County use the same compensation scheme for appointed counsel.

tained FSRs for all indigent defense systems within Oakland County for fiscal years 2019 through 2021.

²²⁴ Michigan Indigent Def. Comm’n, Minimum Standards for Indigent Crim. Defense Services 6, std. 5 (Oct. 2021).

²²⁵ See, e.g., Michigan Indigent Def. Comm’n, Facesheet for Compliance Plan and Cost Analysis Renewal - FY 2022, question 29 (Aug. 2, 2021) (“How are you compensating attorneys for Standard 4? Please provide detail for compensating counsel at first appearance and compensating counsel at all other critical stages.”).

The indigent defense systems within Oakland County often compensate attorneys differently depending on:

- whether the attorney is representing the defendant at the arraignment, the pretrial conference, or trial;
- whether the lawyer is staffing a scheduled court docket during a multi-hour shift as “house counsel”²²⁶ or is individually appointed to represent an individual client; and
- whether the lawyer is representing a defendant accused of a misdemeanor offense or a felony offense.

And all of these factors are further influenced by the system’s timing and method of appointing counsel to represent the defendant at the various court proceedings throughout the duration of the case. (See discussion of appointment of counsel, pages 95-113.)

The table below shows the compensation scheme used in each indigent defense system within Oakland County as of fiscal year 2022. The systems in which trial counsel usually is appointed in misdemeanor cases following the arraignment on the complaint or warrant are highlighted in gray.

Indigent defense system attorney compensation methods within Oakland County, FY 2022				
District Court		Arraignment on the complaint (misdemeanors and felonies)	Pretrial conference & sentencing (misd. only)	Trial (misd. only)
43-1 Hazel Park		Hourly (capped at 4 hours)	Flat fee per event	Hourly*
43-2 Ferndale		Flat fee per shift	Flat fee per shift	Hourly
43-3 Madison Heights		Hourly	Hourly (capped)	Hourly*
44 Royal Oak	In-custody	Flat fee per shift	Flat fee per shift	Hourly
	Out-of-custody	Flat fee per shift	Hourly	Hourly
45 Oak Park		Flat fee per shift	Flat fee per shift	Hourly
46 Southfield		Flat fee per shift	Flat fee per event	Flat fee per event
47 Farmington		Flat fee per shift	Flat fee per case	
48 Birmingham		Flat fee per shift	Flat fee per shift	Hourly
50 Pontiac		Flat fee per shift	Flat fee per shift	Hourly*
51 Waterford		Hourly	Flat fee per shift	Hourly
52-1 Novi 52-2 Clarkston 53-3 Rochester Hills 54-4 Troy		Flat fee per shift	Flat fee per shift	Flat fee per event
* In addition to an hourly base rate of pay, these jurisdictions pay attorneys additional flat fees for certain events (e.g., 43 rd District Courts-1 Hazel Park and 43 rd District Courts-3 Madison Heights pay lawyers \$25 for sending an initial letter to the client).				

²²⁶ Although “house counsel” is the most commonly term used, different jurisdictions in Oakland County use “shift attorney,” “public defender for the day,” “king/queen for the day,” and “duty lawyer” all to describe the same concept of a single attorney scheduled to appear in district court and tasked with representing however many defendants have court hearings that day.

Arraignment on the complaint or warrant in district court (both felony and misdemeanor cases). As shown in the table above, eight jurisdictions’ indigent defense systems pay attorneys staffing arraignments a flat fee per shift (usually a half day or full day).²²⁷ For example, as of April 19, 2022, Oakland County pays the “house counsel” attorneys it assigns to appear at scheduled arraignment dockets in the four divisions of the 52nd District Court a flat fee of \$260 for a half-day house counsel shift or \$520 for a full-day house counsel shift.²²⁸ The remaining three jurisdictions pay lawyers \$100 per hour for staffing the arraignment shift,²²⁹ and one of those three also cap the hourly pay at a maximum number of hours in court.²³⁰

For all subsequent felony proceedings in district courts throughout Oakland County, regardless of the district court in which the case originates, appointed attorneys are paid according to Oakland County’s fee schedule for the circuit court assigned counsel roster, as described below on pages 79-84.

Pretrial conferences (misdemeanor cases). Following the arraignment in a misdemeanor case, the district court schedules the case for a pretrial conference, during which the prosecution generally makes a plea offer and, if accepted and the defendant pleads guilty, the court sentences the defendant – all during that same appearance. As explained at pages 111-113, most of the indigent defense systems in the district courts in Oakland County appoint an individual attorney following the arraignment to represent a defendant at all subsequent misdemeanor proceedings, including the first and any subsequent pretrial conferences, trial, and sentencing. Depending on the indigent defense system, the appointed attorney is either appointed to an individual defendant’s case or is assigned as house counsel to a particular day/shift and is thus appointed as trial counsel to all defendants who are scheduled for their first pretrial conference during that day/shift.

Two indigent defense systems within Oakland County have an individual attorneys represent an individual misdemeanor defendant prior to the defendant’s first pretrial conference and through disposition of the defendant’s case (i.e., trial counsel); however, these two systems use different methods for paying trial counsel for representing appointed clients at the pretrial conference:

²²⁷ These jurisdictions include: 43rd District Court-Ferndale (\$300 per shift); 44th District Court (\$300 per shift); 45th District Court (\$250 per shift); 46th District Court (\$200 for morning shift, and \$150 for afternoon shift); 47th District Court (\$300 per shift); 48th District Court (\$250 per shift); 50th District Court (\$300 per shift); and 52nd District Courts (\$650 for staffing jail arraignments on weekdays, \$700 on weekends, and \$750 on holidays, and \$250 for a half-day or \$500 for a full-day staffing out-of-custody arraignments as house counsel).

²²⁸ Effective April 19, 2022, Oakland County announced MIDC’s approval to mid-year pay increases for certain felony and misdemeanor events. *See Vouchers*, OAKLAND COUNTY, MICHIGAN, INDIGENT DEFENSE SERVICES OFFICE, <https://www.oakgov.com/idso/Pages/vouchers.aspx>; Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 52nd District Court (rev’d Jan. 1, 2022); Oakland County, Michigan, Indigent Defense Services Offices, Fee Schedule Changes (OCIDSO FY22 Plan Change #2) (undated document).

²²⁹ Arraignment dockets in district courts in Oakland County are a mixture of misdemeanors and felonies (carrying life and non-life sentences).

²³⁰ These jurisdictions include: 43rd District Court-Hazel Park (\$100/hr for a maximum of four hours); 43rd District Court-Madison Heights (\$100/hr, with no maximum duration); and 51st District Court (\$100/hr, with no maximum duration).

- the 46th District Court pays the appointed trial counsel a flat fee by event for the pretrial conference;²³¹ and
- the 47th District Court pays the appointed trial counsel a flat fee per case and there is no additional compensation for the pretrial conference.²³²

The remaining nine indigent defense systems within Oakland County schedule a “house counsel” or “shift attorney” to handle all pretrial conferences during a given day or shift and the attorney scheduled for each shift is the appointed trial counsel for each defendant with a case scheduled for that shift; however, these jurisdictions use different methods for paying trial counsel for representing appointed clients at the pretrial conference:

- the 43rd - Hazel Park pays the appointed trial counsel a flat fee per event for the pretrial conference;²³³
- the 43rd - Madison Heights pays the appointed trial counsel hourly for the pretrial conference;²³⁴ and
- seven systems (the 43rd – Ferndale, 44th,²³⁵ 45th, 48th, 50th, 51st, and 52nd) pay the appointed trial counsel a flat fee per shift for the pretrial conference.²³⁶

Trial (misdemeanor cases). For any misdemeanor case not disposed of at the arraignment or the pretrial conference, all indigent defense systems within Oakland County appoint an individual attorney to represent the defendant at trial. As explained, most jurisdictions assign an individual attorney following the arraignment to represent the defendant for the duration of their misdemeanor case, including any pretrial conferences and trial (shown in gray on the table on page 75). Only the indigent defense system for the 48th District Court waits in each case to appoint trial counsel once the misdemeanor case is set for trial.²³⁷ (In certain misdemeanor cases, the Oakland County indigent defense services office waits until after the pretrial conference to appoint trial counsel.)

²³¹ The 46th District Court pays house counsel \$50 per pretrial or adjournment for good cause (maximum of two cases billable per court session), \$100 per entry of a plea (if sentencing occurs on a separate day), \$100 per sentencing (if plea occurs on a separate day), \$200 for conducting the pretrial hearing, entry of guilty plea, and sentencing if all in one day, \$50 for an appearance in which a bench warrant is issued, \$125 for a bench warrant or bond violation hearing, \$50 for a violation of probation plea, \$75 for a probation review / show cause hearing, \$125 for a violation of probation hearing, \$50 for a violation of probation sentencing, and \$75 for attending the client’s presentencing investigation interview. *See* City of Southfield, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 21-22 (May 27, 2021).

²³² City of Farmington, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11 (Oct. 4, 2021).

²³³ City of Hazel Park, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 9 (Oct. 4, 2021).

²³⁴ City of Madison Heights, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 8 (Oct. 4, 2021).

²³⁵ This is only for in-custody misdemeanor defendants, as out-of-custody misdemeanor defendants have pure vertical representation from arraignment through disposition.

²³⁶ City of Ferndale, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 8 (Aug. 2, 2021); City of Royal Oak, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11-12 (Oct. 4, 2021); City of Oak Park, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 10 (Aug. 2, 2021); City of Birmingham, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 10 (May 27, 2021); City of Pontiac, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 9 (May 27, 2021); City of Waterford, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 9 (May 27, 2021); Oakland County, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 69 (Aug. 2, 2021).

²³⁷ City of Birmingham, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 6 (May 27, 2021).

Once the attorney is individually appointed to represent the defendant as trial counsel, the attorney is paid: \$100 per hour in some systems;²³⁸ or in one system, a flat fee per case;²³⁹ or in other systems (including Oakland County), a flat fee per event.²⁴⁰

Oakland County compensates attorneys in misdemeanor cases before the 52nd District Court according to a fee schedule that pays a flat fee per event. 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 same defendant in each of their other ongoing cases.²⁴¹ The table below provides the fee schedule in effect as of April 19, 2022, for attorneys individually appointed to represent clients in misdemeanor cases in Oakland County.²⁴²

Event	Fee
Appearance at a scheduled event (e.g., arraignment, plea, pretrial, sentence, motion, VOP, etc.)	\$55
Hearing conducted (non-trial) where testimony was taken	\$80 per day
Appearance at trial with plea or dismissal, and no jury selected	\$80
Trial conducted (jury or bench)	\$275 per half-day or \$525 per full day
Miscellaneous Events	Fee
Initial Client Interview	\$100
Jail visit	\$75 (two per misdemeanor)
Appeal to circuit court of district court conviction (must be sentenced to jail term or suspended jail sentence)	\$100 per hour (max 10 hours per plea or 15 hours per trial conviction)

²³⁸ They are the 43rd District Court-Hazel Park (paying attorneys an additional \$25 for sending an initial letter to the client), the 43rd District Court-Ferndale, the 43rd District Court-Madison Heights (paying attorneys an additional \$25 for sending an initial letter to the client), the 44th District Court, the 45th District Court, the 48th District Court, the 50th District Court, and the 51st District Court.

²³⁹ The indigent defense system serving the 47th District Court pays misdemeanor trial counsel a flat fee per case. See City of Farmington, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11 (Oct. 4, 2021) (“Vertical appointment attorneys shall be compensated \$300 per case (an increase from \$200 per case at the recommendation of MIDC staff). Attorneys are compensated \$50 for companion cases. Attorneys may request and submit documentation for extraordinary fees to the System Administrator, who will have them reviewed and considered for approval by the System MACC. Vertical appointment attorneys requesting extraordinary fees may receive up to \$100 per hour.”).

²⁴⁰ They are: the 46th District Court (e.g., \$50 for the initial client interview if the client is in-custody (\$25 if the client is out-of-custody), \$75 for preparing and filing any motions, \$75 for the oral argument on motions, \$100 for trial prep (\$50 if no trial is conducted), and \$200 per half-day of a bench trial or jury trial); See City of Southfield, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 9, 21-22 (May 27, 2021); Oakland County, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 12 (Aug. 2, 2021).

²⁴¹ Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 52nd District Court at 1 (rev'd Jan. 1, 2022).

²⁴² Effective April 19, 2022, Oakland County announced MIDC's approval to mid-year pay increases for certain felony and misdemeanor events. See Vouchers, Oakland County, Michigan, Indigent Defense Services Office, <https://www.oakgov.com/idso/Pages/vouchers.aspx>; Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 52nd District Court (rev'd Jan. 1, 2022); Oakland County, Michigan, Indigent Defense Services Offices, Fee Schedule Changes (OCIDSO FY22 Plan Change #2) (undated document).

In any misdemeanor case in the 52nd District Court that resolves (by plea or dismissal) without a trial being conducted, the appointed lawyer is paid a maximum of \$500.²⁴³ For example, the lawyer is paid \$100 for conducting an initial interview with the client. The lawyer earns another \$150 for visiting the client twice in jail (\$75 per visit, for up to two jail visits in a misdemeanor) if being detained pretrial. If the case is set for a pretrial conference, the appointed lawyer is paid another \$55 for that hearing. If there is a contested hearing at which testimony is taken, the lawyer earns \$80 per day of the hearing. If the case is set for trial, but a plea agreement is reached within two court dates of the scheduled trial date,²⁴⁴ the attorney earns \$80 for the trial appearance and entry of the client's guilty plea. If the court schedules the sentencing hearing for a different day, the lawyer earns another \$55 for the additional court appearance. That is a total of \$520 of billable events in a typical misdemeanor case, but for which the lawyer can expect to be paid a maximum of \$500.

Circuit court appointments (felony cases). As explained on pages 95-97, counsel representing felony defendants at arraignment (their initial appearance following arrest) is selected from the roster of attorneys administered by the indigent defense system for that district, and the cost of counsel at arraignment is paid by the indigent defense system for that district court. (By agreement, Oakland County provides and pays for appointed counsel for in-custody felony defendants at “jail arraignment” in cases arising out of the 44th, 45th, and 50th District Courts,²⁴⁵ in addition to the 52nd District Court.) Counsel appointed to represent a felony defendant in all subsequent district court proceedings – i.e., the probable cause conference and the preliminary examination – is assigned from the circuit court roster of attorneys administered by Oakland County's indigent defense system, and the cost of appointed counsel in felony cases in district court proceedings following the arraignment is paid by Oakland County, not the indigent defense system for that district court.

The Oakland County indigent defense system compensates attorneys in felony cases according to a fee schedule that pays a flat fee per event. 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.²⁴⁶ The table on page 80 provides the fee schedule in effect as of April 19, 2022, for felony cases in Oakland County.²⁴⁷

²⁴³ Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 52nd District Court at 1 (rev'd Jan. 1, 2022) (establishing a “presumptive maximum allowable amount” of \$500).

²⁴⁴ “If an attorney is scheduled to appear for an event which is cancelled by the court less than 2 full business days prior to the scheduled appearance date, the attorney will still be paid for that event.” Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 52nd District Court at 1 (rev'd Jan. 1, 2022).

²⁴⁵ City of Royal Oak, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11 (Oct. 4, 2021); City of Oak Park, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 10 (Aug. 2, 2021); City of Pontiac, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 9 (May 27, 2021).

²⁴⁶ Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 6th Circuit Court at 4 (rev'd Jan. 11, 2022).

²⁴⁷ Effective April 19, 2022, Oakland County announced MIDC's approval to mid-year pay increases for certain felony and misdemeanor events. See *Vouchers*, OAKLAND COUNTY, MICHIGAN, INDIGENT DEFENSE SERVICES OFFICE, <https://www.oakgov.com/idso/Pages/vouchers.aspx>; Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 6th Circuit Court (rev'd Jan. 11, 2022); Oakland County, Michigan, Indigent Defense Services Offices, Fee Schedule Changes (OCIDSO FY22 Plan Change #2) (undated document).

Oakland County assigned counsel fee schedule for felony cases					
	Non-capital felony (up to Habitual 3rd)	Non-capital felony with Habitual 4th enhancement		Capital felony	
Event		max sentence of less than life	max sentence of life in prison	other capital felony	capital murder (or other mandatory life offense)
Plea to misdemeanor in district court	\$375				
Felony dismissal in district court	\$275				
Preliminary examination (first day)	\$675 (if waived) or \$775 (if held)		\$900 (waived) or \$950 (held)	\$1,205 (waived) or \$1,275 (held)	\$1,380 (waived) or \$1,450 (held)
Preliminary examination (any additional days)	\$180/day				
Trial	\$550/day	\$700/day	\$1,000/day		

Miscellaneous Events			
Initial Client Interview	\$100		
Jail Visit	\$75 (three per non-capital felony, six per non-capital felony with Habitual 4th with life max, and 12 per capital felony)		
Motions filed and briefed	\$150 (one per non-capital and three per capital)		
Evidentiary & Walker hearings (with testimony taken)	\$550/day	\$700/day	\$1,000/day
Competency hearing (with testimony taken)	\$190/day		
Restitution hearing	\$190/day		
Remand to district court (after bind over to circuit court)	\$210		
Attendance at <u>full</u> polygraph interview	\$115		
Other district court fees (e.g., retained without notice, attorney withdrawal, bench warrant issued)	\$95		
Other circuit court fees (e.g., delayed sentence, review hearing, attending corporeal lineup, attending PSI interview, bench warrant issued)	\$95		

Here is an example of how this works based on a non-capital felony case. In such a case, for conducting an initial interview with the client, the attorney is paid \$100. The attorney is paid another \$675 for appearing at the preliminary examination in district court, even if the attorney just appears to enter a waiver of the client's right to a preliminary examination. Assuming the case resolves by plea agreement in the circuit court, the attorney receives no additional pay. This is a total of \$775 for a felony case.

If other factors come into play, an attorney might be paid more for a given case. For example, if the client does not waive the preliminary examination and instead holds that hearing, the attorney in our hypothetical case receives an additional \$100, plus another \$180 per day for each additional day the preliminary examination requires. The attorney is paid another \$75 if the attorney visits the client in jail, up to a maximum of three jail visits (after the initial client interview) in a non-capital felony case. If the attorney petitions the court to review the client's bond and is granted a hearing, the attorney earns \$95 for the hearing. If the attorney files a motion, the attorney earns \$150 or more in connection with that motion.²⁴⁸ If the case goes to trial, the attorney earns \$550 per day. If the client is convicted, the attorney does not earn any additional pay if the client is sentenced that day, but instead earns another \$95 for appearing at the sentencing hearing if held on a *different* day. If the judge orders the client to undergo a pre-sentencing investigation (PSI) interview in advance of the sentencing hearing, the attorney is paid \$0 for assisting the client in gathering and submitting to the probation officer the extensive background documentation (education, family history, medical history, etc.) as required in advance of the PSI interview but earns \$95 for attending the PSI interview with the client. Similarly, if the court orders the client to undergo a polygraph interview, the lawyer is paid \$0 for preparing the client for the interview (including producing background documents) and earns \$115 for attending the polygraph interview.

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, it is in the attorney's own financial interest to spend as little time as possible on each individual defendant's case.²⁴⁹ 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, it can take more than an hour 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

²⁴⁸ If an assigned counsel attorney files and briefs a motion, the attorney receives \$150 compensation. If there is a hearing on the motion but at which no testimony is taken, the lawyer receives no additional pay. If there is a hearing on the motion at which testimony is taken, the lawyer in a non-capital case receives \$550 per day of the hearing (regardless of whether the motion is granted or denied).

²⁴⁹ See MICH. INDIGENT DEF. 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.").

be a dozen officers on a case who each have body camera footage to review. For all this work, the attorney is paid \$75. 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, Oakland County's fee schedule only authorizes an attorney to be paid for three jail visits for non-capital felonies carrying less than a life sentence.²⁵⁰

Similarly, to understand how the event-based schedule pits the lawyer's financial interests against the client's legal interests, consider the following hypothetical. Shortly after being appointed to represent a felony defendant at the preliminary stages of the case in district court, the appointed lawyer sees that one or more elements of the crime cannot be proven and points that out to the assistant prosecuting attorney handling the case. If the prosecutor offers a plea to a reduced misdemeanor offense and if the defendant accepts the offer and pleads guilty, the appointed attorney is paid \$375. However, if the attorney convinces the prosecutor to dismiss the felony charge altogether in district court – a better outcome for the defendant, which may require several more hours and several rounds of discussion between the appointed attorney and the prosecutor – the attorney earns only \$275. As one attorney explained, it is “clearly better for the client” for the lawyer to put in the extra work to convince the prosecutor to dismiss the case “than waiving all of the client's rights and pleading guilty” to the reduced misdemeanor charge. “But I would get paid more” to accept the reduced plea offer “and be rewarded for doing less work.”

Furthermore, because attorneys are paid almost exclusively for events that occur inside the courtroom,²⁵¹ attorneys are not compensated at all for much of the work that is necessary to provide effective representation. For example, aside from the initial client interview, 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. Attorneys receive no pay for any investigation, 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 the number of hours spent preparing for trial. 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.

“Event-based pay doesn't make any sense,” one appointed attorney said. The sentiment is shared generally among indigent defense system attorneys who find the pay offered by Oakland County is “ridiculous” and “woefully inadequate” for the most serious felony appointments. In fact, multiple attorneys report they no longer accept category 1 (capital) felony cases because the event-based pay does not compensate lawyers for the full number of hours necessary to handle the cases effectively.²⁵² Even for category 4 felony cases, the pay is “nothing.”

²⁵⁰ In non-capital felony cases prosecuted as a “habitual 4th” (meaning the defendant has three qualifying prior felony offenses) carrying a maximum sentence of life in prison, appointed lawyers are paid \$75 per visit for a maximum of six jail visits. Likewise, assigned counsel attorneys can bill for a maximum of 12 jail visits for a capital felony case.

²⁵¹ The only exceptions are: \$100 for an initial client interview; and \$75 for jail visits.

²⁵² For fiscal year 2022-23, Oakland County has informed MIDC that its compliance plan voluntarily will shift from

Attorneys are deeply aware of the financial conflicts of interest created by the attorney compensation schemes used by Oakland County providing a fixed fee per event in felony cases (as in misdemeanor trials), which create negative incentives against their fulfilling basic obligations of attorney performance to their appointed clients. To illustrate the problem, one lawyer points to the issue of motions practice where appointed lawyers are paid \$150 for filing one motion, “but it takes six or seven hours to do the research to file the motion. And you may need to file multiple motions for your client,” – for example, an attorney in a single case may need to file a motion to suppress evidence, a motion to sever the client’s trial from a co-defendant’s, and a motion to reduce the client’s bond – but the lawyer is only paid for one motion in a non-capital felony case. If the lawyer researches and files the multiple motions necessary to effectively represent the client anyway, the lawyer could petition Oakland County for payment of extraordinary fees at the end of the case (*see* discussion of extraordinary fees in felony trials, below). But the lawyer has no guarantee that they will be paid the extraordinary fees for the work, and so the lawyer has incentive not to do the additional work.

Several attorneys similarly expressed frustration with MIDC standards calling for attorneys to communicate with their clients, but a compensation structure that does not pay attorneys to meet with their clients by phone or in person. “There is little incentive to keep the lines of communication open,” said one attorney, “because we are incentivized to do as minimal as possible.” Another attorney said Oakland County’s compensation structure “incentivizes people to look for events” to maximize their income, rather than “actually doing their job.” As a result, attorneys observe their colleagues “going through the motions,” knowing they “can spend less than 2 hours on a case and get \$900” for making court appearances at the right billable events.

Worse, lawyers feel the event-based pay “punishes” the attorneys for “doing a good job” for their clients. An attorney gave the example of a felony case in which the defendant had fired two previously appointed attorneys, and so the client had already been arraigned in circuit court and the case was headed for trial. Had the attorney reached a quick plea agreement, the attorney would have earned \$900 for the plea and sentencing hearing. Instead, the attorney spent hours preparing the case for trial and, after a one-and-a-half-day jury trial, the client was acquitted, for which the attorney was paid \$775. “The system is set up to encourage you to not work,” said the attorney. “The compensation on the felonies borders on absurd sometimes.”

An assigned attorney may petition Oakland County 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.²⁵³ The chief attorney of the county’s indigent defense services office holds the power to approve or deny the petitions; if approved, the attorney is

event-based compensation to hourly compensation for capital felony cases only, at the \$120/hour set by MIDC’s proposed standard on attorney compensation. All other private attorney compensation on non-capital felonies and misdemeanors will remain on a fixed fee per case or per event basis, although fixed fee pay rates for some case types will be increased. *See* Email from Pete Menna, Chief Attorney, Indigent Defense Services Office, Oakland County, Michigan, to Sixth Amendment Center (May 25, 2022) (on file with 6AC).

²⁵³ Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 6th Circuit Court at 4 (rev’d Jan. 11, 2022).

presumptively paid 1.5 times the event-based rate, although the chief attorney reserves the right to increase or decrease the extraordinary fees as they see fit. “If the Chief Attorney decides to grant more than 1.5 times the voucher amount, the amount to be paid shall not exceed the suggested payment amounts in MIDC Standard 8.”²⁵⁴ The indigent defense services office became operational as of October 1, 2021, and prior data about the number of petitions received and denied each year is unavailable. From October 2021 to May 2022, the office received a total of 47 petitions for extraordinary expenses from appointed attorneys (all in felony cases), of which three petitions were denied altogether as unwarranted; in almost all others, the petitions were partially approved, although not necessarily at the total amount requested. The chief attorney notes: “Requests take various forms, with some attorneys requesting specific amounts that are way higher than what we are even allowed to pay.” For example, an attorney in a non-capital felony case who was due to be paid \$1,220.00 according to Oakland County’s event-based pay scheme – an initial client interview for \$100, one motion for \$150, three jail visits for \$75 each, and \$745 for the preliminary examination – instead requested extraordinary fees totaling \$5,100.00 for 25 hours of work at \$200 per hour (in excess of the MIDC standard rate of \$110 per hour) plus \$100 for the initial client interview. The chief attorney approved a total payment of \$1,830 by applying 1.5x the regular voucher amount (an additional \$610.00), noting the approved amount equates to approximately \$72 per hour for the work actually performed (but less than the hourly rate proposed by *MIDC Standard 8*).

As with misdemeanor trials, many attorneys handling felony cases say they feel discouraged from requesting extraordinary fees from Oakland County thinking “the fee schedule says that’s what I get” – perhaps even resulting from some lawyers believing incorrectly that extraordinary fees are “only available for capital cases” – and otherwise are reluctant to spend time preparing a request for extraordinary fees where they may be denied.

One attorney illustrates the problem by pointing to a felony case that eventually was disposed of in district court, through a reduced plea to a misdemeanor charge as a result of the attorney’s advocacy to the prosecutor, for which the fee schedule would pay the attorney \$350. The attorney had “put 40 hours, easily” into the representation, reviewing 90 pages of discovery, regulations, interviewing experts, and multiple in-person court appearances, for which the attorney billed Oakland County asking for extraordinary fees. The attorney received “maybe \$400 more” than the attorney was owed under the terms of the fee schedule, but far less than the full amount of the bill. The attorney says no reason was given from the indigent defense services office’s chief attorney – just “an email saying he tried to get me some money.”

1. Overhead

Throughout Oakland County, indigent defense system attorneys must pay all of the costs of their own overhead.

Maintaining a private practice in Oakland County is expensive. Office rent typically costs anywhere from \$500 to \$700 per month, depending on location. Additionally, there are the

²⁵⁴ Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 6th Circuit Court at 4 (rev’d Jan. 11, 2022).

ongoing costs of supplies, utilities, and salaries for any support staff. Because of Oakland County's size²⁵⁵ and the number of courthouses in which each lawyer may have cases, the lawyers spend a good amount of time driving between meetings and court appearances – lawyers report putting anywhere between 3,600 and 23,000 miles per year on their car during the Pandemic (between 5,800 and 35,000 miles per year pre-COVID). Lawyers also must pay for their own gas, car insurance, oil changes, and maybe even purchasing a different car every few years due to wear and tear. Lawyers have to pay for their own health insurance, which can range anywhere from \$120 per month to \$14,000 per month (depending on the lawyer's healthcare plan and coverage for dental and vision), as well as their own state bar license (\$315 per year for most lawyers²⁵⁶) and other professional memberships (some attorneys report paying \$1,140 per year to join the Oakland County Bar Association, Criminal Defense Association of Michigan, and national groups like the National Association of Criminal Defense Lawyers).

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 incur any costs for administrative or support staff, without regard to whether the resources are necessary to provide effective representation. One attorney explained that he would hire an assistant if he could afford the cost, because it would greatly decrease the amount of time he currently spends on clerical work, such as closing files, opening, and responding to mail, and so forth.

Attorneys who accept felony appointments in the Sixth Judicial Circuit Court report a wide range in overhead costs. Some estimate their monthly overhead to be a little over \$1,200, 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 \$74,000 on overhead expenses each year, including maintaining offices in both Oakland and Wayne counties.

2. Case-related expenses

All indigent defense systems directly fund some case-related expenses for investigation and experts (*see* discussion above at 68). Some indigent defense systems permit attorneys to seek reimbursement for some of their discovery costs. Attorneys must personally pay for all of the other necessary case-related expenses they incur on behalf of their appointed clients.

Discovery. Obtaining and reviewing discovery materials from the prosecution is essential to effective advocacy; any costs related to obtaining discovery is a case-related expense. In some indigent defense systems within Oakland County, lawyers must pay the arresting law enforcement agency for the cost of producing discovery.²⁵⁷ The Oakland County indigent defense system expressly does not permit appointed attorneys to seek reimbursement for their actual

²⁵⁵ At 907 square miles, Oakland County ranks as 21st largest of Michigan's 83 counties by area.

²⁵⁶ *See Law License Fee Information*, STATE BAR OF MICHIGAN, <https://www.michbar.org/generalinfo/fees>.

²⁵⁷ MIDC states that they no longer believe this is an issue. "While there were some earlier issues with discovery being charged, it has been remedied and discovery is now always free."

expenses incurred in obtaining discovery materials from the prosecution.²⁵⁸ By contrast, starting in FY2021, some indigent defense systems – such as the 43rd District Court-Hazel Park, 43rd District Court-Madison Heights, 44th District Court, and 51st District Court now permit indigent defense system attorneys to seek reimbursement for those costs, but the payments are reflected in the lawyers’ 1099s as “income” that is taxed, meaning the attorney cannot recoup the full amount spent on obtaining discovery. One attorney estimates that all discovery in a given misdemeanor case (videos only, CDs) can run anywhere from \$5 to \$15, “but it adds up” over the course of a year. Another lawyer said she recently had a case involving video discovery that cost \$334. This attorney has money in her business account to cover these types of case-related costs. However, the lawyer emphasized the strain of paying for this discovery out of pocket can cause hardship for some attorneys, particularly solo practitioners who can find it difficult to pay for the upfront costs for all of their indigent clients.

3. Attorney take-home pay

What remains from the compensation paid to the attorney by the indigent defense system, after the attorney pays for unreimbursed overhead and case-related expenses, is the attorney’s take-home pay.

²⁵⁸ “The [Oakland County Indigent Defense Services Office] assumes that attorneys may need to make two copies of discovery materials. This assumption is incorporated into the listed fees and is not reimbursable as an extra expense. If a police department is attempting to charge attorneys for discovery materials (discs for example), attorneys may want to consider issuing a subpoena for the materials or getting a court order waiving any fees.” Oakland County, Michigan, Indigent Defense Services Offices, Appointed Attorney Fee Schedule – 6th Circuit Court at 2 (rev’d Jan. 11, 2022).

CHAPTER V.

EARLY APPOINTMENT OF COUNSEL & CONTINUOUS REPRESENTATION

“Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each state is responsible for ensuring that every indigent defendant who does not choose to self-represent and who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.²⁵⁹ All crimes in Michigan are designated as either a felony or a misdemeanor and carry the possibility of incarceration as a punishment,²⁶⁰ so every person charged with any of these crimes who cannot afford to hire their own attorney is entitled under the Sixth and Fourteenth Amendments to have an attorney provided at public expense to represent them.²⁶¹

In 2008, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”²⁶² 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,”²⁶³ without regard to whether a prosecutor is aware of the arrest.²⁶⁴ For all defendants, both in- and out-of-custody, the beginning of formal judicial proceedings is signaled when prosecution is commenced, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”²⁶⁵

²⁵⁹ *United States v. Cronic*, 466 U.S. 648, 659 (1984). See also *In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

²⁶⁰ A felony is enacted by the state legislature and is punishable by imprisonment in the state prison. MICH. COMP. LAWS §§ 750.7, 761.1(f) (2020). Although previously authorized, the death penalty is no longer an available punishment in Michigan. MICH. CONST. art. IV, § 46.

A misdemeanor may be enacted by the state legislature (referred to colloquially as a “state-law misdemeanor”) or by a local government as a violation of its ordinances (referred to colloquially as “ordinance cases”), and all misdemeanors are punishable by imprisonment. MICH. COMP. LAWS §§ 750.5, 750.6 (2020). See MICH. CONST. art. VII, § 22; MICH. COMP. LAWS §§ 41.181, 42.15, 42.23, 45.514(1)(i), 45.556(b), 46.11(j), 67.1, 67.1a[1], 88.12, 91.1, 117.3, 117.4i, 750.8, 750.9, 761.1(n)-(o) (2020). Misdemeanor ordinances enacted by counties can be punishable by not more than 90 days imprisonment. MICH. COMP. LAWS § 46.10b(1) (2020). Misdemeanor ordinances enacted by townships, cities, or villages can be punishable by imprisonment of up to 90, 93, or 180 days, depending on the ordinance violated. MICH. COMP. LAWS §§ 41.181, 41.183, 42.21, 66.2, 66.4, 89.2, 117.3(k), 117.4i(k) (2020).

Although a person charged with a civil infraction cannot be sentenced to jail and so is not entitled to appointed counsel, the failure to appear in court on a civil infraction constitutes a misdemeanor. MICH. COMP. LAWS §§ 600.113(1)(a), 600.8727(10), 600.8827(8) (2020).

²⁶¹ *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁶² *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).

²⁶³ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

²⁶⁴ *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

²⁶⁵ *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).

The Court in *Rothgery* carefully explains 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.²⁶⁶ 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.²⁶⁷ When an indigent defendant is actually deprived of counsel at a critical stage, the U.S. Supreme Court says that is unfair and so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”²⁶⁸

A. How a person enters into the criminal justice system

When a person is alleged to have committed any crime in Michigan, they can be issued a summons (or “appearance ticket”) or they can be arrested (with or without a warrant).

Summons. For most ordinance violations and misdemeanors, a person can be issued a summons (or “appearance ticket”) to appear in court at a future date.²⁶⁹ For a felony or any other non-minor misdemeanor or violation²⁷⁰ in which only a complaint has been filed, upon request of the prosecutor, a magistrate can issue a summons (instead of an arrest warrant) for the person to appear in court on a certain date.²⁷¹ Most people accused of an ordinance violation or a misdemeanor in Oakland County are given a summons to appear, rather than being arrested.

The date the person is directed by a summons to appear in court is the “arraignment on the complaint.” This is the first time they will appear in court before a judge, and in some district courts in Oakland County it may occur up to four weeks after the incident.

Arrest. A person can be arrested in Michigan for any criminal offense, including an ordinance violation.²⁷² In Oakland County, few people accused of misdemeanors and ordinance violations are arrested, while any person accused of a felony is almost always arrested.

²⁶⁶ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

²⁶⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

²⁶⁸ *United States v. Cronin*, 466 U.S. 648, 658-59 (1984) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

²⁶⁹ MICH. COMP. LAWS §§ 764.1a, 764.9a, 764.9c, 764.9f, 772.3 (2020); MICH. CT. R. 6.6103, 6.615(A).

²⁷⁰ See MICH. COMP. LAWS §§ 764.1, 764.9c (2020).

²⁷¹ MICH. COMP. LAWS §§ 764.1, 764.1a, 764.9c (2020); MICH. CT. R. 6.103.

²⁷² MICH. COMP. LAWS §§ 66.9, 90.10(1), 764.15, 764.15a, 764.17 (2020); MICH. CT. R. 6.102(A), 6.615(A).

PLEADING GUILTY WITHOUT APPEARING BEFORE A JUDGE OR MAGISTRATE (MISDEMEANORS ONLY)

Michigan law permits the district courts to accept a guilty plea without a personal appearance of the defendant before a judge or magistrate, but only where the court determines that “the combination of the circumstances and the range of possible sentences makes the situation proper.”^a In order to plead guilty without appearing before a judge or magistrate, the defendant’s plea must be “in a writing to be placed in the district court file,” the written guilty plea must acknowledge guilt or nolo contendere, and the writing must include a waiver of all trial rights including the right to counsel.^b In order to accept the defendant’s written guilty plea without appearing before a judge or magistrate, the court must be “satisfied that the waiver [of counsel and other trial rights] is voluntary.”^c

In only misdemeanor cases and under certain circumstances, the district courts in Oakland County accept defendants’ guilty pleas without appearing before a judicial officer, using standard forms produced by the Michigan State Court Administrative Office (SCAO) to effectuate those guilty pleas, whether pleading “over the counter” or by mail.

“Over the counter” guilty pleas.

Generally, the district courts in Oakland County do not permit over the counter guilty pleas. Only two district courts in

Oakland County accept over the counter guilty pleas, and even then, only for certain types of misdemeanors.

When pleading guilty “over the counter” at the clerk’s window to a “payable misdemeanor” offense (i.e., where the court does not intend to impose a jail sentence), the district courts within Oakland County require defendants to sign the SCAO’s *Advice of Rights and Plea Information* form^d indicating that the court has advised them of the right to counsel. In this manner, the signed advice of rights form constitutes the defendant’s waiver of counsel.

The *Advice of Rights and Plea Information* form is available in several languages,^e and it reads in part:^f

3. You have the right to an attorney appointed at public expense if you are indigent (without money to hire an attorney) and if
 - a. the offense charged requires a minimum jail sentence, or
 - b. the court determines that it might sentence you to jail.

The appointing authority will decide if you are indigent and appoint counsel if you are eligible.

^a MICH. CT. R. 6.610.

^b MICH. CT. R. 6.610.

^c MICH. CT. R. 6.610.

^d State of Michigan, State Court Administrative Office, form DC213 (rev’d Dec. 2021) (citing MICH. COMP. LAWS §§ 750.504, 770.3; MICH. CT. R. 1.110, 6.610; 18 U.S.C. 922(g)(9)).

^e See *Index of District Court Forms*, MICHIGAN COURTS:

ONE COURT OF JUSTICE, <https://www.courts.michigan.gov/SCAO-forms/district-court-index/> (“Advice of Rights and Plea Information (also available in Arabic, Chinese, Hmong, Korean, Russian, and Spanish)”).

^f State of Michigan, State Court Administrative Office, form DC213 at 1 (rev’d Dec. 2021) (citing MICH. COMP. LAWS §§ 750.504, 770.3; MICH. CT. R. 1.110, 6.610; 18 U.S.C. 922(g)(9)).

4. You may have to repay the expense of an appointed attorney. You may contest your ability to pay the ordered fees if the court attempts to collect any costs for an attorney, and the court must determine your ability to pay at that time.

Guilty plea by mail. Every district court in Oakland County accepts guilty pleas by mail in some circumstances. Although a defendant in *any* misdemeanor case can enter a guilty plea by mail, the court is not obliged to accept every guilty plea that it receives by mail. Rather, each district court within Oakland County sets its own unofficial criteria for the circumstances in which it allows defendants to enter guilty pleas by mail. Some district courts only allow guilty pleas by mail when the defendant is located outside the county or state, or when the defendant is incarcerated. Some district courts will not accept guilty pleas by mail in certain types of misdemeanors (e.g., alcohol related offenses, domestic violence related offenses, etc.), and some will not accept them when the misdemeanor is punishable by imprisonment. And some district courts have almost entirely ceased accepting guilty pleas by mail during the Pandemic, and instead schedule most cases for virtual (video) appearances.

When entering a plea by mail, defendants must download, fill in, and return to the district court the SCAO's *Misdemeanor*

Plea by Mail form,^g which is available only in English,^h and which provides the following regarding the right to counsel:ⁱ

2. You have the right to an attorney appointed at public expense if you are indigent (without money to hire an attorney) and

- a. the offense charged requires a minimum jail sentence, or
- b. the court determines that it might sentence you to jail.

The appointing authority will decide if you are indigent and appoint counsel if you are eligible. You may have to repay the expense of an appointed attorney. You may contest your ability to pay the ordered fees if the court attempts to collect any costs for an attorney, and the court must determine your ability to pay at that time.

The *Misdemeanor Plea by Mail* form also lists additional trial rights of the defendant including: the right to question the government's witnesses, to call and subpoena defense witnesses, to remain silent, and to be presumed innocent until proven guilty. The defendant is instructed to check the box indicating their plea – either guilty or not guilty.^j Next to the checkbox option to plead guilty the form reads:^k

^g State of Michigan, State Court Administrative Office, form DC233 (rev'd Dec. 2021) (citing MICH. CT. R. 6.610), <https://www.courts.michigan.gov/siteassets/forms/scao-approved/dc223.pdf>.

^h See *Index of District Court Forms*, MICHIGAN COURTS: ONE COURT OF JUSTICE, <https://www.courts.michigan.gov/SCAO-forms/district-court-index/> ("Misdemeanor, Plea By Mail").

ⁱ State of Michigan, State Court Administrative Office,

form DC233, at 1 (rev'd Dec. 2021) (citing MICH. CT. R. 6.610).

^j State of Michigan, State Court Administrative Office, form DC233, at 1-2 (rev'd Dec. 2021) (citing MICH. CT. R. 6.610).

^k State of Michigan, State Court Administrative Office, form DC233, at 2 (rev'd Dec. 2021) (citing MICH. CT. R. 6.610) (bold text original).

GUILTY: I understand my rights and the sentence to be imposed and enter my plea of guilty to the offense charged. My signature acknowledges that I have read my rights as printed on the front of this form. I waive those rights. If I have posted bond, I understand that it may be applied to the fine and costs.

The plea by mail form further provides fields for the court to enter information regarding the charge(s), the amount of bond instituted if the defendant pleads not guilty, maximum and minimum penalties (fines, costs, and/or jail time) permitted by law, and the sentence to be imposed (fines, costs, and/or jail time) if the defendant pleads guilty without appearing in court – all of which the court fills in *after* receiving the plea by mail form from the defendant. One clerk explained, first the judge decides whether to accept the defendant’s guilty plea by mail, and then reaches out to the city or county prosecutor for their consent to a plea by mail. “At that point, the prosecutor and judge will determine the actual sentence.” The court then enters the defendant’s conviction and returns the plea by mail form to the convicted defendant, with the sentencing guidelines and actual sentence provided on the completed form.

Constitutional concerns. Permitting misdemeanor defendants to waive their constitutional rights, including the right to counsel, by pleading guilty by mail or over the counter raises concerns. Without

doubt, many defendants can little afford to attend one or perhaps multiple court appearances – losing income through lost working hours (if not entire days), finding alternate care of dependents for whom they are responsible, obtaining transportation to and from the relevant courthouse location, etc. – making their desire to get the cases over without appearing in court quite understandable. Nevertheless, the contents of the plea by mail form may chill the right to counsel by advising indigent defendants that they “may have to repay the expense of an appointed attorney” if they choose to exercise the constitutional right.

Furthermore, permitting indigent defendants to plead guilty to offenses carrying a potential loss of liberty, without appearing before a judicial officer, risks actually denying the right to counsel to indigent defendants. For example, although Michigan Court Rules provide that the trial court need only be “satisfied that the waiver” of counsel and other trial rights “is voluntary” in order to accept the defendant’s written guilty plea by mail,¹ the U.S. Supreme Court has established a higher standard for valid waivers of pretrial rights – holding that the waiver must be made knowingly, intelligently, and voluntarily^m – and the Michigan Supreme Court has further clarified that a defendant’s waiver of the right to counsel additionally must be “unequivocal.”ⁿ

First, the guilty plea by mail form commonly used in Oakland County is only provided in English, and without a court appearance, the judge or

¹ MICH. CT. R. 6.610.

^m *Faretta v. California*, 422 U.S. 806, 835 (1975).

ⁿ *People v. Anderson*, 398 Mich. 361, 368; 247 N.W.2d 857 (Mich. 1976) (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

magistrate reviewing the defendant's plea submitted by mail has no way of knowing whether the defendant can read and write in the English language. (By contrast, the advice of rights form commonly used in Oakland County for guilty pleas taken over the counter is provided in multiple languages, but again the trial court judge or magistrate cannot know whether the defendant understands the information provided.)

Second, the defendant does not know the potential statutory penalties when signing and returning the guilty plea by mail, because the judge or magistrate fills in that information later when returning the form to the defendant.

As the U.S. Supreme Court stated in *Faretta v. California*: "Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"⁸ A misdemeanor defendant's uncounseled guilty plea and waiver of rights by mail may be voluntary (evidenced by the defendant's signing the form returned by mail), but the

waiver of the right to counsel cannot be knowing given the defendant's near total lack of information about the nature of the offense and potential punishment faced at trial and – depending on the defendant's "education and sophistication"⁹ – the waiver also may not be intelligent.

It is not possible to determine precisely how many defendants attempt to plead by mail each year, how many of those guilty pleas are accepted, and, of those, how many receive jail sentences (including suspended sentences). For example, the 52nd District Court maintains data on the number of cases disposed by "pleas by mail/taken at the counter" each year, but the data does not distinguish between guilty pleas by mail versus over the counter, nor does the data show the types of sentences received. Nevertheless, data shows that, in the first quarter of FY 2021-22, a total of 113 misdemeanor cases were disposed by guilty "pleas by mail/taken at the counter" across the four divisions of the 52nd District Court; another 107 misdemeanor cases disposed by mail in quarter two of FY 2021-22 – meaning approximately 3% of all 52nd District Court misdemeanors disposed each year are disposed through a guilty plea by mail or over the counter.⁹

⁸ *Faretta v. California*, 422 U.S. 806, 835 (1975).

⁹ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 4 cmt. 6 (rev'd Oct. 2021) (citing *People v. Anderson*, 398 Mich. 361, 247 N.W.2d 857 (1976)).

⁹ The Michigan Courts' published data shows that in 2020, the most recent year in which court data is publicly available, the four divisions of the 52nd District Court disposed of a combined total 13,579 misdemeanor cases (4,459 non-traffic misdemeanor dispositions; 7,219 traffic misdemeanor dispositions;

1,901 OUIL/OWI dispositions). See MICHIGAN SUPREME COURT, OAKLAND COUNTY, 52ND DISTRICT COURT: 2020 CASELOAD REPORT, <https://www.courts.michigan.gov/4a4bcb/siteassets/reports/statistics/caseload/2020/oakland-52nddistrictcourt.pdf>. Assuming there are approximately 400 guilty pleas by mail or over the counter (annualized from Oakland County FY2021-22 quarter one and quarter two data), then approximately 3% of all misdemeanor dispositions in the 52nd district court occur by mail or over the counter.

In certain circumstances, a person who has been arrested can be released quickly and without appearing before a judge or magistrate.²⁷³ Almost all misdemeanor defendants in Oakland County are released before appearing in court with a judge; the limited number of misdemeanor defendants who are in-custody when they first appear in court are usually accused of some sort of domestic violence offense.

If not released in one of these ways though (for example, because they cannot afford the amount of bail required or they are arrested on an offense that is not bailable without a hearing²⁷⁴), a person who is arrested must be taken “without unnecessary delay” before a magistrate at the next session of court,²⁷⁵ generally within 24 hours of arrest.²⁷⁶

Probable cause determination following warrantless arrest. In *County of Riverside v. McLaughlin*, the United States Supreme Court held that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest, or the government risks being held responsible for an illegal detention.²⁷⁷ It is not necessary for there to be an actual hearing, and a judge can make this determination without ever seeing the defendant. Instead, the court reviews the paperwork signed under oath by the officer. If the judge finds that there was not probable cause for the arrest, the person is released from jail. If the judge finds, based on the officer’s declaration, that there was probable cause for the arrest, the person remains in jail.

In Oakland County, after taking the defendant into custody, the arresting officer prepares a warrant request and police report summarizing the allegations, which is reviewed by a supervising law enforcement officer and then the prosecutor’s office. If the prosecutor’s office determines there is probable cause to support criminal charges, the prosecutor sends the signed warrant with the recommended charges back to the police department. The arresting officer then appears in person or remotely by video before a magistrate or judge who certifies probable cause on the warrant without the presence of the defendant.

B. Arraignment on the complaint and the right to counsel

Generally, the next step after a person is either arrested or cited is to appear in court before a judge at the “arraignment on the complaint.”²⁷⁸ Some defendants are in-custody, while

²⁷³ A person who has been arrested pursuant to a warrant including an interim bail provision may be released by posting the bail on the warrant in certain circumstances. MICH. COMP. LAWS §§ 780.582, 780.585 (2020); MICH. CT. R. 6.102 (last updated Sept. 20, 2021). An officer may release a person arrested without a warrant in certain circumstances, “if a magistrate is not available or immediate trial cannot be held” (i.e., the arrest occurs outside of regular court business hours), on an “interim bond to guarantee his or her appearance” at arraignment of between 20% of the minimum and 100% of the amount of the maximum possible fine that may be imposed for the arrested offense. MICH. COMP. LAWS §§ 780.581, 780.582a, 780.583a, 780.586 (2020).

²⁷⁴ MICH. COMP. LAWS §§ 764.7, 765.6e, 780.581 (2020).

²⁷⁵ MICH. COMP. LAWS §§ 764.6, 764.26, 780.581, 780.582 (2020); MICH. CT. R. 6.102.

²⁷⁶ MICH. COMP. LAWS §§ 764.9c, 764.15e (2020). If a law enforcement officer uses their statutory discretion to conduct a warrantless arrest instead of issuing an appearance ticket on a misdemeanor or ordinance violation, the defendant “must be charged by the appropriate prosecuting authority or released from custody not later than 3 p.m. the immediately following day during which arraignments may be performed.” MICH. COMP. LAWS § 764.9c(7) (2020).

²⁷⁷ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

²⁷⁸ If arrested on a warrant, the proceeding is called the “arraignment on the warrant.” See MICH. COMP. LAWS §§

²⁵⁷ 625b, 767.37 (2020); MICH. CT. R. 6.104, 6.106.

other defendants are out-of-custody. Whether a defendant is in- or out-of-custody, this is the proceeding in Michigan that triggers the attachment of the right to counsel under *Rothgery v. Gillespie County*.²⁷⁹ From that moment forward, every indigent defendant has the right to be effectively represented by appointed counsel during every critical stage of their case, unless they make an informed and intelligent waiver of their right to counsel.²⁸⁰

At the arraignment on the complaint, the court is required to:²⁸¹

- inform the defendant of the charge against him and possible sentences;
- if the defendant is not already represented by counsel, inform the defendant of the rights to which they are entitled including the right to appointed counsel if indigent, and allow the defendant to request appointed counsel if they so desire;
- if the defendant is in-custody on a bailable offense,²⁸² set or reconsider previously set bail and conditions of release; and
- schedule the probable cause conference, and for felonies schedule the preliminary examination.²⁸³

1. Pleading at the arraignment

State law permits but does not require the defendant to enter a plea at the arraignment.²⁸⁴

In misdemeanor cases, the district court can accept a defendant's guilty plea and impose sentence, all at the defendant's initial appearance before a judicial officer.²⁸⁵ However, "[i]f an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence."²⁸⁶ Some district court judges in Oakland County do permit while others expressly do *not* permit magistrates to accept guilty pleas at arraignment in misdemeanor cases.

Whether defendants can plead guilty at arraignment largely depends on whether a prosecuting attorney is present in court or has made an offer in advance. The Oakland County prosecutor does not assign prosecutors to staff any arraignment proceedings anywhere in the county. "There are 18 prosecutors and 30 district court judges" across Oakland County, a senior prosecutor explained. The prosecutor's office does have "criminal law days" where assistant prosecuting attorneys are present in district court, and if present they can negotiate plea offers for cases scheduled for that same day. But since arraignments can happen at any time in any district court,

²⁷⁹ *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).

²⁸⁰ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

²⁸¹ MICH. COMP. LAWS §§ 257.625b, 762.10d, 764.1c, 764.9c, 764.13, 764.14, 764.26, 765.1, 780.581, 780.582, 780.582a (2020); MICH. CT. R. 6.102, 6.104, 6.106, 6.610, 6.615.

²⁸² *See* MICH. CONST. art. I, § 15 (establishing the right to bail, except for certain offenses); MICH. COMP. LAWS §§ 765.5, 765.6 (2020).

²⁸³ MICH. COMP. LAWS § 766.4 (2020); MICH. CT. R. 6.104.

²⁸⁴ MICH. COMP. LAWS § 767.37 (2020); MICH. CT. R. 6.104(A)(2) (felonies), 6.610(F) (misdemeanors).

²⁸⁵ MICH. COMP. LAW §§ 600.8511, 600.8513 (2020); MICH. CT. R. 6.610. By contrast, felony offenses are not cognizable by the district courts. *See* MICH. CT. R. 6.001. Although a felony defendant may enter a plea in district court, "[f]ollowing a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing." MICH. CT. R. 6.611(A).

²⁸⁶ MICH. CT. R. 6.610.

the county prosecutor's office cannot guarantee that someone is available to appear. Likewise, not all municipalities require prosecutors to be present at arraignment in their respective district courts. But the city attorney in some jurisdictions sometimes will send a written plea offer (a "motion to amend the charge") to the MAC attorney manager for that district court the day prior to the arraignment, which the MAC attorney manager provides to the scheduled arraignment attorney to review with the defendant during their court appearance.

One district court judge voiced concern that some district courts within Oakland County have a practice of encouraging unrepresented misdemeanor defendants to negotiate plea agreements directly with prosecutors at their initial court appearance prior to being advised of the right to counsel. The Michigan State Court Administrative Office lacks data on the number of defendants in criminal cases who proceed without representation, and it is not currently possible to determine the extent of the practice and in which district courts specifically the practice proliferates.

2. The right to counsel

a. Presence of counsel during arraignment

Michigan law and MIDC standards require that every defendant is provided with counsel *during* the arraignment, and each indigent defense system within Oakland County assigns an "arraignment attorney" to appear alongside the accused for the limited purpose of arraignment.

Michigan law directs MIDC to enact minimum standards effectuating the requirements of U.S. Supreme Court case law that "each criminal defendant is advised of his or her right to counsel" and specifically requiring that "[a]ll adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under this act, and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."²⁸⁷ On May 22, 2017, LARA approved *MIDC Standard 4 (Counsel at First Appearance and other Critical Stages)*, which provides that "[c]ounsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services" and that the defendant must be provided with representation *during* "the arraignment on the complaint and warrant."²⁸⁸

A comment to *MIDC Standard 4* describes the duties of counsel appointed at first appearance as consisting of "an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal."²⁸⁹ Criminal cases should be disposed of at the arraignment (for example, through a guilty plea) only in "rare cases," and only where the "attorney has reviewed discovery and has an opportunity for a confidential discussion with her client."²⁹⁰

²⁸⁷ MICH. COMP. LAW § 780.991(1)(c) (2020).

²⁸⁸ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4(A) (Oct. 2021).

²⁸⁹ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 3 (Oct. 2021).

²⁹⁰ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 3 (Oct. 2021).

Acknowledging that the standard on counsel at first appearance does not address vertical representation (i.e., continuous representation of a single defendant by the same attorney from initial appearance through disposition), as vertical representation “will be the subject of a future minimum standard as described in MCL 780.991(2)(d),”²⁹¹ MIDC expressly permits indigent defense systems to comply with *MIDC Standard 4* using “an on-duty arraignment attorney to represent defendants” who makes a “limited appearance for arraignment only” and where the system later provides “subsequent appointment of different counsel for future proceedings”²⁹² – i.e., through a system of so-called horizontal representation.

Each indigent defense system is responsible for providing counsel at arraignment proceedings for both in-custody and out-of-custody defendants at its respective district court(s), and almost every indigent defense system within Oakland County uses some form of “on-duty arraignment attorney”²⁹³ system as permitted by *MIDC Standard 4*:

- For cases arising out of one of the four divisions of the 52nd District Court, and the defendant appears in-custody for arraignment (i.e., jail arraignment), whether charged with a felony or a misdemeanor, the Oakland County indigent defense services office schedules one attorney to staff each jail arraignment docket, which are held daily (including holidays and weekends). Arraignment attorneys for jail arraignments in the 52nd District Court must be on the Sixth Judicial Circuit Court roster of attorneys (i.e., eligible to handle felony trial appointments, as described on page 50).
- For cases arising out of one of the four divisions of the 52nd District Court, and defendant is out-of-custody, whether felony or misdemeanor – the Oakland County indigent defense services office schedules one attorney to so-called “walk-in arraignment” dockets each day, who is selected from the roster of attorneys handling cases out of that particular division of the 52nd District Court. (*See* discussion of qualification and selection of counsel in misdemeanor cases before the 52nd district court, page 56.)
- For cases arising out of any *other* district court within Oakland County, whether in-custody or out-of-custody, and whether charged with a felony or a misdemeanor, the “arraignment attorney” is selected from each indigent defense system’s own roster of private appointed attorneys.²⁹⁴ That is, attorneys representing felony defendants at arraignment in district courts other than the 52nd district need not be on the Oakland County indigent defense services office’s roster of felony-qualified attorneys for Sixth Judicial Circuit Court cases. Rather, “arraignment attorneys” in the district courts other than the 52nd need only be qualified to handle misdemeanor appointments. (*See* discussion

²⁹¹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 1 (Oct. 2021).

²⁹² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 2 (Oct. 2021).

²⁹³ In addition to the term “on-duty arraignment attorney,” different jurisdictions in Oakland County use terms such as “shift attorney,” “public defender for the day,” “king/queen for the day,” “duty lawyer,” and “arraignment attorney” to describe the same concept of a single attorney scheduled to appear in district court and tasked with representing however many defendants appear for arraignment that day or half day.

²⁹⁴ Note however that in out-of-custody misdemeanor cases in the 44th District Court, the “arraignment attorney” is also appointed as trial counsel, thus the same attorney provides representation from arraignment through disposition (pure vertical representation). City of Royal Oak, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11 (Oct. 4, 2021).

of qualification and selection of counsel in misdemeanor cases before the district courts, page 56.) The Oakland County jail holds video jail arraignments daily at schedule time blocks for each district court within Oakland County.

The district courts also generally schedule time blocks each day (including Saturdays and Sundays) for walk-in arraignments and for in-custody arraignments for defendants held by local police departments (usually misdemeanor cases), sometimes holding multiple arraignment dockets each day. One private attorney is generally assigned to staff each arraignment docket. And because many private attorneys take cases from multiple district courts (and sometimes the circuit court as well), frequently one private attorney can be scheduled as “arraignment attorney,” for example, at 10:00 a.m. in one district court before driving across the county by 1:00 p.m. that same day to serve as “arraignment attorney” in another district court. The number of defendants each arraignment attorney represents at a given arraignment docket can vary. In the smaller district courts (e.g., 46th District Court), attorneys estimate the scheduled arraignment attorney represents three or four defendants on a normal day (up to six or seven defendants on busier days). In the 50th District Court, attorneys explain that “more than 10” arraignments on a given day “is a lot.” And attorneys commonly handle between 15 and 20 arraignments in the 52nd District Court’s various divisions, although the Oakland County indigent defense services office notes that it now has a practice of assigning additional attorneys to any docket with more than eight cases scheduled for arraignment. Attorneys find the pace of arraignments “crazy” in the busier court systems in Oakland County. “Other people can’t handle the pace,” said one attorney. “I’m arraigning [defendants] every 15 minutes.”

Attorneys explained that the arraignment attorney’s role is limited to “letting the defendant know what their constitutional rights are, explaining the process, waiving formal reading of the complaint, saying the defendant stands mute, and arguing bond before the judge.” Private attorneys distinguish their role on the day of the arraignment for indigent defendants from private retained clients. The system needs “someone to go through it quickly, not like in my real practice,” one attorney said. Multiple attorneys explained that no attorney-client relationship exists between the arraignment attorney and the defendant. As a result, the assigned arraignment attorney has “no responsibility to investigate the case.” One attorney even rejected the notion that the arraignment attorney might want to know the factual allegations to the defendant’s arrest: “That’s not what that’s about. The facts don’t matter. It’s all irrelevant and would waste time because that’s not what you’re doing today.” As another attorney put it: “The purpose of providing counsel to the defendant at arraignment is to have the attorney address the issue of bond. That is the extent of that attorney’s responsibility.”

Except in out-of-custody misdemeanor cases in the 44th District Court, the on-duty attorney provided at arraignment is not automatically assigned as trial counsel going forward; rather, in all likelihood the defendant will be appointed a new attorney to represent them at their next court appearance. Therefore, every indigent defense system within Oakland County uses some form of horizontal representation. The arraigning attorney has no way of knowing which attorney will be appointed to represent the defendant from that point forward. Nor is the attorney who is ultimately appointed informed of the identity of the arraigning attorney.

b. Notice of the right to counsel

Michigan law provides that an “indigent defendant has a right to an appointed attorney whenever the offense charged requires on conviction a minimum term in jail or the court determines it might sentence to a term of incarceration, even if suspended. If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence.”²⁹⁵

For any defendant appearing for arraignment without counsel, the judge must advise the defendant of the right to counsel at public expense and encourage the defendant “to be screened for indigency and potential appointment of counsel.”²⁹⁶ Unless the unrepresented defendant waives the right to counsel, upon the defendant’s application for court appointed counsel,²⁹⁷ “the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the Michigan indigent defense commission act.”²⁹⁸

Michigan law provides that at arraignment in a felony case, if the defendant is determined to be eligible for appointed counsel, the court must “promptly appoint a lawyer and promptly notify the lawyer of the appointment.”²⁹⁹ In both felony and misdemeanor cases, *MIDC Standard 4* further provides that counsel must be “appointed to provide assistance to the defendant as soon as the defendant’s liberty is subject to restriction by a magistrate or judge,”³⁰⁰ and upon the determination of financial eligibility for appointed counsel services, all indigent defendants “shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.”³⁰¹

c. Waiver of the right to counsel

A defendant at arraignment is not permitted to waive the right to counsel unless the court has first: “(1) advis[ed] the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offer[ed] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.”³⁰² However, a misdemeanor defendant seeking to plead guilty “by mail” or “over the counter” (*see side bar on*

²⁹⁵ MICH. CT. R. 6.610.

²⁹⁶ MICH. CT. R. 6.005. *See also* MICH. COMP. LAWS § 764.26 (2020).

²⁹⁷ MICH. COMP. LAWS § 780.991 (2020).

²⁹⁸ MICH. COMP. LAWS § 775.16 (2020). To be clear, the language of section 775.16 permitting magistrates to appoint counsel conflicts with *MIDC Standard 5*, which states that “[t]he selection of lawyers . . . shall not be made by the judiciary or employees reporting to the judiciary” and the role of judges and/or their employees “shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency.” MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 6, std. 5 (Oct. 2021).

²⁹⁹ MICH. CT. R. 6.005(D).

³⁰⁰ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 4 (Oct. 2021).

For any two or more defendants jointly accused of committing the same offense, Michigan law further provides for the appointment of “separate lawyers unassociated in the practice of law for each defendant.” MICH. CT. R. 6.005(F).

³⁰¹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4(B) (Oct. 2021).

³⁰² MICH. CT. R. 6.005(D).

pleading guilty without appearing before a judge or magistrate, pages 89-92) can enter a written waiver of the right to the assistance without appearing before a judicial officer, so long as the defendant is first informed of the right to counsel before entering their written waiver.³⁰³ (If any defendant pleads not guilty by mail, the district court schedules the case for arraignment and revisits the issue of appointment or waiver of counsel at that future court hearing.)

MIDC Standard 4 provides that “[a]ny waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.”³⁰⁴ It is not possible for a court to determine whether a defendant pleading guilty by mail or over the counter has made an “intelligent choice” to waive counsel because there is no opportunity for a judge or magistrate to examine the defendant’s “education or sophistication” as required by *MIDC Standard 4*.

Waivers of counsel are rare in the Sixth Judicial Circuit Court but are common enough in the 52nd District Court to cause concern for some prosecutors – defendants who would be “better off with appointed counsel do not always recognize that they are better off.” The Oakland County indigent defense services office reports waivers of counsel in its quarterly reports to MIDC. When asked whether defendants waive counsel due to fear of being required to reimburse the county for the cost of their representation, the indigent defense service office’s chief attorney was uncertain, but offered that 52nd District Court judges usually do order some reimbursement, usually a flat \$100-\$150 on each misdemeanor case. In felony cases, the Sixth Judicial Circuit Court leaves to the court business office the decision of whether to assess defendants the cost of their representation, and the court business office usually pursues reimbursement of the entire cost of counsel.

d. Requesting appointed counsel and indigency determinations

At the defendant’s “first appearance in court,” there must be a preliminary inquiry regarding the defendant’s indigency, or partial indigency, and ability to pay.³⁰⁵ The defendant is responsible for “establishing his or her indigency and eligibility for appointed counsel;”³⁰⁶ the defendant cannot be charged a fee for the indigency assessment.³⁰⁷

At the time of this evaluation, each district court was responsible for making indigency determinations; either a court clerk, judge, or magistrate would make the determination. All of the district courts in Oakland County except the 45th use the Form MC 222, “Request for Appointment of Attorney and Order”; the defendants fills out the first part of the form to request

³⁰³ MICH. CT. R. 6.610(D)(3).

³⁰⁴ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 4 cmt. 6 (Oct. 2021) (citing *People v. Anderson*, 398 Mich. 361; 247 N.W.2d 857 (1976)).

³⁰⁵ MICH. COMP. LAWS § 780.991(3)(a) (2020). “First appearance” is not defined by statute. The MIDC standards provide “[a] defendant must be screened for indigency as soon as reasonably possible. . .” and “[t]he indigency determination shall be made. . . as soon as the defendant’s liberty is subject to restriction by a magistrate or judge.” MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, 14 (Oct. 2021).

³⁰⁶ MICH. COMP. LAWS § 780.991(3)(g) (2020).

³⁰⁷ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 16 (Oct. 2021).

appointed counsel and the courts fill out the rest to approve or deny that request.³⁰⁸ To help the court determine the defendant's indigency, the form requires the defendant to provide various pieces of information such as whether the defendant is currently incarcerated, whether the defendant is currently receiving public assistance, the defendant's income, the defendant's assets, and the defendant's obligations.

Generally, each district court determines a defendant's indigency purely based on the information provided by the defendant on the form, though some judges may ask additional questions during the arraignment. Some judges specifically told us they do not have the resources to verify any of the information provided by the defendant on the form. In sum, whether a defendant is found indigent and approved for appointed counsel is really based on the discretion of the clerk, judge, or magistrate making the determination in each case. However, in general, felony defendants are always found indigent and referred for appointment of counsel. And in misdemeanor cases, most court officials in most of the district courts in Oakland County generally err on the side of finding the defendant indigent.

The exception to that general rule is the 52nd District Court – Division 3 where stakeholders report that judges often deny requests for counsel in misdemeanor cases even when the defendant seems to be indigent, especially in instances where the defendant incorrectly fills out the form. Moreover, stakeholders expressed concern that a specific judge frequently will deny counsel, stating that the defendants requesting counsel are not entitled to a court appointed attorney because the judge does not intend to sentence them to jail, in which instance the defendants proceed without counsel (because they cannot find friends or family members with sufficient funds to afford the cost of private counsel). However, upon the defendant's guilty plea or conviction at trial, the judge will impose, as one stakeholder put it, "onerous probation requirements which defendants will violate" and, as a result of the probation violation, will be sentenced to jail for an amount of time that is "far beyond commensurate to the violation." Such practices are a clear violation of the U.S. Supreme Court's decision in *Alabama v. Shelton*,³⁰⁹ in which the Court reaffirmed that trial courts are prohibited from ever sending an indigent defendant to jail following a suspended sentence unless the defendant had originally received or waived their right to an attorney during the underlying trial phase.

A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point 'result[s] in imprisonment,' . . . it 'end[s] up in the actual deprivation of a person's liberty,' . . . This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow.³¹⁰

Or, as one prosecutor put it: "These are often people who are not represented who need to be."

³⁰⁸ Form MC 222, Request for Appointment of Attorney and Order (Rev. Dec. 2021). Generally, when a defendant in the 45th District Court requests appointed counsel, the court automatically finds every defendant indigent (the defendant is not required to fill out any type of form).

³⁰⁹ *Alabama v. Shelton*, 505 U.S. 654 (2002).

³¹⁰ *Alabama v. Shelton*, 505 U.S. 654, 662 (2002).

INDIGENCY AND PARTIAL INDIGENCY DETERMINATION

In Michigan, a defendant is considered indigent if he/she “is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own.”^a National standards similarly require jurisdictions to determine whether hiring counsel will impose a substantial hardship on a defendant.^b In Michigan, substantial financial hardship is rebuttably presumed if:^c

1. the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance;
2. the defendant resides in public housing;

3. the defendant earns an income less than 200% of the federal poverty guideline;^d
4. the defendant is currently serving a sentence in a correction institution; or
5. the defendant is currently receiving residential treatment in a mental health or substance abuse facility.

If the defendant does not meet any of the situations in which substantial financial hardship is presumed, the defendant “must be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel.”^e In determining the defendant’s

^a MICH. COMP. LAWS § 780.991(3)(b) (2020); MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^b AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-7.1 (3d ed. 1992) (“Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person’s ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.”). See also NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, ch. 13, guideline 1.5 (1976):

Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations. If the person’s liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation. The accused’s assessment of his own financial ability to obtain competent representation should be given substantial weight.

(a) Liquid assets include cash in hand, stocks and bonds, bank accounts and any other assets which can be readily converted to cash. The person’s home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility. Nor should the fact of whether or not the person has been released on bond or the resources of a spouse, parent or other person be considered.

(b) The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.

See e.g., BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING COUNSEL (2008); THE SPANGENBERG GROUP, DETERMINATION OF ELIGIBILITY FOR PUBLIC DEFENSE (2002).

^c MICH. COMP. LAWS § 780.991(3)(b) (2020); MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^d Though the MIDC Act provides a rebuttable presumption of indigency when a defendant earns an income less than 140% of the federal poverty guideline, “[r]esearch and input from stakeholders... reveals that it is unlikely that a defendant earning an income less than 200% of the federal poverty guideline would be able to retain counsel without experiencing substantial financial hardship.” MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 18, cmt. 2 (Oct. 2021).

^e MICH. COMP. LAWS § 780.991(3)(c) (2020).

indigency, statute, court rule, and MIDC standards lay out various factors to be considered such as the defendant's income, debt, property owned, number of dependents, employment, and level of education.^f In addition, and in line with national standards,^g the defendant's "ability to post bond for pretrial release does not make the defendant ineligible" for appointed counsel.^h If a defendant is found not indigent, and thus ineligible for appointed counsel, the defendant can request judicial review of the indigency determination.ⁱ

A defendant can only be found partially indigent "if the indigent criminal defense system determines that a defendant is not fully indigent."^j Specifically, "[a] defendant who cannot obtain competent counsel on their own without substantial financial hardship, but who has the current or reasonably foreseeable ability to pay some defense costs, is partially indigent."^k In making a partial indigency determination, the defendant "must be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and

local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel."^l Unlike the indigency determination, the determination of whether a defendant is partially indigent can be deferred until contribution or reimbursement (see side bar on contribution and reimbursement, pages 103-107) is requested or ordered.^m

The defendant's indigency determination can be "reviewed by the indigent criminal defense system at any other stage of the proceedings."ⁿ The defendant has an ongoing duty to report significant improvements in their financial condition, which can lead to a redetermination of the defendant's status as indigent or partially indigent.^o Alternatively, if during the case the defendant's financial condition declines, the defendant can request to be rescreened for indigency and partial indigency.^p

^f MICH. COMP. LAWS § 780.991(3)(a) (2020); MICH. CT. R. 6.005(B); MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^g AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-7.1 (3d ed. 1992); NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, ch. 13, guideline 1.5 (1976).

^h MICH. CT. R. 6.005(B).

ⁱ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 17 (Oct. 2021).

^j MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^k MICH. COMP. LAWS § 780.991(3)(c), (d) (2020).

^l MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^m MICH. COMP. LAWS § 780.991(3)(a) (2020).

ⁿ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 15-16 (Oct. 2021).

^o MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 15 (Oct. 2021).

^p MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 15 (Oct. 2021).

A WORD ON CONTRIBUTION AND REIMBURSEMENT

Local governments assessing defense costs in excess of local share. Prior to the creation of MIDC, some local governments opted to fund public defense primarily through recouping representation costs from indigent defendants through the assessment of legal fees, as allowable under state law.^a In calculating each jurisdiction's "local share," the MIDC Act expressly excludes attorney's fees collected from indigent defendants as a factor.^b As a result, these governments' local shares are minimal because of the limited government expenditure used to fund indigent defense in the years prior to the creation of MIDC. As more MIDC standards have been adopted, and more state funding is

made available to meet those standards, the local share in these jurisdictions is an increasingly small percentage (less than 5% in some jurisdictions, which are highlighted in gray in the table below) of the overall indigent defense funding.^c

Recoupment practices in some jurisdictions continued even after the creation of MIDC. The table below shows the attorney fees collected from indigent and partially indigent defendants in each jurisdiction within Oakland County during fiscal year 2020 and fiscal year 2021.^e Four jurisdictions within Oakland County generated more revenue through recoupment of attorney fees than their certified local share (highlighted gray in the table on the left).

Local share as percentage of indigent defense system's total income			
Indigent Defense System	FY 2018-19	FY 2019-20	FY2020-21
43-1 Hazel Park	1.6%	1.5%	2.2%
43-2 Ferndale	2.4%	2.4%	2.8%
43-3 Madison Heights	0.4%	0.3%	0.3% ^d
44 Royal Oak	5.7%	2.6%	3.1%
45 Oak Park	16.5%	8.2%	8.6%
46 Southfield	16.1%	13.8%	11.2%
47 Farmington	11.3%	10.7%	11.6%
48 Bloomfield Hills	5.1%	3.9%	3.3%
50 Pontiac	2.2%	1.6%	2.0%
51 Waterford	11.3%	9.0%	8.7%
52/6 Oakland County	27.1%	24.8%	25.8%

MIDC cannot monitor fees assessed on indigent defendants. In line with national standards,^f Michigan policymakers have determined that only defendants determined to be partially indigent

^d The local share of funding for the 43rd District Court - Madison Heights in fiscal year 2021 was \$1,780 – or only \$0.06 per capita in local indigent defense spending. As of the 2020 federal census, the city of Madison Heights has a population of 28,468. *Quickfacts: Madison Heights city, Michigan*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/madisonheightscitymichigan>.

^e Data displayed is obtained from the "report of unexpended funds" for fiscal years 2020 and 2021 submitted by each jurisdiction to the Michigan Indigent Defense Commission.

^f See, e.g., AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-7.1 through 5-7.3 (3d ed. 1992) (proscribing recoupment or reimbursement of costs of representation, except in cases of fraud, but otherwise approving the practice of requiring defendants determined to be partially indigent to make contributions during the pendency of the representation only where "satisfactory procedural safeguards are provided").

^a MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020).

^b MICH. COMP. LAWS § 780.993(17) (2020). See also MICH. COMP. LAWS § 780.983(i) (2020).

^c Calculated by dividing the jurisdiction's local share by total income, as reported on its "report of unexpended funds" for fiscal years 2018-19, 2019-20, and 2020-21 submitted by each jurisdiction to the Michigan Indigent Defense Commission (on file with 6AC).

Attorney fees collected, fiscal years 2020 and 2021				
Fiscal Year 2019-20			Fiscal Year 2020-21	
Indigent Defense System	Local share	Attorney Fee Reimbursement Collections for the Indigent Defense System	Local share	Attorney Fee Reimbursement Collections for the Indigent Defense System
43-1 Hazel Park	\$18,375	\$-	\$18,357	\$-
43-2 Ferndale	\$15,309	\$-	\$15,294	\$-
43-3 Madison Heights	\$1,781	\$689	\$1,780	\$3,400
44 Royal Oak	\$22,692	\$-	\$22,670	\$-
45 Oak Park	\$42,170	\$10,238	\$42,129	\$5,477
46 Southfield	\$82,782	\$-	\$82,701	\$23,009
47 Farmington	\$21,911	\$20,592	\$21,890	\$32,237
48 Bloomfield Hills	\$17,464	\$26,031	\$17,446	\$23,687
50 Pontiac	\$18,023	\$-	\$18,005	\$1,055
51 Waterford	\$31,808	\$41,160	\$31,776	\$46,109
52/6 Oakland County	\$1,868,991	\$1,029,655	\$1,867,162	\$1,471,026

and able to contribute to the cost of their representation without substantial hardship should be required to repay the jurisdiction a portion of their attorney's fees.⁹ There are two statutorily allowable ways local governments may assess representation costs against indigent defendants:

- "Contribution" generally occurs at the outset of the case, and creates an "ongoing obligation" of the defendant to pay a portion of the cost of their representation "during the term of

the appointment"^h – *i.e.*, until the conclusion of the case.ⁱ Only partially indigent defendants can be ordered to pay contribution and only as long as the contribution does not cause the partially indigent defendant "a substantial financial hardship."^j Partially indigent defendants are ordered to "contribute" to the cost of their representation without regard to the eventual outcome of the

⁹ See MICH. COMP. LAWS § 780.991(3)(f); MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 13 (Oct. 2021) (citing MICH. COMP. LAWS § 780.991(3)(f) and the U.S. Supreme Court's decision in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.") as authority for the promulgation of the MIDC standard on determining indigency and contribution).
^h *People v. Jose*, 896 N.W.2d 491, 495-496 (Mich. Ct. App. 2016); see also MICH. CT. R. 6.005(C); MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 13, 16-17 (Oct. 2021).

ⁱ "The defendant's obligation to make contribution payments ends at sentencing or when defendant's defense costs are paid – whichever is earlier." MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 17 (Oct. 2021).

^j MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 16-17 (Oct. 2021). If a partially indigent defendant disagrees with the decision that the defendant must pay contribution, or the contribution amount, the defendant can request judicial review. MICH. COMP. LAWS § 780.991(3)(a) (2020).

case.^k If at sentencing, a partially indigent defendant's contribution payments do not equal the cost of the defendant's representation, the indigent defense system can request reimbursement at the defendant's sentencing.^l The locality is permitted to keep 80% of the costs collected through contributions from *partially* indigent defendants (the remaining 20% must be remitted to the state Department of Licensing and Regulatory Affairs, not MIDC directly), and the locality is not required to reinvest the attorney fees that it collects back into the indigent defense system.^m

- “Reimbursement” occurs at the conclusion of the case, when the representation by counsel is complete.ⁿ Following entry of a guilty plea or conviction, the trial court “may” require any indigent defendant to reimburse the county or municipal government for the “expenses of providing legal assistance to the defendant.”^o The locality keeps 100% of the attorneys fee collected (the state is owed 0%) and the locality is permitted to direct that revenue to any purpose of its choosing.^p

With *MIDC Standard for Determining Indigency and Contribution* made binding on local governments starting in fiscal year 2023,^q indigent defense systems soon will not recoup costs from fully

^k See MICH. COMP. LAWS § 780.991(3)(a) (2020).

Contribution is required under statute but permissible under Michigan Court Rule. *Compare* MICH. COMP. LAWS § 780.991(3)(a) (2020) (“If an indigent criminal defense system determines that a defendant is partially indigent, the indigent criminal defense system shall determine the amount of money the defendant must contribute to his or her defense.”), *and* MICH. COMP. LAWS § 780.993(17) (2020) (“The court shall collect contribution or reimbursement from individuals determined to be partially indigent under applicable court rules and statutes.”), *with* MICH. CT. R. 6.005(C) (“If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.”).

^l MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 13, 17 (Oct. 2021).

^m MICH. COMP. LAWS § 780.993(17) (2020).

ⁿ *People v. Jose*, 896 N.W.2d 491, 495-496 (Mich. Ct. App. 2016); *see also* MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020); MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 14 (Oct. 2021).

^o MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020). There is no provision for “reimbursement” of indigent defense expenses in cases where the defendant is

not convicted (e.g., acquittal, dismissal, diversion, etc.). Although reimbursement often is ordered at the sentencing hearing, it is not a formal part of sentencing because the obligation to reimburse the government for the cost of representation is not a consequence of conviction. *See People v. Nowicki*, 213 Mich. App. 383, 386 (Mich. Ct. App. 1995) (finding that the “defendant’s obligation to reimburse the county for legal fees and costs is completely independent of his sentence. Unlike his sentence, this obligation does not arise as a consequence of his conviction. Instead, it arises from the defendant’s obligation to defray the public cost of representation.”).

^p MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020). *See also* Memorandum from Thomas Clement, General Counsel, Michigan Supreme Court, to Trial Courts re: Michigan Indigent Defense Commission Act Amendments 2-3 (Oct. 31, 2018).

^q *See* STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, IN THE MATTER OF: THE MICHIGAN INDIGENT DEFENSE COMMISSION PROPOSED STANDARD ON INDIGENCY AND CONTRIBUTION (Oct. 28, 2021) (“Indigent criminal defense systems shall have 180 days from the date of this order to submit compliance plans to the MIDC pursuant to MCL 780.993(3).”), https://michiganidc.gov/wp-content/uploads/2021/10/Hawks_Order_Approving_Indigency_Standard_102821_739492_7.pdf.

indigent defendants.^r However, at the time of this study, each district court in Oakland County and the Sixth Judicial Circuit Court handled reimbursement in their own way and thus reimbursement decisions were often left to the discretion of each judge on each particular case.^s Some court websites actually may chill the right to counsel by announcing that

most defendants will incur fees if the defendant asks for their constitutional right to counsel.^t

Because MIDC's authority is restricted to regulating the conduct of indigent defense systems through the annual compliance planning process, it has no direct power over the conduct of judges to enforce

^r See MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 16 (Oct. 2021) ("This Standard does not require local funding units to seek contribution. But if a local funding unit elects to pursue contribution in a specific case, this Standard controls, among other things, when and how much contribution can be sought. The appointing authority cannot require an indigent defendant to contribute to the cost of their defense. An appointing authority cannot require a partially indigent defendant to contribute to the cost of their defense if doing so would cause defendant a substantial financial hardship.").

^s Criminal justice stakeholders explained that judges in the 44th District Court will occasionally impose about a \$150 to \$200 reimbursement fee on a defendant if the defendant can afford it, even when the defendant's case is dismissed (i.e., there is no conviction, as required by statute for reimbursement); though the judges also will work with the defendant to set up a payment plan or waive the fee in some situations. Similarly, in the 48th District Court, the reimbursement decision is left up to the judge; judges in the 48th District Court occasionally assess a \$150 reimbursement fee. On the other hand, judges in the 50th and 51st District Courts often do not charge reimbursement fees at all, except that judges in the 51st District Court often assess \$250 reimbursement when a defendant is sentenced to probation. In the 52nd District Court divisions, judges usually order a reimbursement fee of anywhere between \$100 and \$300 in misdemeanor cases. Finally, in felony cases, the Sixth Circuit Court judges leave the decision of whether to charge and how much to charge in reimbursement to the court's business office, which generally pursues a reimbursement fee covering the entire cost of the appointed counsel. According to the Oakland County indigent defense services office, the Oakland County executive has informed the sixth circuit and 52nd District Courts that, in a change of county policy starting in fiscal year 2023, the courts are not expected to order reimbursement against indigent defendants, and courts will not be penalized

for doing so. Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (July 19, 2022) (on file with 6AC). Nevertheless, Oakland County government has no authority to enforce its policy should a trial court judge order reimbursement in a particular case anyway, as currently is permitted by statute. See MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020) (permitting the court to impose reimbursement of any indigent defendant upon conviction).

^t For example, the 48th District Court website states: "In most cases, the cost to the defendant for a court appointed attorney in a misdemeanor case from pre-trial to sentence is \$150, unless otherwise determined by the judge. The cost to the defendant for a court appointed attorney at a probation violation hearing is \$50." *Court Appointed Attorney, 48th District Court*, OAKLAND COUNTY MICHIGAN, <https://www.oakgov.com/courts/district-courts/48/criminal/Pages/court-appointed-attorney.aspx>. Similarly, the website for the 52nd District Court – Division 3, states the "Cost to Defendant for Misdemeanor Appointed Attorney" is "\$100: Each Time the Attorney Appears." *Appointed Attorney/Public Defender, 52nd District Court – Division 3*, OAKLAND COUNTY MICHIGAN, <https://www.oakgov.com/courts/district-courts/52-3/criminal/Pages/court-appointed-attorney.aspx>. And the website for the 52nd District Court – Division 4, responds to a frequently asked question (FAQ): "If I have a public defender, is this service free?" "No. Visit our Court Appointed Attorney page to find out more on fees associated with these services." The website then explains: "Cost to Defendant for Misdemeanor Court Appointed Attorney" is "First Appearance for Attorney: \$200.00," "More than 1 Appearance: \$300.00," and "Jury Trial: \$500.00." *Frequently Asked Questions, 52nd District Court – Division 4*, OAKLAND COUNTY MICHIGAN, <https://www.oakgov.com/courts/district-courts/52-4/criminal/Pages/criminal-faq.aspx>. *Appointed Attorney, 52nd District Court – Division 4*, OAKLAND COUNTY MICHIGAN, <https://www.oakgov.com/courts/district-courts/52-4/criminal/Pages/court-appointed-attorney.aspx>.

the purpose and spirit of the standards it promulgates.^u Additionally, there is no statewide data available on the revenues generated from attorney fees assessed on indigent defendants, which means MIDC does not have the capacity to monitor the trial courts' compliance with

its MIDC standard on indigency.^v While the locality can spend the revenue it generates from indigent defendants as it sees fit,^w there also is no requirement that the locality report how it actually spends that revenue.^x

^u MIDC notes that individual trial court judges are constitutional officers with independent authority to interpret Michigan statutes. Were certain judges to fail to conduct an indigency determination as provided by MICH. COMP. LAWS § 780.991(3) (2020) and *MIDC Standard for Determining Indigency and Contribution*, appoint public counsel to represent the accused person, and then – without regard to the defendant's indigency status – assess the defendant the cost of their representation as provided by MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020), MIDC is powerless to take any action.

^v In theory, it is possible for MIDC to learn this information, but it is not easily done. This is because MIDC receives no direct reporting of disbursements made to the Michigan Department of Treasury by each jurisdiction (i.e., the 20% of funds collected from contributions by partially indigent defendants that are owed to the state). Instead, each trial court submits monthly reports to the Department of Treasury of the court's disbursements from all court costs collected in that jurisdiction that are owed to the state, including "Local Indigent Defense Contribution/Reimbursement - MCL 780.993." Michigan Department of Treasury, Form 295: Fee Transmittal for State of Michigan District or Municipal Court Offices. The Department of Treasury does not produce periodic reports to MIDC or the Michigan State Court Administrative Office from the data received regarding the total amount of attorney fees collected by each jurisdiction, and neither MIDC nor the Michigan State Court Administrative Office has the ability to cull reports from Department of Treasury databases. Rather, to determine a given jurisdiction's actual revenue from recouped indigent defense costs, one must:

1. submit a Freedom of Information Act request to the Department of Treasury for all monthly reports from that jurisdiction for a given 12-month period;
2. tally the monthly amounts under "Local Indigent Defense Contribution/Reimbursement - MCL 780.993" to determine the total amount

disbursed to state government during that period (i.e., the sum equates to the 20% of collections from partially indigent defendants that the state is owed); and finally

3. subtract that sum from the total amount of attorney fees collected, as reported to MIDC on the jurisdiction's year-end "report of unexpended funds," to determine the amount the jurisdiction keeps (i.e., the remaining 80% of costs collected from partially indigent defendants, plus the 100% of costs collected from fully indigent defendants).

Once local governments are required to comply with the *MIDC Standard for Determining Indigency and Contribution* starting in fiscal year 2023, in theory, it becomes a simple math problem to determine what portion of revenue generated from attorney fees is paid to the state (calculating 20% of the total amount reported) and what portion is kept by the local government (calculating 80% of the total amount reported). However, because MIDC lacks capacity to monitor and enforce the trial courts' compliance, there is no guarantee that reported revenues from collected attorney fees will be assessed only on partially indigent defendants starting in fiscal year 2023.

^w MICH. COMP. LAWS § 780.993(17) (2020) (providing that the "remaining 80% of the funds collected under this subsection *may* be retained by the indigent criminal defense system for purposes of reimbursing the costs of collecting the funds under this subsection and funding indigent defense in the subsequent fiscal year," but leaving open the option to use the funds collected for some other purpose) (*italics added*).

^x However, MIDC notes that the MIDC Act explicitly gives MIDC authority to audit, monitor, and enforce compliance. While it is not directly with the courts, the funding units oversee the courts and the MIDC will take necessary action, which can, at its worst, include seeking court action against the local system and allowing the MIDC to take over their indigent defense services. MICH. COMP. LAWS § 780.995(6)(2020).

Michigan law directs MIDC to “promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent”³¹¹ and “to determine the amount a partially indigent defendant must contribute to his or her defense”³¹² if the defendant is found not to be “fully indigent.”³¹³ The *MIDC Standard for Determining Indigency and Contribution* was approved by LARA on October 28, 2021,³¹⁴ with which all local funding units in Michigan must comply by the end of fiscal year 2023.

Under *MIDC Standard 5*, trial court judges and their employees retain authority to make indigency determinations,³¹⁵ and a determination of the defendant’s financial eligibility for the appointment of counsel is required “not later than at the defendant’s first appearance in court.”³¹⁶ However, under *MIDC Standard for Determining Indigency and Contribution*, “[a] local funding unit can designate the individual(s) or entity of its choice to review applications for the appointment of counsel...; this is the appointing authority.”³¹⁷ In the event the local funding unit places responsibility for indigency screening with the appointing authority, the court loses its authority to determine the defendant’s financial eligibility for the appointment of counsel.³¹⁸ An appointing authority can be a MAC attorney manager or public defender office but cannot be anyone employed by a court funded by the local funding unit.³¹⁹

If the defendant is determined to be “partially indigent,” the indigent defense system also “shall determine the amount of money the defendant must contribute to his or her defense.”³²⁰ (*See side bar on contribution and reimbursement of the cost of representation, pages 103-107.*)

e. How a specific attorney is appointed to represent each indigent defendant

Michigan law calls for MIDC to set standards ensuring the early appointment of counsel.³²¹ *MIDC Standard 4* states that “[c]ounsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services”³²² and that “[a]ll persons determined to

³¹¹ MICH. COMP. LAWS § 780.991(3)(e) (2020).

³¹² MICH. COMP. LAWS § 780.991(3)(f) (2020).

³¹³ MICH. COMP. LAWS § 780.991(3)(d) (2020).

³¹⁴ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES (Oct. 2021).

³¹⁵ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 6, std. 5(B) (Oct. 2021) (“The court’s role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver).”).

³¹⁶ MICH. COMP. LAWS § 780.991(3)(a) (2020). *See also* MICH. CT. R. 6.005.

³¹⁷ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 13, 16 (Oct. 2021).

³¹⁸ *See* MICH. CT. R. 6.005(B) (requiring the court to “refer the defendant to the appointing authority for indigency screening” if an appointing authority exists under an MIDC-approved compliance plan); MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 13, 16 (Oct. 2021) (defining “appointing authority” to mean “the individual or office selected by the local funding unit that determines indigency and approves requests for counsel and/or requests for experts and investigators”).

³¹⁹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 16 (Oct. 2021).

³²⁰ MICH. COMP. LAWS § 780.991(3)(a) (2020).

³²¹ MICH. COMP. LAWS § 780.991(1)(c) (2020).

³²² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4(A) (Oct. 2021).

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.”³²³

Michigan law also requires MIDC to promulgate standards ensuring that the “same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case.”³²⁴ In promulgating *MIDC Standard 4* requiring indigent defense systems to provide counsel at first appearance and all critical stages of a criminal case, MIDC expressly reserves “addressing vertical representation (same defense counsel continuously represents)” as “the subject of a future minimum standard,” and not made a requirement of *MIDC Standard 4*.³²⁵ Instead, MIDC expressly permits systems to use non-continuous, horizontal representation of indigent defendants under *MIDC Standard 4* in which an “on-duty arraignment attorney” makes a “limited appearance for arraignment only,” so long as the indigent defense system makes a “subsequent appointment of different counsel for future proceedings.”³²⁶ Additional appointments of separate counsel – i.e., providing a third or perhaps a fourth attorney to represent a single defendant across multiple court appearances – are not contemplated by *MIDC Standard 4*.

Michigan law further requires MIDC ensure that the “delivery of indigent criminal defense services must be independent of the judiciary.”³²⁷ MIDC policy clarifies that, under *MIDC Standard 5*, judges have no authority to appoint counsel to represent individual defendants in specific cases.³²⁸ Instead, the individual appointment of trial counsel must be made by the indigent defense system’s independent appointing authority.³²⁹ Within Oakland County’s several indigent defense systems, therefore, the appointment of trial counsel must be made by the chief attorney of Oakland County’s indigent defense services office (or a deputy), or in all other systems the MAC attorney manager.

Felony prosecutions. If at arraignment a felony defendant is determined to be eligible for appointed counsel, the court must “promptly appoint a lawyer and promptly notify the lawyer of the appointment.”³³⁰

Although Michigan law provides for commencing felony prosecutions by grand jury indictment, the grand jury system generally is not used and instead practically all felony prosecutions in Oakland County are commenced by information in circuit court following a preliminary

³²³ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4(B) (Oct. 2021).

³²⁴ MICH. COMP. LAWS § 780.991(2)(d) (2020).

³²⁵ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 1 (Oct. 2021).

³²⁶ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 2 (Oct. 2021).

³²⁷ MICH. COMP. LAWS § 780.991(1)(a) (2020).

³²⁸ See MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. (Oct. 2021); MICHIGAN INDIGENT DEF. COMM’N, ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT STANDARD 5, question 4 (Feb. 2021), <https://michiganidc.gov/wp-content/uploads/2021/02/MIDC-Standard-5-Answers-to-FAQs-February-2021.pdf>.

³²⁹ See MICHIGAN INDIGENT DEF. COMM’N, ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT STANDARD 5, questions 1, 4 (Feb. 2021), <https://michiganidc.gov/wp-content/uploads/2021/02/MIDC-Standard-5-Answers-to-FAQs-February-2021.pdf>.

³³⁰ MICH. CT. R. 6.005(D).

examination in district court.³³¹ Following the arraignment on the complaint or warrant in a felony case, the next proceedings in district court are:

- the probable cause conference, which must be held between seven and 14 days from the arraignment, and at which the defense and prosecution negotiate possible plea agreements and other procedural matters, and the court may reconsider bond and other conditions of pretrial release;³³² and
- the preliminary examination, which must be held between five and seven days from the probable cause conference (or 21 days maximum from the arraignment), unless waived.³³³

Unless the prosecutor obtains an indictment against a defendant who has been arrested on a felony, that defendant has the right to demand and have a preliminary examination.³³⁴ A preliminary examination is a hearing conducted in district court, at which the judge or magistrate determines on the basis of the evidence presented whether there is probable cause to believe that an offense has been committed and that the defendant committed it.³³⁵ For a defendant who is in jail when his preliminary examination occurs, the court can also modify a prior release condition, including revisiting previously set bail.³³⁶ The preliminary examination is a critical stage in a criminal case at which the indigent defendant has a right to counsel.³³⁷

If at the preliminary examination the court finds probable cause, and also finds that the offense is “not cognizable by the district court,” then the district court “must bind the defendant over for trial” on the information before the circuit court.³³⁸ “The defendant may waive the preliminary examination with the consent of the prosecuting attorney,”³³⁹ in which instance the district court “must bind the defendant over for trial” before the circuit court “on the charge set forth in the complaint or any amended complaint.”³⁴⁰

Generally, the court finds a felony defendant indigent and appoints counsel at, or right after, the arraignment. Then, generally within two days of the arraignment, the court notifies the Oakland County indigent defense services office of the approval of the request for appointed counsel. The indigent defense services office refers to the list of attorneys eligible to handle the type of felony offense with which the defendant is charged, finds the next attorney on the list,³⁴¹

³³¹ MICH. COMP. LAWS §§ 761.1, 767.7, 767.25, 767.41, 767.42 (2020); MICH. CT. R. 6.112.

³³² MICH. COMP. LAWS § 766.4 (2020); MICH. CT. R. 6.106(H), 6.108.

³³³ MICH. COMP. LAWS §§ 766.7, 766.4 (2020); MICH. CT. R. 6.104(E)(4).

³³⁴ MICH. COMP. LAWS §§ 766.1, 767.42 (2020); MICH. CT. R. 6.110(A).

³³⁵ MICH. COMP. LAWS §§ 766.1, 766.4 (2020); MICH. CT. R. 6.110(E).

³³⁶ MICH. CT. R. 6.106(H) (permitting the court to modify a previous release determination).

³³⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 202 (2008) (explaining *Coleman v. Alabama*, 399 U.S. 1, 8 (1970), as saying that the “right to counsel applies at preindictment preliminary hearing at which the ‘sole purposes . . . are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable’”). *See* MICH. CT. R. 6.106(H).

³³⁸ MICH. CT. R. 6.110(E). *See also* MICH. COMP. LAWS §§ 766.13, 766.14, 767.42 (2020); MICH. CT. R. 6.111, 6.113.

³³⁹ MICH. COMP. LAWS § 766.7 (2020); MICH. CT. R. 6.110.

³⁴⁰ MICH. CT. R. 6.110(A), (I). *See also* MICH. COMP. LAWS § 767.42 (2020).

³⁴¹ Attorneys qualified for each category of felony cases are generally appointed “in rotation according to the date of their last appointment.” Oakland County Indigent Defense Program Policy and Procedures at 8-9 (Dec. 2, 2021). Sometimes an attorney or judge requests that the arraignment attorney be assigned to the case so the defendant receives pure vertical representation; the Indigent Defense Services Office may approve that request in certain situations. *See* Oakland County Indigent Defense Program Policy and Procedures at 8-9 (Dec. 2, 2021).

confirms the attorney's availability to take the case, and then submits notice of the appointment to the appropriate district court and the appointed attorney;³⁴² this process generally takes about two days. However, despite the requirements of *MIDC Standard 5*, some attorneys report that judges still directly appoint counsel in some instances, such as where a case involves a particular issue or specialty, or sometimes request the indigent defense services office to appoint a certain attorney to a specific case. The Oakland County indigent defense services office strongly disputes that trial court judges make any direct appointments or that the office receives and/or considers judges' requests when making individual case assignments to attorneys. Nevertheless, some private attorneys hold the opinion that "judges are removed but not to the extent that MIDC thinks they are."

Once the attorney is assigned, that attorney represents the felony defendant from that point through the disposition of the case. Following the appointment, another one- or two-days pass before the appointed attorney contacts the defendant, meaning the defendant learns the identity of their appointed trial attorney about five or six days after the arraignment.

Misdemeanor prosecutions. Following the arraignment on the complaint, the district court may set the misdemeanor case for a pretrial conference for the purpose of hearing any collateral matters and pretrial motions.³⁴³ The defendant also may plead guilty at the pretrial conference and be sentenced, or the case may be set for trial. In the event a misdemeanor case is not disposed of at the first pretrial conference (by plea or dismissal, or setting the case for trial), the district court may set the case for another pretrial conference. This process continues for however many pretrial conferences are necessary before the case is disposed by plea or dismissal or set for a bench or jury trial.

Within Oakland County, once a defendant has been found indigent and been approved for appointed counsel in misdemeanor cases the indigent defense systems have adopted one of three methods for appointing trial counsel.³⁴⁴ The method in each district court is shown in the table at page 113 (no highlight means trial counsel is appointed on an individual basis by the MAC attorney manager, while gray highlight means trial counsel is appointed through the scheduling of a house counsel shift).

- In the first method, which is used only in the 44th District Court in misdemeanor cases where the defendant is out-of-custody at the arraignment, the managed assigned counsel coordinator appoints an attorney to handle an out-of-custody misdemeanor arraignment docket and that same attorney represents each of those defendants through the disposition of their cases (i.e., pure vertical representation).³⁴⁵
- In the second method, which is only used in the 48th District Court, a "house counsel" attorney is assigned to handle all pretrial conferences occurring on a given day, meaning the assigned attorney provides representation to each defendant only for the purpose of that pretrial conference (i.e., the representation does not continue through the disposition

³⁴² Oakland County Indigent Defense Program Policy and Procedures at 8 (Dec. 2, 2021).

³⁴³ MICH. CT. R. 6.610(B).

³⁴⁴ Note, however, that sometimes an attorney or judge requests that the arraignment attorney continue as trial counsel so that the defendant receives pure vertical representation; the managed assigned counsel manager for each indigent defense system may approve that request.

³⁴⁵ City of Royal Oak, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 11 (Oct. 4, 2021).

of each defendant's case).³⁴⁶ If the misdemeanor case is not resolved at the first pretrial conference, the defendant is represented by whichever attorney serves as "house counsel" at the second pretrial conference, who may be different than the attorney representing the defendant at the first pretrial conference. After any pretrial conference, the assigned house counsel can request that the MAC attorney manager appoint them as trial counsel (i.e., to handle the case through disposition), or the MAC attorney manager can independently decide to assign an attorney as trial counsel after a pretrial conference.³⁴⁷ But, generally in practice, the MAC attorney manager only appoints an attorney as trial counsel once the case is set for trial. So, for example, a misdemeanor defendant in the 48th district court who has two pretrial conferences during their case could have four different attorneys providing representation from the beginning of their case to the end of their case - attorney A represents the defendant at their arraignment (as described above at pages 95-97), attorney B represents the defendant at their first pretrial conference, attorney C represents the defendant at their second pretrial conference, and attorney D represents the defendant from the point when the case is set for trial and through to disposition. The managed assigned counsel coordinator for the 48th District Court notes that this appointment process frequently results in a gap of two or three weeks from the arraignment in which misdemeanor defendants do not have trial counsel appointed to represent them.³⁴⁸

- In the third method, which happens in all the district courts in Oakland County (except for in the 44th District Court in out-of-custody cases and the 48th District Court), the MAC attorney manager appoints an attorney to handle each case from the first pretrial conference through disposition. In some district courts, the MAC attorney manager appoints an individual attorney to represent an individual defendant (i.e., the next attorney on the rotation list is appointed to represent defendant A at their scheduled pretrial conference on X date). However, in other district courts, the MAC attorney manager appoints the assigned "house counsel"³⁴⁹ staffing all of the first pretrial conferences on a given day/shift to all of the defendant's scheduled that day (i.e., the scheduled "house counsel" is appointed to represent all defendants at their scheduled pretrial conference on X date – in some systems, appointed to represent as many as eight defendants on a given "house counsel" shift).

For almost all misdemeanor cases before the 52nd District Court, Oakland County adopts this third method. A limited exception exists, however, in the event a misdemeanor case is continued for several weeks following the initial pretrial conference (e.g., the defendant absconds or the court grants time for the defendant to clear up any underlying administrative issues, such as reinstating their driver's license), in which circumstances the Oakland County indigent defense services office assigns a new attorney to represent the defendant at their subsequent pretrial

³⁴⁶ City of Birmingham, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 6 (May 27, 2021).

³⁴⁷ City of Birmingham, Facesheet for compliance plan and cost analysis renewal – FY 2022 at 6 (May 27, 2021).

³⁴⁸ If the managed assigned counsel manager is made aware of a "serious issue" requiring early action by counsel, she would individually assign the case to an attorney at that time, rather than waiting until the case is set for trial.

³⁴⁹ In addition to the term "house counsel," different jurisdictions in Oakland County use terms such as "shift attorney," "public defender for the day," "king/queen for the day," and "duty lawyer" to describe the same concept of a single attorney scheduled to appear in a district court and tasked with representing however many defendants appear for their first pretrial conference that day or half day.

conference and that newly assigned attorney continues as trial counsel going forward. In those circumstances, the appointment process more closely resembles that used in the 48th District Court, in which defendants frequently have a gap of two or three weeks from the arraignment without trial counsel appointed to represent them.

Indigent defense system attorney appointment in misdemeanor cases within Oakland County, FY 2022					
District Court		Arraignment on the com- plaint*	First pretrial conference	Second pretrial conference**	Trial
43rd Hazel Park		Arraignment attorney	Trial counsel***		
43rd Ferndale		Arraignment attorney	Trial counsel		
43rd Madison Heights		Arraignment attorney	Trial counsel		
44th District Court	In-custody	Arraignment attorney	Trial counsel		
	Out-of-custody	Trial counsel			
45th District Court		Arraignment attorney	Trial counsel		
46th District Court		Arraignment attorney	Trial counsel		
47th District Court		Arraignment attorney	Trial counsel		
48th District Court		Arraignment attorney	Attorney for this appearance only	Attorney for this appearance only	Trial counsel
50th District Court		Arraignment attorney	Trial counsel		
51st District Court		Arraignment attorney	Trial counsel		
52-1 Novi 52-2 Clarkston 53-3 Rochester Hills 54-4 Troy		Arraignment attorney	Trial counsel****		
* Note, this table assumes that the defendant requests court appointed counsel at their arraignment and is ap- proved for said court appointed counsel prior to their first pretrial conference. ** There may be additional pretrial conferences after the second one. *** “Trial counsel” means the attorney is appointed to handle the case from the first event at which they appear (as shown in the table) through disposition. **** Trial counsel is appointed at the first pretrial conference, except in cases continued for several weeks without action, in which circumstances the attorney at the pretrial conference makes a limited appearance and trial coun- sel is not appointed until the second pretrial conference.					

3. Pretrial release & bail determination

Unless the defendant is charged with an offense that does not entitle them to bail,³⁵⁰ at the arraignment the judge must determine whether to hold the defendant in-custody or determine the defendant’s conditions of pretrial release.³⁵¹ If the defendant is arrested and held in-custody, *MIDC Standard 4* requires counsel at arraignment “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.”³⁵²

³⁵⁰ MICH. CONST. art. I, § 15; MICH. COMP. LAWS § 765.5 (2020).

³⁵¹ MICH. CONST. art. I, § 15; MICH. COMP. LAWS § 780.586 (2020); MICH. CT. R. 6.104, 6.106. *See also* MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 5 (Oct. 2021) (“Formal arraignment and the formal setting of bond should be done as quickly as possible.”).

³⁵² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4(A) (Oct. 2021).

In order to make a bond argument at arraignment, the arraignment attorney needs to meet with the defendant in advance of the arraignment. In the Oakland County district courts, some arraignment attorneys are able to meet with their client prior to the arraignment while others are not. Attorneys note that the MAC attorney manager's or the court's failure to provide assigned arraignment attorneys with defendants' contact information leaves the lawyers unable to communicate with defendants or otherwise prepare for their bond hearings.

At arraignment, the scheduled arraignment attorney does not have discovery materials from the prosecution. The attorney usually is provided only with the defendant's name and telephone number (although some attorneys complain that they no longer receive the defendants' contact information in advance now that district courts again are holding in-person arraignment hearings), and the "charge information."³⁵³ Sometimes the attorney also receives a pretrial services report by email showing the defendant's place of employment, children or other dependents, substance abuse admission, history of failing to appear, history of violent crimes, and whether the defendant was on release when the crime was committed. The arraignment attorney does not have a copy of the complaint or a copy of the police report setting forth the factual allegations against the defendant, nor the defendant's criminal history – all of which the court has access to. Attorneys say that, even though the court has access to all of this information, they feel they are not permitted to ask the court for it – or, if they do, the court clerk usually responds with "I don't have the ability to give it to you" or "We don't have the prosecutor here" to provide a copy to the lawyer directly.

C. Next steps after arraignment

To effectuate indigent defendants' constitutional rights to effective assistance of counsel as required by Michigan statute,³⁵⁴ MIDC has promulgated standards establishing performance requirements pertaining to attorney-client confidential communications and the attorneys' continuing duty to investigate and consult with experts.

MIDC has not prepared standards addressing all of the fundamental tasks each attorney must do on behalf of every client in every criminal case. Regardless of case complexity and other factors, in each case the attorney must additionally:

- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- request and review discovery from the prosecution;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein the attorney must preserve his client's rights;

³⁵³ The charge information is a list of the formal charges filed against the defendant, such as "domestic violence assault" or "reckless endangerment," without providing any facts of the allegation.

³⁵⁴ MICH COMP. LAWS § 780.985(3) (2020) (authorizing MIDC to promulgate "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel").

- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes and collateral consequences that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while, prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).³⁵⁵

Because MIDC permits non-continuous representation of an individual defendant by multiple attorneys where a “duty attorney” makes a limited appearance to handle the arraignment only³⁵⁶ (see discussion of how and when trial counsel is appointed, pages 108-113), MIDC standards presume that the obligation to fulfill these fundamental tasks on behalf of each indigent defendant falls on the attorney individually appointed following the arraignment.

1. Initial client interview, and ongoing communication with the client

All Michigan lawyers have an obligation to meet with and interview the client, and keep the client informed throughout the duration of proceedings.³⁵⁷ On May 22, 2017, LARA approved *MIDC Standard 2 (Initial Interview)*, which provides that, within three business days of appointment, the defense attorney “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” and, to further develop the attorney’s relationship with the client and promote the attorney’s effective assistance, that the attorney “shall conduct subsequent client interviews as needed.”³⁵⁸ *MIDC Standard 2* further provides that all attorney-client communications “shall be conducted in a private and confidential setting to the extent reasonably possible”³⁵⁹ and that, in preparation for the initial client interview, appointed 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.”³⁶⁰

In all district courts in Oakland County, the attorney appointed as trial counsel is expected to conduct the initial client interview in compliance with *MIDC Standard 2*. For example, in felonies, the Oakland County indigent defense services office requires attorneys to conduct the

³⁵⁵ See NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIM. DEFENSE REPRESENTATION (1995).

³⁵⁶ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, std. 4 cmt. 2 (Oct. 2021).

³⁵⁷ MICH. RULES OF PRO. CONDUCT r. 1.4.

³⁵⁸ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 2(A) (Oct. 2021). The MIDC standard further explains that 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.” *Id.* See also MICH. COMP. LAWS § 780.991(2)(a) (2020) (requiring MIDC to establish standards ensuring that “[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel’s client”).

³⁵⁹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 2(B) (Oct. 2021).

³⁶⁰ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 2(C) (Oct. 2021).

initial client interview within three business days of the appointment (i.e., several days prior to the preliminary examination).

In misdemeanor cases, although the method of appointing counsel varies among the district court systems, in each system (except for the 48th District Court in all misdemeanors and the 52nd District Court in certain circumstances), the trial counsel appointed prior to the defendant's first pretrial conference is required to conduct the initial client interview within three business days of the appointment. By contrast, in the 48th District Court, where trial counsel is not appointed until the case is set for trial, the "house counsel" attorneys representing the defendant at each pretrial conference are not required to conduct an initial client interview and are not compensated to do so (*see* attorney compensation, pages 74-84), though the MAC attorney manager believes most attorneys try to call each defendant before their pretrial conference date even if unpaid. Only the appointed trial counsel is required to conduct the initial client interview once appointed, on the eve of trial. Similarly, in the 52nd District Court, in the event a misdemeanor case is continued for several weeks following the initial pretrial conference (e.g., the client absconds or the court grants time for the defendant to clear up any underlying administrative issues, such as reinstating their driver's license), the Oakland County indigent defense services office assigns a new attorney to represent the defendant at their subsequent pretrial conference and that newly assigned attorney continues as trial counsel going forward.

In each indigent defense system within Oakland County, the MAC attorney manager checks the invoices or forms submitted by the trial counsel to ensure compliance with *MIDC Standard 2* requirements.

Attorneys raised concern, however, over structural barriers to effective communication with clients, beyond merely conducting an initial interview. For example, some attorneys report that there is inadequate space in some trial court facilities for confidential communications with out-of-custody clients. The 51st District Court in Waterford has repurposed the room previously used for attorney-client conferences as a storage space while the courthouse facility is under construction.³⁶¹ As a makeshift solution, some attorneys use the prosecutor's office in the courthouse while the prosecuting attorney is elsewhere. One attorney expressed: "You have to communicate confidentially with your client, but how? Who's going to make sure we have a room?"

Attorneys also note that they do not always receive contact information for their newly appointed clients in the notice of appointment received from the MAC attorney managers, which hinders the attorneys' ability to fulfill their duty to conduct an initial interview within three business days, and also their efforts to develop a relationship with the client. "Access to information is key" to developing relationships of trust with clients, said one attorney. Another attorney found 52nd District Court judges were unwilling to give enough time to talk to clients, despite being unable to reach clients in advance of the court date (phone numbers change, unstable housing, etc.). Worried for the unfair result for clients and their own potential loss of license for failure to communicate with appointed clients, the attorney removed themselves from Oakland County's appointed counsel list for misdemeanors.

³⁶¹ MIDC notes that this deficiency identified during the course of this study has since been resolved.

2. Duty to make reasonable investigations and to consult with experts

In every criminal case, regardless of complexity, the lawyer must independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence.³⁶² On May 22, 2017, LARA approved *MIDC Standard 3 (Investigation and Experts)*, which requires that appointed defense counsel “shall conduct an independent investigation of the charges and offense as promptly as practicable,”³⁶³ including requesting indigent defense system funds for investigative resources as necessary.³⁶⁴ Citing U.S. Supreme Court case law, commentary to *MIDC Standard 3* notes that “counsel can make ‘a reasonable decision that makes particular investigations unnecessary’ after a review of discovery and an interview with the client.”³⁶⁵ Commentary to *MIDC Standard 3* further explains that counsel’s “decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government”³⁶⁶ and that “a client’s professed desire to plead guilty does not automatically alleviate the need to investigate.”³⁶⁷

Similarly, *MIDC Standard 3* requires appointed defense counsel to request, and the indigent defense system to fund, “the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution’s case.”³⁶⁸ In all cases, the appointed lawyer “has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.”³⁶⁹

Indigent defense system attorneys throughout Oakland County make little use of experts and investigators in felonies and practically no use at all in misdemeanor cases. In most indigent defense systems in Oakland County, requests for investigative or expert assistance must be in writing, submitted for the MAC attorney manager’s review and approval. Some indigent defense systems have a standard the MAC attorney manager uses when determining whether to approve or deny requests for expert assistance; none of the systems have any standard for reviewing requests for investigative assistance. However, the MAC attorney managers express eagerness to approve the cost of investigators and experts – the indigent defense system attorneys rarely ask for such case-related resources. (*See* discussion of case-related resources, pages 68-70.)

³⁶² See *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (holding that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel); NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIM. DEFENSE REPRESENTATION, Guideline 4.1 (1995).

³⁶³ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3(A) (Oct. 2021).

³⁶⁴ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3(B) (Oct. 2021).

³⁶⁵ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3 cmt. 1 (Oct. 2021).

³⁶⁶ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3 cmt. 2 (Oct. 2021).

³⁶⁷ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3 cmt. 3 (Oct. 2021).

³⁶⁸ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3(C) (Oct. 2021).

³⁶⁹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 3(D) (Oct. 2021).

3. Discovery

Upon request, Michigan law requires the prosecution to provide the defense with discovery known to the prosecution.³⁷⁰ *MIDC Standard 2* requires appointed counsel to “obtain copies of any relevant documents which are available” and any other “discoverable material.”³⁷¹ Furthermore, commentary to *MIDC Standard 4* suggests that appointed counsel must review discovery and communicate with the client prior to engaging in plea negotiations with prosecutors.³⁷²

Several attorneys in Oakland County expressed deep frustration at the delay in receiving discovery from prosecutors. In particular, the Oakland County prosecuting attorney’s office is “terrible,” as one lawyer put it, often failing to provide discovery until the day prior to the pretrial conference in some misdemeanors. Other estimates receiving the police report and discovery two or three business days before the pretrial date only about 50% of the time. “The other 50% of the time it’s as good as getting it the day before the pretrial date at 7 p.m.”

Additionally, the cost of discovery can be a barrier as private attorneys must carry the cost as case-related expenses billable to the indigent defense system at the end of a case, which can add up. (See discussion of case-related expenses, page 85-86.) Defense attorneys argue that they should have prompt and free access to their clients’ criminal records from the pretrial services unit and other discovery.

By practice, many lawyers will always wait to get the discovery before calling the client. “There is no benefit to the client if I see them without information,” said one. “You can’t give legal advice if you don’t have information on the case and it doesn’t serve the client any good because they’re not getting accurate information.” In this way, the failure to produce timely discovery negatively affects attorneys’ communications with their clients. The MIDC standards are “asinine,” one attorney opined, because the “only one with the burden is us [defense attorneys], and there is nothing that requires the court and prosecutors to do things timely.”

4. Litigation and motions practice

Indigent defense system attorneys throughout Oakland County rarely file and argue motions, even in felony cases before the circuit court. One attorney says he has never filed a motion to suppress in either the circuit court or district courts. Another lawyer reports never seeing an attorney file a motion to suppress in their 15 years accepting indigent defense appointments. Lawyers most commonly see their colleagues filing motions to reduce the defendant’s bond or amend conditions of release. Additionally, attorneys see their colleagues handling felonies in circuit court failing to object or litigate issues where they should – for example, failing to object to the prosecutor trying to admit 404(b) prior bad acts as evidence.

³⁷⁰ MICH. CT. R. 6.201, 6.610.

³⁷¹ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 2(C) (Oct. 2021).

³⁷² MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 5, std. 4 cmt. 3 (Oct. 2021).

It is rarer for lawyers to make legal arguments in the district courts. One district court MAC attorney manager says indigent defense system attorneys only file motions “once in a while.” A different MAC attorney manager said the opposite, that motions are common in misdemeanors because attorneys bill for them on their invoices. An appointed lawyer said: “No one argues anything in district court except retained cases and drunk driving” where the client is indigent. “This is even the case before Pandemic. It’s probably because the attorneys think that ‘it’s just a misdemeanor.’”

5. Plea negotiations and trial

Trial courts suspended all jury trials for approximately two years due to the Pandemic; bench trials were being held by video with the defendant’s consent. One MAC attorney manager reports there have been only three trials in the district court since the beginning of the Pandemic. Even prior to the Pandemic, district court trials were rare. One district court MAC attorney manager says misdemeanor attorneys “sometimes” have bench trials, and another MAC attorney manager estimates seeing about one or two jury trial per month. Most misdemeanor cases resolve by plea.

While the pace of trials may increase as the courts work through the backlog of cases caused by the Pandemic attorneys across Oakland County note that their compensation incentivizes quick pleas over trials – a “turn and burn” mentality, as one attorney described it. (*See* discussion of attorney compensation, pages 74-84.)

CHAPTER VI. 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.³⁷³ As one state supreme court observed nearly 30 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.”³⁷⁴

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,” the *Powell* Court explained.³⁷⁵ The lack of sufficient time may be caused by any number of things, including but not limited to payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients, or excessive workloads. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

A. Understanding the time necessary for effective representation

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal and juvenile delinquency case. Even in the simplest case, the attorney must, among other things:³⁷⁶

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution’s motions;

³⁷³ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

³⁷⁴ *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

³⁷⁵ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

³⁷⁶ See, e.g., NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

- prepare for and appear at necessary pretrial hearings, and preserve the client’s rights in those hearings;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepares for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant’s case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of “caseloads” or “workloads.”

Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. A lawyer’s total annual caseload is the count of all indigent representation system cases in which the lawyer provided representation during a given year, starting with the number of cases the attorney had open at the beginning of the year and adding to that the number of cases assigned to the attorney during the year.

In addition to considering the raw number of cases of each type that an attorney handles, the U.S. Department of Justice has advised, and national standards agree, that “caseload limits are no replacement for a careful analysis of a public defender’s *workload*”³⁷⁷ Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public representation cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.³⁷⁸ Further, national standards agree that the lawyer’s workload must take into consideration “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.”³⁷⁹

B. Caseloads & workloads of indigent defense system attorneys in the courts in Oakland County

The State of Michigan does not presently require its indigent defense systems to collect or report caseload or workload information (*see* sidebar at pages 124-126 regarding MIDC proposed

³⁷⁷ 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), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

³⁷⁸ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

³⁷⁹ 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), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

Standard 6 - Indigent Defense Workloads). The administrative office of the state court collects some data from circuit and district court clerks, but it does not require court clerks to maintain consistent records showing the criminal cases in which attorneys are appointed to represent indigent defendants.

The local governments that operate each individual indigent defense system in Michigan are left with the responsibility to collect and analyze the caseloads and workloads of the attorneys to whom they appoint cases, in order to ensure that the indigent defense system attorneys have sufficient time to provide effective assistance of counsel to each individual defendant whom they are appointed to represent.

C. Measuring whether attorneys have sufficient time to provide effective representation to each indigent person

To ensure that indigent defense system lawyers have adequate time to fulfill the duties they owe to each appointed client, national standards summarized in the *ABA Ten Principles of a Public Defense Delivery System* provide that an indigent defense system must control attorneys' workload.³⁸⁰ Over the years since the *Gideon* decision, standards have developed both nationally and in many states against which to measure the caseloads and workloads of indigent defense system attorneys, in order to ensure that attorneys are not appointed to represent more defendants than they can effectively represent as required by the Sixth Amendment.

1. The National Advisory Commission (NAC) caseload standards

The first national standards for caseloads of attorneys appointed to represent indigent defendants were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, as part of an initiative funded by the U.S. Department of Justice.³⁸¹ *NAC Standard 13.12* prescribes that a single attorney should not handle in a year any more than the absolute maximum numerical caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.³⁸²

³⁸⁰ AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 5 & cmt. (2002); NATIONAL STUDY COMM'N ON DEFENSE SERVICES, *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* § 5.3 (1976).

³⁸¹ 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 CRIM. JUST. STANDARDS AND GOALS, *REPORT OF THE TASK FORCE ON THE COURTS*, ch. 13 (The Defense) (1973).

³⁸² NATIONAL ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, *REPORT OF THE TASK FORCE ON THE COURTS*, ch. 13 (The Defense), std. 13.12 (1973). This means a lawyer handling felony cases should not be responsible for more

It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload standards be exceeded.³⁸³

The NAC caseload limits presume that each lawyer devotes 100% of their time to providing representation in their appointed cases.³⁸⁴ When indigent representation system attorneys have managerial or supervisory responsibilities, this reduces the amount of their time that is available for representing clients, and so national standards require that for every ten attorneys who carry a full caseload there must additionally be one full-time supervisor.³⁸⁵ When indigent representation system attorneys have to perform tasks that do not require legal credentials or experience, this reduces the amount of their time that is available for representing clients, and so national standards require that for every four attorneys who carry a full caseload there must additionally be at least one legal secretary/assistant.³⁸⁶ When indigent representation system attorneys have to fulfill responsibilities in their appointed cases that require specialized skills the attorneys lack, this increases the amount of time the attorney must devote to each appointed case, and so national standards require that for every three attorneys who carry a full caseload there must be at least one investigator³⁸⁷ and one social service caseworker.³⁸⁸

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 follow the NAC caseload standards.

³⁸³ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002) (“National caseload standards should in no event be exceeded.”). *See* NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

³⁸⁴ *See* NATIONAL ADVISORY COMM’N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), stds. 13.9, 13.14 (1973). *See also* NATIONAL LEGAL AID & DEF. ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-6 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

³⁸⁵ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

³⁸⁶ NATIONAL LEGAL AID & DEF. ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

³⁸⁷ NATIONAL LEGAL AID & DEF. ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976). *See also* AMERICAN BAR ASS’N, STANDARDS FOR CRIM. JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984).

³⁸⁸ NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* AMERICAN BAR ASS’N, STANDARDS FOR CRIM. JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

MIDC'S PROPOSED STANDARD FOR INDIGENT DEFENSE WORKLOADS

As required by state law, MIDC submitted to LARA for approval a proposed standard to ensure that “[d]efense counsel’s workload is controlled to permit effective representation.”^a At the time of this evaluation, LARA has not yet approved the standard.

As proposed by MIDC, *Standard 6 – Indigent Defense Workloads* states:^b

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 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.

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 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-

^a MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021) (“This packet . . . contains the complete text of the . . . standards pending approval by LARA which were submitted in September 2018 (amended June 2019). Those standards address defender workload limitations, qualification and review of attorneys accepting

assignments in adult criminal cases, and attorney compensation.”); MICH. COMP. LAWS § 780.991(2)(b) (2020).

^b MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 7, proposed std. 6 (Oct. 2021).

Case Type	Delphi Panel Median Recommended Minimum Hours	Maximum Caseload Standard
Murder or manslaughter	120	15
CSC (1st, 2nd, and 3rd degrees)	80	23
Other class A offenses	50	37
Other high-severity felonies	40	46
Low-severity felonies and two-year high court misdemeanors	25	74
One-year misdemeanors	8	232
93-day misdemeanors	7	265
Probation violations	3.5	530
Other adult criminal indigent defense trial court-level matter	3	619

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.

The earliest possible time at which this workload standard can be required of and implemented by all Michigan indigent defense systems is at least one full year away from the publication date of this report, and more likely 18 to 24 months or longer. If approved by LARA as proposed, each indigent defense system in Michigan will be required to submit a plan to MIDC within 180 days for how they will limit the caseloads of each full-time equivalent indigent defense system attorney during any rolling 12-month period and the anticipated cost of doing so.^c Then, assuming that the legislature provides sufficient funding at the next legislative budget cycle, MIDC will provide a grant to each indigent defense system to implement the plan as approved by MIDC.^d After receiving the necessary grant of state funds, each indigent defense system will have up to 180

days (or longer if authorized by MIDC) to bring their system into compliance with *Standard 6 – Indigent Defense Workloads*.^e

If LARA had approved MIDC’s proposed *Standard 6* at any time before September 2019, the maximum caseloads for each full-time equivalent indigent defense system attorney would have been no more than 150 felonies or 400 non-traffic misdemeanors (or the proportional equivalents) during any rolling 12-month period. As the proposed standard states, these would be the maximum caseloads “[u]ntil the completion of” “special Michigan specific weighted caseload studies.”^f

But during the four years since MIDC submitted its proposed *Standard 6* to LARA, MIDC received the results of a study it commissioned to determine appropriate caseloads specific to

^c MICH. COMP. LAWS § 780.993(2)-(3) (2020).

^d MICH. COMP. LAWS § 780.993(10) (2020).

^e MICH. COMP. LAWS § 780.993(11) (2020).

^f MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES 7, proposed std. 6 (Oct. 2021).

Michigan^g and publicly released the report on the MIDC website in September 2019.^h The authors of the report carefully explain that they are providing “only *recommended* caseload standards for the [MIDC] commissioners’ review,” and that the responsibility to develop final caseload standards remains with the MIDC.ⁱ It is possible that, whenever *Standard 6* is acted on by LARA, the Michigan-specific caseloads recommended in that report will become the MIDC caseload standards with which every indigent defense system must comply.

The report on Michigan-specific recommended caseloads sets the maximum number of cases, in nine criminal trial-level case type categories, that should be appointed to a full-time equivalent attorney during any rolling 12-month period. To arrive at those caseload limits,^j the report also explains the median number of hours determined to be minimally necessary to deliver effective representation in each type of case. The following table, as contained in the report, shows both the median number of hours necessary for each case and the maximum number of cases to be assigned, by type of case.^k

^g NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION (2019).

^h Standard 6, in *Standards*, MICHIGAN INDIGENT DEF. COMM’N, <https://michiganidc.gov/standards/#tab-id-6> (stating “Read about the MIDC and RAND caseload study here: Final RAND Report Caseloads September 2019 (pdf)” and linking to the published report at <https://michiganidc.gov/wp-content/uploads/2019/09/Final-RAND-Report-Caseloads-September-2019.pdf>).

ⁱ NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION 3, 71 (2019).

^j After allowing for vacation, personal leave, and holidays, the study assumed that each indigent defense system attorney in Michigan has 230.4 “duty days” of work each year (52.2 weeks X 5 days, minus 30.5 leave days) and works 9 hours each workday, providing a total of 2,073.5 “duty hours” in a year. Because attorneys must devote some of their hours to duties other than representing a client in a case, the study assumed that indigent defense system attorneys in Michigan are able to devote 89.5% of their working hours to case-related duties, resulting in 1,855.8 hours per attorney per year. To establish the maximum caseload for each type of case, the study divided the 1,855.8 available case-related attorney hours by the median number of hours determined to be minimally necessary to deliver effective representation in the case type. NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION 71-74 (2019).

^k NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION 73, table 5.2 (2019).

The NAC caseload limits were established and remain as absolute maximums. Since the adoption of the NAC caseload limits, increased complexity in forensic sciences and criminal justice technology have made correspondingly increased demands on the time attorneys must devote to each case in order to provide effective assistance of counsel. 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.³⁸⁹

2. Michigan state standards

Policymakers in many states have recognized the need to set their own state caseload and workload standards. State standards are able to consider unique demands made on appointed attorneys in the local jurisdiction, such as the travel distance between the court and the local jail, or the prosecution's charging practices. State caseload standards are also able to address types of cases for which a state provides a right to counsel, but that are not contemplated by the NAC standards.

At the time of this evaluation, the State of Michigan has not established any guidelines or requirements for the caseloads or workloads of indigent defense system attorneys, although the MIDC submitted its proposed *Standard 6 - Indigent Defense Workloads* to LARA for approval in September 2018.³⁹⁰ (See side bar on MIDC's proposed standard for indigent defense workloads, pages 124-126.)

D. Applying standards to the caseloads & workloads of indigent defense system attorneys

The proposed MIDC standards on attorney workloads (*see* side bar, page 124-126) are the best tool available against which to measure what little is known about the caseloads and workloads of the indigent defense system attorneys working in the courts located within Oakland County.

Attorney caseload data for indigent defense systems within Oakland County generally is unavailable. Multiple indigent defense systems within Oakland County report that they do not maintain data on the number of cases assigned to each attorney. Prior to October 1, 2021, Oakland County maintained data on the number of payments made to each attorney, but it is unable to produce attorney caseload data for fiscal years 2019 through 2021. Beginning October 1, 2021, the Oakland County indigent defense services office started tracking data, corresponding to categories of cases provided in its fee schedules, for circuit court and district court appointments made to each private attorney:

³⁸⁹ 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.").

³⁹⁰ MICHIGAN INDIGENT DEF. COMM'N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021) ("This packet . . . contains the complete text of the . . . standards pending approval by LARA which were submitted in September 2018 (amended June 2019). Those standards address defender workload limitations, qualification and review of attorneys accepting assignments in adult criminal cases, and attorney compensation.").

In cases before the 52nd District Court, in each division:

- the number of cases handled as house counsel, and
- the number of new assignments.

In cases before the Sixth Judicial Circuit Court:

- the number and date of each appointment (following the arraignment) by type of felony case, and
- the number and date of each voucher paid³⁹¹ in each case by type of felony case.

As of this report's publication, Oakland County was able to provide indigent defense system data for the first three quarters of fiscal year 2022 (October 1, 2021, through June 30, 2022). Because of questions about the reliability of the Oakland County voucher data, the Sixth Amendment Center uses the attorney appointment data for felony cases in the Sixth Judicial Circuit Court.

Not all case categories from the Oakland County fee schedules correspond to the case types provided on the proposed MIDC standards. The Sixth Amendment Center conservatively uses the lowest MIDC standard applicable to each category of case payment in Oakland County. (*See* table on page 125.)

Furthermore, although not expressly stated, it seems the proposed MIDC standards assume a single appointed attorney continuously represents an individual defendant from their initial appearance before a judicial officer through disposition,³⁹² and therefore do not contemplate the non-continuous, “horizontal” method of representation used by Oakland County. As explained on pages 95-97, a misdemeanor defendant is represented by an “arraignment attorney” at their initial court appearance (i.e., their walk-in arraignment or scheduled arraignment date), and most often the defendant is represented by a different Oakland County indigent defense system attorney staffing their pretrial conference date as “house counsel.” Oakland County’s “number of cases handled as house counsel” case category combines data on the number of misdemeanor cases represented at arraignment as the assigned “arraignment attorney” (walk-ins and scheduled arraignments, but not jail arraignments) and misdemeanor cases represented at the pretrial conference as “house counsel” as a single case-category – meaning a portion of misdemeanor cases are double-counted within the “number of cases handled as house counsel” case category data. The Sixth Amendment Center conservatively applies MIDC’s lowest recommended standard of 619 “other adult criminal indigent defense trial court-level matters” per attorney per year to Oakland County data on the number of cases handled as house counsel in the 52nd District Court.

Moreover, as explained on pages 111-113, in some misdemeanor cases, the house counsel attorney representing the defendant at the pretrial conference is individually appointed to represent the defendant at trial before the 52nd District Court, and the attorney submits separate bills to Oakland County for the work performed on behalf of the defendant as house counsel

³⁹¹ Oakland County generally permits attorneys 30 days from the completion of the case to submit bills for payment. Therefore, the date on which the attorney submits the voucher for a case is a loose proxy, but not an exact match, of the date of disposition for that case.

³⁹² *See, e.g.,* NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION 93, 99 (2019).

and as trial counsel – meaning 100% of all “new assignments” in district court are double-counted misdemeanor cases. The Sixth Amendment Center conservatively applies MIDC’s lower recommended misdemeanor standard of 265 cases per attorney per year to Oakland County data on “new assignments” in the 52nd District Court. And, to correct against counting those misdemeanor cases twice, the Sixth Amendment Center conservatively reduces each attorney’s “number of cases handled as house counsel” by their number of “new assignments.”

Oakland County provides appointed counsel at jail arraignments for multiple indigent defense systems within Oakland County. The Oakland County jail produces a daily “run sheet” indicating the name of each defendant represented by the indigent defense system attorney during that jail arraignment shift, but the indigent defense services office lacks capacity to input that information into its attorney caseload database. As a result, the time each attorney spends staffing jail arraignments is not reflected in the Oakland County caseload data.

The table below lists the case categories used by Oakland County’s indigent defense services office and the proposed MIDC standards applied in analyzing Oakland County indigent defense system attorney caseloads.

Oakland County		MIDC Proposed Standard 6			Analysis
Case category	Description	Case type	Recommended Minimum Hours	Maximum Caseload Standard	
Capital	anything punishable by life	Murder or manslaughter	120	15	23
		CSC (1st, 2nd, and 3 rd degrees)	80	23	
Major Felony	punishable by more than 5 years but less than life	Other class A offenses	50	37	37
Regular Felony	punishable by more than 2 years, up to and including 5 years	Other high-severity felonies	40	46	46
Low Felony/High Misdemeanor	punishable by more than 1 year, up to and including 2 years	Low-severity felonies and two-year high court misdemeanors	25	74	74
Felony Probation Violations		Probation violations	3.5	530	530
District Court New Appointment		One-year misdemeanors	8	232	265
		93-day misdemeanors	7	265	
District Court House Counsel	Misdemeanor arraignments (walk-in and scheduled arraignment, and pretrial)	Other adult criminal indigent defense trial court-level matter	3	619	619

To analyze the caseloads of each Oakland County indigent defense system attorney receiving appointments in the Sixth Judicial Circuit Court and/or 52nd District Court, appointment data from the first three quarters of fiscal year 2022 were prorated to calculate each attorney's projected total caseload for all four quarters of fiscal year 2022 for each type of case,³⁹³ and then divided against proposed MIDC annual caseload maximums. From October 1, 2021, to June 30, 2022, Oakland County's indigent defense services office appointed 190 different attorneys to handle indigent defense cases in the Sixth Judicial Circuit Court and 52nd District Court combined. The table on page 131-132 shows the 50 attorneys with the largest projected annual caseloads for fiscal year 2022 when analyzed against the recommended MIDC caseload limits.

³⁹³ I.e., dividing each attorney's total caseload by case type for three quarters of fiscal year 2022 by 3 to find their average per quarter caseload for each case type, and then multiplying that average per quarter caseload by case type by 4 to find a projected annual caseload for each case type.

Attorney	Circuit Court Appointments (FY22 projected total)					District Court Appointments (FY22 projected total)		Annual caseload Analysis	
	Capital	Major Fel	Regular Fel	Low Fel/High Misd	Probation Viol	# of Cases Handled as House Counsel (adjusted by new assignments)	# of New Assign- ments in Reporting Period	Percentage of NAC Standard	Percentage of recommended MIDC Standard
Attorney 1	0	39	43	3	51	43	1	101%	218%
Attorney 2	0	40	32	3	128	0	0	135%	205%
Attorney 3	9	21	39	3	28	36	0	76%	197%
Attorney 4	21	0	31	7	1	0	0	40%	169%
Attorney 5	0	31	27	7	89	0	0	102%	167%
Attorney 6	0	24	36	5	4	45	1	58%	159%
Attorney 7	0	21	32	7	96	0	0	104%	154%
Attorney 8	0	28	21	5	68	57	0	96%	151%
Attorney 9	15	8	12	3	0	177	9	72%	147%
Attorney 10	0	1	27	9	0	424	8	133%	146%
Attorney 11	8	13	29	0	63	0	0	76%	146%
Attorney 12	0	0	39	7	11	215	28	98%	140%
Attorney 13	0	0	27	9	13	411	5	137%	141%
Attorney 14	0	0	59	8	19	0	0	57%	142%
Attorney 15	0	0	23	5	1	405	33	129%	135%
Attorney 16	17	0	25	7	0	0	0	33%	139%
Attorney 17	20	0	19	7	0	0	0	30%	137%
Attorney 18	0	20	20	3	67	73	4	92%	127%
Attorney 19	0	0	0	4	0	672	21	176%	122%
Attorney 20	0	0	28	7	0	237	27	89%	118%
Attorney 21	0	21	17	0	59	95	1	89%	122%
Attorney 22	0	11	35	5	0	56	1	48%	121%
Attorney 23	5	17	21	3	5	0	0	35%	121%
Attorney 24	0	0	25	4	17	232	36	98%	115%
Attorney 25	0	5	25	4	0	173	32	74%	115%
Attorney 26	0	0	0	0	0	591	45	159%	113%
Attorney 27	13	0	19	3	0	83	8	46%	119%
Attorney 28	0	17	23	5	81	0	0	84%	119%
Attorney 29	0	12	36	5	0	0	0	36%	118%
Attorney 30	0	23	24	3	1	0	0	34%	117%
Attorney 31	0	0	0	0	0	677	11	172%	113%
Attorney 32	0	20	23	5	5	0	0	36%	112%

Attorney	Circuit Court Appointments (FY22 projected total)					District Court Appointments (FY22 projected total)		Annual caseload Analysis	
	Capital	Major Fel	Regular Fel	Low Fel/High Misd	Probation Viol	# of Cases Handled as House Counsel (adjusted by new assignments)	# of New Assign- ments in Reporting Period	Percentage of NAC Standard	Percentage of recommended MIDC Standard
Attorney 33	0	13	31	5	0	0	0	33%	110%
Attorney 34	1	13	28	4	0	0	0	31%	108%
Attorney 35	0	16	27	4	5	0	0	35%	108%
Attorney 36	0	17	21	3	41	0	0	55%	105%
Attorney 37	0	16	25	4	0	0	0	30%	104%
Attorney 38	0	0	41	7	3	27	0	40%	104%
Attorney 39	0	11	21	0	0	171	0	64%	103%
Attorney 40	0	20	16	3	39	0	0	52%	100%
Attorney 41	0	13	19	0	44	77	3	71%	98%
Attorney 42	3	0	36	5	0	7	0	31%	98%
Attorney 43	0	20	20	0	1	0	0	28%	98%
Attorney 44	0	15	21	4	20	0	0	40%	95%
Attorney 45	1	0	23	7	0	183	3	67%	95%
Attorney 46	0	0	32	0	3	119	9	55%	93%
Attorney 47	0	0	35	7	0	32	8	38%	93%
Attorney 48	1	11	24	3	12	0	0	34%	93%
Attorney 49	1	1	28	1	16	91	1	55%	90%
Attorney 50	0	12	20	1	0	68	3	40%	90%

Of the 50 attorneys with the largest projected caseloads, 39 attorneys' total caseloads are in excess of the proposed MIDC annual caseload maximums (shown in red in the table above), and that is before factoring in any work performed representing defendants at jail arraignments in Oakland County. In fact, those 39 attorneys are handling a workload requiring *more than 52 full time attorneys* to handle effectively under the MIDC standards. Even if the caseload analysis excludes any work performed as house counsel, 29 of the 50 attorneys still have caseloads in excess of the proposed MIDC annual caseload maximums. For example, Attorney 1's total projected caseload includes handling 43 cases as house counsel; if those house counsel cases are not included as part of the analysis, Attorney 1's total annual caseload is still 211% of the recommended MIDC caseload maximums. That is, Attorney 1 is handling the work of more than two full time attorneys from cases assigned by the Oakland County indigent defense services office.

Importantly, almost all of the individual attorneys handling indigent defense cases in Oakland County also maintain private practices. Some attorneys accepting appointments in Oakland County also have administrative responsibilities as MAC attorney managers in one or more indigent defense systems both within and outside of Oakland County. The Oakland County caseload data does not account for the other professional responsibilities of appointed private attorneys. For example, Attorney 6 has a projected annual caseload of 159% of the MIDC limits *before* considering the attorney's other obligations beyond handling indigent defense appointments from Oakland County. Attorney 6 handles indigent defense cases in both the Sixth Judicial Circuit Court and the 52nd District Court and accepts cases in the 44th District Court. But this attorney also has a robust private practice that accounts for about 50% of the attorney's total workload, meaning the time available for the representation of indigent clients must be adjusted downward by an equal amount. In fact, factoring in the representation of clients in the 44th District Court, the attorney actually is able to devote less than 50% of their total time available to the representation of indigent clients in the Sixth Circuit and 52nd District Courts. In sum, Attorney 6 is handling an indigent defense caseload of more than 1.5 full time attorneys while able to devote less than 50% of time to the representation.

As another example, Attorney 25 has a projected annual caseload of 115% of the MIDC caseload limits, but the attorney also maintains a private practice that encompasses about 25% of the attorney's total workload. Moreover, Attorney 25 accepts cases from the indigent defense systems in the 47th District Court and the 48th District Court. That means, Oakland County appoints Attorney 25 to an annual caseload requiring more than one full time attorney to handle it effectively, but the attorney has less than 75% of time available to do the work.

Attorney 38 has a projected annual caseload of 104% of the MIDC standards, but reports that they do not have a private practice and only handle indigent defense cases, which suggests their projected caseload is reasonable. However, in addition to 52nd District Court and Sixth Judicial Circuit Court appointments, Attorney 38 accepts indigent defense appointments from five other indigent defense systems within Oakland County, as well as handling appellate cases under the Michigan Appellate Assigned Counsel System. Because there is no centralized method of tracking indigent defense system attorney workloads throughout Oakland County, and indeed across Michigan, the Oakland County indigent defense services office has no way of knowing how far in excess of the proposed MIDC standards each attorney's total workload truly is.

CHAPTER VII. FINDINGS AND RECOMMENDATIONS

Although the Michigan Indigent Defense Commission (MIDC) funded this study, the state of Michigan is not the focus of this report. Rather, this study evaluated Oakland County’s system for providing the right to counsel in the trial courts for which the county government is fiscally responsible as the basis for making a recommendation on the feasibility of creating a public defender office. Therefore, it is to Oakland County that these findings and recommendations are addressed.

It is worth restating that it is the responsibility of the State of Michigan to ensure effective assistance of counsel.³⁹⁴ That the state has passed on part of that constitutional obligation to local governments places these jurisdictions – including Oakland County – in an unenviable position. The Michigan legislature has directed MIDC to promulgate standards in line with the current parameters of the Sixth Amendment structures.³⁹⁵ However, not all of those standards have been drafted, or approved and funded, specifically in regard to reasonable indigent defense caseloads, financial conflicts of interests arising from compensation schemes, and continuous representation, among others.³⁹⁶ Because the State of Michigan has delegated its constitutional responsibilities to local governments, the local governments – including Oakland County – have exposure to liability for structuring their indigent defense systems in ways that currently violate defendants’ rights to effective assistance of counsel.

A. Findings

FINDING 1: Oakland County’s assigned counsel compensation method creates economic disincentives that impair defense counsel’s ability to provide effective representation.

More than 80 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.”³⁹⁷ Effective assistance of counsel cannot be ensured in an

³⁹⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel is an obligation of state governments under the Fourteenth Amendment).

³⁹⁵ See MICH COMP. LAWS §§ 780.985(3), 780.991 (2020).

³⁹⁶ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIM. DEFENSE SERVICES, cover page (Oct. 2021) (noting that “standards address[ing] defender workload limitations, qualification and review of attorneys accepting assignments in adult criminal cases, and attorney compensation” are “pending approval by LARA”). See also *id.* at 5 (noting that “vertical representation” is not covered by existing or proposed MIDC standards and instead “will be the subject of a future minimum standard as described in MCL 780.991(2)(d)”).

³⁹⁷ *Glasser v. United States*, 315 U.S. 60, 70 (1942). See also *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 U.S. 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.”).

indigent defense system that places appointed attorneys in a position where their own financial interests conflict with those of the indigent people whom they are appointed to represent.³⁹⁸

To prevent financial conflicts of interest between attorney and client, all national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”³⁹⁹ As explained in chapter VI, there is a significant amount of state caselaw that requires states to pay attorneys a reasonable fee in addition to overhead expenses. Requiring that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each appointed client.

Although not yet made binding on local indigent defense systems, MIDC’s proposed standard on attorney compensation likewise calls for appointed attorneys to “receive prompt compensation at a reasonable rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses,” and that “[a]ssigned counsel should be compensated for all work necessary to provide quality legal representation,” including activities “outside of court appearances such as directing an investigation, negotiating, or tactical planning, etc.”⁴⁰⁰

Compensating attorneys with a fixed rate for mostly in-court lawyer activities creates economic disincentives that impair defense counsel’s ability to provide effective representation. Although MIDC has promulgated a standard that will rectify this, it has not yet been adopted or funded. The absence of a statewide standard does not relieve local governments from the constitutional obligation to provide representation free from financial conflicts of interest.

FINDING 2: Oakland County indigent defense attorneys’ workloads are not controlled to permit effective representation.

The national caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards that take into consideration the additional demands made on defense attorneys in each case. MIDC has promulgated a standard adopting those national caseload limits that, if approved by LARA, will be made binding on Oakland County. Heeding the call to set localized caseload standards, MIDC also has commissioned Michigan-specific caseload maximums that, if approved by LARA, also will be made binding on Oakland County.

Oakland County has taken no steps to limit the number of cases that an attorney representing indigent clients may handle in a year. As shown in chapter VII, several private attorneys have caseloads far above the proposed Michigan-specific caseload standards and many attorneys are in excess of the national caseload limits as well. Furthermore, Oakland County has no way of

³⁹⁸ MICH. RULES. OF PRO. CONDUCT r. 1.7(b) (“A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests.”), r. 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

³⁹⁹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

⁴⁰⁰ MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std. 8 (rev’d Oct. 2021).

knowing the full caseloads of an attorney representing indigent clients because those attorneys can also handle cases outside of Oakland County’s purview (i.e., privately retained clients, indigent clients with cases in other district courts in Oakland County, indigent clients with cases in courts outside of Oakland County) or may have other jobs in the criminal justice system (i.e., managed assigned counsel coordinator, magistrate, municipal prosecutor).

Additionally, indigent defense system attorneys in Oakland County do not have adequate support staff, such as secretaries, paralegals, and social workers. When an attorney lacks support resources, the attorney must personally perform work that is not only outside the attorney’s expertise, but also takes up valuable time that should be devoted to developing legal arguments and preparing the client’s case.

FINDING 3: Oakland County indigent defense attorneys do not continuously represent and personally appear at every court appearance throughout the pendency of the case.

If an attorney is appointed early in the criminal process, that appointed 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.”⁴⁰¹ Yet, early appointment of counsel will not result in effective representation if that trust is breached. For example, what good is it from the defendant’s perspective if the lawyer provided early in the case is taken away and replaced with someone else? The “confessional” is not some article, like a sheet of paper, that can be passed from one attorney to another. 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 the client’s case,⁴⁰² commonly referred to as “vertical representation.”⁴⁰³ Michigan law also directs MIDC to set standards requiring vertical representation of indigent defendants in adult criminal trials.⁴⁰⁴

In all case types, Oakland County uses “horizontal representation,” whereby appointed clients are represented by a series of attorneys, rather than a single attorney representing a client from appointment through disposition of the case. In felony cases, many defendants are represented at their arraignment by an attorney appointed by some other indigent defense system within the county and then by a different attorney who is assigned by the Oakland County government for preliminary stages in district court and the trial stage in circuit court.

As the American Bar Association explains, “horizontal representation” is uniformly implemented as a cost-saving measure in the face of excessive workloads, and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: “Counsel initially provided should continue to represent the defendant throughout the trial court

⁴⁰¹ 287 U.S. 45, 61 (1932).

⁴⁰² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 7 (2002).

⁴⁰³ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-6.2 cmt. (3d ed. 1992).

⁴⁰⁴ MICH. COMP. LAWS § 780.991(2)(d) (2020).

proceedings and should preserve the defendant’s right to appeal, if necessary.”⁴⁰⁵ In explaining why horizontal representation is so harmful to clients, 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 re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.⁴⁰⁶

The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially then remains with that client’s case through to completion is to ensure that the level of advocacy necessary to mount a meaningful defense commences as soon as possible. While MIDC has established minimum standards requiring trial counsel, for example, to conduct early communications with their appointed clients, indigent defense attorneys in Oakland County seem to operate from the belief that, because they are not individually appointed as trial counsel when staffing arraignment hearings, no confidential attorney-client relationship exists between the scheduled arraignment attorney and defendants at their initial court appearances – and thus the attorney provided at arraignment has no duty to comply with MIDC standards on the early appointment of counsel. Just as government intrusion into the attorney-client relationship violates the right to effective assistance,⁴⁰⁷ a government scheme in which counsel is provided in name only but where no attorney-client relationship exists creates a systemwide constructive denial of the right to effective assistance of counsel at all critical stages of the criminal case.

In systems that rely on horizontal representation, the delay in appointing the actual trial lawyer has further negative consequences for the client as promising investigative leads can go cold, critical evidence can be destroyed if not timely preserved, witnesses can become harder and harder to track down, and memories can fade.

FINDING 4: Oakland County’s indigent defense services office is not appropriately staffed and resourced to provide qualitative oversight of indigent defense services.

Effective October 1, 2021, Oakland County established the indigent defense services office within the executive branch of county government to comply with MIDC standards requiring

⁴⁰⁵ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-6.2 (3d ed. 1992).

⁴⁰⁶ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-6.2 cmt. (3d ed. 1992).

⁴⁰⁷ See *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the trial was unfair because defendants lacked the “guiding hand of counsel”); *United States v. Cronin*, 466 U.S. 648, 657-62 (1984) (citing the *Powell* case – in which the trial court had appointed members of the bar to assist the defendants at arraignment, but without “any degree of responsibility” to the defendants in preparing a zealous defense as trial counsel – as illustrative of a constructive denial of counsel rendering the trial presumptively unfair); *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (explaining that because “free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful” the government’s “invasion of the attorney-client relationship” violates the right to counsel).

independence of the defense function from the judiciary. The office was created by transferring into county government the court personnel already coordinating indigent defense services and hiring a chief attorney to supervise that staff. That is, with the exception of the newly created chief attorney position, Oakland County inherited the pre-existing structures, policies, methods, and personnel for providing the right to counsel in the sixth circuit court and in the 52nd District Court.⁴⁰⁸

Over the course of fiscal year 2022, the indigent defense services office has sought to improve policies, for example by making small increases to the level of fixed-fee compensation provided to private attorneys for staffing certain court dockets or for completing certain events in felony cases. Oakland County should be applauded for its initial steps to improve services. Yet more must be done to ensure each defendant receives the constitutionally adequate assistance of counsel they are guaranteed.

The indigent defense services office lacks sufficient staff members qualified to ensure proper oversight of indigent defense services. For example, the indigent defense services office currently has ten full-time staff members, of which the chief attorney is the only attorney position on staff. The majority of non-attorney staff time is devoted to coordinating coverage by panel attorneys at court hearings and reviewing attorney vouchers submitted for payment. These are important functions, but non-lawyers are ill-equipped to provide qualitative reviews of criminal defense lawyers.

Moreover, the office's only attorney has multiple responsibilities that prohibits him from conducting lawyer oversight, including, but not limited to:

- day-to-day supervision of the indigent defense services office's non-attorney staff members;
- liaising with the county administration, and the court and prosecution functions;
- reviewing and revising indigent defense system procedures;
- preparing quarterly and annual documentation on compliance planning and compliance reviews to MIDC;
- monitoring the office's expenditures; and,
- approving payments to individual attorneys and other case-related expenses.

There simply is not enough time remaining for the chief attorney to provide basic, systematic oversight of the approximately 190 individual private attorneys appointed to represent indigent defendants in the circuit and district courts in a given year.

This problem extends to the oversight of attorney training. The Oakland County indigent defense services office does not have enough staff, nor with sufficient expertise, to coordinate

⁴⁰⁸ Specifically, the office inherited: from the sixth circuit court, the court's committee, criteria, and processes for selecting attorneys, by level of case complexity, to be made available for appointment in felony trials; from the sixth circuit court and the 52nd District Court, the existing rosters of private attorneys available for appointment in misdemeanor and felony cases; from the 52nd District Court, the method used in each district court location of appointing private attorneys to staff court dockets as "arraignment attorney" or "house counsel," and tasked with representing each defendant appearing on that date, no matter how few or how many; and from the sixth circuit court and the 52nd District Court, each court's fixed fee attorney compensation schemes for adult criminal indigent defense in felony and misdemeanor cases.

with the Oakland County Bar Association a comprehensive training program in line with county-established performance expectations for criminal defense representation.⁴⁰⁹ In fact, Oakland County has no performance guidelines for private attorneys handling indigent defense appointments.⁴¹⁰ Existing attorney qualification criteria (by case type) is tied to the attorney's past experience and attendance at training events, but not tied to the attorney's current performance on behalf of their appointed clients.

Additionally, although the Oakland County indigent defense services office requires attorneys to comply with MIDC training requirements to maintain their annual eligibility for appointments in felony and misdemeanor cases – and attorneys can be automatically removed from eligibility for failing to attend trainings – there is no set process by which attorneys are systematically reviewed for performance over time. That is, there are no objective criteria providing all indigent defense system attorneys with notice of the system's expectations regarding the representation of clients in each case, and the measure by which attorneys will be periodically reviewed. Any reviews currently are ad hoc rather than systematic – occurring only when a judge, attorney, or member of the community raises an issue to the indigent defense services office's chief attorney's attention, and then the chief attorney uses his discretion to decide whether the attorney's conduct merits action and of what recourse. Not only does the indigent defense services office lack enough senior attorneys to adequately monitor attorney performance, but the office also lacks senior attorneys qualified to provide the level of supervision required of a functioning indigent defense system.

Proper oversight also requires access to timely, comprehensive, and relevant information. Not only does Oakland County government lack access to centralized information regarding all indigent defense systems within Oakland County and the services provided by the attorneys handling cases in each system, but what data Oakland County currently collects does not permit county policymakers to make informed policy decisions. For example, Oakland County maintains attorney billing and payment data, and data on the number of appointments made to each indigent defense system attorney, but neither source of data provides information on the caseloads and workloads of each private attorney. Without that data, Oakland County cannot ensure that the attorneys it appoints to represent indigent defendants have sufficient time to permit effective representation for all appointed clients. Likewise, Oakland County does not have sufficient indigent defense services office staff to process and analyze the information that it ought to be collecting, but currently does not.

⁴⁰⁹ For example, Oakland County (along with all other indigent defense systems within the county) contracts with the Oakland County Bar Association to fulfill the county's obligation to provide ongoing training to indigent defense system attorneys. Although some stakeholders believe newer attorneys should have more training before they can start handling low-level felony cases, and some raise concerns about the substance of specific training sessions, in general the trainings provided by the Oakland County Bar Association are high quality and relevant. Yet, it is the responsibility of Oakland County government to ensure not only that its indigent defense system attorneys attend and receive trainings, but that the attorneys incorporate lessons from their trainings into their everyday practice on behalf of their indigent clients – i.e., not only learning what it takes to prepare a case, but then actually preparing their cases.

⁴¹⁰ For example, the Massachusetts Committee for Public Counsel Services publishes its performance guidelines for all private attorneys the committee appoints to represent indigent defendants in criminal cases. *See* COMMITTEE FOR PUBLIC COUNSEL SERVICES, ASSIGNED COUNSEL MANUAL: POLICIES AND PROCEDURES § 4 (Performance Standards), <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>.

FINDING 5: Oakland County chills the right to counsel in the 52nd District Court by publicly announcing that all misdemeanor defendants will be required to contribute a monetary amount towards one's representation without considering an individual defendant's ability to pay, and the practices of some 52nd District Court judges to deny some defendants' requests for appointed counsel may violate the right to counsel.

Misdemeanors matter. For most people, misdemeanor courts are the place of initial contact with the Oakland County justice system. Much of a citizenry's confidence in the courts as a whole – their faith in the county's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great.⁴¹¹ Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

Stakeholders expressed concern that some judges in the Rochester Hills division of the 52nd District Court routinely deny appointed counsel to persons who may in fact be financially eligible. By anecdote, sometimes the court's denial of counsel is due to a defendant's mistake in correctly filling out the form provided. Individuals who come into contact with the criminal courts may have limited proficiency in English, or may be undereducated, developmentally delayed, or any other factor that may cause difficulty in correctly filling out a government form. Oakland County does not maintain data on the number of people appearing in district court; the number with privately retained counsel, the number requesting appointed counsel, and the number who choose to self-represent; and the number of people denied counsel at public expense.

By anecdote, one judge in the Rochester Hills division denies some misdemeanor defendants publicly appointed counsel for the trial phase but places them on probation with a suspended jail sentence, whereupon the defendant is incarcerated for violating the terms of probation. Such

⁴¹¹ Collateral consequences are those things that automatically happen to a defendant who is convicted of a crime, even though they are not contained as part of the sentence that is publicly imposed on the defendant in court. In 2009, the American Bar Association attempted to compile, for the first time, an exhaustive listing of the collateral consequences of a felony conviction that arise under federal laws. AMERICAN BAR ASS'N, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (Jan. 2009). In explaining the limitations of that report, the ABA noted:

[I]t does not include the many collateral consequences contained in state laws and regulations, or in state-controlled federal benefit programs such as welfare, food stamps, and public housing. Moreover, it does not include court-imposed conditions of probation and parole that may have a collateral effect on travel, employment, and other family matters, or civil forfeiture provisions that are often triggered by an arrest. . . . People with criminal convictions who served time in prison may have significant difficulty due to gaps in work experience on a resume in a job application. More and more frequently potential employers and landlords are requesting and using background check information, including arrest and conviction records in their decisions regarding jobs and leases independent of statutory requirements.

Id. at 11.

practices are in violation of the U.S. Supreme Court’s decision in *Alabama v. Shelton*,⁴¹² in which the Court reaffirmed that trial courts are prohibited from ever sending an indigent defendant to jail following a suspended sentence unless the defendant had originally received or waived their right to an attorney during the underlying trial phase.

A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point ‘result[s] in imprisonment,’ . . . it ‘end[s] up in the actual deprivation of a person’s liberty,’ . . . This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow.⁴¹³

Moreover, several judges of the 52nd District Court routinely require all defendants represented by public counsel to repay some amount of the appointed attorney’s fees as part of court costs assessed upon conviction, without regard to the defendant’s indigency status. This effort is aided by Oakland County websites that instruct defendants appearing in the 52nd District Court on misdemeanor charges that they will be required to repay the county the costs of representation. For example:

- Division 3 (Rochester Hills): the Oakland County website states that a defendant will be charged a fee of \$100 for every court appearance in this court.⁴¹⁴
- Division 4 (Novi): the Oakland County website states that a defendant will be charged a fee of \$200 for the first appearance of the attorney, another \$100 for subsequent appearances, and \$500 for representation at a jury trial in this court.⁴¹⁵

Such public statements announce to the defendant that they will be financially punished for executing their constitutional rights regardless of ability to pay.

Announcing online that invoking the right to counsel will cost money can chill the right to counsel, particularly if indigent persons do not understand that no defendant will be denied counsel at public expense if the defendant cannot, without “substantial financial hardship to himself or his dependents, obtain competent, qualified legal representation on his or her own.”⁴¹⁶ Yet, no further explanation is provided on the Oakland County websites that the trial courts are prohibited from assessing attorney fees in felony and misdemeanor cases unless the court makes

⁴¹² *Alabama v. Shelton*, 505 U.S. 654 (2002).

⁴¹³ *Alabama v. Shelton*, 505 U.S. 654, 662 (2002).

⁴¹⁴ *52nd District Court - Division 3, Appointed Attorney/Public Defender*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/courts/district-courts/52-3/criminal/Pages/court-appointed-attorney.aspx>. Oakland County reports that it has worked with the 52nd District Court – Division 3 to “remove the attorney fee reimbursement references” from its website “based on the stated policy of the County that courts are not expected to order attorney fee reimbursement against indigent defendants” starting fiscal year 2023. See Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (Sept. 16, 2022) (on file with 6AC).

⁴¹⁵ *52nd District Court - Division 4, Appointed Attorney*, OAKLAND COUNTY, MICHIGAN, <https://www.oakgov.com/courts/district-courts/52-4/criminal/Pages/court-appointed-attorney.aspx>. Oakland County reports that it has worked with the 52nd District Court – Division 4 to “remove the attorney fee reimbursement references” from its website “based on the stated policy of the County that courts are not expected to order attorney fee reimbursement against indigent defendants” starting fiscal year 2023. See Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (Sept. 16, 2022) (on file with 6AC).

⁴¹⁶ MICH. COMP. LAWS § 780.991(3)(b) (2020).

a factual determination of the defendant's ability to contribute to the costs of their representation, as required by MIDC standards on determining indigency and contribution.⁴¹⁷

B. Recommendations

RECOMMENDATION A: Oakland County should advocate for statutory changes to allow the county to create a unified indigent defense system serving all of the courts within its geographic boundaries. In the meantime, Oakland County should seek to negotiate with the municipalities responsible for the other indigent defense systems in Oakland County and come to an agreement where all indigent defense services in the county are provided by Oakland County.

Michigan law defines an indigent defense system as the unit of local government that funds the trial court. That means that all trial level adult criminal indigent defense services in Michigan were historically formed to serve the local courts first and foremost. Michigan Indigent Defense Commission *Standard 5* requiring judges to be removed from the administration of indigent defense services is a critical first step in rectifying this problem. However, *MIDC Standard 5* is not enough to undo the historical antecedent making indigent defense services beholden to courts and to ensure that indigent defense services are independent.

Michigan's indigent defense schematic means that there are 12 separate indigent defense systems within Oakland County administered and funded by at least 11 different county and municipal government entities, providing right to counsel services in 31 courtrooms at 14 separate court locations.⁴¹⁸ The decentralization of right to counsel services in Oakland County in this manner

⁴¹⁷ Oakland County reports that the county government has informed the Sixth Judicial Circuit and 52nd District Courts that, in a change of county policy starting fiscal year 2023, the courts are not expected to order reimbursement against indigent defendants, and courts will not be penalized for doing so. *See* Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (July 19, 2022) (on file with 6AC). Nevertheless, Oakland County government has no authority to enforce its policy should a trial court judge order reimbursement in a particular case anyway, as currently is permitted by statute. *See* MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020) (permitting the court to impose reimbursement of any indigent defendant upon conviction).

Moreover, the issue is the risk of chilling indigent defendants' free exercise of the right to counsel guaranteed by the U.S. Constitution. As of this study, county-funded websites inform defendants appearing in certain 52nd district court divisions that they are required to repay the cost of their representation. There is no contrary explanation to defendants that the county's policy has changed, and that defendants in fact no longer will be required to repay the cost of their representation at a future date.

⁴¹⁸ In fact, it is not easily determined which local governments, or precisely how many, have oversight of the various systems within Oakland County. Instead of a coordinated indigent defense system ensuring effective representation for all courts within its geographic boundaries, Michigan statutorily mandates: one circuit court administered by Oakland County; and nine district courts administered by 23 cities and townships plus the government of Oakland County. Multiple cities and townships can be made jointly responsible for providing the right to counsel in a district court (e.g., seven municipalities are statutory funding units of the 48th District Court). In addition to creating the funding units for each district court, Michigan law also permits the local governments to enter into agreements for funding the district courts in a manner different than provided by statute. As a result, the local governmental entities responsible for providing the right to counsel in a particular district court may be different than created by statute. There is no central repository of all interlocal agreements for district court funding, and some written agreements have been lost over the years. Moreover, those interlocal agreements for district court funding can be revised over

causes interference with each system's ability to ensure the effective representation of indigent adult criminal defendants in all courts throughout the county. For example:

- Each of the 12 indigent defense systems within Oakland County maintains its own list of private attorneys whom they appoint to represent indigent defendants. An individual private attorney may be available for appointment through more than one of these lists. Of the 287 attorneys who accept appointed cases in trial courts in the county at the time of this study, 217 of them are appointed by multiple indigent defense systems. Yet there is no means for the heads of those indigent defense systems to know how much work each attorney is appointed to do by the other indigent defense systems within the county.
- The same private attorneys who are appointed in the trial courts within Oakland County are frequently also appointed through indigent defense systems in other Michigan counties (most notably, in Macomb and Wayne counties), as well as accepting appointments to represent indigent defendants for state appeals and in the federal courts. Additionally, each private attorney is also free to represent privately retained clients. There is no way for the manager of each indigent defense system within Oakland County to know how much work these attorneys are trying to handle.

Moreover, there is no longer any reason that indigent defense should remain attached to each trial court jurisdiction. As described in chapter III, the local share of indigent defense funding in many jurisdictions within the boundaries of Oakland County is less than 5% of total annual spending. In one system, the local government's share is less than 0.5% of total spending. Each year the State of Michigan comes closer and closer to providing 100% of all indigent defense funding, and yet the state gains no additional decision-making authority over each local system.

The policy choice to maintain local control of indigent defense services under the state's general supervision, made at the time the MIDC Act of 2013 was passed into law, was a legitimate choice in the aggregate to maintain local control until such time as the state began putting money into indigent defense services. But with judges now removed from responsibilities for the indigent defense systems, and with the state funding the majority of indigent defense costs in the trial courts, that decision warrants revisiting. The philosophy of local control can be maintained by moving the administration and local share funding of indigent defense services to the county level of government.

The people who work and reside in Oakland County would be best served by a single indigent defense system that can provide uniform administration and oversight of attorneys representing indigent defendants in adult criminal cases throughout all trial courts within the county. After all, the level of justice one receives should not be dependent on which side of a municipal line a crime is alleged to have been committed. The promulgation of MIDC standards made binding on

time, which means the governmental entities providing indigent defense services in each judicial district within Oakland County can change from year to year. Each indigent defense system must annually report to the Michigan Indigent Defense Commission the fiduciary governmental entity or entities responsible for devising the local system's plan for compliance with MIDC standards, but MIDC does not make those compliance plans publicly available. Moreover, it cannot be determined from a jurisdiction's compliance plan alone whether the other statutory district court funding units retain a say over indigent defense services, or instead have agreed to devolve all responsibility onto a single governmental entity within that court district.

all indigent defense systems starting in fiscal year 2019 sparked a years-long effort to “change the culture” among attorneys providing indigent defense services within Oakland County. But the absence of a single indigent defense system means the culture change being sought must be addressed separately within each indigent defense system within the county, each occurring at its own pace, and with Oakland County lacking power and authority to guarantee to its citizenry the creation of a uniform standard of practice that complies with constitutional commands. Unfortunately, Oakland County currently lacks the statutory authority to create such a unified indigent defense system without obtaining the consent of the various local governments within Oakland County.

Therefore, Oakland County officials should advocate for the Michigan legislature to enact the following statutory changes:

- The consolidation of responsibility for providing indigent defense services under the auspices of county government in each county, thereby eliminating the district court-level indigent defense systems;
- The reformation of criminal procedure to make all felony prosecutions commence in the circuit courts, and abolish horizontal representation within and/or across different indigent defense systems;
- A resolution of the conflict caused by the separate statutory provisions authorizing indigent defense systems to collect contribution only from defendants determined to be partially indigent,⁴¹⁹ while also permitting trial courts to assess attorney fees at conviction regardless of the defendant’s indigency status⁴²⁰; and
- A requirement that court-generated revenue from attorneys fee assessments is counted as indigent defense system income that is reported annually to MIDC and require that 100% of revenues collected locally from indigent defendants are disbursed to the state of Michigan in support of local indigent defense services through future MIDC grants.

While these statutory changes are being debated by state lawmakers, there is nothing that precludes Oakland County from pursuing a local memorandum of agreement with all the other local governments currently providing public defense services to create a unified countywide indigent defense system. Indeed, there is precedent already within Oakland County for such an effort. Since fiscal year 2019, the county and all district court funding units have agreed to share the administrative burden of providing training to indigent defense system attorneys through a coordinated method – a contract with the Oakland County Bar Association, funded by MIDC annual grants to the government of Oakland County – rather than each devising a training program of its own. Similarly, as permitted by Michigan law and MIDC policies,⁴²¹ Oakland County should convene all necessary stakeholders to develop plans for creating a single indigent defense system providing the right to counsel in all criminal trial courts within Oakland County under a single annual compliance plan, with MIDC annual grant support to Oakland County directly.

⁴¹⁹ MICH. COMP. LAWS § 780.993(17) (2020) (“The court shall collect contribution or reimbursement from individuals determined to be partially indigent under applicable court rules and statutes.”).

⁴²⁰ MICH. COMP. LAWS § 769.1k(1)(b)(iv) (2020) (authorizing trial courts to assess all convicted defendants “expenses of providing legal assistance to the defendant”).

⁴²¹ See MICHIGAN INDIGENT DEF. COMM’N, MIDC GRANT MANUAL 10 (rev’d Feb. 2021) (“The Commission urges efficient models of providing indigent defense. In some communities, multiple funding units may collaborate to deliver indigent defense services. The statutory authority for multiple counties cooperating in a regional delivery system model can be found in the Urban Cooperation Act of 1967, at MCL §124.501 et seq.”).

RECOMMENDATION B: Oakland County should seek MIDC grant funding to redesign its indigent defense services office. Specifically:

- **The county should create a new position of executive director of indigent defense services.**
- **The executive director should be appointed to a four-year term of office, removable only for just cause and eligible for reappointment.**
- **The executive director should oversee a central office staff to provide centralized services that produce economies of scale (e.g., training, finance, information technology, etc.).**
- **Representation in adult criminal cases should be provided by a combination of:**
 - **a public defender office staffed by government employees, funded at a level to provide for a sufficient number of attorneys, support staff, and supervisors to meet MIDC proposed workload standards; and**
 - **a managed assigned counsel system in which private attorneys are paid at least \$100 per hour for misdemeanors, \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies.**
- **The executive director should be authorized to explore offsetting the costs of these higher assigned counsel rates by creating an alternate defender office to provide representation in a portion of conflict cases.**

The U.S. Supreme Court has consistently required that the defense function must be independent, commenting that the 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”⁴²²; “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation”⁴²³; and governments have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”⁴²⁴

As explained, the creation of the Oakland County indigent defense services office was an important milestone towards ensuring independence from undue judicial influence. But more is needed.

Executive Director of Indigent Defense Services: As detailed below, we recommend Oakland County provide direct services to indigent defendants through a combination of government-employee public defenders and private attorneys. To oversee all indigent defense services in the county, Oakland County requires an executive director of indigent defense services.

To ensure the independence of the defense function, Oakland County should insulate the indigent defense services office from undue political influence. If the executive director is an at-will county employee of Oakland County, subject to removal by the county executive at any time with or without reason, this will replace one form of governmental interference with another.⁴²⁵

⁴²² Strickland v. Washington, 466 U.S. 668, 686 (1984).

⁴²³ Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

⁴²⁴ Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

⁴²⁵ To be clear, we do not imply that current Oakland County leadership or any future county administration would

There will be many times when the constitutional obligations under the Sixth Amendment will force serious debate and the county administration needs to hear accurate information from the executive director, without the fear of dismissal for telling the county what a particular decision will mean to people of limited means.

Therefore, guardrails need to be in place for how best to hire and remove an executive director. Guideline 2.12 of the *Guidelines for Legal Defense Systems in the United States* explains that the executive director should “be selected on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.”⁴²⁶

National standards agree that the best way to protect defense counsel independence is to establish an oversight commission, whose members are appointed by diverse authorities,⁴²⁷ and to vest that commission with responsibility for hiring an executive director. Michigan law establishes an independent oversight commission in the form of the Michigan Indigent Defense Commission but does not vest MIDC with responsibility for selecting the senior attorney administrators in each local jurisdiction. Therefore, at the very least, Oakland County should form an advisory group to assist the county in recruiting, interviewing, and selecting the county’s executive director of indigent defense services. Oakland County should heed to the national standards on oversight commissions in creating the advisory hiring group.⁴²⁸

consciously or maliciously interfere with the independence of the defense function. To the contrary, the county’s undertaking the current assessment of its method of providing the right to counsel is clear evidence of the county administration’s strong desire to ensure a fair and effective criminal process for all accused persons in furtherance of constitutional commands. Institutionalizing independence now protects against future county administrations (who have not been involved in this evaluation and may not understand the full parameters of effective Sixth Amendment representation) inadvertently interfering in the independence of the executive director and the indigent defense system down the road.

⁴²⁶ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* (1976). The NSC Guidelines were created in 1976 in consultation with the United States Department of Justice under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

⁴²⁷ The first of the *ABA Ten Principles of a Public Defense Delivery System* explains that in a properly constituted system “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent,” and that in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.” AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 1 (2002).

⁴²⁸ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* (1976). The relevant sections explain:

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.

Guideline 2.12 of the *Guidelines for Legal Defense Systems in the United States* provides that an indigent defense system executive director’s “term of office should be from four to six years in duration and should be subject to renewal,” and the executive director “should not be removed from office in the course of a term without a hearing procedure at which good cause is shown.”⁴²⁹ Because the prosecuting attorney for Oakland County has a four-year term, we recommend that the executive director also be a full-time appointment for a four-year term with termination for just cause only.

Finally, rather than providing direct services to any indigent person, the executive director’s primary role is to be the outward face of the indigent representation system in Oakland County, advocating with other criminal justice stakeholders, the county executive and county board of commissioners, MIDC, and the communities most in need of indigent representation services. Because of this, it is possible for the executive director’s indigent defense system to oversee both a public defender office division and a private counsel division without conflicts of interest, so long as the executive director creates ethical screens between those two silos (as discussed further below).⁴³⁰

The Central Office: In addition to the executive director, the indigent defense system should centralize services that provide economies of scale. These include but are not limited to:

- *Information technology.* Without available data, it is impossible to know the number of misdemeanor and felony defendants each year requiring representation, and therefore impossible to project the full resources required to handle the representation effectively. Starting fiscal year 2021-22, the Oakland County indigent defense services office is working with the trial courts to address the county’s absence of accurate data, but the office lacks infrastructure and technical know-how to oversee this data collection and use the information effectively.

The indigent defense system, and Oakland County policymakers, must have data collection and analysis procedures that allow the system to address shifts in criminal justice priorities and practices in coming years.

By implementing proper processes for data collection and analysis (*see* Appendix C), the indigent defense system will be able to predict its staffing and resource needs more accurately, permitting Oakland County to budget accordingly. For all of these reasons, Oakland County must provide adequate funding to the indigent defense system to obtain

(e) A majority of the Commission should consist of practicing attorneys.

(f) The Commission should not include judges, prosecutors, or law enforcement officials.

⁴²⁹ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* (1976).

⁴³⁰ MICH. R. OF PRO. CONDUCT r. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2.”). *See also* MICH. R. OF PRO. CONDUCT r. 1.10 cmt. (defining the term “firm” to include “lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization”).

and operate the technology necessary to, among other things: monitor the indigent defense system's true workload year by year; determine whether attorneys have sufficient time and sufficient resources to provide effective representation in each case; and develop and present accurate, timely, and transparent indigent defense system budgets to the county – and to MIDC – for review and approval.⁴³¹ Securing and adapting technology to the needs of the Oakland County indigent defense system will require the expertise of an information technology professional.

- *Finance.* Given the scale of Oakland County's indigent defense workload, and the inadequate number of attorneys currently providing representation in the trial courts, Oakland County should be requesting MIDC grant funding far above the county's current annual levels. (*See* discussion of estimated attorney and non-attorney staff needed to provide direct representation, Appendix A.) The indigent defense system requires accounting, budgeting, and finance services, administered by a finance professional who can assist the executive director in developing indigent defense system budgets.
- *Training.* Oakland County currently complies with MIDC training standards through its annual contract with the Oakland County Bar Association. Yet the county must provide adequate funding to the indigent defense system to ensure that lawyers are appointed *only* to cases that they are qualified to handle; the trainings being provided are not tied to any attorney-qualification standards. Because ongoing training is an active part of the job of being an attorney, the indigent defense system must have a full-time training professional who is an attorney to provide all indigent representation system attorneys with ongoing, mandatory training,⁴³² tailored to the types and levels of cases to which each attorney is appointed.⁴³³ This is best achieved by establishing a comprehensive training program under the executive director's direct supervision, in lieu of an external contract. The county must also fund the indigent representation system to have an adequate number of lawyers, so that every attorney has sufficient time to attend training in addition to fulfilling their case-related obligations to all of their clients. The county's comprehensive training program must be coordinated with systematic reviews of attorney performance to ensure that attorneys implement the trainings they receive.

The executive director should be authorized and directed to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel throughout the county's

⁴³¹ *See* Appendix C for a list of the types of data Oakland County should be collecting.

⁴³² *See generally* NATIONAL LEGAL AID & DEFENDER ASS'N, DEFENDER TRAINING AND DEVELOPMENT STANDARDS (1997). *See also* NATIONAL ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std. 13.16 (1973); NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976), guidelines 2.4(4), 5.7-5.8.

⁴³³ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. *See* AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed.) ("Counsel defending in specialized subject areas should receive training in those specialized areas."). *See also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992) ("Criminal 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.").

restructured indigent defense system, including the representation provided by any county-employed attorneys and the representation provided by any appointed private attorneys. The executive director should promulgate these standards as soon as is practicable.

MIDC's statewide standards establish the general contours that each local system must follow, but each local system is responsible for filling in the details needed to fulfill the Sixth Amendment right to counsel. Louisiana's statewide public defense commission is required by statute to promulgate a series of standards that serve as a good example of the types of standards the Oakland County indigent defense system executive director should develop. These include attorney performance guidelines, attorney supervision protocols, time sufficiency standards, continuity of services standards whereby the same attorney provides representation from appointment through disposition, client communication protocols, and data collection standards.⁴³⁴

As noted, the indigent defense services office inherited policies crafted by the local trial courts. The executive director also should reexamine all existing indigent defense system policies and revise them as necessary to comply with constitutional requirements. For example, as explained in chapter IV, the county's criteria for selecting private attorneys for appointment in felony and misdemeanor cases are inadequate to ensure lawyers are minimally qualified to effectively handle the cases to which they are appointed.

Direct Representation: The executive director, in consultation with central office staff, should be the county's point person in building out the new indigent defense system, including establishing a public defender office division and a private counsel division, determining the types and numbers of cases to be handled by each division, and deciding when and how to hire attorneys and staff in the public defender office division and how many attorneys and staff are necessary in the private counsel division.

Each fiscal year, Oakland County must obtain (primarily through MIDC grants) and allocate the necessary funds to hire or retain a sufficient number of lawyers, with adequate resources, to provide direct representation to all indigent people who are entitled to an appointed attorney. The beginning points for determining the amount of necessary funding is the county's anticipated indigent representation system caseload. Internal data compiled by the indigent defense services office⁴³⁵ provides the best current understanding of the indigent defense system's caseload as a whole. Oakland County's total indigent defense appointments for fiscal year 2021-22, measured against recommended MIDC caseload standards, shows that Oakland County requires an estimated total of 229.9 full-time equivalent positions (including attorneys and non-attorneys) to provide direct representation to indigent defendants in the sixth circuit and 52nd district courts. (See Appendix A.)

Compliance with the recommended MIDC caseload standards should provide a sufficient number of attorneys to ensure that each appointed client can be continuously represented by a single

⁴³⁴ LA. REV. STAT. § 15:148(B) (2021).

⁴³⁵ See Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (July 19, 2022) (on file with 6AC).

attorney from appointment through disposition of the case. The current practice in Oakland County of providing non-continuous or “horizontal” representation, explained in chapter V, raises serious ethical concerns, and is prohibited under national standards. Michigan law calls for MIDC to abolish the practice altogether.⁴³⁶ As explained in chapter VII, Oakland County’s total projected indigent defense system new appointments in fiscal year 2021-22, measured against MIDC caseload standards, shows that Oakland County requires an estimated total of 114 full-time equivalent attorneys to handle the total number of new cases appointed during a single year.

Although MIDC later developed Michigan-specific workload standards (and Oakland County should comply with those recommended standards),⁴³⁷ the proposed MIDC caseload standards start by adopting the national caseload standards.⁴³⁸ The national caseload standards contemplate that a full contingent of supervision and support is available to the appointed attorney,⁴³⁹ including: one supervisor for every ten attorneys⁴⁴⁰; one investigator for every three attorneys⁴⁴¹; one social service caseworker for every three attorneys⁴⁴²; one paralegal for every four felony attorneys⁴⁴³; and one secretary for every four felony attorneys.⁴⁴⁴ Based on the estimated total of 114 FTE trial attorneys necessary to provide direct representation to clients, Oakland County’s indigent defense system requires an estimated additional 115.9 full-time equivalent attorney and non-attorney positions: 11.4 attorney supervisors, 38.0 investigators, 38.0 social workers, and 28.5 paralegals. (See Appendix A.)

The next thing that must occur in creating a system to provide effective assistance of counsel is to select the attorneys who will be available to provide that representation. National standards, as compiled in the *ABA Ten Principles*, require that, “[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.”⁴⁴⁵ The commentary clarifies that the “appointment process” of both government public defender employees and private attorneys “should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.”⁴⁴⁶

⁴³⁶ MICH. COMP. LAWS § 780.991(2)(d) (2020).

⁴³⁷ See NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION (2019).

⁴³⁸ See MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std. 6 (Oct. 2021) (“Until the completion of [Michigan-specific weighted caseload] studies, defender 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 misdemeanors per attorney per year.”).

⁴³⁹ See NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁴⁰ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁴¹ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁴² See NATIONAL LEGAL AID & DEFENDER ASSOCIATION, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES § VII (f) (2000).

⁴⁴³ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

⁴⁴⁴ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

⁴⁴⁵ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 2 (2002).

⁴⁴⁶ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 2 (2002).

National experience shows that a jurisdiction with an annual criminal caseload greater than 3,500 felonies and 10,000 misdemeanors, such as Oakland County, is large enough to support establishing a county public defender office division staffed by full-time government employees.⁴⁴⁷ Conflict of interest rules require generally that a public defender office only provide one attorney in a given case.⁴⁴⁸ Therefore, Oakland County must always have ample numbers of private attorneys to represent, for example, co-defendants in the same case. The executive director should develop a comprehensive indigent defense system plan to properly and timely identify conflicts of interest.⁴⁴⁹

Oakland County's executive director must determine how many of the estimated 229.9 overall direct representation FTE positions should be government employees in the public defender office division and how many should be in the private counsel division; and how the workload should be allocated between the two divisions. (See Appendix B illustrating one possible structure for the new indigent representation system, demonstrating how the total indigent representation system workload could be distributed between the public defender office division and the private counsel division, with both under the auspices of the executive director of indigent defense services.)

- *Public defender office division.* The executive director should build, and Oakland County should fund with MIDC grant dollars, a public defender office division with the following in mind:
 - Day-to-day administration – A deputy director should report directly to the executive director and administer the day-to-day functions of the public defender office division. The deputy director position should be filled by an experienced criminal defense attorney.
 - Parity – The county should ensure that all employees (both attorneys and non-attorneys) in the public defender office division have salary and benefits parity with their counterparts in the offices of the prosecuting attorney and the corporation counsel.

⁴⁴⁷ The Sixth Amendment Center notes that some counties in Michigan, such as Wayne County, have chosen to contract with a non-profit law firm to provide public defender services. The Sixth Amendment Center does not recommend this option for Oakland County. The right to counsel in Oakland County suffers from uncoordinated structures to a degree that may be unmatched elsewhere in Michigan. As has been explained, the citizens of Oakland County are best served by consolidation of services within a single oversight structure. Outsourcing public defense services to a private entity runs contrary to that initiative.

⁴⁴⁸ MICH. R. OF PRO. CONDUCT r. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2.”). See also MICH. R. OF PRO. CONDUCT r. 1.10 cmt. (defining the term “firm” to include “lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization”).

⁴⁴⁹ Michigan's criminal process, which bifurcates felonies between different levels of court and across different indigent defense systems, raises significant administrative and procedural hurdles to Oakland County's developing effective plans for quickly identifying conflicts. Oakland County should request the State Court Administrative Office and the Michigan Legislature jointly examine reforms to criminal procedure, whereby all felony prosecutions commence directly in the circuit court, as part of other potential judicial system reforms that are necessary to fulfill constitutional obligations.

- Early and continuous representation – The executive director and deputy director should ensure that staff public defender attorneys are individually appointed at the defendant’s arraignment in all case types, and that the appointed attorney continuously represents the client until the conclusion of the case. Although the county government should seek greater coordination among all indigent defense systems within Oakland County permitting early and continuous representation in cases arising out of all district courts in Oakland County, at the very least the executive director and deputy director immediately should implement procedures providing for the early and continuous representation by public defender attorneys in felony and misdemeanor cases arising out of the 52nd District Court.

In addition to a sufficient number of attorneys, supervisors, and support staff, Oakland County must provide necessary funding for adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) and for case-related expenses (such as experts and interpreters) in order to ensure effective assistance of counsel, as explained in the American Bar Association’s *Standards for Criminal Justice*.⁴⁵⁰

- *Private Counsel Division.* The executive director should build, and Oakland County should fund with MIDC grant dollars, the private counsel division with the following in mind:
 - Day-to-day administration and supervision – A deputy director should report directly to the executive director and administer the day-to-day functions of the private counsel division, with the assistance of a billing coordinator and a social worker outreach coordinator. The deputy director should be responsible for systematic supervision of the private attorneys the county appoints, and therefore the deputy director position should be filled by an experienced criminal defense attorney.
 - Eliminating financial conflicts between appointed private attorneys and their clients – Because of the financial conflicts of interest between attorney and client that result from Oakland County’s existing compensation methods, the executive director should abolish fixed fee compensation of private attorneys who are appointed to represent indigent persons. U.S. Supreme Court case law holds that government’s failure to provide conflict-free representation is a form of governmental interference that violates the right to effective assistance of counsel.⁴⁵¹ To prevent financial conflicts of interest, all national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”⁴⁵² Likewise, Michigan law requires that “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation

⁴⁵⁰ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

⁴⁵¹ Strickland v. Washington, 466 U.S. 668, 682 (1984); United States v. Cronin, 466 U.S. 648, 661 n. 28 (1984).

⁴⁵² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

shall be avoided.”⁴⁵³ Attorneys appointed through the private counsel division should be paid for all case types at an hourly rates set by *MIDC standard 8* on attorney compensation, accounting for both actual overhead and a reasonable fee (or alternatively they should be county employees).⁴⁵⁴

Under Michigan’s statutory scheme for providing the right to counsel in adult criminal trials, Oakland County cannot be required to increase county funding to meet existing MIDC standards. But, as delegated by the State of Michigan, Oakland County government officials are responsible for fulfilling each defendant’s constitutional right to representation free from financial and other forms of conflict, even where MIDC standards do not yet exist.

To its credit, despite not yet being required to do so under MIDC standards, Oakland County reports that it has informed MIDC that the county intends to pay private attorneys an hourly rate of \$120 per hour in felonies carrying a potential punishment of life in prison, and that it is seeking MIDC grant funding to support that policy change starting fiscal year 2023. Nevertheless, in all other felony and misdemeanor case types, Oakland County maintains its fixed fee compensation scheme creating inherent financial conflicts between attorney and client. The more hours the appointed attorney devotes to the representation of each indigent client, the less time available for paying clients’ cases. The more that the appointed attorney spends on necessary overhead and case-related expenses for appointed clients, the less money the attorney has left over for their personal compensation. A federal court in 2013 considered a fixed fee contract in which the appointed attorneys were required to pay for all of the overhead and case-related expenses in an unlimited number of cases, and found it to be an “[i]ntentional choice[]” of government that left “the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”⁴⁵⁵ The managed assigned counsel system rates should be at least \$100 per hour for misdemeanors, \$110 per hour for non-life offense felonies, and \$120 per hour for life offense felonies.

- *Alternate defender.* Banning the events-based payment scheme and moving to a private attorney system paying a reasonable hourly rate plus overhead will make it more difficult to predict and contain costs. A properly staffed, managed assigned counsel system can estimate future caseloads based on prior-year trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. For this reason, some governments have funded alternate public defender offices for conflict representation. There will always be a need for private attorneys

⁴⁵³ MICH. COMP. LAWS § 780.991(2)(b) (2020). *See also* MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std. 8 (Oct. 2021).

⁴⁵⁴ *See also* MICHIGAN INDIGENT DEF. COMM’N, MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES, std. 8(B) (Oct. 2021).

⁴⁵⁵ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132 (W.D. Wash. 2013).

in certain conflict situations but funding an alternate public defender office under the central oversight of the executive director of indigent defense could offer Oakland County policymakers more predictability with funding while increasing oversight and supervision. Therefore, the executive director should be authorized to explore the potential of offsetting the higher assigned counsel rates by exploring the option of an alternate public defender office to handle a portion of cases in which the primary government staffed public defender office has a conflict of interest.

APPENDICES

A. Analysis of Oakland County total indigent defense system caseload

As explained in the body of the report, Oakland County has a constitutional obligation to ensure that each indigent defendant in each case is appointed an attorney with sufficient time and resources to provide effective representation. To determine the total number of attorneys and non-attorneys required to handle Oakland County's total indigent defense caseload effectively, it is first necessary to decide the source(s) of data for analysis.

Determining what indigent defense system data is available for caseload analysis. In simplest terms, the indigent defense system's total caseload is the sum of all cases worked on during the year. Stated differently, the indigent defense system's total caseload by each type of case is:

- the number of open and pending cases at the start of the fiscal year
- + the number of cases that are newly assigned during the fiscal year.

Oakland County provided the Sixth Amendment Center with data showing, for fiscal years 2016 through 2020, the sum of all payments made by Oakland County to each individual attorney, by fiscal year, in the sixth circuit court and in each 52nd District Court division.⁴⁵⁶ However, data showing total dollars paid to each attorney does not permit analysis of the lawyer's caseload because it does not provide enough detail about the work conducted by each attorney. For example, it cannot be determined whether an attorney paid \$5,000 during a given fiscal year was appointed to ten cases in which the lawyer was paid \$500 each, or five cases and paid \$1,000 in each case, or earned all \$5,000 from a single indigent defense appointment, and so forth.

Oakland County also provided caseload data for the circuit court for fiscal years 2005 through 2021, showing in capital felonies and in non-capital felonies, for each fiscal year, the total number of new filings, jury trials, pleas, total dispositions, and total court caseload (pending at the beginning of the fiscal year, plus new cases).⁴⁵⁷ Although trial court caseload data provides a view of the criminal justice system's total adult criminal caseload overall, it cannot be determined what percentage of those cases involved indigent defendants represented by counsel at public expense, what percentage retained private counsel, and what percentage self-represented. The data also only shows circuit court data (and not similar data for the 52nd District Court) and cannot be broken down further into each case type (e.g., separating regular felonies from low level felonies from felony probation violations).

Having determined that complete, accurate, reliable caseload data from fiscal years prior to fiscal year 2022 is unavailable, Oakland County provided data showing the number of payments made to each private attorney in the first three quarters of fiscal year 2022 in each circuit court case category.⁴⁵⁸ Unlike the payment data from prior fiscal years, because it is broken out by case type, the payment data for fiscal year 2022 is a better proxy for attorney caseload data. However, because Oakland County generally permits attorneys to submit vouchers up to 30

⁴⁵⁶ Email from Mary Ann Jerge, Oakland County senior assistant corporation counsel, to Sixth Amendment Center (July 1, 2021) (on file with 6AC).

⁴⁵⁷ Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (July 17, 2022) (on file with 6AC).

⁴⁵⁸ Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (April 4, 2022) (providing a spreadsheet titled "TRIAL_VOUCH_TB Query1") (on file with 6AC).

days following the disposition of a case, an unknowable number of payments made during the first quarter of fiscal year 2022 actually were cases worked on during the close of the prior fiscal year. Moreover, given the backlog of resolving criminal cases caused by the Pandemic, Oakland County believes payment data significantly undercounts its indigent defense system's actual workload.⁴⁵⁹

Therefore, Oakland County provided data on the number of appointments made to each indigent defense system attorney for the first three quarters of fiscal year 2022 showing⁴⁶⁰:

- In the circuit court, the following case categories:
 - 1 – “Capital cases. Anything where the underlying charge is punishable by life.”
 - 2 – “Major felonies. Underlying offense punishable by more than 5 years but less than life.”
 - 3 – “Regular felonies. Underlying offense punishable by more than 2 years but less than five.”
 - 4 – “Low Felonies/High Misdemeanors. Underlying offense punishable by up to 2 years.”
 - 7 – “probation violation cases.”
- In the district court, the following case categories:
 - “# of Cases Handled as House Counsel”
 - “# of New Assignments in Reporting Period”

Of all data sources available, the fiscal year 2022 appointment data for quarters one through three is the best source of information from which to analyze indigent defense system caseloads in total and by each attorney. To permit analysis against annual caseload limits, the data is prorated to estimate the full-year indigent defense system caseload for fiscal year 2022,⁴⁶¹ which is shown in the following table:

OAKLAND COUNTY DATA		
PANEL	OAKLAND COUNTY CASE TYPE	FY22 TOTAL # CASES (PROJECTED)
6th Circuit	Capital	231
	Major Felonies	793
	Regular Felonies	2593
	Low Felonies/High Misdemeanors	356
	Probation Violations	1424
52nd District	# of New Assignments in Reporting Period	532
	# of Cases Handled as House Counsel (adjusted by new assignments)	10843

⁴⁵⁹ Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (July 19, 2022) (providing a spreadsheet titled “TRIAL_VOUCH_TB Query1”) (on file with 6AC).

⁴⁶⁰ Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (April 4, 2022) (providing a spreadsheet titled “APPT_TB”) (on file with 6AC); Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (April 4, 2022) (explaining the numerical case categories) (on file with 6AC).

⁴⁶¹ Because data for the first three quarters of fiscal year 2022 is provided, calculating an estimated caseload for the fourth quarter is all that remains. This is done by finding the average quarterly caseload per category. Then, the average quarterly caseload is added to the total caseload for the first three quarters to find the estimated full-year caseload for each category.

Importantly, the Oakland County data on individual appointments to attorneys is tied to the county's compensation method. Therefore, Oakland County has data on flat fee payments made to private attorneys for staffing a jail arraignment shift but does not track the number of defendants attorneys represent during each jail arraignment shift. That aspect of the indigent defense system's actual workload is not represented in the appointment data.

Additionally, because of Oakland County's horizontal representation method, a single defendant likely is represented by more than one attorney during the pendency of the case. This raises questions as to whether misdemeanor cases are double-counted in the district court appointment data, and how to measure that double-counting. As explained in chapters IV and V, Oakland County schedules private attorneys to staff arraignment dockets in the 52nd District Court and pays them a fixed fee for representing each defendant with court appearances during their shift, and then schedules a different attorney to staff pretrial conference dockets in the 52nd District Court and pays them a fixed fee for representing each defendant with court appearances during their shift. Oakland County explains that the "# of Cases Handled as House Counsel" category includes both district court arraignments (out-of-custody misdemeanors and felonies) and pretrial conferences (misdemeanors only). Therefore, if a misdemeanor case is not disposed of at the arraignment, then that misdemeanor case is counted twice in the district court "House Counsel" data – once for the arraignment and once for the pretrial conference. But because some district court arraignment cases are felonies, and some misdemeanor cases resolve at the arraignment, it is not possible to know how many of the "# of Cases Handled as House Counsel" category cases are double counted (i.e., one cannot simply divide that number in half to find the total number of new misdemeanor indigent defense cases).

However, as explained in chapters IV and V, for any misdemeanor case that does not resolve at the defendant's first pretrial conference, Oakland County appoints the house counsel attorney to continue representing the defendant at all subsequent court appearances, including trial and sentencing, and the individually appointed attorney receives two payments – i.e., the same attorney handles both parts of the client's case and only bills separately for the pretrial and trial phases (once as house counsel and once for the individual appointment). That means 100% of the "# of New Assignments in Reporting Period" are cases already counted in the district court House Counsel data.

Whereas the "house counsel" can include multiple categories of representation in district court – anything from a limited appointment to represent an out-of-custody felony defendant at arraignment on the one hand, to lengthy negotiations with prosecutors and conferences with clients in advance of resolving a misdemeanor case at the pretrial conference on the other – the "new appointment" data most closely reflects an attorney's individual appointment to represent a misdemeanor defendant as trial counsel. Therefore, to resolve the double-counting, rather than disregarding the "new appointment" data altogether the Sixth Amendment Center adjusts the "house counsel" data downward by the same number as there are "new appointments."⁴⁶²

The table on page 159 shows the adjusted total fiscal year 2022 indigent defense system caseload by case type for Oakland County:

⁴⁶² That is, the estimated 532 "new appointments" are subtracted from the estimated 10,843 "house counsel" cases to find an adjusted total 10,311 "house counsel" cases.

OAKLAND COUNTY DATA (ADJUSTED)		
PANEL	OAKLAND COUNTY CASE TYPE	FY22 TOTAL # CASES (PROJECTED)
6th Circuit	Capital	231
	Major Felonies	793
	Regular Felonies	2593
	Low Felonies/High Misdemeanors	356
	Probation Violations	1424
52nd District	# of New Assignments in Reporting Period	532
	# of Cases Handled as House Counsel (adjusted by new assignments)	10311

Determining which caseload standard to apply to each Oakland County case category. As explained in chapter VI, the Michigan Indigent Defense Commission commissioned a Michigan-specific caseload standard for indigent defense attorneys, as called for by national standards. The recommended MIDC caseload standards set annual limits by case-type.⁴⁶³

Recommended MIDC caseload standards		
Case type	Delphi Panel Median Recommended Minimum Hours	Maximum Caseload Standard
Murder or manslaughter	120	15
CSC (1st, 2nd, and 3 rd degrees)	80	23
Other class A offenses	50	37
Other high-severity felonies	40	46
Low-severity felonies and two-year high court misdemeanors	25	74
One-year misdemeanors	8	232
93-day misdemeanors	7	265
Probation violations	3.5	530
Other adult	3	619

Because Oakland County appointment data is tied to payment levels provided in the county's compensation scheme, and do not necessarily align with the case-types provided by the recommended MIDC caseload standards, it is necessary to determine which MIDC standard for each case-type to apply to each Oakland County appointment case category. For example, whereas MIDC provides separate case categories for "murder or manslaughter" and "CSC (1st, 2nd, and 3rd degrees)," the Oakland County counts all crimes punishable by life in prison as a "capital case." The Sixth Amendment Center conservatively applies the lowest possible MIDC standard to each Oakland County case-category.

⁴⁶³ NICHOLAS M. PACE ET AL., RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION xxi (2019), <https://michiganidc.gov/wp-content/uploads/2019/09/Final-RAND-Report-Caseloads-September-2019.pdf>.

Additionally, the recommended MIDC caseload standards presume there is continuous representation of the defendant by a single attorney from appointment through disposition, whereas in Oakland County some portion of the “house counsel” data involves limited appearances by attorneys at arraignment. Therefore, the Sixth Amendment Center conservatively applies the lowest recommended MIDC standard of 619 “other adult matters” per attorney per year to all “house counsel” cases.

The following table shows the recommended MIDC caseload standard applied to each Oakland County case category:

	Oakland County	MIDC Standard applied	
	Case type	Case Type	Annual Caseload Maximum
6th Circuit	Capital	“CSC (1st, 2nd, and 3rd degrees)”	23
	Major Fel	“Other class A offenses”	37
	Regular Fel	“Other high-severity felonies”	46
	Low Fel/High Misd	“Low-severity felonies and two-year high court misdemeanors”	74
	Probation Viol	“Probation violations”	530
52nd District	# of New Assignments in Reporting Period	“93-day misdemeanors”	265
	# of Cases Handled as House Counsel (adjusted by new assignments)	“Other adult”	619

Analysis of total indigent defense system caseload requirements. When measured against MIDC annual caseload maximums, Oakland County requires 114.0 FTE attorneys to handle the projected fiscal years 2022 total indigent defense system caseload effectively, as shown in the table on page 161.

Number of attorneys required to handle Oakland County indigent defense system total projected FY 2022 caseload, measured against MIDC caseload limits				
OAKLAND COUNTY DATA			ANALYSIS	
Panel	Oakland County Case type	FY22 total # cases (proj)	MIDC Standard applied	Attys req'd
6th Circuit	Capital	231	23 ("CSC (1st, 2nd, and 3rd degrees)")	10.0
	Major Fel	793	37 ("Other class A offenses")	21.4
	Regular Fel	2593	46 ("Other high-severity felonies")	56.4
	Low Fel/High Misd	356	74 ("Low-severity felonies and two-year high court misdemeanors")	4.8
	Probation Viol	1424	530 ("Probation violations")	2.7
52nd District	# of New Assignments in Reporting Period	532	265 ("93-day misdemeanors")	2.0
	# of Cases Handled as House Counsel (adjusted by new assignments)	10311	619 ("Other adult")	16.7
TOTAL				114.0

As explained in chapter VI, the proposed MIDC caseload standards presume the indigent defense system has a full complement of non-attorney positions to assist in the representation of indigent clients. National standards call for one full-time supervising attorney position for every 10 trial attorneys, one full-time investigator for every three trial attorneys, one social worker for every three trial attorneys, and one law clerk/paralegal for every four trial attorneys.

Therefore, in addition to the 114.0 FTE trial attorney positions required, Oakland County requires an additional 115.9 FTE attorney and non-attorney positions to support the effective representation of indigent clients – a combined total of 229.9 FTE positions (attorneys and non-attorneys) to handle its total estimated indigent defense system caseload for fiscal year 2022.

Position type	Standard (ratio to trial attorneys)	FTE positions required
Trial attorneys		114.0
Supervising attorneys	1:10	11.4
Investigators	1:3	38.0
Social Workers	1:3	38.0
Law clerks/paralegals	1:4	28.5
TOTAL		229.9

B. One possible structure and workload distribution for the new Oakland County indigent defense system

The following demonstration is offered solely to help Oakland County policymakers better understand how the county's total indigent representation system workload *could* be distributed between a public defender office division and a private counsel division. Other scenarios are possible, and the county must provide the chief public defender with flexibility (both in terms of funding and authority) to meet future workload and policy requirements.

The Sixth Amendment Center recommends: that Oakland County hire an executive director to administer all indigent defense services, and that those services be provided by a public defender office division and a private counsel division. Based on recommended MIDC standards and national standards as applied to Oakland County's total projected indigent defense system appointments for fiscal year 2022 (*see* Appendix A), the Sixth Amendment Center recommends that Oakland County's indigent representation system have an estimated total of 238.9 full-time equivalent positions: 9.0 administrative positions, and 229.9 direct representation positions.

OAKLAND COUNTY INDIGENT DEFENSE SYSTEM	
Central Administration, 5.0 FTE positions	
executive director information technology professional finance professional training professional administrative assistant	
Public Defender Division, 1.0 FTE positions	Private Counsel Division, 3.0 FTE positions
deputy director	deputy director billing coordinator social worker outreach coordinator
TOTAL ADMINISTRATIVE FTE POSITIONS	
9.0	

As explained in Appendix A, based on recommended MIDC standards as applied to Oakland County's total projected indigent defense system appointments for fiscal year 2022, the Oakland County indigent defense system must have an estimated total of 229.9 full-time equivalent positions (including attorneys and non-attorneys) to provide direct representation to indigent people.

Direct Representation of Clients	
line attorneys	114.0
supervising attorneys	11.4
investigators	38.0
social workers	38.0
paralegals	28.5
Total direct representation FTE positions	229.9

The number of attorneys and non-attorneys needed in each division depends on the allocation of the total workload. The Sixth Amendment Center also notes that Oakland County is responsible for providing direct representation in other case types than adult criminal where there is a right to counsel under federal and/or state law (such as juvenile delinquency) that are outside of the scope of this study. As the county's overall indigent representation system workload increases and decreases over time, the type of cases and/or the percentage of cases handled by each of the divisions can be adjusted as needed.

In some jurisdictions (such as Massachusetts), the private bar component is the primary indigent defense provider while the public defender office component handles less than 50% of the total caseload statewide. In other jurisdictions, the public defender office component is the primary provider, and fewer total indigent defense cases are handled by appointed private attorneys.

One possible allocation of the direct representation workload for Oakland County between the two divisions is:

- Public Defender Division –
 - adult criminal and juvenile delinquency trial cases in which the division does not have a conflict of interest (including conflicts caused by excessive caseload); and
 - all criminal or civil matters deriving from those cases (e.g., probation revocations, criminal appeals, criminal post-convictions, criminal mental competency hearings, and any other petitions arising out of the trial representation);
- Private Counsel Division –
 - all other adult criminal and juvenile delinquency cases that the public defender division cannot handle because of a conflict of interest (including conflicts caused by excessive caseload); and
 - all other non-criminal matters in which Michigan law provides a right to counsel at county expense.

Creating a public defender division cannot occur in an instant and building out the staffing and infrastructure may take several years. Moreover, unless and until the state of Michigan remedies the bifurcated felony case process by requiring that all felony complaints are filed directly in the circuit courts, scheduling conflicts caused by the myriad pretrial stages of felonies happening concurrently across the many district courts within Oakland County requires that private attorneys continue handling the majority of the county's indigent defense caseload.

Assuming therefore that the public defender division handles no more than 40% of adult criminal trial cases and 60% of adult criminal cases are allocated to the private counsel division, based on estimated appointments for fiscal year 2022, the table below shows the share of total cases by case type to be handled by the public defender division and by the private counsel division.

	Circuit Court					52nd District Court	
	Capital	Major Fel	Regular Fel	Low Fel/ High Misd	Probation Viol	House Counsel (adjusted)*	New Appointments
Public defender division	92	317	1037	142	570	4124	213
Private counsel division	139	476	1556	214	854	6187	319
TOTAL	231	793	2593	356	1424	10311	532

* As explained in Appendix A, the number of cases handled as house counsel is adjusted by the number of new appointments.

To provide direct representation in accordance with MIDC caseload standards in a system where the public defender division handles 40% of the total adult criminal trial caseload (based on fiscal year 2022 estimates), the public defender office division requires a total of 88.9 full-time equivalent positions (attorneys and non-attorneys), as shown in the table below.

Position type	FTE positions
Supervising Attorneys 1:10	4.4
Line Attorneys	44.1
Social Workers 1:3	14.7
Investigators 1:3	14.7
Law clerks/paralegals 1:4	11.0
Total public defender division direct representation FTE positions	88.9

Just as the county cannot instantly establish a public defender division handling 40% of the total indigent defense system caseload, the distribution of total indigent defense system workload between the county's public defender component and its private bar component necessarily will vary over time according to factors, including: the number of courthouse locations being served; the time and distance required to travel between them; the number of court dockets at which indigent defense system attorneys must be physically present; the use of videoconferencing technology; charging practices of the county and municipal prosecution functions; etc. Based on those factors, the indigent defense system's executive director and county policymakers may determine the county is best able to ensure effective assistance of counsel where the public defender component handles something other than 40% of the county's total caseload. We use 40% here only for purposes of demonstration.

For purposes of discussion, Oakland County requires an anticipated \$13,196,343.55 to cover the costs of salaries and fringe benefits for all full-time county employee positions where the public defender component handles 40% of the total indigent defense system workload, as shown in the table below.

Position	# req'd	Cost per position	Total salary & fringe
CENTRAL ADMINISTRATION			
executive director	1.0	\$260,353.31	\$260,353.31
information technology professional	1.0	\$196,086.02	\$196,086.02
finance professional	1.0	\$196,086.02	\$196,086.02
training professional	1.0	\$196,086.02	\$196,086.02
administrative assistant	1.0	\$85,799.63	\$85,799.63
PUBLIC DEFENDER DIVISION			
deputy director	1.0	\$230,513.68	\$230,513.68
supervising attorney / principal attorney	4.4	\$196,086.02	\$862,778.49
line attorney*	44.1		
<i>senior assistant public defender</i>	17.6	\$156,577.18	\$2,762,021.46
<i>assistant public defender</i>	26.5	\$131,222.72	\$3,472,153.17
investigator	14.7	\$115,790.38	\$1,702,118.59
social worker	14.7	\$125,620.25	\$1,846,617.68
paralegal / legal secretary / clerk	11.0	\$85,799.63	\$943,795.93
PRIVATE COUNSEL DIVISION			
deputy director	1.0	\$230,513.68	\$230,513.68
billing coordinator / legal secretary / clerk	1.0	\$85,799.63	\$85,799.63
social worker outreach coordinator	1.0	\$125,620.25	\$125,620.25
TOTAL	97.9		\$13,196,343.55
* Assumes 40% of line attorney positions are filled by senior assistant public defenders, and the remaining 60% of attorney positions are filled by assistant public defenders.			

Importantly, these projected costs for the indigent defense system *only* include salaries and fringe benefits for county employee positions, according to pay classifications provided by the Oakland County indigent defense services office.⁴⁶⁴ The projected costs do *not* include any indirect costs, such as building space allocation, supplies, etc. Additionally, although the projected costs include salaries of the county employee positions that are required to administer the indigent defense system's private appointed counsel component, the projected costs do *not* include the compensation of the private attorneys appointed to provide direct representation in the remaining 60% of cases, and the costs of the private appointed attorneys' overhead and case-related expenses.

⁴⁶⁴ Email from Pete Menna, Oakland County indigent defense services office chief attorney, to Sixth Amendment Center (Aug. 26, 2022) (on file with 6AC).

C. Data needed to be collected and analyzed by Oakland County

To ensure the provision of the effective right to counsel to all indigent defendants in the trial courts for which Oakland County is responsible, the county should collect and analyze on an on-going basis the following data.

Adult criminal trials (new offenses and probation violations). All adult criminal data should be tracked by the court's case number, once it is assigned.

Arrest & citation

The number of people arrested for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of arrest. Of these:

The number of people seen by a district court judge or magistrate, including the date of that meeting, and of these:

The number of people determined to be ineligible for bail prior to appearing in front of a judge or magistrate;

The number of people for whom bail was set prior to appearing in front of a judge or magistrate; and

The number of people notified of their right to counsel if indigent and provided the paperwork necessary to request appointed counsel.

The number of people released from custody before appearing in front of a district court judge or magistrate, including the date of release.

The number of people ordered detained without bail;

The number of people for whom bail / conditions of release are ordered, and of these:

The number of people subsequently released, including the date of release; and

The number of people continuing in-custody.

The number of people cited for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of citation.

Arraignment

The number of people entering a plea by mail (or over the counter), without appearing in court, on any offense that carries a possible sentence of incarceration (grouped by type of case and court in which plea by mail is received), including the date of plea by mail. Of these:

The number of people entering a plea of guilty by mail. Of these:

The number of people with guilty pleas rejected by the court;

The number of people with guilty pleas accepted by the court, and the sentence / disposition imposed, including the date of imposition of sentence / disposition. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and

The number required to serve any period of incarceration (usefully broken

down into ranges of sentence imposed), including but not limited to work release, and remanded to:

County jail;
State prison.

The number of people entering a plea of not guilty by mail (or over the counter).
The number of people appearing in court for arraignment on any offense that carries a possible sentence of incarceration (grouped by type of case and court in which arraignment is conducted), including the date of appearance, and showing whether the person is in-custody or out-of-custody at the time of appearance. Of these:

The number of people who are represented by privately secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people who waive their right to counsel and self-represent.

The number of people who request appointed counsel (showing the number making the request before the arraignment and the number making the request during the arraignment). Of these:

The number of people determined by the court to be not indigent. Of these:

The number who waive their right to counsel and self-represent; and

The number who are represented by privately secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people determined by the court to be indigent, the name of the attorney appointed to represent each person in each case number, and the date on which that appointed attorney makes an appearance in the case.

Effective assistance of counsel – systemwide caseloads

At the beginning of each month, the number of separate case file numbers being represented by an appointed attorney (grouped by type of case, court in which pending, and by appointed attorney).

During each month, the number of separate case file numbers to which a court appointed an attorney (grouped by type of case, court in which pending, and by appointed attorney).

During each month, the number of separate case file numbers that were disposed or reappointed to a different attorney (grouped by type of case, court in which pending, and by appointed attorney). Of these:

Reappointment to different attorney:

The number of separate case file numbers reappointed from one attorney to another. Of these, showing the reason for the reappointment:

Appointed attorney left the indigent representation system;

Attorney personal conflict of interest that does not conflict out the attorney's law firm / public defender office;

Attorney conflict of interest that conflicts out the attorney's law firm / public defender office. Of these, whether a multi-defendant case (co-defendants) or excessive caseload or other conflict.

Disposed cases:

The number of separate case file numbers that were dismissed, including the date of dismissal, and whether by prosecutorial action or as the result of a preliminary examination.

The number of separate case file numbers that resulted in acquittal, and whether by bench trial or jury trial, including the date of acquittal.

The number of separate case file numbers that resulted in conviction / adjudication, and whether by plea, bench trial, or jury trial, including the date of conviction / adjudication. Of these:

The number convicted as charged, and the number convicted of a lesser offense (responsive verdict).

The number receiving deferred entry of judgment, including the date the court announced deferred judgment. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and

The number required to serve any period of incarceration, including but not limited to work release.

The sentence / disposition imposed, including the date of imposition of sentence / disposition. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and

The number required to serve any period of incarceration (usefully broken down into ranges of sentence imposed), including but not limited to work release, and remanded to:

County jail;

State prison.

Suspended cases:

The number of separate case file numbers in which a bench warrant has been issued and the person's appearance has not yet been secured, including the date the bench warrant was issued; and

The number of separate case file numbers that are not active because the prosecution is suspended in some fashion, such as defendants receiving mental health treatment to restore competency and/or sanity, including the date prosecution was suspended.

At the end of each month, the number of separate case file numbers that are in active prosecution status.

Effective assistance of counsel – systemwide resources.

Available resources:

At the beginning of each month, and showing change at end of month:

The number of indigent defense system managers (such as executive director, chief assigned counsel administrator, financial officer, IT officer) (grouped by county indigent defense system division, such as administration or public defender division or private counsel division);

The number of supervisors (grouped by type of case responsibility, and grouped

by public defender division or private counsel division);

The number of qualified attorneys available (grouped by type of case responsibility and/or court location availability, and grouped by public defender division or private counsel division);

The number of paralegals (grouped by public defender division or private counsel division);

The number of secretaries / administrative assistants (grouped by public defender division or private counsel division);

The number of social workers (grouped by public defender division or private counsel division);

The number of investigators (grouped by public defender division or private counsel division);

The number of interpreters (grouped by public defender division or private counsel division);

The number of any additional support staff not included in the above categories, with description (grouped by public defender division or private counsel division).

The amount of funding available for overhead reimbursement and fair compensation of appointed counsel (grouped by public defender division or private counsel division);

The amount of funding available for case-related expenses (grouped by public defender division or private counsel division).

Use of resources:

During each month, the number of separate case file numbers (grouped by type of case and by appointed attorney) and amount of expenditure for:

Compensation of appointed counsel (grouped by public defender division or private counsel division);

Reimbursement of overhead (grouped by public defender division or private counsel division);

Direct payment to provider or reimbursement of appointed counsel for case-related expenses (grouped by public defender division or private counsel division), broken down by type of expenses (such as: expert; investigation; translation/interpreter; copies; subpoenas; travel; etc.)

Juvenile delinquency, and other civil proceedings. Data similar to that shown above for the trial court level in adult criminal cases should also be collected and analyzed for juvenile delinquency proceedings in all courts in which Oakland County is responsible for providing the right to counsel. These include: juvenile detention hearings; juvenile transfers to adult court; delinquency trials; and juvenile specialty or collaborative court proceedings. Likewise, data similar to that shown above for the adult criminal trial court level should also be collected and analyzed for all types of proceedings in which a right to counsel is guaranteed in civil cases and provided at the expense of Oakland County government. These can include: children in need of services, abuse & neglect, termination of parental rights, truancy, paternity, involuntary treatment and/or commitment, and involuntary guardianship.

