

State of Nevada
Department of Indigent Defense Services
Board Meeting Minutes/Workshop

Wednesday, October 6, 2021

1:00 PM

Meeting Locations:

OFFICE	LOCATION	ROOM
Virtual Only		

Public was able to access the following link: Join Zoom Meeting
<https://us02web.zoom.us/j/82304735072?pwd=ZFhQWk1Zb1J4cjNHbnlWaifUmt1tZz09>

Meeting ID: 823 0473 5072
Passcode: 750606

By Telephone:
One tap mobile
+13462487799,,82304735072#,,,,*750606# US (Houston)
+16699006833,,82304735072#,,,,*750606# US (San Jose)

Dial by your location
+1 346 248 7799 US (Houston)
+1 669 900 6833 US (San Jose)
+1 253 215 8782 US (Tacoma)
+1 312 626 6799 US (Chicago)
+1 929 205 6099 US (New York)
+1 301 715 8592 US (Washington DC) Meeting ID: 823 0473 5072

1. Call to Order/Roll Call

Chair Professor Anne Traum called the meeting of the Board on Indigent Defense Services to order a shortly after 1:00 p.m. on Wednesday, October 6, 2021.

A roll call was conducted, and a **quorum was established.**

Board Members Present: Chair Professor Anne Traum, Vice Chair Dave Mendiola, Laura Fitzsimmons, Joni Eastley, Drew Christensen, Chris Giunchigliani, Jeff Wells, Bevan Lister, Rob Telles, Justice William Maupin, Commissioner Hall. Kate Thomas and Allison Joffe were not present.

Others Present: Executive Director Marcie Ryba, Deputy Director Peter Handy, Deputy Director Thomas Qualls, Cynthia Atanazio, Bet-Nimra Torres Perez, Todd Reese, Maxine Cortes, Sophia Long, Franny Forsman, Anne Langer and John Arrascada.

2. Public Comment

Chair Traum noted that the Board had received one written public comment from Carson City the prior evening and that it had been circulated to the Board this morning. Instructions were provided pertaining to time allotted for public comment and that additional time would be provided when addressing a specific agenda item.

3. Introduction and Welcome to New Board Members: (For possible action).

Director Ryba advised the Board that the Governor had appointed two new Board members. We have Cassie Hall a NACO appointment who is a commissioner in Mineral County. Our other new member was unable to attend because she had court today. Allison Joffe is an attorney in Carson City and qualifies as an attorney in the rurals and was appointed by the Board of Governors. We have new staff in the department, Peter Handy is our new Deputy Director who replaces Jarrod Hickman and comes to us from the Attorney General's Office. Our new Administrative Assistant is Bet-Nimra Torres Perez who is at our front desk.

4. Approval of September 1, 2021, Minutes (For possible action).

Motion: Approval of Minutes from September 1, 2021.

By: Chris Giunchigliani

Second: Laura Fitzsimmons

Vote: Passed unanimously

5. Presentation and Discussion of Revised Proposed Regulations of the Board on Indigent Defense Services, Chapter 180 of the Nevada Administrative Code, LCB File No. R042-20: (For discussion and possible Action).

Director Ryba provided a historical perspective of the work this Board has put into place on these regulations. Under Mayor Crowell's leadership we sent off our regulations to LCB in March 2020 and they were returned November 2020. On December 2, 2020, we held a workshop where we did receive comments and then held a hearing on January 28, 2021 and adopted those temporary regulations. In June of this year, we sent the temporary regulations to LCB and received them back and held a workshop in September. We did receive public comment and there were some changes that were made to those regulations from that workshop. Those temporary regulations are set to expire November of 2021 and we are here today to adopt permanent regulations.

Todd Reese stated Carson City's concerns of the regulations and believes there is a conflict which may violate the constitution.

Chair Traum commented that it may be helpful to have Director Ryba respond and explained the department's goal to set standards and ensure adequate funding and independence.

Director Ryba reminded the Board that when we created AB 480 which came into law that created a lot of these changes that we are talking about today. The distinction of selection of counsel versus appointment of counsel was something David Carroll from the Sixth Amendment Center recommended that the State of Nevada adopt. AB 480 is to create that independence from the

judiciary which has been recommended by the Sixth Amendment Center and recommended in the *Davis* settlement consent judgement. As for the costs related to these expenses DIDS has been tasked with several requirements and we have been told by the legislature in NRS 180.320(d)(1) that DIDS must establish requirements for specific education and experience for public defenders to be in court. Since 2020 we have worked hard to ensure that the experience of the attorney fits the complexity of that case. A maximum contribution formula was created for the counties which is contained in section 16 through 19 of the regulations.

Laura Fitzsimmons directed her comment and questioned if Mr. Reese was aware that we need to adopt these regulations today, so I just want to make sure Carson City submitted a plan.

Todd Reese confirmed that Carson City did create a plan, but it was not included in the materials provided and not on the agenda today. He explained that Director Ryba had given Carson City until the end of October to submit a plan to DIDS.

Laura Fitzsimmons questioned if Mr. Reese was aware of the hearings with the Right to Counsel Commission as she had never heard of him. This has all been in process long before last year, the Board and the late Mayor as well as Director Ryba and her crew have worked extremely hard on this. You do make good points and I want to make sure that you said the Nevada Supreme Court has authorized the use of senior judges to shuffle cases off.

Todd Reese wanted to clarify that the Nevada Supreme Court did not authorize senior judges to be DIDS designee. What the Nevada Supreme Court did authorize was to allow senior justices to review requests for compensation and expenditures of money from defense counsel.

Chair Traum questioned if Mr. Reese was talking under ADKT 411 or more recent.

Todd Reese stated that he was talking more recent. Our court administrator spoke with the court administrator at the Supreme Court and said if we receive a request for expenses from indigent defense counsel would senior judges be authorized to review those and the answer we got was yes.

Laura Fitzsimmons questioned if they told the Supreme Court, it was in the context of these regulations which were an outgrowth of the Indigent Defense Commission. The conversation couldn't have been in that context because the primary thing the Supreme Court justices has always said is a total separation between the judiciary and expenses.

Joni Eastley commented that Laura was right they were adamant about that.

Maxine Cortes stated that she is the court administrator for the Carson City court and assists Storey County. When Judge Russell and Judge Armstrong were on the Indigent Defense Commission, they said that Carson City was the gold standard. Back in April of this year I was approached by the city to talk about the indigent defense services plan, and I went to Katherine Stocks, State Court Administrator. Ms. Stocks said she had conferred with John McCormick who was at a meeting with Director Ryba and provided input with them for support of the plan. I did ask them if senior judges would be allowable to review expenses because they have the background and legal experience needed and there would be no cost to Carson City.

Laura Fitzsimmons questioned if John McCormick knew you were making this inquiry?

Maxine Cortes answered that she had an email from Katherine Stocks stating she had spoken with John McCormick. We are concerned that the regulations that are for the counties that are not using the state public defender are going to dismantle what we are currently doing with indigent services in Carson City and Storey.

Drew Christensen wished to convey a few comments around the judiciary reviewing expenses. This has been a 12-year project since ADKT 411, and AB 480 and the regulations have somewhat narrowed that discussion. ADKT 411 did originally say specifically whereas the appointment of counsel, approval of fees and determination of indigency could be performed by an independent board, agency, or committee or by judges not directly involved in the case. On a second note I am not as offended by Carson City's practice if Director Ryba's department has vetted and approved the counsel on the list.

Franny Forsman wanted to make it clear that Carson City was not sued in *Davis* because it was determined that it was best to go after those counties that didn't have a public defender's office. It was not because we had done an assessment of quality of representation or the services before naming the defendants.

Maxine Cortes wanted the Board to know that the Justice Court has four full-time employees that review cases every morning. The person is screened within 24 hours of arrest for the financial disclosure form and that is presented at the 72-hour hearing and that is a very fast turnaround.

Chair Traum stated she appreciated that one of the realities is we are navigating new terrain trying to do so with efficiency, but we are also realigning the way the system works which we realize is a big adjustment.

Laura Fitzsimmons commented that we are an hour into this, but we have got to approve these regulations today. We understand that you guys were busy, but we have been working on this for a long time. After the adoption of the regulations if there is a problem you guys can come back to us with specifics and facts. It would be helpful if you could work with Director Ryba and submit a plan.

Chair Traum stated this is a baby agency launched to tackle this work. The regulation process is an ongoing dialogue where I know the department will be talking to everybody about their experiences and fine-tuning as we go along so we will keep that conversation going.

Bevan Lister stated he had a process question. Do the temporary regulations expire and if I understand there's different timelines? Is November 1st the last opportunity to submit permanent regulations before the next legislative commission process?

Sophia Long stated the temporary regulations expire November 1st and if you have nothing in place you just don't have regulations.

Chair Traum commented that if you start over the process, but we do not know how long that would take so that is one of the reasons we have been mindful of this. In September we had a discussion that if we were to substantially revise the regulations we would be off our timeline, and

we have been careful in terms of making fine-tuning the regulations that we can still meet this November deadline.

Bevan Lister stated he understood and wondered what the implications are if we re-adopt our temporary regulations without going forward with the permanent regulations.

Sophia Long stated you can't re-adopt temporary regulations because we are outside that timeframe. We are in the timeframe where you can only adopt permanent regulations.

Chair Traum questioned whether the temporary regulations are mostly what our regulations are with very minor adjustments to incorporate the change in the statute that happened this legislative session. We have talked about moves to cement this independent function, so we are no longer having judges appoint counsel and approve public defender expenses in cases.

Director Ryba confirmed that they are very similar, with only minor modifications.

Bevan Lister questioned if we adopt these today and then we feel like there are warranted arguments and amendments need to be made what is the process or time schedule in that case?

Sophia Long answered that you can adopt permanent regulations every other year. I would recommend that in the in-between you can adopt temporary regulations just as we did you have to do this process twice.

Chris Giunchigliani commented that in looking at the handout today we had the list of the plans that were submitted. Storey county did submit a plan. Where is Carson City's plan?

Chair Traum stated that Storey County is the only one that has not been recommended for approval. Storey County and Carson City plans are similar. We don't have Carson City's plan they have been given an extension until the end of October.

Chris Giunchigliani commented that we have been laboring this conversation of trying to appease something when we don't even have the final document to look at. We need to move forward see if there is any more testimony and get through the rest of the items on the agenda. It appears that there still seems to be an available process down the road if there is a concern after we adopt the regulations.

Jeff Wells commented that he is sympathetic to one of Carson City's concerns that when we talk about expenses for investigator and expert expenses now the state public defender's office is reporting to Director Ryba. The way around that would be a simple amendment that they will appoint a designee in those jurisdictions that the state public defender is providing the first layer of defense.

Chair Traum commented that she would like to hear from Director Ryba and point to the language because we are not changing the statute. I want to be dialed into the particular regulation and want to get clarification from Director Ryba.

Director Ryba stated that she thinks Mr. Wells is referring to is a law, assembly bill 480, where it is the department or its designee. I don't believe that we are able to modify at this point without going back to the legislature. When considering a designee, they should consider Karin Kreizenbeck as the designee for expenses within the Nevada State Public Defender's office. It shouldn't be a conflict if Karin is the designee for her office and this would be consistent with what Drew Christensen and Krista Meyer do for Clark and Washoe Counties.

Anne Langer commented the Storey County has 111 cases that are with the State Public Defender's Office. The problem that I see is the State Public Defender's office is under DIDS and Director Ryba has the ability to go through her case management system and read attorney notes. How do you distinguish her being Karin's boss and also the head of DIDS?

Chair Traum advised Ms. Langer that was incorrect that DIDS does not go through the case management system and read attorney notes. We should table this for the moment because we are getting into hypotheticals and mixing regulations and specific plans and getting into a whole new area. This is beyond the scope of what is in front of us now in terms of acting and passing these regulations that have been in the works for more than a year.

Jeff Wells stated that while suggesting it be a designee, I was not suggesting the designee be the judiciary and it is not the same as what we do down here. Would we be able to appease Carson City and Storey County with a minor amendment that simply says for the expenses for experts when in those counties that are represented by the State Public Defender that they pick a designee outside of that system to do it.

Chair Traum commented that the reality is that is a plan decision and can be worked out at the plan level and not necessarily required in the regulations. The real sticking point is whether the designee is the judiciary and if we move off of that DIDS is going to designate that and will consider the local situation of having a public defender and who could step into that role.

6. Adoption of Revised Proposed Regulations of the Board on Indigent Defense Services Chapter 180 of the Nevada Administrative Code, LCB File No. R042-20 (For possible action).

Laura Fitzsimmons stated she would like to make a motion and move to adopt the proposed regulations with the minor clarifications that were noted by Director Ryba.

Bevan Lister expressed concerns that in trying to minimize the challenges to the counties to provide sound public defense and have the state take some of that responsibility and cost all we have done is develop a whole new layer of government and a whole other set of costs to go along with it. There are some challenges that will need to be addressed down the road and we are going to have to start the process of molding this in a direction that it needs to be to make is simpler and more effective for the counties.

Motion: Motion to Adopt the Proposed Regulations with Minor Clarifications
By: Laura Fitzsimmons
Second: Chris Giunchigliani
Vote: Passed unanimously

7. **Process for Approval of Department Designee. (For discussion and possible action).**
 - a. Confidentiality Agreement and Terms and Conditions for Department designees.

Thomas Qualls stated we will be asking the Board to approve a number of these county plans and those plans will include the designation of someone to fulfill the role of selection of counsel and of approval of defense fees. AB 480 was introduced and passed last year by the legislature with the primary intent to create a measure of independence for indigent defense from the judiciary which is on par with what the prosecutors enjoy. The designee will have temporary access to potentially sensitive information. With that in mind we created a confidentiality agreement, with the assistance of the AG's office, Chair Traum and ethic professors at UNLV. Since the designee will be in the chain of collecting data and inputting these cases it seems inappropriate for the judicial system or even the clerks to be doing the case input or be in the chain of transferring these case files to conflict counsel.

Director Ryba stated that she wanted to clarify that we cannot see what is in the LegalServer files until it is transferred to our office. Even though we have oversight over the Public Defender's office arguably within our statute we cannot see any of their cases. When a case is transferred into the LegalServer system that individual will have access to that information to transfer to the new attorney so we can track this information and ensure that information is staying with the case.

8. **County Plans and Budget Approval. (For discussion and possible action).**

Director Ryba commented that before we get into specifics of the plans, I would like to call out the individuals we have been able to work with in creating their plans. We will be recommending approval of several plans. Churchill County we worked with Jim Barbee (County Manager), Jacob Sommer (Public Defender) and Commissioner Pete Olsen; Douglas County we worked with Patrick Cates (County Manager); Elko County we worked with Cash Minor (Asst. County Manager), Amanda Osborne (County Manager), Matt Pennell (PD), Rand Greenburg (Chief Civil Deputy DA); Esmeralda County we worked with Robert Glennan (DA), Jason Earnest (acting PD), Judge Johnson (Justice of the Peace); Eureka County we worked with Kelly Brown (PD) and Judge Dorothy Rowley; Humboldt County we worked with Dave Mendiola (County Manager), Matt Stermitz (PD) Maureen MacDonald (PD's office), Derrick Penney (Alt. PD); Lander County we worked with Judge Shirley, Bert Ramos (County Manager), Ted Herrera (DA); Lincoln County we worked with Bevan Lister (County Commissioner) and Franklin Katschke; Lyon County we worked with Jeff Page (County Manger), Eric Milavsky (Lyon County HR Director), Jeff Foli (Comptroller); Mineral County we worked with Judge Shirley, Sean Rowe (DA), John Oakes (acting PD); Carl Hylin (Alt. acting PD); Nye County we worked with Lorina Dellinger (Asst. County Manager); Pershing County we worked with Judge Shirley, Bryce Shields (DA), and Steve Cochran (PD). In order to get these plans prepared today there were some last-minute changes and these individuals worked extremely hard to get these plans where we needed them today for approval.

Chair Traum questioned whether the Board should approve batch by batch or as a whole bunch. All the plans check out, some have proposed designees that you would then approve and then there is a request for funds.

Director Ryba stated that as the Board is aware, we did receive 1.2 million that is earmarked in the IFC contingency fund. In working with the counties and how much they budgeted in their plans we could request \$1,124,427.14. After speaking to the Governor's Finance Office, we need to add inflation which may reduce that amount. Since the request will use up the funds that were set forth or set aside for the *Davis* counties will need additional funding to comply with their plan, we are seeking permission to seek additional funding from the BOE and IFC contingency fund in amount of approximately \$1.7 million. This amount has increased by two hundred thousand.

Jeff Wells expressed that he would like to make a motion to approve all the plans in 8(a).

Joni Eastley stated she would second the motion.

Motion: Motion to Approve All Davis County Plans in 8(A)

By: Jeff Wells

Second: Joni Eastley

Vote: Passed unanimously

Chair Traum requested that Director Ryba address the Non-*Davis* County plans.

Director Ryba responded the Non-*Davis* County plans that we received are Clark County and Washoe County. These plans had been previously approved by the Supreme Court and ADKT 411 so they meet our requirements. We will be asking Clark, Humboldt, and Washoe County's plans and budget approval subject to BOE and IFC and subject to approval of designee for Elko County and Pershing County. We are requesting permission to seek from the BOE and IFC contingency funds in the amount of \$3,644,980.66 and again that amount will be reduced by inflation.

Drew Christensen stated considering that the money that we really wanted is for those *Davis* counties does it hurt our request to include funds based on the formula on Clark and Washoe's budget when neither Clark nor Washoe are probably going to request those.

John Arrascada commented that regarding the budget is that related to the reimbursement funds that are referenced in the regulations. It is my understanding that our assistant county manager declined the reimbursement funds.

Director Ryba stated that she didn't think it appropriate for DIDS to recommend to not seek funds from IFC and BOE on behalf of a county. We did have discussion with the Governors Finance Office and there is appropriately six million dollars that is set aside in the IFC contingency fund. If we request the \$3,644,000 the largest portion of that is for Clark and Washoe County so if we took those requests out it would significantly reduce our request by about three million dollars.

Drew Christensen commented that he just threw that out there because I know you guys have more experience with dealing with IFC but that is such a big number in the percentage of what's available that we are more successful asking for those counties that are in more need as commissioner Lister said. Some of these concerns of the expenses with the hope that the IFC does that we want to make a big push that there is a need in these counties' funds.

Jeff Wells stated that the risk I see of taking that three million out is we may go to IFC asking for three million and they decide because of other requests they only give DIDS a million and a half. They cut it in half so if we ask for six million and they cut it in half you still have three. Perhaps we can make these decisions after we see what IFC says as opposed to jumping out half of the money to start with.

Motion: Motion to go to BOE and IFC for Contingency funds for the County Plans

By: Joni Eastley

Second: Jeff Wells

Vote: Passed unanimously

9. **County Plans Corrective Action (For discussion and possible action).**

a. **Non-Davis County: Storey County**

i. Recommend Rejection of the Storey County Plan

ii. Recommend entering into a Corrective Action Plan with the Storey County Board of County Commissioners for the purpose of establishing a complaint plan as the proposed plan is deficient in the provision of indigent-defense services. NRS 180.440(4).

Deputy Director Qualls stated that Storey County's plan and Carson City's plan are similar. Carson City withdrew their plan and requested that we not bring it to this Board so that we could continue to work with them. We are supporting corrective actions just as a way saying we want to enter the next phase of this process and want to continue to work with Storey County to bring this plan into compliance.

Jeff Wells stated that he would suggest that we not do this. Carson City and Storey County basically have the same issues and we have agreed that Director Ryba will continue the discussions and negotiations with Carson City. I do not see why she can't do both simultaneously and we can entertain both of them at the same time. This is the first round of submissions and I do not want to start off doing corrective actions since we know there is going to be ongoing discussions.

Anne Langer stated that she wanted to bring up a few points when looking at the plan. When you are looking at the initial appearance or at vertical prosecution those are things that are going to subject to DIDS. These are things we can't enforce as a county. When looking at the county budget, we realize that the defense wants to enjoy the pleasures of or what the prosecution gets. Storey County has an issue in trying to predict something that you are never going to get back.

Chair Traum commented that we appreciate you being here and there has been a robust discussion and I wanted to give you sufficient time so that people really understand in context what your perspective. There is a proposal to not act on this but to send it back for more constructive dialogue and work together to a positive solution. Unless anyone is opposed it is my inclination to move on to number ten.

Anne Langer questioned if Storey County would be set on the agenda next month to address this.

Chair Traum stated that it would depend on the status of where things stand but we are hopeful that there will be parallel talks because they are so interconnected and similar.

Laura Fitzsimmons commented that after hearing from Ms. Langer I think we are on the cusp of a corrective action. If Director Ryba feels comfortable having the same deadline as Carson City to come to an agreement and work out a plan which DIDS can approve and if not, I would very much ask that this be put on the agenda for a vote on corrective action.

Anne Langer questioned if you come back for corrective action what happens next? What is the next stage that DIDS Board would do if we were not going to correct, or we don't have a plan?

Director Ryba answered that if we are unable to come to an agreement on a corrective action plan then ultimately the Board is the one that would decide what the plan would look like.

10. Update from the Department: (For discussion and possible action).

- a. Discussion of County Plans and Recommendations for the Department.
- b. Introduction of Peter Handy, Deputy Director, and Bet-Nimra Torres Perez, Administrative Assistant.
- c. RFI Released for data analyst.

Director Ryba named the parties that the department has been working with in trying to create a plan with Carson City. There was a request to extend the deadline until the end of October because the mayor was unavailable. Their next Board meeting is scheduled for October 21st and the plan will be agenzized for that meeting. We will be reaching out to Story County to schedule a meeting to try and get their plan moving forward. We released our request for a data analyst and there is a deadline of October 15th. We will use the information to go in front of and will request from the Governor's Finance Office funding for a data analyst so we can do a salary survey and review whether or not we can create a pipeline to get attorneys into the rural counties and finally to review our oversight.

Chair Traum stated that she wanted to compliment the Department on the enormous amount of work that went into today and all of this there is so much outreach and coordination. It's all very time sensitive because of the regulation deadlines, IFC deadlines, Davis monitoring deadlines which are just being adjusted to make room for this. Not only is this a lot of work but very time sensitive and we are so grateful for the amount of teamwork but also outreach and very detailed work that you have done with the counties.

11. Confirmation of Next Meeting:

- a. Request to Cancel meeting: October 27, 2021
- b. Confirmation of next meetings: November 17, 2021, at 1pm; December 15, 2021, at 1 pm; January 26, 2022, at 1pm.

Chair Traum stated that we are cancelling the October 27th meeting and we have scheduled meetings through January 2022. There will be notifications sent via zoom for the future meetings and cancellations for the team meetings.

12. Public Comment:

Todd Reese stated he wanted to make a brief comment. I want to thank the Board for their consideration and hard work. You know it is always difficult establishing new regulations in a new regulatory scheme as in many other areas. We miss Mayor Crowell's guidance on this particular issue. The last thing I wanted to say is that there was a comment that the county's contributions are capped. The county contributions are not capped. Essentially, we are spending it and then looking for reimbursement from the state who can choose not to reimburse us, and we are stuck with the expense.

Chair Traum commented that we are of course mindful of the funding scheme and would have been extremely happy if we had the whole thing funded that would make it more secure for everyone, but I think part of the reality is that we are a new agency and a new Board and building this piece by piece. Hopefully over time we will make the case that this is a viable way to do indigent defense and with everyone's buy-in and also the state's full support, so we are working on that. So, with that I am going to adjourn the meeting. Thank you everyone for your attention and thank you Carson City and Storey County for showing up and being part of this and we wish you well as you move forward.

13. Adjournment:

Chair Traum adjourned the meeting at approximately 3:10 p.m.



CARSON CITY, NEVADA
CONSOLIDATED MUNICIPALITY AND STATE CAPITAL

October 5, 2021

VIA EMAIL TO: catanzio@dids.nv.gov

Anne Traum, Chairperson
Board of Indigent Defense Services
896 West Nye Lane, Suite 202
Carson City, NV 89703-1578

Re: Carson City Comments to the
Revised Proposed Permanent Regulation of the
Board of Indigent Defense Services

Dear Professor Traum,

As comment to the Revised Proposed Permanent Regulation (“regulations”) of the Board of Indigent Defense Services (“Board”), please find attached to this letter (a) Carson City’s comments regarding how the regulations fit into the overall indigent defense scheme in Nevada (Attachment 1), and (b) comments and suggested edits for the regulations themselves (Attachment 2), and (c) supporting documentation (Attachments 3-5).

Briefly, Carson City supports the mission of the Board and the provision of quality indigent defense to the citizens of Nevada. But Carson City is concerned that many of the regulations violate separation of powers and that the regulations and applicable Nevada Revised Statutes place an unfunded mandate on Carson City, permit unsupervised and unfettered access for the Department of Indigent Defense Services to Carson City’s treasury, remove government checks and balances, contain potential ethical violations, and delay the indigent defense process. Carson City respectfully requests that the Board consider Carson City’s comments, and is available at the Board’s convenience to discuss any proposed edit.

Thank you for your consideration of Carson City’s Comments.

Sincerely,

Nancy Paulson
City Manager

Todd E. Reese
Deputy District Attorney
as Counsel for Carson City

Maxine Cortez
Court Administrator

Attachment 1

Discussion of the Revised Proposed Permanent Regulation of the Board of Indigent Defense Services in Relation to Indigent Defense in Nevada

I. Introduction

At the outset, Carson City fully supports the mission of the Board of Indigent Defense Services (“Board”). Carson City’s former Mayor Bob Crowell was a proponent of competent indigent defense, and was the former Chairperson of this Board. Through Mayor Bob and others, Carson City has a rich history of providing competent, effective assistance of counsel to indigent persons in Carson City. Carson City is proud of the fact that, to Carson City’s knowledge, no person in Carson City, ever, has been found by a court to have been provided ineffective assistance of counsel.

To provide indigent defense services, Carson City uses the Nevada State Public Defender’s Office (“State PD”) as the first layer, contracts with conflict counsel as the second layer, and works with private attorneys as the third layer of indigent defense. The conflict counsel working for Carson City provides over 60 years’ worth of experience to represent indigent persons. The initial counsel conflict screening and selection of counsel are performed by the Court Clerk’s Office, without any input from the judges, and the process expeditiously selects counsel on a rotational basis (for conflict counsel and private attorneys, the State PD is appointed first where not conflicted). Carson City’s, the First Judicial District Court’s, and the Carson City Justice/Municipal Court’s stringent goals for indigent defense are to have the initial screening for indigency done in 48 hours, to have counsel appointed for an indigent defendant within 24 hours after requested by an indigent defendant and ordered by a court, and, if an indigent defendant posts bail or is otherwise released from jail, to give the indigent defendant a piece of paper with his counsel’s name and phone number when he or she is released. **Carson City has provided quality indigent defense**, as was recognized by the Indigent Defense Commission.

Davis v. Nevada, No. 17 OC 00227 1B (First Jud. Dist. Nev. 2018) (“*Davis*”) was filed against the State of Nevada alleging that certain Nevada rural counties, Churchill, Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties, were not providing effective indigent defense services. *Davis* did not implicate Carson City.¹ Nevertheless, although Carson City is not subject to *Davis*, the Temporary Regulations of the Board, adopted January 28, 2021, and effective March 5, 2021, and the Revised Proposed Permanent Regulation (“regulations”) of the Board being considered at the October 6, 2021, Board meeting, adopt the standards of *Davis* and standards that go beyond *Davis*, and impose them on Carson City.

¹ Elko, Humboldt, Pershing and Storey counties also were not included in *Davis* (nor were Clark or Washoe counties, although they are not considered “rural” counties). Of note, Storey County is also served by the First Judicial District Court of Nevada, along with Carson City.

As applied, the applicable Nevada Revised Statutes (“NRS”) and the proposed regulations require Carson City to structure an indigent defense plan (“Plan”) that, among other things, omits the judiciary entirely from the Plan and subjects attorneys providing indigent defense services to judicial supervision only in the same manner as retained counsel or prosecutors. NRS 7.115, 7.135, 7.145; Regulations Section 21. As has been communicated to Carson City, the “judiciary” means judges and all persons reporting to judges or working for the courts. As interpreted, this prohibits the Court Clerk’s Office from selecting counsel from previously approved lists of counsel, and prohibits senior judges from approving expense requests.

As interpreted and imposed, **the Board’s proposed permanent regulations require DISMANTLING Carson City’s successful system of providing indigent defense.** This will result in unavoidable delay in Carson City providing indigent defense services because Carson City will have to implement a new system or will no longer be in charge of indigent defense services in Carson City. Carson City will not be able to notify indigent defendants of their counsel when they are released from jail. Carson City will not be able to ensure that counsel is appointed for an indigent defendant within 24 hours of counsel being ordered.

Carson City respectfully requests that before the Board adopts its permanent regulations, the Board consider Carson City’s comments and proposed edits to the regulations (in Attachment 2) to allow Carson City to continue to provide the high quality indigent defense that Carson City is accustomed to providing, using the already established machinery. For reference, Carson City’s proposed Plan is attached hereto as Attachment 3. Carson City is available to work with the Board on any edit, compromise, or resolution that the Board may be willing to consider.

II. Nevada’s Indigent Defense Scheme

Section 21 of the Regulations provides, in part, that a plan must be subject to judicial supervision only in the same manner and to the same extent as retained counsel or a prosecuting attorney. The recent changes to NRS 7.115, 7.125, 7.135, and 7.145 in AB 480 (2021) provide, in relevant part, that DIDS or its designee must select attorneys to be appointed to cases and must review and approve or deny request for compensation and expenses. As conveyed to Carson City, the intent here is to treat attorneys providing indigent defense services the same as prosecutors. Also as conveyed, DIDS cannot approve “a designee” unless Carson City hires one person, not in the “judiciary,” to be an indigent defense coordinator to select counsel and approve or deny requests for compensation and expenses. But the desire to treat attorneys providing indigent defense services the same as prosecutors is a false distinction, and DIDS’ insistence on one person to be the designee is arbitrary. As applied to Carson City, the regulations and NRS provisions (a) require dismantling effective and expeditious appointment of counsel through the court clerk’s office, and (b) provide unfunded mandates, allow unfettered state access to a county’s treasury, remove government checks and balances, create potential ethical violations, and compromise and delay the provision of indigent defense services.

A. The Carson City Court Clerks Quickly Assign Counsel; and this Well-Oiled Machine is Being Dismantled Only Because It Is the “Judiciary”

As currently constituted, the Court Clerk’s Office in Carson City assigns counsel. The operation of this function is a well-oiled machine, and Carson City’s goal is to have counsel

appointed within 24 hours after counsel is ordered by the court, and for indigent individuals held in the jail, the goal is to have their counsel appointed before they are released so that the indigent individual can be handed a piece of paper with his or her counsel's name and phone number when the individual is released. This, however, is the "judiciary," which is not permitted to be a designee of DIDS.

Carson City proposes retaining the institutional knowledge of the Court Clerk's Office to select counsel, but to render the assignment of counsel a purely clerical task. This would be accomplished by retaining the State PD as the first level indigent defense provider, retaining Carson City's conflict counsel as the second level of indigent defense providers, and using the DIDS qualified private attorneys as the third level of indigent defense providers. The Court Clerk's Office will then simply designate the appropriate level of indigent defense provider, given any relevant conflicts, and will rotate through the list of conflict counsel or private attorneys. The Board of Supervisors would select the conflict counsel, and DIDS would select qualified attorneys to be appointed as private attorneys. This process will exclude the judges. Under this scheme, Carson City would designate Max Cortez, the Court Administrator as the person to oversee the administrative selection of an attorney. By removing discretion from this process and using the list of private attorneys provided by DIDS, the potential for any abuse or direction by the judiciary is eliminated. For this reason, Carson City supports DIDS' independent qualification of attorneys to provide indigent defense services because the attorneys are selected as qualified attorneys without the input of the judges. Moreover, in Carson City, the Clerk-Recorder is ex officio the First Judicial District Court Clerk for Carson City. The Clerk-Recorder is an independently elected position, and the Clerk-Recorder deputizes the clerks in the Court Clerk's Office.

Nevertheless, DIDS has insisted that the designee be one person, not in the judiciary. The problem with deputizing just one person and insisting that the one person select counsel is: What happens when that one person is on vacation, sick, or otherwise out of the office? If only one person can select counsel, as conveyed to Carson City by DIDS, hearings will be delayed and indigent persons will languish in jail for several days or a week, waiting for that person to return from vacation. This will delay the courts from proceeding with an indigent defendant's case.

An additional problem with one person being the designee is that the designee is being asked to (a) perform an administrative task, for which Carson City may pay between \$10 and \$30 per hour, and (b) judge whether requested compensation is warranted and whether expenses are reasonable and necessary to the representation, for which Carson City may pay \$100 or more per hour. By insisting on one person being DIDS' designee, DIDS is forcing Carson City to either pay a clerical person to make decisions for which he or she is unqualified, or over pay an attorney or judge to make clerical decisions. Either option is unpalatable. For this reason, and the reason above, Carson City proposes to use a team of people to accomplish the selection of counsel, with an administrator overseeing their activities without the involvement of judges. Indeed, the plans from Washoe and Clark Counties are plans from the Second and Eighth Judicial Districts, which involves the judiciary, and because the First Judicial District is more like the Second and Eighth Judicial District in its approach to indigent defense, Carson City respectfully asks to involve the judiciary in its plan on a merely clerical basis.

If DIDS requires that DIDS assign counsel for Carson City, it is unclear how this will proceed. Because another entity is involved in the process, delays in communication and assignment are likely to impact the provision of services to indigent defendants.

B. The Buck Stops at the Counties for Indigent Defense Financing, Creating an Unfunded Mandate

Although approximately 30 states directly administer and fund indigent defense services at the trial level, Nevada does not. Instead, Nevada commands that the various Nevada counties (including Carson City) fund Nevada's indigent defense programs. NRS 7.155 provides:

The compensation and expenses of an attorney appointed to represent a defendant must be paid from the county treasury unless the proceedings are based upon a postconviction petition for habeas corpus, in which case the compensation and expenses must be paid from money appropriated to the Office of State Public Defender, but after the appropriation for such expenses is exhausted, money must be allocated to the Office of State Public Defender from the reserve for statutory contingency account for the payment of such compensation and expenses.

(emphasis added). No applicable NRS **requires** the State to pay indigent defense expenses. Notably, Assembly Bill ("AB") 480 (2021) did not change NRS 7.155. Thus, the buck stops at the Counties for indigent defense financing.

Through this Board, however, Nevada is taking steps to involve the State in funding indigent defense. Under NRS 180.320(3), "the Board shall adopt regulations to establish a formula for determining the maximum amount that a county may be required to pay for the provision of indigent defense services." Through the formula, a maximum amount that a county should pay is determined, and the Department of Indigent Defense Services ("DIDS") can seek funding for reimbursement to the county if the county spends more than that amount. Regulations, Section 16-18. Similarly, if a corrective action plan is put in place for a county, DIDS may seek from the State reimbursement for any amounts that a county spends over the calculated maximum. *Id.*, Section 17.

While Carson City appreciates the steps that the Board is taking to develop a funding structure for indigent defense and limit Carson City's expenditures on indigent defense, the problem with the current approach is that Carson City must spend, or plan to spend, the money first, before DIDS seeks reimbursement from the State. But nothing, no statute, no regulation, no constitutional provision, and no case, requires the State to reimburse Carson City. Reimbursement is subject to the discretion, and the economic variation, of the State. Because State funding is not guaranteed, any required expenditure of funds above the maximum amount calculated by DIDS constitutes an unfunded mandate.

C. DIDS' Unfunded Mandate Conflicts with DIDS' Mandate to Remove the Judiciary and Treat Indigent Defense Providers the Same as Prosecutors and Results in Unfettered Indigent Defense Access To A County Treasury

The argument that attorneys providing indigent defense services should be treated as prosecutors sounds great in theory, but is impossible to implement because of the 6th Amendment to the United State Constitution ("6th Amendment") and NRS 7.115.

In historical practice, the Carson City District Attorney ("DA") receives funds to prosecute cases from Carson City. The DA receives a finite amount of funds, and must make calculated decisions on which cases to spend funds. On some cases, the DA may not have sufficient funds available to spend on expenses that may be reasonable and necessary for the prosecution of a case. The DA must make do with the allocated funds and make decisions as to which cases get funding. To request more funds, the DA must ask the Board of Supervisors; and the Board of Supervisors can simply tell the DA, no. The check and balance on the DA is the Board of Supervisors.

By contrast, and also in historical practice, an attorney providing indigent defense services received funds from Carson City. Unless contracted for, the attorney must request approval of compensation and expenses from the trial court. If the court approves the compensation, and if the expenses are reasonable and necessary for the representation of the indigent defendant, the court approves the expenses and Carson City pays the expenses. The check and balance is the court; the Carson City Board of Supervisors has no discretion in the matter. Carson City must pay the expenses approved by the Court. NRS 7.155.

To make the indigent defense attorney exactly like a prosecutor would involve providing a fund to indigent defense attorneys and limiting them to spending only those funds for all defense cases. But this would violate the 6th Amendment and NRS 7.115. Under those laws, Carson City **must** compensate indigent defense attorneys, and **must** pay expenses that are reasonable and necessary for the representation. Thus, Carson City is reluctant to simply provide a "budget" for DIDS to spend because DIDS is statutorily not limited to the budget. Thus, indigent defense attorneys and prosecutors cannot be treated the same because they have different checks and balances.

Because Carson City **must** compensate indigent defense attorneys, and **must** pay reasonable and necessary expenses, the effect of Regulation 23 and striving to treat the defense and the prosecution the same by eliminating the judiciary eliminates the judicial check and balance on the costs for indigent defense services. Without the judiciary, or someone, as the check and balance, the defense can now approve their own expenses, which the Carson **must** pay. This results in the indigent defense service providers having an unlimited budget, essentially free access to the county treasury, while the prosecution does not, because the Carson City Board of Supervisors can tell the prosecution, the DA, to take a hike.

To state this a different way, the problem is that the entity with oversight of the budget does not have oversight of the person spending the funds, and no independent oversight exists. Without the judiciary, in this case the source of independent oversight of expenditures of public dollars, the county must spend the money, while the State, through DIDS, authorizes spending

the money. This disconnect where the budget authority does not have oversight of the spending authority, without independent oversight, is something that Carson City cannot permit; that is, Carson City cannot operate its budget when one line item in the budget is subject to unlimited expenditures that are not within the control of Carson City.

Exacerbating the situation is that the entity having the unlimited spending authority over Carson City's budget is a State agency. Carson City is unaware of any other situation in Nevada law where Carson City is asked to provide an unlimited spending authority to a State agency.

Solutions to the quagmire exist. The first and the second options are to align the budget oversight and spending authority in the same entity—either in the State or Carson City. To align the budget oversight with the State, NRS 7.155 must be repealed or amended to provide that the State must pay the compensation and expenses of an attorney appointed to represent a defendant. Similar to Michigan's indigent defense laws, the local match from Carson City would be capped, and the State would be required to pay for indigent defense expenses over and above Carson City's share. *See* Michigan Common Law 780.993(8) through (12) (the Michigan Indigent Defense Act is attached hereto as Attachment 4). Here, Carson City's share would be capped, and the State would have oversight over DIDS, so the budget oversight and spending authority would be aligned.

The second solution, to align the budget oversight and spending authority in Carson City, can be accomplished by Carson City withdrawing from use of the State PD and establishing its own Office of the Public Defender ("CCPD"). In this scenario, the Carson City Board of Supervisors would provide a budget to the CCPD, which would make the CCPD the most like the DA out of all of the options. The Board of Supervisors would also have oversight of the CCPD's expenditure of funds. While Carson City may be forced, under the 6th Amendment and NRS 7.115, to pay expenses above and beyond the budget provided to the CCPD, if such occurred the Board of Supervisors could hold the CCPD to account for the funds if the CCPD spends exorbitant sums. Here again, the budget oversight and spending authority are aligned.

The third solution is to leave the system as is, but provide independent checks and balances to requests for compensation and expenses. This independent oversight could come from the judiciary or independent contractors hired by Carson City or DIDS. Carson City has identified senior judges and judges pro tempore that would be able to review requests from attorneys for compensation and expenses. This solution was approved by the Nevada Supreme Court. *Order*, ADKT No. 411 (Nev. January 8, 2008). The Court ordered that the approval of expenses should be performed, by among other people, "judges not directly involved in the case." *Id.* Moreover, Senior District Court Judges are paid for by the Nevada Supreme Court, and Carson City has been advised that the Nevada Supreme Court has agreed to pay for Senior District Court Judges performing the review and approval or denial of requests for compensation and expenses for indigent defense services. This appears to be a viable solution to expeditiously provide review and approval or denial of requests for compensation and expenses, while minimizing the costs that DIDS must attempt to recover from the State. This also provides for a team approach to requests for compensation and expenses, which will expedite the requests.

If the judiciary must truly be removed from the process of reviewing and approving requests for compensation and expenses, then Carson City can contract with the senior judges and judges pro tempore directly on a time and materials basis to approve these expenses. This removes the judiciary, and the only issue is that this does not provide one “designee” for DIDS to appoint. Carson City can provide an administrator, again Carson City would prefer to use Max Cortez, to be the point of contact for the attorneys making the requests and for the judges deciding the issue. This will cost Carson City more because it will have to pay the senior judges and judges pro tempore directly (as opposed to the Nevada Supreme Court paying senior judges), but this will no longer involve the judiciary because this is a direct contract with Carson City.

D. DIDS Has Ethical And Procedural Dilemmas In Reviewing Request For Compensation And Expenses, Which Will Lead to Confusion And Delay

As has been conveyed to Carson City, DIDS will likely object to any of the above options and insist that, if Carson City will not hire one person to do both clerical and attorney work, then DIDS will refuse to designate a designee and will require Carson City to use DIDS to review and approve or deny requests for compensation and expenses. Unfortunately, DIDS has ethical and procedural dilemmas.

The first ethical conflict is that DIDS oversees the State PD, oversees the State PD’s handling of cases, and also approves the State PD’s request for expenses. This allows DIDS to, for example, require the State PD to incur certain expenses to investigate a case in a certain manner, and then to approve the expenses and have Carson City pay, regardless of whether the expenses are reasonable and necessary to the representation. This is at least an appearance of impropriety, if not an outright violation of governmental ethics.

The second ethical conflict is similar, but applies to DIDS oversight of private attorneys. Here, DIDS oversees the qualification of a private attorney, the selection of an attorney for a case, the compensation of an attorney for a case, the approval of expenses on the case, the review of whether the attorney is provided effective assistance of counsel in the case (including whether the attorney adequately investigated the case), and the removal of an attorney from the DIDS qualification list if the attorney is not, in DIDS view, providing effective assistance of counsel. Here, as with the State PD, DIDS has an ethical conflict because it has authority to require a private attorney to incur additional expenses, or face removal from the qualification list, and then to approve the expense. Again, this is at least an appearance of impropriety, if not an outright violation of governmental ethics.

DIDS procedural dilemma is how compensation or expenses would be processed by Carson City once DIDS approves the payment. Once approved, invoices for payment are entered into Carson City’s financial system and released to the Carson City Finance Department for review, final approval, and disbursement of check. The Finance Department, however, is comfortable and familiar with court ordered payments. Given a court order, Carson City will process the payment absent accounting irregularities.

However, if the Finance Department receives an invoice for payment from DIDS, the Finance Department must conduct an independent review of the invoice because the invoice is not court ordered, because the invoice is received from a State department without a contract

with Carson City, and due to the ethical concerns with DIDS approving requests for compensation and expenses from the State PD and private attorneys. The problem is that the Finance Department has no experience with litigation and does not know whether an invoice reflects proper compensation or expenses that are reasonable and necessary for the representation. In such a case, the Finance Department would usually ask its assigned civil Deputy District Attorney for assistance. However, this must be foreclosed because the prosecution cannot approve the defense's compensation and expenses. Accordingly, this leaves the finance department with little option but to refuse to pay the invoice and to deny the request for compensation or expenses. Under NRS 7.145, as amended by AB 480, the attorney providing indigent defense services will then file a motion in the trial court seeking to have the expense approved. In the end, using DIDS to process requests for compensation and expenses will merely result in confusion and delay in the litigation, and ultimately end up in the exact spot DIDS is trying to avoid, the trial court.

III. Conclusion

As recognized by the Nevada Supreme Court's Indigent Defense Commission, Carson City has historically provided quality indigent defense representation. Carson City is concerned with maintaining that high quality of representation for indigent defendants in the municipality. Carson City respectfully requests that the Board consider Carson City's concerns and help Carson City continue to provide quality indigent defense. Carson City is available to work with the Board on any edit, compromise, or resolution that the Board may be willing to consider.

Attachment 2

Carson City Comments and Suggested Edits to the Revised Proposed Permanent Regulation of the Board of Indigent Defense Services

Financial Disclosure in the Notice of Intent to Act Upon a Regulation

3. *The estimated economic effect of the regulation on the business which it is to regulate and on the public. These must be stated separately and, in each case, must include:*

(a.) Adverse Effect;

a. Immediate effect: Attorneys may have an increase in duties with the time-keeping requirement dependent upon whether they were previously required to keep time. Overall, the Department has determined that the proposed regulation does not have an adverse economic impact on small businesses.

b. Long-term effect: Attorneys may have an increase in duties with the time-keeping requirement dependent upon whether they were previously required to keep time. Overall, the Department has determined that the proposed regulation does not have an adverse economic impact on small businesses.

Comment: The regulations clearly have an impact on small businesses. The Revised Proposed Permanent Regulation (“regulations”) of the Board of Indigent Defense Services (“Board”) require attorneys who do not keep statistics or time sheets to keep those records, and require all attorneys to use the time tracking software provided by the Department of Indigent Defense Services (“DIDS”). Attorneys are small businesses. Carson City’s conflict counsel have informed Carson City that the DIDS regulations take an additional 25 percent of their time, or 2 hours a day, to comply with. This is a significant amount of time for a small business. The Board may wish to amend this statement of economic impact on small businesses and consider whether the impact of these regulations on small businesses can be minimized.

Section 3

Sec. 3. *"Attorney" means an attorney who provides indigent defense services.*

Comment: Indigent defense services, defined under NRS 180.004, means services provided to an indigent person who is charged with a public offense, or an indigent child who is alleged to be delinquent or in need of supervision. However, counties are also required to provide counsel to juveniles or indigent adults under NRS 62D.100 (parents of an indigent child who is alleged to be delinquent or in need of supervision), NRS 128.100 (children and parents in proceedings to terminate parental rights), NRS 432B.420 (children and parents in abuse and neglect actions), and NRS 433A.270 (adults facing involuntary commitment). While it has been suggested that Carson City have one plan for “indigent defense services” and another plan for the provision of legal representation in other cases, it makes little sense to have two different programs for the same thing, the selection and appointment of counsel and the approval of expenses.

Carson City requests that the Board consider allowing indigent defense services plans to cover selection and appointment of counsel and the approval of expenses in all cases, with the necessary reporting and compliance covering “indigent defense services.” This would necessarily require selection of counsel and approval of expenses to be performed by a person at the county, as Carson City has been informed that DIDS is unable to perform those services in cases involving the provision of indigent representation outside of NRS 180.004.

Section 17

Sec. 17. 1. *A county may seek state contributions for the provision of indigent defense services in excess of the maximum county contribution, as calculated pursuant to section 16 of this regulation, through:*

(a) The submission of the annual report containing the plan for the provision of indigent defense services for the county for the next fiscal year as required pursuant to subsection 2 of NRS 260.070; or

(b) Pursuant to NRS 180.450, a request by the Executive Director to the Interim Finance Committee for an allocation from the Contingency Account pursuant to NRS 353.266 to address immediate needs in a corrective action plan.

2. *In accordance with the duty of the Board to review and approve the budget for the Department pursuant to paragraph (j) of subsection 1 of NRS 180.320, any state contribution requested by a county is subject to the approval of the Board. Any disagreement with respect to a plan for the provision of indigent defense services or state contributions necessary to comply with sections 2 to 45, inclusive, of this regulation will be resolved by the Board.*

3. *A county seeking state contributions pursuant to subsection 1 must submit to the Department a financial status report, certified by the board of county commissioners or its designee and in a form approved by the Department, not later than 15 days after the end of each calendar quarter.*

Comment: As discussed in Carson City’s letter regarding the regulations, Attachment 1, this is not a mandatory State contribution, and Carson City must pay any increases in costs for a Plan and then hope to be reimbursed at the discretion of the State. See NRS 7.155. Carson City suggests that the Board consider provisions similar to Michigan Common Law 780.993 (the Michigan Indigent Defense Commission Act is attached hereto as Attachment 3, which provides:

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

(9) An indigent criminal defense system is not required to expend its local share if the minimum standards established by the MIDC may be met for less than that share, but the local share of a system that expends less than its local share under these circumstances is not reduced by the lower expenditure.

(10) This state shall appropriate funds to the MIDC for grants to the local units of government for the reasonable costs associated with data required to be collected under this act that is over and above the local unit of government's data costs for other purposes.

(11) Within 180 days after receiving funds from the MIDC under subsection (8), an indigent criminal defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel. The terms of a grant may allow an indigent criminal defense system to exceed 180 days for compliance with a specific item needed to meet minimum standards if necessity is demonstrated in the indigent criminal defense system's compliance plan. The MIDC has the authority to allow an indigent criminal defense system to exceed 180 days for implementation of items if an unforeseeable condition prohibits timely compliance.

(12) If an indigent criminal defense system is awarded no funds for implementation of its plan under this act, the MIDC shall nevertheless issue to the system a zero grant reflecting that it will receive no grant funds.

(emphasis added).

Carson City also suggests that the Board may wish to consider whether to eliminate NRS 7.155 and have indigent defense services become State funded.

Section 18

Sec. 18. 1. Any state contributions for the provision of indigent defense services must be provided for:

(a) One fiscal year; and

(b) The express purpose of complying with applicable indigent defense standards and regulations and improving the provision of indigent defense services in a county.

2. If a county reaches its maximum contribution for the provision of indigent defense services as determined in accordance with section 16 of this regulation, state contributions for the provision of indigent defense services will be provided to the county treasury by reimbursement, up to the amount approved by the Board and the Legislature in the county's plan for indigent defense services, upon the quarterly submission of the financial status report of the county in accordance with subsection 3 of section 17 of this regulation.

3. If a county reaches the maximum state contributions approved by the Board in accordance with section 17 of this regulation, any additional state contributions necessary for the provision of indigent defense services must, in accordance with NRS 180.450, be sought by a corrective action plan pursuant to a request by the Executive Director to the Interim Finance Committee for an allocation from the Contingency Account pursuant to NRS 353.266.

4. Any unencumbered or unexpended balance of state contributions remaining at the end of the fiscal year lapses and reverts to the available balance of the fund from which it was appropriated.

5. As used in this section, "fiscal year" means the period beginning on July 1 of a given year and ending on June 30 of the following year.

Comment: See comments to Section 17.

Section 21

Sec. 21. A plan for the provision of indigent defense services must be designed to promote the integrity of the relationship between an attorney and a client. The plan and any attorneys providing indigent defense services pursuant to the plan must be free from political and undue budgetary influence and be subject to judicial supervision only in the same manner and to the same extent as retained counsel or a prosecuting attorney.

Comment: As explained in more detail Carson City's letter regarding the regulations, Attachment 1, as the "judicial supervision" portion of this section is applied, this section eviscerates the method by which Carson City selects counsel, and removes independent oversight of the compensation and expenses of attorneys providing indigent defense services, while giving those same attorneys unfettered access to the county treasury.

Carson City requests that the Board consider permitting the court clerk's involvement in the indigent defense process under tightly controlled circumstances. Under the proposed regulation, the Carson City Board of Supervisors and DIDS would "select" the conflict counsel and private attorneys to be on the respective lists, and the court clerk's office would perform the clerical function of applying the rubric and merely picking the next attorney on the list. For example, in Carson City's proposed indigent defense services plan, the court clerk's office would assign the Nevada State Public Defender's Office ("State PD") first, or if they are conflicted the next conflict counsel on the list of contracted conflict counsel, or if conflict counsel is conflicted the next counsel on the list of DIDS approved attorneys that meets Carson City's Plan. This would enable Carson City to use its experienced clerks to continue to provide counsel to indigent defendants within 24 hours of a court order for appointed counsel.

Carson City also requests that the Board permit the judiciary, specifically a senior judge or a judge pro tempore, to provide independent oversight of compensation and expenses for attorneys providing indigent defense services. This provides several benefits. First, it provides an expeditious, independent review of compensation and expenses outside of the trial court. Second, it provides a check and balance for the attorneys providing indigent defense, just as the prosecutor has in the Board of Commissioners/Supervisors. Finally, the Nevada Supreme Court has agreed to pay for Senior Judges when they consider requests for compensation and expenses, alleviating Carson City and DIDS from having to appropriate funds for that function.

Also, as explained in more detail in comment to Section 23, the Nevada Supreme Court regulates the practice of law. Section 21 goes beyond Nevada Indigent Defense Standards of Performance adopted by the Nevada Supreme Court in ADKT 411 on October 16, 2008. It is unclear if the Board can adopt standards different from those adopted by the Nevada Supreme Court. *State v. Second Jud. Dist. Ct.*, 116 Nev. 953, 960-961, 11 P.3d 1209, 1213 (2000) ("And, to reiterate, to the extent that any legislative regulation in this area contradicts the judiciary's exercise of its inherent power, the latter prevails."). The Board may wish to review its regulations in light of separation of powers, and seek Nevada Supreme Court approval of the regulations.

Carson City suggests revising Section 21 as follows:

Sec. 21. 1. A plan for the provision of indigent defense services must be designed to promote the integrity of the relationship between an attorney and a client.

2. Except as otherwise provided in this Chapter, ~~The plan and any~~ attorneys providing indigent defense services ~~pursuant to the plan must~~ **should** be free from political and undue budgetary influence and **should** be subject to judicial supervision only in the same manner and to the same extent as retained counsel or a prosecuting attorney.

3. Personnel in a court clerk's office may perform clerical tasks for indigent defense services, including:

(a) the assignment of counsel for appointment to a case if:

(1) judges are not involved in and do not oversee the assignment of counsel;

(2) the assignment of counsel is made according to a pre-determined method that complies with this regulation and is according to the Plan of the county; and

(3) the assignment of conflict counsel or private attorneys is made from lists provided by the county, for conflict counsel, or by the Department, for private attorneys;

(b) the entry of approved compensation and expenses into a county's financial system for review of the compensation and expenses by the county finance department and payment of the compensation and expenses; and

(c) any other clerical task approved by the Board in a county's plan.

4. A judge, senior judge, or judge pro tempore may approve compensation and expenses for indigent defense attorneys if:

(a) the judge, senior judge, or judge pro tempore is not the trial judge;

(b) the process for the submission of requests for compensation and expenses is not a part of the case file and is treated as confidential until a final order or judgment is entered; and

(c) the process is approved by the Board in a county's plan.

Section 23

Sec. 23. 1. A plan for the provision of indigent defense services must set forth the process of screening for indigency that is necessary for the judicial determination of eligibility for appointed counsel. The process of screening for indigency must:

(a) Occur ~~before~~ prior to, or at, the earlier of the initial arraignment or appearance and not later than 48 hours after the arrest of the defendant; and

(b) ~~Exclude the judiciary; and~~

~~(c)~~ Describe the person or agency responsible for the screening.

2. After such screening and upon a judge, justice of the peace or master finding that a defendant is eligible for appointed counsel in accordance with subsection 3 of NRS 171.188, the plan must provide for the prompt appointment of counsel. If a public defender is disqualified from providing representation, a plan must provide for the selection of another attorney in accordance with NRS 7.115 and 171.188.

3. If a county uses attorneys who are independent contractors in lieu of an office of public defender or if the public defender is disqualified, a plan must describe how attorneys are

assigned cases. The distribution of cases may be made on a rotational basis or in accordance with another method that ensures the fair distribution of cases.

4. A plan for indigent defense services must require that an attorney be present at initial appearances and arraignments and be prepared to address appropriate release conditions in accordance with all relevant laws, rules of criminal procedure and caselaw. A timely initial appearance or arraignment must not be delayed pending a determination of the indigency of a defendant. A plan should ensure the presence of counsel at all other critical stages, whether in court or out of court.

5. This section must not be construed to preclude a defendant from waiving the appointment of an attorney in accordance with subsection 1 of NRS 171.188.

Comment: Carson City acknowledges that a Plan should establish the process by which counsel is selected and compensated, and that it is appropriate for the Board's regulations to address what should be in the Plan. However, Carson City has no authority to regulate attorneys or the practice of law, and forcing Carson City to include such terms in its Plan is ultimately ineffectual. Thus, Carson City requests that the Board directly regulate an attorney or the practice of law itself, to the extent that it can do so, instead of forcing Carson City to regulate through its Plan.

Also, Section 23(4) regulates the practice of law by directing an attorney to take certain actions when practicing law. This violates separation of powers because the Nevada Supreme Court has the power to regulate the practice of law. *Galloway v. Truesdell*, 83 Nev. 13, 23, 422 P.2d 237, 244 (1967) (“[T]here are regulating and licensing powers of the Judicial Department that are within the province of the judicial function, i.e., licensing attorneys to practice law; prescribing rules of professional conduct for attorneys and judges; disbarring attorneys; promulgating and prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions.”); *see also State*, 116 Nev. at 959-63, 11 P.3d at 1212-15; *State Bar v. Claiborne*, 104 Nev. 115, 211-12, 756 P.2d 464, 526-27 (1988) (“This court has inherent power over the admission, suspension, and disbarment of attorneys . . .”); *Goldberg v. Eighth Jud. Dist. Ct.*, 93 Nev. 614, 615-17, 572 P.2d 521, 522 (1977); Supreme Court Rule (“SCR”) 250 (setting experience requirements for capital cases). The Nevada Supreme Court has established standards for representation of indigent persons. Order, ADKT 0411 (Nev. Oct. 16, 2008) (establishing standards for the provision of indigent defense services in Nevada). To the extent that this provision goes beyond what the Nevada Supreme Court has established, the Board may wish to consider working with the Nevada Supreme Court to implement new standards or updated standards, or seeking the approval of the Nevada Supreme Court of the Board's standards.

Moreover, the directive to Carson City to regulate the initial appearance and the presence of counsel at hearings directly conflicts with the Nevada Indigent Defense Standards of Performance adopted by the Nevada Supreme Court in ADKT 411 on October 16, 2008. Standard 2-2(c)(1) provides that “The appointing authority shall not interfere with counsel's legal representation.” However, by setting requirements for counsel's appearance at arraignments or hearings, Carson City is interfering with counsel's legal representation. Accordingly, to the extent that this regulation requires Carson City to regulate counsel's legal representation, the regulations appear to conflict with established Nevada Supreme Court orders, and this violates separation of powers. *State*, 116 Nev. at 960-961, 11 P.3d at 1213.

Recognizing this conflict, Michigan has incorporated the Michigan court system into the approval process of its regulations. Mich. Common Law 780.985(3) (“The MIDC shall propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state. These minimum standards must be designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel. However, these minimum standards must not infringe on the supreme court's authority over practice and procedure in the courts of this state as set forth in section 5 of article VI of the state constitution of 1963.”); *see also Minimum Standards for Indigent Criminal Defense Services*; Michigan Indigent Defense Commission (August 2021) (stating that the approved standards were “conditionally approved by the Court”) (attached here to as Attachment 4).

Also, Section 23(4) regulates the court itself, and thus violates separation of powers, when it states: “A timely initial appearance or arraignment must not be delayed pending a determination of the indigency of a defendant.” Carson City has no authority over the scheduling of an initial appearance in a court. The court has the inherent power to govern cases before it, *State*, 116 Nev. at 960-61, 11 P.3d at 1213 (“[T]he judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice.”), and while, in general, an initial appearance should not be delayed pending a determination of indigency, in certain cases a court might delay the initial appearance pending the determination of indigency based on case specific circumstances. This is within the power of the court, and there is nothing Carson City can do to cabin the court’s discretion.

Carson City suggests revising Section 23 as follows:

- Sec. 23. 1. A plan for the provision of indigent defense services must set forth the process of screening for indigency that is necessary for the judicial determination of eligibility for appointed counsel. The process of screening for indigency must:*
- (a) Occur prior to, or at, the earlier of the initial arraignment or appearance and not later than 48 hours after the arrest of the defendant; and*
 - (b) Describe the person or agency responsible for the screening.*
- 2. After such screening and upon a judge, justice of the peace or master finding that a defendant is eligible for appointed counsel in accordance with subsection 3 of NRS 171.188, the plan must provide for the prompt appointment of counsel. If a public defender is disqualified from providing representation, a plan must provide for the selection of another attorney in accordance with NRS 7 115 and 171.188.*
- 3. If a county uses attorneys who are independent contractors in lieu of an office of public defender or if the public defender is disqualified, ~~the plan must describe how attorneys are assigned cases. The~~ distribution of cases ~~must~~ *may* be made on a rotational basis or in accordance with another method that ensures the fair distribution of cases.*
- 4. ~~An plan for indigent defense services must require that an~~ attorney must be present at initial appearances and arraignments and be prepared to address appropriate release conditions in accordance with all relevant laws, rules of criminal procedure and caselaw. A timely initial appearance or arraignment must*

not be delayed pending a determination of the indigency of a defendant. Counsel must be present ~~[A plan should ensure the presence of counsel]~~ at all ~~[other]~~ critical stages, whether in court or out of court.

5. This section must not be construed to preclude a defendant from waiving the appointment of an attorney in accordance with subsection 1 of ~~[NRS 171.188.]~~ NRS 171.188, or to preclude an appointed attorney from exercising his or her professional judgment to waive an initial hearing.

Section 24

Sec. 24. *A plan must:*

- 1. Seek to provide, through cooperation with local agencies, necessary resources and accommodations for private discussions between an attorney and a client in courthouses, jails, prisons, detention centers and other places where a client must confer with an attorney; and*
- 2. Provide a description of such resources and accommodations.*

Comment: For the same reasons stated in the comment to Section 23, Carson City suggests revising this section as follows:

Sec. 24. *A county must ~~[A plan must:~~*

- ~~1. Seek to]~~ provide, through cooperation with local agencies, necessary resources and accommodations for private discussions between an attorney and a client in courthouses, jails, prisons, detention centers and other places where a client must confer with an **attorney**. ~~[attorney; and~~*
- ~~2. Provide a description of such resources and accommodations.]~~*

Section 25

Sec. 25. *1. A plan for the provision of indigent defense services must ensure that an attorney has the resources to:*

- (a) Conduct an independent investigation of the charges filed against a client as promptly as practicable and, if appropriate, retain an investigator to assist with the defense of the client; and*
- (b) Request the assistance of experts when such assistance is reasonably necessary to prepare the defense of a client.*

2. In accordance with paragraph (e) of subsection 2 of NRS 180.320, it is recommended that a plan provide for the payment of expenses related to trial, including, without limitation, expenses for expert witnesses and investigators, in the following manner:

(a) In a county whose population is less than 100,000:

(1) By excluding the judiciary from the payment of reasonably necessary investigative, expert or other case-related expenses for providers of indigent defense services.

(2) If the office of public defender is created pursuant to chapter 260 of NRS. by providing a budget for investigative, expert and other case-related expenses that is administered by the public defender.

(3) If public defense services are provided by independent contractors, by providing a budget for case-related expenses that is administered by the Department or its designee and that includes a mechanism for judicial review of any modified or denied requests.

(4) *If the public defender has been disqualified, by providing a budget for case-related expenses that is administered by the Department or its designee and that includes a mechanism for judicial review. A budget provided pursuant to this subparagraph and subparagraph (3) may be the same budget*

(5) *To ensure the prompt approval of frequent and necessary case-related expenses, by providing for the automatic approval of case-related expenses up to \$2,500.*

(b) *In a county whose population is 100,000 or more, in accordance with the determination of the county.*

Comment: The standard in Section 25(1)(b) does not track the requirements for the approval of expenses. For consistency, and so that a new standard is not inadvertently created, Carson City suggests that Section 25(1)(b) be revised as follows:

Sec. 25. 1. A plan for the provision of indigent defense services must ensure that an attorney has the resources to:

(a) Conduct an independent investigation of the charges filed against a client as promptly as practicable and, if appropriate, retain an investigator to assist with the defense of the client; and

(b) Request the assistance of experts when such assistance is reasonable and ~~fr~~ ~~reasonably~~ necessary to prepare the defense of a client.

Section 26

Sec. 26. 1. A plan for the provision of indigent defense services must ensure, to the greatest extent possible, consistency in the representation of indigent defendants so that the same attorney represents a defendant through every stage of the case without delegating the representation to others, except that administrative and other tasks which do not affect the rights of the defendant may be delegated.

2. The provisions of subsection 1 do not preclude a county from using a single attorney or rotation of attorneys to provide representation to an indigent defendant at an initial appearance or arraignment, but any such attorney should, to the extent possible, discuss only matters pertaining to the initial appearance or arraignment to avoid creating a conflict of interest.

Comment: For the same reasons stated in the comment to Section 23, Carson City suggests revising this section as follows:

Sec. 26. 1. ~~A plan for the provision of indigent defense services must ensure, to~~ To the greatest extent possible, to ensure consistency in the representation of indigent defendants, ~~defendants so that~~ the same attorney should represent ~~represents~~ a defendant through every stage of the case without delegating the representation to others, except that administrative and other tasks which do not affect the rights of the defendant may be delegated.

2. The provisions of subsection 1 do not preclude a county from using a single attorney or rotation of attorneys to provide representation to an indigent defendant at an initial appearance or arraignment, but any such attorney should, to the extent possible, discuss only matters pertaining to the initial appearance or arraignment to avoid creating a conflict of interest.

Section 27

Sec. 27. 1. *A plan for the provision of indigent defense services must require that representation be provided in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court.*

2. *Any plan or contract for the provision of indigent defense services must require the attorney representing the defendant to:*

(a) *Advise each client not to waive any substantive rights or plead guilty at the initial appearance unless doing otherwise is in the best interest of the client; and*

(b) *Make all reasonable efforts to meet with each client within the first 7 days following the assignment of the case and, unless there are no significant updates in the client's case, every 30 days thereafter.*

3. *A plan for the provision of indigent defense services in a county whose population is less than 100,000 must ensure that any client surveys authorized by the Board are provided to a client at the conclusion of his or her representation by an attorney.*

Comment: For the same reasons stated in the comment to Section 23, Carson City suggests revising this section as follows:

Sec. 27. 1. *An attorney must provide indigent defense representation* ~~*A plan for the provision of indigent defense services must require that representation be provided*~~ *in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court.*

2. *An attorney providing indigent defense services must:* ~~*Any plan or contract for the provision of indigent defense services must require the attorney representing the defendant to:*~~

(a) *Advise each client not to waive any substantive rights or plead guilty at the initial appearance unless doing otherwise is in the best interest of the client; and*

(b) *Make all reasonable efforts to meet with each client within the first 7 days following the assignment of the case and, unless there are no significant updates in the client's case, every 30 days thereafter.*

3. *An attorney providing* ~~*A plan for the provision of*~~ *indigent defense services in a county whose population is less than 100,000 must ensure that any client surveys authorized by the Board are provided to a client at the conclusion of his or her representation by an attorney.*

Section 28

Sec. 28. *As used in sections 28 to 37, inclusive, of this regulation, unless the context otherwise requires, "CLE" means continuing legal education as discussed in Nevada Supreme Court Rules 205 to 215, inclusive.*

Comment: This section contains clerical errors from converting the temporary regulations to permanent regulations. This section should refer to sections 30 to 39, not sections 28 to 37.

Section 29

Sec. 29. The provisions of sections 28 to 37, inclusive, of this regulation apply only to the provision of indigent defense services in counties whose population is less than 100,000.

Comment: This section contains clerical errors from converting the temporary regulations to permanent regulations. This section should refer to sections 30 to 39, not sections 28 to 37.

Section 31

Sec. 31. 1. An attorney who seeks to provide indigent defense services to a person charged with a misdemeanor must:

(a) Be licensed to practice law in the State of Nevada; and

(b) Have sufficient training or experience to provide competent representation.

2. An attorney who is beginning to provide indigent defense services in misdemeanor matters is encouraged to consider seeking the participation of a supervising or more experienced attorney before undertaking representation in a jury trial involving a misdemeanor offense or a misdemeanor offense for which the penalty can be enhanced and, if applicable, make a motion for the appointment of such an additional attorney pursuant to NRS 260.060, as amended by section 17 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2270.

Comment: This section is regulating the practice of law by setting standards for required experience to practice indigent defense. This violates separation of powers because the Nevada Supreme Court has the power to regulate the practice of law. *State*, 116 Nev. at 959-63, 11 P.3d at 1212-15; *State Bar*, 104 Nev. at 211-12, 756 P.2d at 526-27; *Goldberg*, 93 Nev. at 615-17, 572 P.2d at 522; *Galloway*, 83 Nev. at 23, 422 P.2d at 244; SCR 250.

While setting experience standards for attorneys providing indigent defense services may be worthwhile, the Board may wish to consider working with the Nevada Supreme Court to implement the standards by Supreme Court Rule, or with the approval of the Nevada Supreme Court.

Also, Section 31(1)(b) is unavoidably vague. The Board may wish to clarify what is meant by “sufficient training or experience.”

Section 32

Sec. 32. An attorney who seeks to provide indigent defense services to a person charged with a category B felony for which the maximum penalty is 10 years or less, a category C, D or E felony or a gross misdemeanor must:

1. Meet the following requirements:

(a) Be licensed to practice law in the State of Nevada; and

(b) Have been trial counsel, alone or with other trial counsel, in two or more bench or jury trials that were tried to completion; or

2. *As determined by the Department, demonstrate experience and skills that are equivalent to the requirements set forth in subsection 1.*

Comment: See comment to Section 31.

Section 33

Sec. 33. *An attorney who seeks to provide indigent defense services to a person charged with a non-capital category A felony or a category B felony for which the maximum penalty is more than 10 years must:*

1. *Meet the following requirements:*

(a) *Be licensed to practice law in the State of Nevada;*

(b) *Have practiced criminal law for 3 full years, either as a prosecutor, provider of indigent defense services or retained counsel; and*

(c) *Have been trial counsel, alone or with other trial counsel, and handled a significant portion of three felony jury trials that were tried to completion; or*

2. *As determined by the Department, demonstrate experience and skills that are equivalent to the requirements set forth in subsection 1, have a significant record of quality representation in criminal trials and have the ability to handle complex felony matters.*

Comment: See comment to Section 31.

Section 34

Sec. 34. *An attorney who seeks to provide indigent defense services to a person charged with or convicted of a category A felony in which the death penalty is or may be sought or has been imposed must meet the criteria set forth in Supreme Court Rule 250.*

Comment: See comment to Section 31. However, this section may not violate separation of powers because it restates SCR 250.

Section 35

Sec. 35. *An attorney who seeks to represent a person in a direct appeal of a non-capital felony must:*

1. *Be licensed to practice law in the State of Nevada; and*

2. *Have sufficient training or experience to provide competent representation.*

Comment: See comment to Section 31, including the comment regarding “sufficient training or experience.”

Section 36

Sec. 36. 1. *An attorney who seeks to represent a juvenile who is alleged to be delinquent or in need of supervision must:*

(a) *Be licensed to practice law in the State of Nevada;*

(b) *Have the knowledge and skills necessary to represent a child diligently and effectively;*

and

(c) *Be familiar with:*

(1) *The department of juvenile justice services in the county and other relevant state and local programs;*

(2) *Issues concerning competency and child development;*

(3) *Issues concerning the interaction between an attorney and a client; and*

(4) *Issues concerning school-related conduct and zero-tolerance policies specific to juvenile representation.*

2. *An attorney who seeks to represent a child in a certification proceeding pursuant to NRS 62B.390 additionally must have litigated at least two criminal jury trials or be assisted by other counsel with requisite experience.*

3. *As used in this section, "department of juvenile justice services" has the meaning ascribed to it in NRS 201.555.*

Comment: See comment to Section 31, including the comment regarding "sufficient training or experience" in relation to "knowledge and skills."

Section 37

Sec. 37. 1. *In addition to any other requirements provided by law or this chapter, an attorney must:*

(a) *Have reasonable knowledge of substantive Nevada and federal law, constitutional law, criminal law and criminal procedure, the rules of evidence, the rules of appellate procedure, ethical rules, local rules and practices and changes and developments in the law. As used in this paragraph, "reasonable knowledge" means knowledge possessed by an attorney who provides competent representation to a client in accordance with Rule 1.1 of the Nevada Rules of Professional Conduct;*

(b) *Have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case and the legal issues concerning defenses to a crime and be reasonably able to litigate such issues effectively; and*

(c) *Be reasonably able to use the office technology that is commonly used in the legal community and the technology that is used within the applicable court system and thoroughly review materials that are provided in an electronic format.*

2. *An attorney shall:*

(a) *Complete, on an annual basis, a minimum of 5 hours of CLE courses relevant to indigent defense services;*

(b) *Except as otherwise provided in subsection 3, submit proof of compliance with the CLE requirements in paragraph (a) to the Department before January 1 each year by submitting a copy of the annual transcript for the attorney from the State of Nevada Board of Continuing Legal Education:*

(1) *By mail; or*

(2) *Electronically, as provided on the website of the Department; and*

(c) *Follow the minimum standards of the Board in determining which CLE courses are relevant to the provision of indigent defense services.*

3. *Any CLE courses provided by the Department count toward satisfaction of the annual CLE requirement set forth in subsection 2. If an attorney satisfies the annual CLE requirement*

through CLE courses provided by the Department, the annual submission of proof of compliance with the CLE requirements required by paragraph (b) of subsection 2 is waived.

Comment: This section violates separation of powers. The Board and the Nevada Legislature do not have the power to promulgate CLE requirements for attorneys. The Nevada Supreme Court governs the practice of law in Nevada, *State*, 116 Nev. at 959-63, 11 P.3d at 1212-15; *State Bar*, 104 Nev. at 211-12, 756 P.2d at 526-27; *Goldberg*, 93 Nev. at 615-17, 572 P.2d at 522; *Galloway*, 83 Nev. at 23, 422 P.2d at 244, and it alone can enact CLE requirements for attorneys.

The Board may wish to consider proposing CLE requirements for attorneys providing indigent defense services to the Nevada Supreme Court for adoption in SCR 210 through an administrative docket before the Nevada Supreme Court.

Also, Section 37(2)(c) is vague. Rather than making attorneys providing indigent defense services guess as to which CLE courses are appropriate for indigent defense service providers, the Board may wish to allow an attorney to request a determination from DIDS as to whether a CLE course meets the indigent defense requirement. This issue also illustrates the separation of powers problem; if the CLE requirement is promulgated by the Nevada Supreme Court and implemented by the Nevada State Bar and the Nevada Board of Continuing Legal Education, these questions should be directed to the State Bar or Board of CLE, as with any other CLE question.

Also, this section appears to suffer from structural errors. “Reasonable knowledge” is defined in Section 37(1)(a) and limited to that paragraph, but “reasonable knowledge” is also used in Section 37(1)(b) and “reasonably able” is used in Section 37(1)(b) and Section 37(1)(c). The Board may wish to consider appropriately defining “reasonable knowledge” and “reasonably able” in Sections 37(1)(b) and (c).

Section 40

Sec. 40. The terms of any contract between a county and an attorney who provides indigent defense services as an independent contractor must avoid any actual or apparent financial disincentives to the obligation of the attorney to provide clients with competent legal services. Such a contract must include, without limitation, the following:

- 1. The identification of the contracting authority and each attorney subject to the contract.*
- 2. The terms of the contract, including, without limitation, the duration of the contract, any provision for renewal and any provision for terminating the contract by a party.*
- 3. The category of cases in which each attorney subject to the contract is to provide services.*
- 4. The minimum qualifications for each attorney subject to the contract, which must be equal to or exceed the qualifications required by sections 2 to 45, inclusive, of this regulation, and a requirement that each attorney maintain the applicable qualifications during the entire term of the contract. If a contract covers services provided by more than one attorney, the qualifications may be graduated according to the seriousness of offense, and each attorney must be required to maintain only those qualifications established for the offense levels for which the attorney is approved to provide indigent defense services.*

5. *The identification of each attorney who will provide legal representation in each category of case covered by the contract and a provision that ensures consistency in representation in accordance with section 26 of this regulation.*
6. *A provision establishing the maximum workload that each attorney may be required to handle pursuant to the contract based upon the applicable guidelines established by the Board pursuant to section 42 of this regulation and a provision requiring the reporting of indigent defense data in accordance with sections 43 and 44 of this regulation.*
7. *In accordance with section 27 of this regulation, a requirement that each attorney provide legal representation to all clients in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court.*
8. *The statement of a policy that ensures that an attorney does not provide representation to a defendant when doing so would involve a conflict of interest.*
9. *A provision regarding how investigative services, expert witnesses and other case related expenses that are reasonably necessary to provide competent representation will be made in accordance with all applicable laws and regulations. If different from a county's Plan.*
10. *A provision requiring compensation to be provided at a reasonable hourly rate that is comparable to the hourly rate provided to local prosecutors with similar experience and that is determined after taking into consideration overhead costs, comparable work load, expenses and costs relating to significant attorney travel.*

Comment: As discussed above in the comments to sections 23 and 31, Carson City suggests that regulatory provisions not be mandated to be included in a contract with an attorney to provide indigent defense services in the county. Such provisions clutter the contract, and serve little purpose because a county and an attorney are already regulated by the Board or the Nevada Supreme Court, as may be legally permitted.

As to Section 40(4), it is unclear which qualifications the attorney needs to maintain. For example, if an attorney meets Section 33(1)(b) by having practiced criminal law for 3 full years, it is unclear what the attorney would need to do to maintain that qualification. A suggested provision requiring a contract to have a provision requiring attorneys to comply with these regulations was added to address this. It is also unclear why the contract would need to repeat the Board's qualification if the contract is using the same qualifications.

As to Section 40(6), workload requirements are being, or will be, set by this Board by regulation.

As to Section 40(10) (proposed 40(8)), this provision conflicts with NRS 7.125, which provides, in relevant part, that "this section does not preclude a governmental entity from contracting with a private attorney who agrees to provide such services for a lesser rate of compensation." Specifying the rate of compensation, which may be more than the \$100 authorized in NRS 7.125, impermissibly restricts a county's ability to contract with an attorney providing indigent defense services. In addition, this provision may inadvertently depress or inflate the compensation paid to an attorney providing indigent defense services because the salary for county district attorneys is set by statute, NRS 245.043, which may be less or more than compensation paid to a similarly-situated defense attorney.

Carson City suggests that Section 40 be revised to state:

Sec. 40. *The terms of any contract between a county and an attorney who provides indigent defense services as an independent contractor must avoid any actual or apparent financial disincentives to the obligation of the attorney to provide clients with competent legal services. Such a contract must include, without limitation, the following:*

1. *The identification of the contracting authority and each attorney subject to the contract.*

2. *The terms of the contract, including, without limitation, the duration of the contract, any provision for renewal and any provision for terminating the contract by a party.*

3. *The category of cases in which each attorney subject to the contract is to provide services.*

4. *If different from these regulations, a provision establishing the ~~the~~ minimum qualifications for each attorney subject to the contract, which must be equal to or exceed the qualifications required by sections 2 to 45, inclusive, of this regulation. ~~regulation, and a requirement that each attorney maintain the applicable qualifications during the entire term of the contract.~~ *If a contract covers services provided by more than one attorney, the qualifications may be graduated according to the seriousness of offense. ~~offense, and each attorney must be required to maintain only those qualifications established for the offense levels for which the attorney is approved to provide indigent defense services.~~**

5. *The identification of each attorney who will provide legal representation in each category of case covered by the contract. ~~contract and a provision that ensures consistency in representation in accordance with section 26 of this regulation.~~*

6. ~~*A provision establishing the maximum workload that each attorney may be required to handle pursuant to the contract based upon the applicable guidelines established by the Board pursuant to section 42 of this regulation and a provision requiring the reporting of indigent defense data in accordance with sections 43 and 44 of this regulation.*~~

7. ~~*In accordance with section 27 of this regulation, a requirement that each attorney provide legal representation to all clients in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court.*~~

8. ~~*The statement of a policy.*~~ *A provision that ensures that an attorney does not provide representation to a defendant when doing so would involve a conflict of interest.*

[9.] *7. If different from a county's plan, a ~~the~~ provision regarding how investigative services, expert witnesses and other case related expenses that are reasonable and ~~reasonably~~ necessary to provide competent representation will be made in accordance with all applicable laws and regulations.*

[10.] *8. A compensation provision consistent with these regulations and applicable NRS that takes ~~A provision requiring compensation to be provided at a reasonable hourly rate that is comparable to the hourly rate provided to local prosecutors with similar experience and that is determined after taking~~ into*

consideration overhead costs, comparable workload, expenses and costs relating to significant attorney travel.

9. A provision requiring attorneys providing indigent defense services to comply with these regulations.

Section 42

Sec. 42. 1. The workload of an attorney must allow the attorney to give each client the time and effort necessary to ensure effective representation. Any office, organization or attorney who provides indigent defense services shall not accept a workload that, by reason of its excessive size, interferes with the attorney's competence, diligence or representation of clients under the Nevada Rules of Professional Conduct

2. At the direction of the Board, the Department shall conduct separate, specific work load studies for counties whose population is less than 100,000 and counties whose population is 100,000 or more to determine workload guidelines and requirements for attorneys. Counties shall ensure that all attorneys providing indigent defense services participate in such workload studies. The results of each study must include a recommendation to the Board for the purpose of establishing guidelines to be used to determine maximum workloads for attorneys providing indigent defense services pursuant to subparagraph (4) of paragraph (d) of subsection 2 of NRS 180.320.

Comment: As suggested in comments to sections 23 and 31, Carson City suggests that counties not be mandated to enforce the Board's regulations. The Board has a remedy for attorneys who refuse to participate in the Board's workload studies; that is that the Board or DIDS can disqualify them from providing indigent defense services. Moreover, the contract provision requiring attorneys providing indigent defense services to comply with Board regulations already serves this purpose.

Carson City suggests that Section 42(2) be revised to omit the requirement that a county ensure that attorneys participate in workload studies:

Sec. 42.

.....

2. At the direction of the Board, the Department shall conduct separate, specific work load studies for counties whose population is less than 100,000 and counties whose population is 100,000 or more to determine workload guidelines and requirements for attorneys. ~~{Counties shall ensure that all attorneys providing indigent defense services participate in such workload studies.}~~ The results of each study must include a recommendation to the Board for the purpose of establishing guidelines to be used to determine maximum workloads for attorneys providing indigent defense services pursuant to subparagraph (4) of paragraph (d) of subsection 2 of NRS 180.320.

Section 43

Sec. 43. 1. In a county whose population is less than 100,000, a plan must require caseload reporting by providers of indigent defense services in the county. The plan must specify whether

such reporting will be done by each attorney or collectively by an office of public defender. The plan must require such reporting to be made on an annual basis and include, without limitation, the total number of:

- (a) Beginning pending cases;*
- (b) New appointments;*
- (c) Cases returned from warrant or reactivated;*
- (d) Cases adjudicated, disposed or closed and the manner in which each case was adjudicated, disposed or closed, including, without limitation, pursuant to a plea, dismissal or verdict at trial;*
- (e) Warrant or placed on inactive status cases;*
- (f) Cases set for review;*
- (g) End pending cases;*
- (h) Motions to suppress:
 - (1) Filed; and*
 - (2) Litigated; and**
- (i) Trials completed during the reporting period.*

2. The cases included in a report required pursuant to subsection 1 must be further arranged by the following case type:

- (a) Death penalty cases;*
- (b) Non-capital category A felonies and category B felonies for which the maximum penalty is more than 10 years;*
- (c) Category B felonies for which the maximum penalty is 10 years or less, category C, D and E felonies, and gross misdemeanors;*
- (d) Misdemeanor cases involving driving under the influence of alcohol or a prohibited substance and misdemeanor cases involving allegations of domestic violence;*
- (e) Other misdemeanor cases, including, without limitation, misdemeanor direct appeals;*
- (f) Probation and parole violations;*
- (g) Direct appeals of capital convictions;*
- (h) Direct appeals of non-capital felony and gross misdemeanor convictions;*
- (i) Juvenile cases, including, without limitation, cases involving a child who is alleged to be delinquent or in need of supervision, and appeals;*
- (j) Juvenile probation and parole violations; and*
- (k) Specialty court cases.*

3. If an attorney who is an independent contractor or an office of public defender provides representation beyond those services set forth in NRS 180.004, the reporting required pursuant to subsection 1 must also include the total number of cases under:

- (a) Chapter 128 of NRS for which representation was provided;*
- (b) Chapter 159 of NRS for which representation was provided;*
- (c) Chapter 432B of NRS for which representation was provided; and*
- (d) Chapter 433A of NRS for which representation was provided.*

4. As used in this section:

- (a) "Adjudicated, disposed or closed" means a case in which an original entry of final adjudication has been entered.*
- (b) "Beginning pending" means a case which, at the start of the reporting period, is awaiting disposition.*
- (c) "End pending" means a case which, at the end of the reporting period, is awaiting disposition.*

- (d) "Final adjudication" means an entry of judgment or adjudication, an order of dismissal or the end of the appointment of an attorney regardless of adjudicatory status.
- (e) "Juvenile case" means a matter involving an allegation of a juvenile in need of supervision or an act committed by a juvenile which, if committed by an adult, would result in criminal prosecution and over which a juvenile court has statutory original or concurrent jurisdiction.
- (f) "New appointment" means a case in which a defendant has been assigned counsel for the first time.
- (g) "Returned from warrant or reactivated" means a case that is reopened because a defendant has been arrested on a warrant for failure to appear and has appeared before the court or has returned from a diversion program or another similar event has occurred that reactivates a case.
- (h) "Set for review" means a case that, after an initial entry of judgment during the reporting period, is awaiting regularly scheduled reviews involving a hearing before a judicial officer.
- (i) "Warrant or placed on inactive status" means a case closed because a warrant for failure to appear has been issued, the defendant has been ordered to participate in a diversion program or another similar incident has occurred to make the case not active.

Comment: See the comments to sections 23 and 31.

Carson City suggests that Section 43(1) be revised to state:

Sec. 43. 1. In a county whose population is less than 100,000, ~~a plan must require caseload reporting by~~ providers of indigent defense services must report caseload statistics to the Department as provided in this Section. Reporting may ~~in the county. The plan must specify whether such reporting will~~ be done by each attorney or collectively by an office of public defender. ~~The plan must require such reporting to~~ Reporting must be made on an annual basis and include, without limitation, the total number of:

Section 44

Sec. 44. 1. Each county whose population is less than 100,000 shall include in its plan a requirement for time reporting by attorneys who provide indigent defense services. Such a report must be submitted on an annual basis and provide:

- (a) The total number of hours an attorney spent providing indigent defense services in each case;
 - (b) The total number of hours that investigators worked on each case;
 - (c) The total number of hours that staff worked on each case;
 - (d) The total number of hours that expert witnesses worked on each case; and
 - (e) The total number of hours an attorney spent on any private workload.
2. A plan must require that time entries be:
- (a) Kept as close to contemporaneous as reasonably practicable to ensure the accuracy of time reporting and the ability of the Department to generate quarterly reports; and
 - (b) Recorded in increments of one-tenth of an hour.
3. As used in this section, "staff" means a paralegal, as that term is defined in the bylaws of the Paralegal Division of the State Bar of Nevada, or a similar employee.

4. In each county whose population is 100,000 or more, time records must be kept only during the periods in which weighted caseload studies are conducted pursuant to section 42 of this regulation.

Comment: See the comments to sections 23 and 31.

Carson City suggests that Section 44(1) be revised to state:

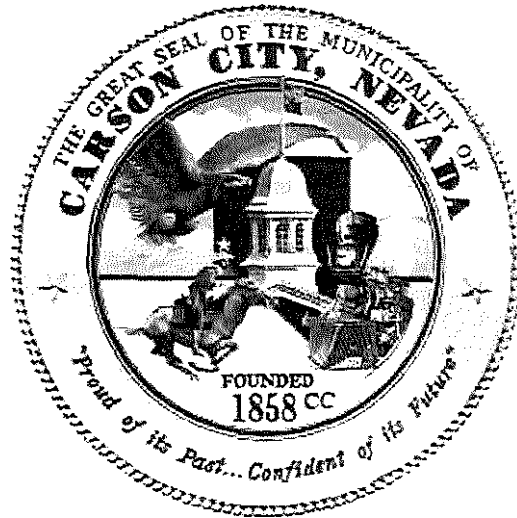
Sec. 44. 1. In a ~~Each~~ county whose population is less than 100,000, an attorney who provides ~~for 100,000 shall include in its plan a requirement for time reporting by attorneys who provide~~ indigent defense services must report to the Department the time spent on indigent defense services. Such a report must be submitted on an annual basis and provide:

.....

ATTACHMENT 3

Consolidated Municipality of Carson City Plan for Indigent Defense Services

Est. September 16, 2021



CARSON CITY INDIGENT DEFENSE SERVICES PLAN

The Carson City Indigent Defense Services Plan (“Plan”) has been developed jointly between the Consolidated Municipality of Carson City (“Carson City”), the First Judicial District Court (“FJDC”), and the Carson City Justice/Municipal Court (“CCJMC”) in all situations in which counsel is required to be appointed for persons under section 180.004 of the Nevada Revised Statutes (“NRS”), or under any other NRS provision. The FJDC and the CCJMC may individually be referred to as a “Court,” or collectively be referred to as the “Courts.” This Plan is designed to meet the requirements of NRS 260.070(2) placed on Carson City, and to comply with the Nevada Supreme Court’s orders in ADKT 411. This Plan is effective once approved by the Carson City Board of Supervisors and adopted by the FJDC and the CCJMC by administrative order.

1. OBJECTIVE

The objective of this Plan is to:

- a. address:
 1. the determination of a person’s status as indigent;
 2. the appointment of counsel for an indigent person in appropriate juvenile, misdemeanor, and felony matters pending before the Courts, including trial and pre-trial proceedings, post-conviction matters, and appeals not subject to Rule 3C of the Nevada Rules of Appellate Procedure; and
 3. the approval of compensation and expenses for appointed counsel, including expert witness fees, investigative fees, and attorney fees; and
- b. ensure an eligible indigent person is provided with qualified counsel to protect his or her constitutional rights.

2. DEFINITIONS

- a. “Conflict Counsel” means a DIDS qualified attorney who has entered into a contract with Carson City to represent indigent persons when the State Public Defender has a conflict and is disqualified from representing an indigent person.
- b. “Counsel” means the State Public Defender, conflict counsel, and a private attorney, unless otherwise defined in a particular section.
- c. “DIDS” means the Nevada Department of Indigent Defense Services.
- d. “DIDS qualified” means DIDS’ placement of an attorney on the list of attorneys who are qualified to represent indigent persons in Carson City.
- e. “Indigent Defense Coordinator” means the person assigned by Carson City to coordinate the selection of counsel and the approval of fees and expenses for counsel, or the person’s designee.
- f. “Indigent Person” means an individual deemed indigent under this Plan.
- g. “Private Attorney” means a DIDS qualified attorney other than the State Public Defender or Conflict Counsel.
- h. “Represent” or “Representation” means legal representation of an indigent person by appointed counsel.
- i. “Services” means services provided to an indigent person during appointed counsel’s representation of that person, and includes investigative, expert, and other services.

- j. “State Public Defender” means the Nevada State Public Defender’s Office established under NRS Chapter 180 with whom Carson City has contracted with to provide representation and services to an indigent person.

3. APPLICABILITY

- a. This Plan covers appointment of counsel for “indigent defense services,” as that term is defined in NRS 180.004. This covers legal representation and services for a person under the Sixth Amendment to the United States Constitution, NRS 7.115, NRS 34.750, NRS 62D.030, NRS 171.180, and for any law imposing criminal liability on a person that requires or permits the appointment of counsel for an indigent person.
- b. In addition to the representation and services required to be covered under NRS 180.004, this plan also addresses NRS 62D.100, NRS 128.100, NRS 432B.420, and NRS 433A.270, or any other law not involving criminal liability that requires or permits the appointment of counsel, whether or not for an indigent person.
 - 1. The appointment of counsel under NRS 62D.100, NRS 128.100, NRS 432B.420(1), and NRS 433A.270 will follow the procedures in this Plan.
 - 2. Carson City has contracted with Washoe Legal Services to represent minors in NRS Chapter 432B actions. Washoe Legal Services will be appointed under NRS 432B.420(2), and if Washoe Legal Services has a conflict, the procedure in subsections 8(c), (d), and (e) will be followed.
- c. This Plan does not cover NRS Chapters 159, 159A, or 253.
- d. Notwithstanding any other section of this Plan, under NRS 180.004 DIDS’ regulations apply only to attorneys providing services in cases under section 3(a). DIDS’ regulations do not apply to attorneys providing services in cases under section 3(b).
- e. This is a holistic plan to address the provision of representation and services to individuals under applicable law in Carson City. The functioning of such representation and services in Carson City relies upon the State Public Defender representing parents in NRS Chapter 432B actions. If the State Public Defender fails to represent parents in NRS Chapter 432B actions or if any part of this Plan is required to be modified, Carson City and the Courts may terminate this Plan or reevaluate indigent defense services in Carson City, or both.

4. CASES IN WHICH COUNSEL MUST OR MAY BE APPOINTED

- a. **Mandatory Appointment.** Representation must be provided for any indigent person who:
 - 1. is charged with a felony;
 - 2. is charged with a misdemeanor or gross misdemeanor in which the prosecution is seeking jail time (incarceration);
 - 3. is alleged to have violated probation or other supervision and a jail or prison sentence of confinement may be imposed;
 - 4. is seeking relief under NRS 34.724(1) from a death sentence, under NRS 34.750;
 - 5. is a minor alleged to have committed an act of juvenile delinquency, under NRS 62D.030;
 - 6. a minor who has been placed outside of his or her home pursuant to NRS Chapter 432B and is involved in a proceeding to terminate the rights of the minor’s parents, under NRS 128.100(2);
 - 7. is a minor who is alleged to have been abused or neglected, under NRS 432B.420;

8. is a parent of an Indian minor who is alleged to have abused or neglected the minor, under NRS 432B.420(3);
 9. is a person who is facing involuntary commitment, under NRS 433A.270;
 10. is in custody as a material witness;
 11. is entitled to appointment of counsel under the Sixth Amendment to the United States Constitution or any provision of the Nevada Constitution;
 12. is entitled to appointment of counsel because due process requires the appointment of counsel;
 13. is likely to face Court imposed jail or prison time;
 14. faces loss of liberty in a case and Nevada law requires the appointment of counsel;
 15. faces loss of liberty for criminal contempt; or
 16. has received notice that a grand jury is considering a charge against him/her and has requested counsel.
- b. Discretionary Appointment. When a court determines that the interests of justice so require, representation may be provided for any indigent person:
1. who is:
 - i. seeking post-conviction relief under NRS 34.724(1), other than from a death sentence, under NRS 34.750;
 - ii. a parent of a minor who is alleged to be delinquent or in need of supervision, under NRS 62D.100(1);
 - iii. a minor involved in a proceeding to terminate or restore parental rights, under NRS 128.100(1);
 - iv. a parent who is facing a proceeding to terminate or restore his or her parental rights, under NRS 128.100(3);
 - v. is alleged to have abused or neglected a child, under NRS 432B.420;
 - vi. charged with civil contempt and faces loss of liberty; or
 - vii. called as a witness before a grand jury, a court, or any agency which has the power to compel testimony, if there is reason to believe, either prior to or during testimony, that the witness could be subject to criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty; or
 2. in any other case in which the court determines in the interests of justice appointment of counsel is appropriate.

5. DETERMINATION OF INDIGENCY

- a. A person must be deemed indigent, and is eligible for appointment of counsel to represent the person, if the person is unable, without substantial hardship to himself or herself or his or her dependents, to obtain competent and qualified legal counsel on his or her own.
- b. "Substantial hardship" is presumed for a person who:
 1. receives public assistance, including food stamps, temporary assistance for needy families, Medicaid, or disability insurance;
 2. resides in public housing;
 3. earns less than 200 percent of the Federal Poverty Guidelines;
 4. is currently serving a sentence in a correctional institution;
 5. is housed in a mental health facility, or
 6. is a minor.

- c. If substantial hardship is not presumed for a person, a Court may deem a person to have a substantial hardship based upon the person's particular circumstances, including:
 - 1. the nature, extent, and liquidity of the person's assets;
 - 2. the person's disposable income from all sources;
 - 3. the person's monthly expenses;
 - 4. the seriousness of the charges that the person is facing;
 - 5. whether the person is able to comprehend the proceedings and the charges that the person is facing;
 - 6. the effort and skill required to gather pertinent information about the case;
 - 7. the length and complexity of the proceedings;
 - 8. local private counsel rates;
 - 9. whether discovery is needed in post-conviction proceedings; or
 - 10. any other consideration that bears upon the person's ability to retain and pay an attorney.
- d. The Court may determine that a person is partially indigent if the Court finds that a person can afford private counsel or has retained counsel, but the person cannot be effectively represented due to the person's inability to pay for necessary services.
- e. A finding of indigency is not required under:
 - 1. NRS 62D.030(3), for a minor alleged to have committed an act of juvenile delinquency;
 - 2. NRS 62D.100(1), for a parent of a minor alleged to have committed an act of juvenile delinquency;
 - 3. NRS 128.100(2), for a minor who has been placed outside of his or her home pursuant to NRS Chapter 432B and is involved in a proceeding to terminate the rights of the minor's parents;
 - 4. NRS 432B.420(2), for a minor who is alleged to have been abused or neglected;
 - 5. NRS 432B.420(3), for the parent of an Indian minor who is alleged to have been abused or neglected; or
 - 6. NRS 433A.270, for a person who is facing involuntary commitment.

6. SCREENING FOR INDIGENCY

- a. Screening for indigency and substantial hardship must be conducted by the Carson City Alternative Sentencing Department, the Carson City Sheriff's Office, or other court or law enforcement personnel:
 - 1. within 48 hours, or sooner as required by applicable law:
 - i. for a person who is booked into the Carson City Jail or a juvenile detention facility; or
 - ii. for a person who appears before a Court and requests, or is required to be appointed, counsel; or
 - 2. within the time frame directed by the Court.
- b. The screening results must be provided to the Courts immediately upon completion.

7. TIME FOR APPOINTMENT OF COUNSEL

- a. The Court must review the screening results and the case to determine:
 - 1. if a person has requested representation, whether:

- i. the appointment of counsel is mandatory or the interests of justice require the discretionary appointment of counsel; and
 - ii. the person is indigent or partially indigent; or
 - 2. if a person is required by law to be appointed counsel.
- b. An attorney must be appointed for any eligible indigent person:
 - 1. as soon as feasible after:
 - i. formal charges being filed against a person held in custody;
 - ii. a person's first appearance before a judge; or
 - 2. as required by any other applicable provision of law;
 - 3. when a Court otherwise considers appointment of counsel appropriate; or
 - 4. otherwise as soon as feasible.
- c. An eligible indigent person must be appointed:
 - 1. one attorney, except in a capital case; or
 - 2. two attorneys in a capital case in which a person is reasonably believed to face capital punishment; at least one of the two attorneys appointed in a capital case must meet the minimum standard for lead counsel pursuant to Rule 250 of the Nevada Supreme Court Rules and both attorneys appointed must conform to the performance guidelines or standards for capital cases as adopted by the Nevada Supreme Court.

8. APPOINTMENT OF COUNSEL

- a. Attorneys appointed for co-defendants may not be from the same law firm.
- b. The indigent defense coordinator will generally follow the procedure in this section to select counsel. The indigent defense coordinator may, however, select as counsel for an indigent person the counsel that represented the indigent person in a previous action if it would be in the indigent person's best interests to have the same counsel and would facilitate the indigent person's defense.
- c. Unless the indigent defense coordinator is aware of a conflict in a particular case for the State Public Defender, the indigent defense coordinator must first select the State Public Defender to represent an eligible indigent person.
 - 1. The State Public Defender must determine whether it may accept the representation and conduct a conflict check to determine whether any conflict of interest exists which would prevent representation of the person. If the State Public Defender cannot accept the representation or a conflict is determined to exist, the State must notify the indigent defense coordinator.
 - 2. The assignment to a case of a specific attorney, or attorneys, working for the State Public Defender rests solely within the discretion of the State Public Defender.
- d. If the State Public Defender has a conflict or is otherwise unable to represent an eligible indigent person, the indigent defense coordinator will select conflict counsel.
 - 1. The indigent defense coordinator will use his or her best effort to balance the number of cases assigned to each conflict counsel, and the workload of each conflict counsel, by fairly rotating the case assignments through the list of conflict counsel.
 - 2. Unless the indigent defense coordinator is aware of a conflict in a particular case for a conflict counsel, the indigent defense coordinator will contact the next conflict counsel on the list. The contacted conflict counsel must conduct a conflict check

- to determine whether any conflict of interest exists which would prevent representation of the person. If a conflict is determined to exist, the conflict counsel must notify the indigent defense coordinator. A conflict counsel must conduct the conflict checks and notify the indigent defense coordinator within 1 day of being appointed.
3. If the contacted conflict counsel has a conflict, the indigent defense coordinator will follow the procedure in subsection 1 and contact the next conflict counsel in the rotation until a conflict counsel accepts the case, or all conflict counsel are unavailable or have a conflict of interest.
- e. If no conflict counsel are available, or if all conflict counsel have a conflict of interest, the indigent defense coordinator will contact private attorneys.
1. The indigent defense coordinator will use his or her best efforts to balance the number of cases assigned to each private attorney, and the workload of each private attorney assigned by the Courts, by fairly rotating the case assignments through the DIDS list of private attorneys. Cases will be assigned to private attorneys having an office in Carson City first. If no private attorney on the DIDS list is available in Carson City, cases will be assigned to private attorneys having an office in Douglas, Lyon, Storey, or Washoe Counties. Private attorneys having offices in other counties are deemed to be too remote to Carson City to provide effective assistance of counsel.
 2. Unless the indigent defense coordinator is aware of a conflict in a particular case for a private attorney, the indigent defense coordinator will contact the next private attorney on the list. The contacted private attorney must conduct a conflict check to determine whether any conflict of interest exists which would prevent representation of the person. If a conflict is determined to exist, the private attorney must notify the indigent defense coordinator. A private attorney must conduct the conflict checks and notify the indigent defense coordinator within 1 day of being appointed.
 3. If the private attorney has a conflict, the indigent defense coordinator will follow the procedure in subsection 1 and contact the next private attorney on the DIDS list until a private attorney accepts the case, or all private attorneys on the DIDS list are unavailable or have a conflict of interest.
- f. If no counsel is available to represent the indigent person, the indigent defense coordinator may contact, and the Court may appoint, any attorney who, in the Court's discretion, will provide competent representation to the indigent person. The indigent defense coordinator and the Court will use their best efforts to contact and appoint an attorney who will comply with DIDS' regulations, if applicable. An attorney based in Washoe County who the Courts appoint to represent indigent persons in Carson City must comply with DIDS' requirements for counties whose population is 100,000 or more.
- g. The Court will enter an order appointing counsel or an attorney to represent the indigent person.
- h. Any counsel or attorney appointed in cases involving juveniles must be experienced in juvenile matters, or must otherwise be able to provide competent representation to the indigent person.
- i. The judges of the Court will have no input regarding the selection of counsel in a particular case.

9. RECONSIDERATION OF DETERMINATION OF INDIGENCY

If a person or the person’s counsel or attorney is unsatisfied with the Court’s determination of indigency or partial indigency, the person or the person’s counsel or attorney may request reconsideration of the Court’s determination of indigency.

- a. A FJDC department will review a decision made by a CCJMC court.
- b. The department of the FJDC not assigned to the case will review a decision made by a FJDC court
- c. The decision of a juvenile court master may be objected to under juvenile court procedures.

10. CHANGE IN ELIGIBILITY

- a. An appointed counsel must advise the Court if, or when, an indigent person has a change in his or her financial condition that may make him or her ineligible for public payment for indigent representation.
- b. Information that an indigent person provides to his or her appointed counsel that concerns the person’s eligibility as an indigent person for appointment of counsel is not protected as a privileged attorney-client communication.

11. COMPENSATION

- a. Carson City will compensate the State Public Defender as provided by NRS Chapter 180 for representation of indigent persons.
- b. Carson City will compensate conflict counsel as provided in the applicable contract with Carson City. Carson City will compensate private attorneys and other attorneys under this Plan or other applicable law for time that is reasonable and necessary for representation of an indigent person.
- c. Unless otherwise provided in a contract, conflict counsel, private attorneys, and attorneys (collectively “counsel” for this section) may seek compensation for representation of an indigent person through the following procedure.
 - 1. Counsel must submit a request for compensation to the indigent defense coordinator, using a form prescribed by the indigent defense coordinator.
 - i. The request must be supported by a sworn statement specifying time entries rounded to the nearest one-tenth of an hour, a detailed description of the work performed for the representation, a description of the compensation rate applicable to counsel, and any compensation already received from any source for representation in the case. The invoice must comply with the requirements of section 14.
 - ii. Counsel must submit a request for compensation at least quarterly, but in any event within 60 days after the date that the representation is terminated. Requests submitted more than 60 days after representation is terminated will be denied.
 - iii. The indigent defense coordinator will submit the request to a senior judge, if available, or a judge pro tempore, if a senior judge is not available, to review the request for compensation. The senior judge or judge pro tempore will approve or deny the request. The senior judge or judge pro tempore will not hold a hearing regarding the request.

2. If the request is denied, counsel may file a motion for compensation with the trial court within 7 days of service of the denial of compensation. A motion for compensation must contain the request for compensation, any information accompanying the request, the denial of the request for compensation, and a proposed order. The Court may order counsel to provide further information regarding the motion for reconsideration. A hearing will not be held on the motion unless ordered by the Court.

12. EXPENSES

- a. Carson City will reimburse the State Public Defender, conflict counsel, private attorneys, and any other attorney (collectively “counsel” for this section) for reasonable and necessary expenses for services.
- b. If funding is provided by the State of Nevada, Carson City will provide a fund of up to \$2,500 per case for counsel to spend without prior approval. Counsel may invoice Carson City directly for such expenses. The invoice must be on a form proscribed by the Carson City Finance Department, must comply with section 14, and the invoice or receipt for services must be attached to the invoice. Carson City will pay counsel directly for these expenses unless otherwise requested. The payee must comply with all applicable Carson City requirements for government payees.
- c. Absent funding under subsection 12(b), and unless otherwise provided in a contract, counsel may incur expenses for services costing \$1,000 or less, but must obtain pre-authorization for expenses for services costing more than \$1,000. Expenses for services costing \$1,000 or less must be reasonable and necessary for representation of the indigent person, and may be denied, even if already spent, if it is determined that the services were not reasonable and necessary for representation of the indigent person.
- d. Counsel may seek reimbursement or pre-authorization for expenses through the following procedure.
 1. Counsel must submit a request for reimbursement or pre-authorization of expenses to the indigent defense coordinator, using a form prescribed by the indigent defense coordinator.
 - i. The request must be supported by a sworn statement specifying the services rendered or requested, the cost of the services, why the services are reasonable and necessary for the representation, and any compensation already received from any source for the services. The invoice accompanying the request must comply with the requirements of section 14.
 - ii. Counsel must submit a request for expenses at least quarterly, but in any event within 60 days after the date that the representation is terminated. Requests submitted more than 60 days after representation is terminated will be denied.
 - iii. The indigent defense coordinator will submit the request to a senior judge, if available, or a judge pro tempore, if a senior judge is not available, to review the request for compensation. The senior judge or judge pro tempore will approve or deny the request. The senior judge or judge pro tempore will not hold a hearing regarding the request.
 2. If the request is denied, counsel may file a motion for compensation with the trial court within 7 days of service of the denial of expenses. A motion for compensation

must contain the request for compensation, any information accompanying the request, the denial of the request for compensation, and a proposed order. The Court may order counsel to provide further information regarding the motion for reconsideration. A hearing will not be held on the motion unless ordered by the Court.

13. SEALED AND EX PARTE REQUESTS FOR COMPENSATION AND EXPENSES

- a. Any documents concerning requests for compensation or expenses or reconsideration filed with the trial court under sections 11 and 12 may be sealed at the request of the counsel or attorney until final judgment is entered in the case.
- b. Any hearings under sections 11 or 12 must be held ex parte, without the presence of the prosecution.

14. PAYMENT FOR COMPENSATION AND EXPENSES

- a. Requests for compensation and expenses or for reconsideration will be denied if not timely submitted.
- b. Invoices for requests for compensation and expenses under sections 11 and 12 must conform to government accounting standards.
- c. Invoices for representation or services provided to an inmate of the Nevada State Prison system, or any person acting in concert with the inmate, for an escape, an attempted escape, or a crime committed while incarcerated must state on the invoices that the services are provided to such an inmate of the Nevada State Prison system.
- d. Any person requesting payment from Carson City must be registered with Carson City as a vendor and have a 1099 tax form and a business license on file with Carson City.
- e. The indigent defense coordinator will forward any request or order approving a motion for compensation or expenses to the Carson City Finance Department (“Finance”), or its designee, for payment processing.
- f. Finance may review the request, order and motion, and request clarification of any portion of the request, order or motion, from the indigent defense coordinator, the court, if approved by court order, or counsel or an attorney.
- g. Carson City will pay counsel or a vendor within 30 days after receipt of the approved request for compensation or expenses, or if Finance requested clarification concerning the request, within 30 days after Finance receives clarification. If the expense is time sensitive, counsel or an attorney may request payment sooner.

15. CONTRACTS FOR CONFLICT COUNSEL

- a. Carson City may, in its sole discretion, contract with attorneys for conflict counsel services on an hourly basis, a flat fee basis, or any other basis.
- b. Carson City will comply with the applicable provisions of NRS Chapter 332 for local government purchasing and with the Carson City purchasing policy when soliciting for conflict counsel.
- c. Carson City will solicit letters of interest through a solicitation released to the public and any DIDS qualified attorneys in Carson City.
- d. At a regularly scheduled public meeting, the Carson City Board of Supervisors may enter into a contract for conflict counsel services with none or any or all of the attorneys submitting letters of interest.

- e. The judges of the Courts, DIDS, or any other interested person or entity may submit public comment regarding the selection of conflict counsel.
- f. When selecting conflict counsel, Carson City will consider:
 1. the experience and qualifications of an applicant;
 2. applicant's past representation of indigent persons;
 3. applicant's ability to comply with DIDS regulations;
 4. the cost of applicant's proposed services;
 5. whether the applicant resides in or has an office in Carson City; and
 6. any other criteria that bears upon a conflict counsel contract.
- g. Contracted conflict counsel must be a DIDS qualified attorney.
- h. Conflict counsel contracts must comply with all applicable DIDS requirements.
- i. If Conflict counsel finds that compensation under the contract is not sufficient to permit conflict counsel to adequately represent indigent persons, conflict counsel may seek extraordinary expenses under the contract or may request additional funds from the Carson City Board of Supervisors.

16. DIDS REQUIREMENTS AND INTERACTION

- a. The State Public Defender's Office must independently make arrangements for required caseload and time reporting to the DIDS, as required by the DIDS.
- b. Conflict counsel and private attorneys must individually, or by firm if contracted or appointed by firm, make arrangements for required caseload and time reporting to the DIDS.
- c. The assigned counsel must make accommodations for confidential communication with the indigent person. Jail and courthouse facilities for attorneys' use for discussions with witnesses or clients are generally available to counsel representing indigent persons for attorney/client meetings to the same extent that they are available to other counsel. Such facilities include the attorney meeting rooms outside of each courtroom, and private meeting space within the jail. Counsel who are not familiar with the accommodations at the Courts or the Carson City Jail may ask the Court Clerk's Office or jail personnel for assistance in speaking privately with the indigent person.
- d. Counsel or the Courts must provide client surveys authorized by the Nevada Board on Indigent Defense Services to an indigent person appointed counsel under this Plan.
- e. Complaints about counsel or attorneys must be forwarded to the DIDS and to the Court Administrator.
- f. If counsel or an attorney becomes aware of a complaint concerning representation of an indigent person that rises to the level of interfering with the representation of the indigent person, the counsel or attorney must timely notify the Court.
- g. Counsel and attorneys must comply with all applicable law concerning representation of an indigent person, including, but not limited to: the U.S. and Nevada Constitutions, the Nevada Revised Statutes, the Nevada Rules of Professional Conduct, and the Nevada Indigent Defense Standards of Performance implemented by the Nevada Supreme Court.
- h. Counsel and attorneys must comply with all applicable court rules. This Plan does not supersede court rules.
- i. As has been the historical practice in Carson City, an attorney appointed to represent an indigent person is expected to appear at the person's initial appearance.

- j. As has been the historical practice in Carson City, an attorney appointed to represent an indigent person is expected to represent that person through every stage of the case, at every hearing, and at trial, unless a court order is entered substituting another attorney in place of the original attorney or otherwise relieving the original attorney of the responsibility of representing the indigent person. This provision does not prohibit another attorney from appearing at a hearing for the appointed attorney to represent the indigent person if the appointed attorney has an unavoidable scheduling conflict, provided that the appointed attorney has sufficiently apprised the other attorney about the case to enable the other attorney to provide effective assistance of counsel.
- k. As has been the historical practice in Carson City, an attorney appointed to represent an indigent person is expected to provide effective assistance of counsel to the indigent person. This includes: meeting with the indigent person before the first appearance; updating the indigent person on his or her case at least every 30 days, unless there are no significant updates in the indigent person's case; and advising the indigent person not to waive any substantive rights or plead guilty at the initial appearance, unless to do otherwise is, in the appointed attorney's professional judgment, in the client's best interest.
- l. Carson City or the Courts may request from DIDS a current list of DIDS qualified conflict counsel and private attorneys. Should an attorney in Carson City become DIDS qualified in between the times that Carson City or the Courts requests a current list of DIDS qualified attorneys, DIDS may, in its discretion, update the Indigent Defense Coordinator with the changes to the list.
- m. Sections 16(a), (b), (d), (e), and (l) apply only to cases under section 3(a) of this Plan.

ATTACHMENT 4

MICHIGAN INDIGENT DEFENSE COMMISSION ACT Act 93 of 2013

AN ACT to create the Michigan indigent defense commission and to provide for its powers and duties; to provide indigent defendants in criminal cases with effective assistance of counsel; to provide standards for the appointment of legal counsel; to provide for and limit certain causes of action; and to provide for certain appropriations and grants.

History: 2013, Act 93, Imd. Eff. July 1, 2013.

The People of the State of Michigan enact:

780.981 Short title.

Sec. 1. This act shall be known and may be cited as the "Michigan indigent defense commission act".

History: 2013, Act 93, Imd. Eff. July 1, 2013.

780.983 Definitions.

Sec. 3. As used in this act:

(a) "Adult" means either of the following:

(i) An individual 17 years of age or older.

(ii) An individual less than 17 years of age at the time of the commission of a felony if any of the following conditions apply:

(A) During consideration of a petition filed under section 4 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.4, to waive jurisdiction to try the individual as an adult and upon granting a waiver of jurisdiction.

(B) The prosecuting attorney designates the case under section 2d(1) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d, as a case in which the juvenile is to be tried in the same manner as an adult.

(C) During consideration of a request by the prosecuting attorney under section 2d(2) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d, that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult.

(D) The prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under section 1f of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.1f.

(b) "Consumer Price Index" means the annual United States Consumer Price Index for all urban consumers as defined and reported by the United States Department of Labor, Bureau of Labor Statistics.

(c) "Department" means the department of licensing and regulatory affairs.

(d) "Effective assistance of counsel" or "effective representation" means legal representation that is compliant with standards established by the appellate courts of this state and the United States Supreme Court.

(e) "Indigent" means meeting 1 or more of the conditions described in section 11(3).

(f) "Indigent criminal defense services" means local legal defense services provided to a defendant and to which both of the following conditions apply:

(i) The defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge.

(ii) The defendant is determined to be indigent under section 11(3).

(g) Indigent criminal defense services do not include services authorized to be provided under the appellate defender act, 1978 PA 620, MCL 780.711 to 780.719.

(h) "Indigent criminal defense system" or "system" means either of the following:

(i) The local unit of government that funds a trial court.

(ii) If a trial court is funded by more than 1 local unit of government, those local units of government, collectively.

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

(j) "MIDC" or "commission" means the Michigan indigent defense commission created under section 5.

(k) "Partially indigent" means a criminal defendant who is unable to afford the complete cost of legal representation, but is able to contribute a monetary amount toward his or her representation.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 439, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.985 Michigan indigent defense commission; establishment; powers and duties; functions; delivery of services; minimum standards; final department action; judicial review; best practices; performance metrics; annual report.

Sec. 5. (1) The Michigan indigent defense commission is established within the department.

(2) The MIDC is an autonomous entity within the department. Except as otherwise provided by law, the MIDC shall exercise its statutory powers, duties, functions, and responsibilities independently of the department. The department shall provide support and coordinated services as requested by the MIDC including providing personnel, budgeting, procurement, and other administrative support to the MIDC sufficient to carry out its duties, powers, and responsibilities.

(3) The MIDC shall propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state. These minimum standards must be designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel. However, these minimum standards must not infringe on the supreme court's authority over practice and procedure in the courts of this state as set forth in section 5 of article VI of the state constitution of 1963.

(4) The commission shall convene a public hearing before a proposed standard is recommended to the department. A minimum standard proposed under this subsection must be submitted to the department for approval or rejection. Opposition to a proposed minimum standard may be submitted to the department in a manner prescribed by the department. An indigent criminal defense system that objects to a recommended minimum standard on the ground that the recommended minimum standard would exceed the MIDC's statutory authority shall state specifically how the recommended minimum standard would exceed the MIDC's statutory authority. A proposed minimum standard is final when it is approved by the department. A minimum standard that is approved by the department is not subject to challenge through the appellate procedures in section 15. An approved minimum standard for the local delivery of indigent criminal defense services within an indigent criminal defense system is not a rule as that term is defined in section 7 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.207.

(5) Approval of a minimum standard proposed by the MIDC is considered a final department action subject to judicial review under section 28 of article VI of the state constitution of 1963 to determine whether the approved minimum standard is authorized by law. Jurisdiction and venue for judicial review are vested in the court of claims. An indigent criminal defense system may file a petition for review in the court of claims within 60 days after the date of mailing notice of the department's final decision on the recommended minimum standard. The filing of a petition for review does not stay enforcement of an approved minimum standard, but the department may grant, or the court of claims may order, a stay upon appropriate terms.

(6) The MIDC shall identify and encourage best practices for delivering the effective assistance of counsel to indigent defendants charged with crimes.

(7) The MIDC shall identify and implement a system of performance metrics to assess the provision of indigent defense services in this state relative to national standards and benchmarks. The MIDC shall provide an annual report to the governor, legislature, supreme court, and the state budget director on the performance metrics not later than December 15 of each year.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 439, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.987 MIDC; membership; terms; appointment by governor; qualifications; staggered terms; vacancy; chairperson; compensation; removal; quorum; official action; confidential case information; exemption from freedom of information act.

Sec. 7. (1) The MIDC includes 18 voting members and the ex officio member described in subsection (2). The 18 voting members shall be appointed by the governor for terms of 4 years, except as provided in subsection (4). Subject to subsection (3), the governor shall appoint members under this subsection as follows:

- (a) Two members submitted by the speaker of the house of representatives.
- (b) Two members submitted by the senate majority leader.
- (c) One member from a list of 3 names submitted by the supreme court chief justice.
- (d) Three members from a list of 9 names submitted by the Criminal Defense Attorneys of Michigan.
- (e) One member from a list of 3 names submitted by the Michigan Judges Association.
- (f) One member from a list of 3 names submitted by the Michigan District Judges Association.
- (g) One member from a list of 3 names submitted by the State Bar of Michigan.
- (h) One member from a list of names submitted by bar associations whose primary mission or purpose is to

advocate for minority interests. Each bar association described in this subdivision may submit 1 name.

(i) One member from a list of 3 names submitted by the Prosecuting Attorneys Association of Michigan who is a former county prosecuting attorney or former assistant county prosecuting attorney.

(j) One member selected to represent the general public.

(k) Two members representing the funding unit of a circuit court from a list of 6 names submitted by the Michigan Association of Counties.

(l) One member representing the funding unit of a district court from a list of 3 names submitted by the Michigan Townships Association or the Michigan Municipal League. The Michigan Townships Association and the Michigan Municipal League shall alternate in submitting a list as described under this subdivision. For the first appointment after the effective date of the amendatory act that amended this subdivision, the Michigan Municipal League shall submit a list as described under this subdivision for consideration for the appointment. For the second appointment after the effective date of the amendatory act that amended this subdivision, the Michigan Townships Association shall submit a list as described under this subdivision for consideration for the appointment.

(m) One member from a list of 3 names submitted by the state budget office.

(2) The supreme court chief justice or his or her designee shall serve as an ex officio member of the MIDC without vote.

(3) Individuals nominated for service on the MIDC as provided in subsection (1) 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. Of the members appointed under this section, the governor shall appoint no fewer than 2 individuals who are not licensed attorneys. Any individual who receives compensation from this state or an indigent criminal defense system for providing prosecution of or representation to indigent adults in state courts is ineligible to serve as a member of the MIDC. Not more than 3 judges, whether they are former judges or sitting judges, shall serve on the MIDC at the same time. The governor may reject the names submitted under subsection (1) and request additional names.

(4) MIDC members shall hold office until their successors are appointed. The terms of the members must be staggered. Initially, 4 members must be appointed for a term of 4 years each, 4 members must be appointed for a term of 3 years each, 4 members must be appointed for a term of 2 years each, and 3 members must be appointed for a term of 1 year each.

(5) The governor shall fill a vacancy occurring in the membership of the MIDC in the same manner as the original appointment, except if the vacancy is for an appointment described in subsection (1)(d), the source of the nomination shall submit a list of 3 names for each vacancy. However, if the senate majority leader or the speaker of the house of representatives is the source of the nomination, 1 name must be submitted. If an MIDC member vacates the commission before the end of the member's term, the governor shall fill that vacancy for the unexpired term only.

(6) The governor shall appoint 1 of the original MIDC members to serve as chairperson of the MIDC for a term of 1 year. At the expiration of that year, or upon the vacancy in the membership of the member appointed chairperson, the MIDC shall annually elect a chairperson from its membership to serve a 1-year term. An MIDC member shall not serve as chairperson of the MIDC for more than 3 consecutive terms.

(7) MIDC members shall not receive compensation in that capacity but must be reimbursed for their reasonable actual and necessary expenses by the state treasurer.

(8) The governor may remove an MIDC member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or for any other good cause.

(9) A majority of the MIDC voting members constitute a quorum for the transaction of business at a meeting of the MIDC. A majority of the MIDC voting members are required for official action of the commission.

(10) Confidential case information, including, but not limited to, client information and attorney work product, is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2018, Act 214, Eff. Dec. 23, 2018;—Am. 2018, Act 443, Eff. Mar. 21, 2019.

780.989 MIDC; authority and duties; establishment of minimum standards, rules, and procedures; manual.

Sec. 9. (1) The MIDC has the following authority and duties:

(a) Developing and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the

United States constitution, the state constitution of 1963, and this act.

(b) Investigating, auditing, and reviewing the operation of indigent criminal defense services to assure compliance with the commission's minimum standards, rules, and procedures. However, an indigent criminal defense service that is in compliance with the commission's minimum standards, rules, and procedures must not be required to provide indigent criminal defense services in excess of those standards, rules, and procedures.

(c) Hiring an executive director and determining the appropriate number of staff needed to accomplish the purpose of the MIDC consistent with annual appropriations.

(d) Assigning the executive director the following duties:

(i) Establishing an organizational chart, preparing an annual budget, and hiring, disciplining, and firing staff.

(ii) Assisting the MIDC in developing, implementing, and regularly reviewing the MIDC's standards, rules, and procedures, including, but not limited to, recommending to the MIDC suggested changes to the criteria for an indigent adult's eligibility for receiving criminal trial defense services under this act.

(e) Establishing procedures for the receipt and resolution of complaints, and the implementation of recommendations from the courts, other participants in the criminal justice system, clients, and members of the public.

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

(g) Establishing rules and procedures for indigent criminal defense systems to apply to the MIDC for grants to bring the system's delivery of indigent criminal defense services into compliance with the minimum standards established by the MIDC.

(h) Establishing procedures for annually reporting to the governor, legislature, and supreme court. The report required under this subdivision shall include, but not be limited to, recommendations for improvements and further legislative action.

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

(3) In establishing and overseeing the minimum standards, rules, and procedures described in subsection (1), the MIDC shall emphasize the importance of indigent criminal defense services provided to juveniles under the age of 17 who are tried in the same manner as adults or who may be sentenced in the same manner as adults and to adults with mental impairments.

(4) The MIDC shall be mindful that defense attorneys who provide indigent criminal defense services are partners with the prosecution, law enforcement, and the judiciary in the criminal justice system.

(5) The MIDC shall establish procedures for the conduct of its affairs and promulgate policies necessary to carry out its powers and duties under this act.

(6) MIDC policies must be placed in an appropriate manual, made publicly available on a website, and made available to all attorneys and professionals providing indigent criminal defense services, the supreme court, the governor, the senate majority leader, the speaker of the house of representatives, the senate and house appropriations committees, and the senate and house fiscal agencies.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 440, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.991 MIDC; establishment of minimum standards, rules, and procedures; principles; application for, and appointment of, indigent criminal defense services; requirements; partially indigent; objective standards.

Sec. 11. (1) The MIDC shall establish minimum standards, rules, and procedures to effectuate the following:

(a) The delivery of indigent criminal defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.

(b) If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.

(c) Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All 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.

(2) The MIDC shall implement minimum standards, rules, and procedures 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. In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles:

(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.

(b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.

(c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.

(d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.

(e) Indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.

(f) Indigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards.

(3) The following requirements apply to the application for, and appointment of, indigent criminal defense services under this act:

(a) A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, for purposes of this act must be made as determined by the indigent criminal defense system not later than at the defendant's first appearance in court. The determination may be reviewed by the indigent criminal defense system at any other stage of the proceedings. In determining whether a defendant is entitled to the appointment of counsel, the indigent criminal defense system shall consider whether the defendant is indigent and the extent of his or her ability to pay. Factors to be considered include, but are not limited to, income or funds from employment or any other source, including personal public assistance, to which the defendant is entitled, property owned by the defendant or in which he or she has an economic interest, outstanding obligations, the number and ages of the defendant's dependents, employment and job training history, and his or her level of education. A trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the supreme court, consistent with section 4 of article VI of the state constitution of 1963. 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. An indigent criminal defense system's determination regarding the amount of money a partially indigent defendant must contribute to his or her defense is subject to judicial review. Nothing in this act prevents a court from making a determination of indigency for any purpose consistent with article VI of the state constitution of 1963.

(b) A defendant is considered to be indigent if he or 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. Substantial financial hardship is rebuttably presumed if the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline. A defendant is also rebuttably presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility.

(c) A defendant not falling below the presumptive thresholds described in subdivision (b) 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.

(d) A determination that a defendant is partially indigent may only be made if the indigent criminal defense system determines that a defendant is not fully indigent. An indigent criminal defense system that determines a defendant is not fully indigent but may be partially indigent must utilize the screening process under subdivision (c). The provisions of subdivision (e) apply to a partially indigent defendant.

(e) The MIDC shall promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent. These standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent criminal defense system is making the determination regarding a defendant's indigency or partial indigency.

(f) The MIDC shall promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to his or her defense. The standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent criminal defense system is making the determination regarding how much a partially indigent defendant must contribute to his or her defense.

(g) A defendant is responsible for applying for indigent defense counsel and for establishing his or her indigency and eligibility for appointed counsel under this act. Any oral or written statements made by the defendant in or for use in the criminal proceeding and material to the issue of his or her indigency must be made under oath or an equivalent affirmation.

(4) The MIDC shall establish standards for trainers and organizations conducting training that receive MIDC funds for training and education. The standards established under 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.

(5) An indigent criminal defense system may include in its compliance plan a request that the MIDC serve as a clearinghouse for experts and investigators. If an indigent criminal defense system makes a request under this subsection, the MIDC may develop and operate a system for determining the need and availability for an expert or investigator in individual cases.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 439, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.993 Investigation, audit, and review of indigent criminal defense services; cooperation and participation with MIDC; development of plan and cost analysis; award of grant; submission of plan; annual plan; approval or disapproval of plan and cost analysis by MIDC; report; maintenance of local share; necessity for excess funding; appropriation of additional funds; grants to local units of government; compliance with minimum standards; zero grant; funds received by MIDC as state funds; financial protocols; unexpended grant funds; reimbursement.

Sec. 13. (1) All indigent criminal defense systems and, at the direction of the supreme court, attorneys engaged in providing indigent criminal defense services shall cooperate and participate with the MIDC in the investigation, audit, and review of their indigent criminal defense services.

(2) An indigent criminal defense system may submit to the MIDC an estimate of the cost of developing the plan and cost analysis for implementing the plan under subsection (3) to the MIDC for approval. If approved, the MIDC shall award the indigent criminal defense system a grant to pay the approved costs for developing the plan and cost analysis under subsection (3).

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

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

(5) The MIDC shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives requesting the appropriation of funds necessary to implement compliance plans after all the systems compliance plans are approved by the MIDC. For standards approved after January 1, 2018, the MIDC shall include a cost analysis for each minimum standard in the report and shall also provide a cost analysis for each minimum standard

approved on or before January 1, 2018, if a cost analysis for each minimum standard approved was not provided and shall do so not later than October 31, 2018. The amount requested under this subsection must be equal to the total amount required to achieve full compliance as agreed upon by the MIDC and the indigent criminal defense systems under the approval process provided in subsection (4). The information used to create this report must be made available to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives.

(6) The MIDC shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives not later than October 31, 2021 that includes a recommendation regarding the appropriate level of local share, expressed in both total dollars and as a percentage of the total cost of compliance for each indigent criminal defense system.

(7) Except as provided in subsection (9), an indigent criminal defense system shall maintain not less than its local share. If the MIDC determines that funding in excess of the indigent criminal defense system's share is necessary in order to bring its system into compliance with the minimum standards established by the MIDC, that excess funding must be paid by this state. 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 as described in subsection (8). 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 under subsection (5). Notwithstanding this subsection, it is the intent of the legislature to fund all of the minimum standards contained in the report under subsection (5) within 3 years of the date on which the minimum standards were adopted.

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

(9) An indigent criminal defense system is not required to expend its local share if the minimum standards established by the MIDC may be met for less than that share, but the local share of a system that expends less than its local share under these circumstances is not reduced by the lower expenditure.

(10) This state shall appropriate funds to the MIDC for grants to the local units of government for the reasonable costs associated with data required to be collected under this act that is over and above the local unit of government's data costs for other purposes.

(11) Within 180 days after receiving funds from the MIDC under subsection (8), an indigent criminal defense system shall comply with the terms of the grant in bringing its system into compliance with the minimum standards established by the MIDC for effective assistance of counsel. The terms of a grant may allow an indigent criminal defense system to exceed 180 days for compliance with a specific item needed to meet minimum standards if necessity is demonstrated in the indigent criminal defense system's compliance plan. The MIDC has the authority to allow an indigent criminal defense system to exceed 180 days for implementation of items if an unforeseeable condition prohibits timely compliance.

(12) If an indigent criminal defense system is awarded no funds for implementation of its plan under this act, the MIDC shall nevertheless issue to the system a zero grant reflecting that it will receive no grant funds.

(13) The MIDC may apply for and obtain grants from any source to carry out the purposes of this act. All funds received by MIDC, from any source, are state funds and must be appropriated as provided by law.

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

(a) Requiring documentation of expenditures.

(b) Requiring each indigent criminal defense system to hold all grant funds in a fund that is separate from other funds held by the indigent criminal defense system.

(c) Requiring each indigent criminal defense system to comply with the standards promulgated by the governmental accounting standards board.

(15) If an indigent criminal defense system does not fully expend a grant toward its costs of compliance, its grant in the second succeeding fiscal year must be reduced by the amount equal to the unexpended funds. Identified unexpended grant funds must be reported by indigent criminal defense systems on or before October 31 of each year. Funds subject to extension under subsection (11) must be reported but not included in the reductions described in this subsection. Any grant money that is determined to have been used for a purpose outside of the compliance plan must be repaid to the MIDC, or if not repaid, must be deducted from future grant amounts.

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

directly related to indigent criminal defense functions.

(17) The court shall collect contribution or reimbursement from individuals determined to be partially indigent under applicable court rules and statutes. Reimbursement under this subsection is subject to section 22 of chapter XV of the code of criminal procedure, 1927 PA 175, MCL 775.22. The court shall remit 100% of the funds it collects under this subsection to the indigent criminal defense system in which the court is sitting. Twenty percent of the funds received under this subsection by an indigent criminal defense system must be remitted to the department in a manner prescribed by the department and reported to the MIDC by October 31 of each year. The funds received by the department under this subsection must be expended by the MIDC in support of indigent criminal defense systems in this state. 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. The funds collected under this subsection must not alter the calculation of the local share made pursuant to section 3(i).

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 441, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.995 Dispute between MIDC and indigent criminal defense system.

Sec. 15. (1) Except as provided in section 5, if a dispute arises between the MIDC and an indigent criminal defense system concerning the requirements of this act, including a dispute concerning the approval of an indigent criminal defense system's plan, cost analysis, or compliance with section 13 or 17, the parties shall attempt to resolve the dispute by mediation. The state court administrator, as authorized by the supreme court, shall appoint a mediator agreed to by the parties within 30 calendar days of the mailing date of the official notification of the third disapproval by the MIDC under section 13(4) to mediate the dispute and shall facilitate the mediation process. The MIDC shall immediately send the state court administrative office a copy of the official notice of that third disapproval. If the parties do not agree on the selection of the mediator, the state court administrator, as authorized by the supreme court, shall appoint a mediator of his or her choosing. Mediation must commence within 30 calendar days after the mediator is appointed and terminate within 60 calendar days of its commencement. Mediation costs associated with mediation of the dispute must be paid equally by the parties.

(2) If the parties do not come to a resolution of the dispute during mediation under subsection (1), all of the following apply:

(a) The mediator may submit his or her recommendation of how the dispute should be resolved to the MIDC within 30 calendar days of the conclusion of mediation for the MIDC's consideration.

(b) The MIDC shall consider the recommendation of the mediator, if any, and shall approve a final plan or the cost analysis, or both, in the manner the MIDC considers appropriate within 30 calendar days, and the indigent criminal defense system shall implement the plan as approved by the MIDC.

(c) The indigent criminal defense system that is aggrieved by the final plan, cost analysis, or both, may bring an action seeking equitable relief as described in subsection (3).

(3) The MIDC, or an indigent criminal defense system may bring an action seeking equitable relief in the circuit court only as follows:

(a) Within 60 days after the MIDC's issuance of an approved plan and cost analysis under subsection (2)(b).

(b) Within 60 days after the system receives grant funds under section 13(8), if the plan, cost analysis, or both, required a grant award for implementation of the plan.

(c) Within 30 days of the MIDC's determination that the indigent criminal defense system has breached its duty to comply with an approved plan.

(d) The action must be brought in the judicial circuit where the indigent criminal defense service is located. The state court administrator, as authorized by the supreme court, shall assign an active or retired judge from a judicial circuit other than the judicial circuit where the action was filed to hear the case. Costs associated with the assignment of the judge must be paid equally by the parties.

(e) The action must not challenge the validity, legality, or appropriateness of the minimum standards approved by the department.

(4) If the dispute involves the indigent criminal defense system's plan, cost analysis, or both, the court may approve, reject, or modify the submitted plan, cost analysis, or the terms of a grant awarded under section 13(8) other than the amount of the grant, determine whether section 13 has been complied with, and issue any orders necessary to obtain compliance with this act. However, the system must not be required to expend more than its local share in complying with this act.

(5) If a party refuses or fails to comply with a previous order of the court, the court may enforce the previous order through the court's enforcement remedies, including, but not limited to, its contempt powers,

and may order that the state undertake the provision of indigent criminal defense services in lieu of the indigent criminal defense system.

(6) If the court determines that an indigent criminal defense system has breached its duty under section 17(1), the court may order the MIDC to provide indigent criminal defense on behalf of that system.

(7) If the court orders the MIDC to provide indigent criminal defense services on behalf of an indigent criminal defense system, the court shall order the system to pay the following amount of the state's costs that the MIDC determines are necessary in order to bring the indigent criminal defense system into compliance with the minimum standards established by the MIDC:

(a) In the first year, 20% of the state's costs.

(b) In the second year, 40% of the state's costs.

(c) In the third year, 60% of the state's costs.

(d) In the fourth year, 80% of the state's costs.

(e) In the fifth year, and any subsequent year, not more than the dollar amount that was calculated under subdivision (d).

(8) An indigent criminal defense system may resume providing indigent criminal defense services at any time as provided under section 13. When a system resumes providing indigent criminal defense services, it is no longer required to pay an assessment under subsection (7) but must be required to pay no less than its share.

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 442, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.997 Duty of compliance with approved plan.

Sec. 17. (1) Except as provided in subsection (2), every local unit of government that is part of an indigent criminal defense system shall comply with an approved plan under this act.

(2) A system's duty of compliance with 1 or more standards within the plan under subsection (1) is contingent upon receipt of a grant in the amount sufficient to cover that particular standard or standards contained in the plan and cost analysis approved by the MIDC.

(3) The MIDC may proceed under section 15 if an indigent criminal defense system breaches its duty of compliance under subsection (1).

History: 2013, Act 93, Imd. Eff. July 1, 2013;—Am. 2016, Act 443, Imd. Eff. Jan. 4, 2017;—Am. 2018, Act 214, Eff. Dec. 23, 2018.

780.999 Annual report, budget, and listing of expenditures; availability on website.

Sec. 19. The MIDC shall publish and make available to the public on a website its annual report, its budget, and a listing of all expenditures. Publication and availability of the listing of expenditures shall be on a quarterly basis, except for the annual report and salary information, which may be published and made available on an annual basis. As used in this section, "expenditures" means all payments or disbursements of MIDC funds, received from any source, made by the MIDC.

History: 2013, Act 93, Imd. Eff. July 1, 2013.

780.1001 Applicability of freedom of information act and open meetings act.

Sec. 21. Both of the following apply to the MIDC:

(a) The freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, except as provided in section 7(10).

(b) The open meetings act, 1976 PA 267, MCL 15.261 to 15.275.

History: 2013, Act 93, Imd. Eff. July 1, 2013.

780.1002 Michigan indigent defense fund; creation; administration; purpose.

Sec. 22. (1) The Michigan indigent defense fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the fund, including private gifts, bequests, and donations. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments.

(3) Money in the fund at the close of the fiscal year shall lapse to the general fund.

(4) The commission shall be the administrator of the fund for auditing purposes.

(5) The commission shall expend money from the fund to carry out its responsibilities under this act.

History: Add. 2018, Act 214, Eff. Dec. 23, 2018.

780.1003 Effect of United States or state supreme court cases; failure to comply with statutory duties; grounds for reversal or modification of conviction.

Sec. 23. (1) Nothing in this act shall be construed to overrule, expand, or extend, either directly or by

analogy, any decisions reached by the United States supreme court or the supreme court of this state regarding the effective assistance of counsel.

(2) Nothing in this act shall be construed to override section 29 or 30 of article IX of the state constitution of 1963.

(3) Except as otherwise provided in this act, the failure of an indigent criminal defense system to comply with statutory duties imposed under this act does not create a cause of action against the government or a system.

(4) Statutory duties imposed that create a higher standard than that imposed by the United States constitution or the state constitution of 1963 do not create a cause of action against a local unit of government, an indigent criminal defense system, or this state.

(5) Violations of MIDC rules that do not constitute ineffective assistance of counsel under the United States constitution or the state constitution of 1963 do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel.

History: 2013, Act 93, Imd. Eff. July 1, 2013.

Minimum Standards for Indigent Criminal Defense Services

August 2021

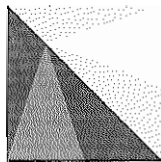
Standards 1, 2, 3, and 4 were approved by the Department of Licensing and Regulatory Affairs (LARA) on May 22, 2017. These standards cover training and education of counsel, the initial client interview, use of investigation and experts, and counsel at first appearance and other critical stages.

Standard 5, which requires independence from the judiciary, was approved by LARA on October 29, 2020.

This packet contains the complete text of the approved standards as well as 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.

This packet also contains a standard for determining indigency and contribution which was approved by the MIDC in October 2020 and is pending approval by LARA.

Information about these standards, plans for compliance, and funding can be found on our website at www.michiganidc.gov.



MICHIGAN INDIGENT
DEFENSE COMMISSION

Standard 1 Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that “[d]efense counsel is required to attend continuing legal education relevant to counsel’s indigent defense clients.” MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial “is not enough to satisfy the constitutional command.” *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association’s *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that “Defense counsel is provided with and required to attend continuing legal education.”

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

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

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

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

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

Comment:

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

Standard 2 Initial Interview

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

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

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

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

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

D. Client status:

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

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

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

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

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

Standard 3 Investigation and Experts

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

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

- 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.

Comments:

- 1. *The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.*
- 2. *The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.*
- 3. *Counsel should inform clients of the progress of investigations pertaining to their case.*
- 4. *Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.*

Standard 4 Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) ...counsel continuously represents and

personally appears at every court appearance throughout the pendency of the case.” MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court and submitted by the MIDC and approved by the department is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant’s liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

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

Comments:

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

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

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

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

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

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

Standard 5 - Independence from the Judiciary

The MIDC Act requires the agency to establish minimum standards, rules, and procedures to adhere to the following: "The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services." MCL 780.991 (1)(a).

The United States Supreme Court addressed the issue of independence in *Polk v Dodson*, 454 US 312, 321-322; 102 S Ct 445, 451; 70 L Ed 2d 509 (1981):

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. . . *Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.* (Emphasis added.)

The MIDC proposes a minimum standard to ensure that indigent criminal defense services are independent of the judiciary:

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

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

Staff Comment:

Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge's input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge.

Standard 6 - Indigent Defense Workloads

The MIDC Act provides that “[d]efense counsel’s workload is controlled to permit effective representation.” MCL 780.991(2)(b). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial “is not enough to satisfy the constitutional command.” *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Fifth Principle of The American Bar Association’s Ten Principles of a Public Defense Delivery System provides that a public defense system, in order to provide effective assistance of counsel, must ensure that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.”

The MIDC proposes a minimum standard for indigent defense workloads:

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

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

Staff comments:

- 1. The MIDC is mindful of caseload pressures on the prosecution and fully supports proper funding for prosecutors to have reasonable caseloads.*
- 2. The MIDC is aware that the problem of excessive caseloads is one that needs to be resolved in tandem with compensation reform, so that attorneys do not need to take on too many indigent defense assignments to earn a living. The MIDC is concurrently proposing a standard on economic disincentives or incentives for representing indigent clients.*
- 3. The MIDC does not believe that caseload pressures should ever create a situation where indigent clients facing criminal charges do not receive the appointment of counsel.*
- 4. Compliance plans should include a means to account for and audit caseload calculations.*

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-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.

Standard 7 - Qualification and Review

The MIDC Act calls for a standard establishing that "Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed." MCL 780.991(2)(c). Further, the Act requires that "Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards." MCL 780.991(2)(f). The MIDC's conditionally approved Standard 1 sets forth the requirements for the Education and Training of assigned counsel, and should be considered a prerequisite to, and means to achieve, the standard for qualification and review of criminal defense attorneys appointed to represent indigent accused defendants. The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). The right to effective assistance of counsel applies equally whether counsel was appointed or retained. *Cuyler v Sullivan*, 446 US 335, 344-45; 100 S Ct 1708, 1716; 64 L Ed 2d 333 (1980).

The MIDC proposes a minimum standard for qualification and review:

- A. **Basic Requirements.** In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications (hereafter "basic requirements"):
1. Satisfy the minimum requirements for practicing law in Michigan as determined by the Michigan Supreme Court and the State Bar of Michigan; and
 2. Comply with the requirements of MIDC Standard 1, relating to the Training and Education of Defense Counsel.
- B. **Qualifications.** Eligibility for particular case assignments shall be based on counsel's ability, training and experience. Attorneys shall meet the following case-type qualifications:
1. Misdemeanor Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - b. Serve as co-counsel or second chair in a prior trial (misdemeanor, felony, bench or jury); or
 - c. equivalent experience and ability to demonstrate similar skills.
 2. Low-severity Felony Cases
 - a. Satisfaction of all *Basic Requirements*; and
 - i. Has practiced criminal law for one full year (either as a prosecutor, public defender, or in private criminal defense practice); and
 - ii. Has been trial counsel alone or with other trial counsel and handled a 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 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.

Staff Comments:

1. *The Minimum Standard for Qualification and Review applies to all attorneys accepting assignments to represent defendants charged in adult criminal cases, including attorneys employed by a public defender office.*
2. *In public defender offices, equivalent experience in misdemeanor and low severity felony cases can include training programs or supervised assignments.*
3. *Misdemeanors, low-severity felonies and high-severity felonies are defined in the Michigan Legislative Sentencing Guidelines. A "life offense" for purposes of this Minimum Standard includes any case where the offense charged or enhancement sought subjects the accused defendant in a criminal case to life in prison.*
4. *The MIDC Act focuses on qualifications that relate to counsel's ability, training and experience. Other non-merit based qualifications that relate to counsel's membership in a bar association or maintaining a local business address shall not be given undue weight.*
5. *The MIDC discourages imposing a geographic limitation on counsel's practice area, so long as counsel can meet with a client on an as-needed basis without hardship to the client and can appear in court when required.*
6. *The appointing authority should maintain a list of qualified counsel, but has the discretion to reach outside of the list of locally qualified attorneys when required in order to appoint counsel with the ability, training and experience to match the nature and complexity of the case to be assigned.*

Standard 8 - Attorney Compensation (Economic Disincentives or Incentives)

Attorneys must have the time, fees, and resources to provide the effective assistance of counsel guaranteed to indigent criminal defendants by the United States and Michigan Constitutions. The MIDC Act calls for a minimum standard that provides: "Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided." MCL 780.991(2)(b). Fair compensation for assigned counsel may optimally be achieved through a public defender office, and the MIDC recommends an indigent criminal defender office be established where assignment levels demonstrate need, together with the active participation of a robust private bar. MCL 780.991(1)(b). In the absence of, or in combination with a public defender office, counsel should be assigned through a rotating list and be reasonably compensated. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized. This standard attempts to balance the rights of the defendant, defense attorneys, and funding units, recognizing the problems inherent in a system of compensation lacking market controls.

The MIDC proposes the following minimum standard regarding economic incentives and disincentives:

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.

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.

Sources and Authority for Proposed Standard 8:

A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis, National Legal Aid & Defender Association (2008).

U.S.C.A. Const. Amend. 6; Mich. Const. 1963 Art. 1, § 20.

ABA 10 Principles of a Public Defense Delivery System (Principle 8).

American Bar Association Criminal Justice Standards for Providing Defense Services, Standard 5-2.4.

Position Paper on Reasonable Fees After the Passage of the MIDC Act, Michigan Indigent Defense Commission (Summer 2016).

In re Atchison, No. 292281, 2012 WL 164437 (Mich. Ct. App. Jan. 19, 2012).

Staff Comments:

- 1. Attorneys should be reimbursed for expenses for investigators, expert witnesses, transcripts, and any reasonable out-of-pocket expenses incurred in the course of representation.*
- 2. For hourly payments, local systems should establish protocol through which indigent defense administrators oversee the submission, review and approval of invoices for both assigned counsel and contract counsel. Attorneys should be directed to submit explanations for any invoices in which their hours exceed the expected maximum hours. After attorneys submit itemized bills, the administrator and/or staff should review and determine whether the case falls into the category of minimal scrutiny, meaning that it falls within the expected number of allotted hours, or the category of heightened scrutiny for exceeding an expected hourly threshold, meaning the administrator needs to further investigate the invoice. Bills should not be automatically approved or denied if they fall too far above or below the expected threshold, but rather the attorneys' explanations should be reviewed, and if the administrator does not find the explanation sufficient, the administrator should invite further explanation. Upon receiving additional details, the administrator then makes a final decision. All local systems should have policies in place that outline voucher review procedures, including the right for attorneys to appeal decisions and the right for administrators to remove attorneys from panel lists or terminate contracts for ongoing submissions that exceed the threshold. Other appropriate remedies or punishments for abusive billing practices should be developed by local systems.*
- 3. Due to the potential to disincentivize quality representation, event based, capped hourly rates, and flat fee payment schemes will be subjected to increased monitoring and auditing as a condition of receiving MIDC funds.*
- 4. The MIDC will collect data on event based, capped hourly rates, and flat fee payment schemes for the first year after implementation of this standard and revise the standard if these schemes are disincentivizing quality representation.*

Standard for Determining Indigency and Contribution

The MIDC Act requires the MIDC to “promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent.” MCL 780.991(3)(e). It also directs the MIDC to “promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to [their] defense.” MCL 780.991(3)(f). The United States Supreme Court has long recognized that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v Illinois*, 351 US 12, 19; 76 S Ct 585; 100 L Ed 891 (1956). The MIDC is also mindful that a system of screening for indigency should not create “cumbersome procedural obstacles” for a defendant. *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984).

Accordingly, the MIDC proposed a minimum standard for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense. The version approved by the Commission is as follows:

Definitions

As used in this Standard

“Appointing authority” means 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.

“Available assets” means funds and property in which defendant has an ownership interest and ability to liquidate that are not exempt assets.

“Basic living expenses” means costs related to those needs which must be met in order to avoid serious harm in the near future. These costs include, but are not limited to, housing, food, clothing, childcare, child support, utilities, medical insurance, other necessary medical expenses, and transportation (fares, car payments, car insurance, gasoline).

“Contribution” means “an ongoing [payment] obligation [for one’s defense costs] during the term of the appointment.” *People v Jose*, 318 Mich App 290, 298; 896 NW2d 491 (2016).

“Current monthly expenses” means those costs that defendant pays on a regular monthly basis. These costs include, but are not limited to, basic living expenses, court obligations, minimum credit card payments, loan payments, tuition payments, phone, internet, and cable. If an expense is not assessed in monthly installments but should be treated as a current monthly expense because it is a regularly occurring or long-term obligation, the expense should be converted to monthly installments.

“Exempt assets” means funds and property that defendant would be able to protect from levy and sale under execution under MCL 600.6023 if they were a judgment debtor or funds and property that defendant would be able to exempt under 11 USC 522 if they were a debtor in a bankruptcy case. Defendant must choose either the state or federal exemptions.

“Gross Income” means funds or compensation periodically received from any source during a 52-week period. Gross income includes, but is not limited to, wages, pensions, stock dividends, rents, insurance benefits, trust income, annuity payments, and public assistance.

“Indigent” means an inability to obtain competent legal representation on one’s own without substantial financial hardship to one’s self or one’s dependents.

“Local funding unit” means the governmental entity or entities listed as a grantee in the grant contract with the MIDC.

“Net income” means gross income minus those deductions required by law or as a condition of employment. These deductions include, but are not limited to, taxes, union dues, and funds withheld pursuant to a garnishment or support order.

“Partially indigent” means an inability to afford the complete cost of legal representation but an ability to contribute a monetary amount toward one’s representation.

"Prosecuting authority" means any governmental agent or entity pursuing charges against defendant.

"Public assistance" means governmental benefits or subsidies like food assistance, temporary assistance for needy families, Medicaid, disability insurance, or public housing.

"Reimbursement" means a repayment "obligation arising after the term of appointment has ended." *Jose*, 318 Mich App at 298.

"Seasonal income" means income that is earned from regularly reoccurring employment that lasts for 26 weeks or less in any 52-week period.

"Substantial financial hardship" means an inability to meet the basic living expenses of one's self or one's dependents.

Indigency Determination

(a) A system must have a reasonable plan for screening for indigency which is consistent with this Standard. A plan that leaves screening decisions to the court can be acceptable.

(b) A defendant is rebuttably presumed to be indigent if defendant receives personal public assistance, earns a net income less than 200% of the federal poverty guidelines, is currently serving a sentence in a correctional institution, is less than 18 years of age, and/or is receiving residential treatment in a mental health or substance abuse facility. See MCL 780.991(3)(b).

(c) A defendant who cannot, without substantial financial hardship to themselves or to their dependents, obtain competent, qualified legal representation on their own also qualifies for appointed counsel. MCL 780.991(3)(b).

(d) Factors to be considered when determining eligibility for appointed counsel under subparagraph (c) include net income, property owned by defendant or in which they have an economic interest to the extent that it is an available asset, basic living expenses, other current monthly expenses, outstanding obligations, the number and ages of defendant's dependents, employment and job training history, and their level of education. MCL 780.991(3)(a). In addition, the seriousness of the charges faced by defendant, whether defendant has other pending cases, whether defendant is contributing to the support and maintenance of someone other than a dependent, and local private counsel rates should also be considered. This subsection does not provide an exhaustive list of factors for the appointing authority to consider.

(e) 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.

(f) A defendant must be screened for indigency as soon as reasonably possible, but a determination as to whether a defendant is partially indigent can be deferred until contribution or reimbursement is requested or ordered.

(g) Defendants who have retained counsel or who are representing themselves can request to be screened for indigency in order to qualify for expert and investigator funding.

Household and Marital Income

The appointing authority will not presume that defendant can use household income, including income of a spouse, and joint marital assets to pay defense costs unless it has information that defendant's household income and/or joint marital assets should be considered.

Joint Bank Accounts

The appointing authority will presume that defendant owns 50% of the funds in a joint bank account. Defendant must inform the appointing authority if they own more than 50% of the funds in a joint bank account. Conversely, defendant can rebut the presumption of 50% ownership by submitting a sworn statement explaining why the presumption should not apply.

Seasonal Income

If defendant earns a seasonal income, the appointing authority should consider how defendant's expected annual income compares to the federal poverty level instead of comparing defendant's current monthly income to the federal poverty level. For example, the federal poverty level for Defendant A's household is \$4,000 per month. Defendant A earns his annual income over three summer months when Defendant A makes \$9,000 to \$10,000 per month. Even though Defendant A's current monthly income is double the federal poverty level, Defendant A should be treated as someone who only makes about 75% of the federal poverty level.

Self-Employment Income

If defendant is self-employed, the appointing authority should consider defendant's adjusted gross income. Adjusted gross income is determined by deducting business expenses and any expenses required by law from gross income. An expense is a "business expense" if it is ordinary and necessary. Expenses are ordinary if they are common and accepted in defendant's trade or business. Expenses are necessary if they are helpful and appropriate for defendant's trade or business.

Educational Grants and Scholarships

A grant or scholarship, or any part thereof, is not income unless it is provided to defendant on a periodic basis and it exceeds the tuition and boarding costs paid to an educational provider. A grant or scholarship is an available asset to the extent that it exceeds defendant's tuition and boarding costs and is allowed to be used for non-tuition and boarding expenses by the grantor. For example, Defendant A receives a number of grants and scholarships at the beginning of the school year. Defendant A has no boarding costs and has \$1,000 in scholarship funds left over after paying tuition. Although the \$1,000 is not income, it is an available asset. Student loan proceeds, however, are not available assets.

Liquidation of Assets

The appointing authority can only consider defendant's income and available assets when deciding whether defendant has sufficient means to retain counsel. Under no circumstances can the appointing authority demand that defendant liquidate or mortgage an exempt asset.

Debts as Disqualifiers

The appointing authority cannot reject a request for counsel because defendant has a regularly recurring expense that the appointing authority deems excessive unless the appointing authority can show that the expense is unnecessary, can be easily eliminated, and the elimination of the expense would result in defendant having sufficient income to retain counsel. For example, if Defendant A has a \$150 monthly cellphone bill, Defendant B has a \$600 monthly car payment, and Defendant C has a \$1,700 mortgage, they might be eligible for appointed counsel.

Change in Financial Condition

The effect of a change in defendant's financial condition during the course of the case depends on whether the change is positive or negative for defendant.

(a) If defendant's financial condition declines during the case, defendant can request to be rescreened to see if counsel should be appointed or if the contribution amount should be reduced or eliminated. This rescreening should occur as soon as reasonably possible.

(b) If defendant's financial condition significantly improves during the course of the case, a redetermination of defendant's status as indigent/partially indigent should be made and a redetermination of defendant's contribution payments should occur. If defendant has sufficient income and/or available assets, defendant should make contribution payments equaling 100% of the costs of representation. There should never be a change of attorney by the court or appointing authority based solely on defendant's new ability to retain counsel.

- (c) Defendant has an ongoing duty during the pendency of the case to report significant improvements in their financial condition to the appointing authority. The obligation to report a change of financial condition belongs exclusively to defendant, not their attorney.
- (d) The prosecuting authority lacks standing to challenge the continuation of appointed counsel due to defendant's improved financial condition.

Appointing Authority

Except as otherwise provided, a local funding unit can designate the individual(s) or entity of its choice to review applications for the appointment of counsel provided that they agree to comply with all applicable MIDC Standards and policies and they agree to take adequate measures to safeguard the sensitive nature of the information disclosed during the application process. Only a licensed attorney, however, can review requests for experts and investigators.

Managed assigned counsel coordinators and public defender offices can serve as appointing authorities. Anyone currently employed by a court funded by the local funding unit cannot serve as an appointing authority or be employed by the appointing authority to assist with their screening responsibilities.

Obligations of Appointing Authority

- (a) When defendant provides information about their financial condition under oath or affirmation, the appointing authority has no obligation to independently verify the information or require supporting documentation from defendant. This Standard, however, does not prohibit the Appointing Authority from investigating defendant's financial situation or requiring defendant to provide supporting documentation.
- (b) Information about defendant's financial situation is confidential and the Appointing Authority can only disclose this information with defendant's consent, upon court order, or upon request from the MIDC or its designee for purposes of auditing, data collection, or investigation.
- (c) This Standard does not impose an obligation on the Appointing Authority, assigned counsel, or the funding unit to recover defense costs from defendant.

Cost of Indigency Assessment

There is no cost for requesting an assessment for indigency. No screening costs can be passed to defendant.

Contribution

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.

In setting the amount of contribution, the appointing authority should first subtract defendant's current monthly expenses from defendant's monthly net income. If the result is negative, the appointing authority cannot require contribution. If the result is positive, the appointing authority shall direct defendant to remit no more than 25% of the result each month. For example, Defendant A's net monthly income is \$2,000. Defendant A's current

monthly expenses are \$1,600. Defendant A should contribute \$100 per month towards Defendant A's defense costs.

The amount of contribution payments cannot be based on whether Defendant could convert an available asset into cash. Nonexempt funds belonging to defendant, however, could be directed to be paid as a single lump sum payment that is no more than 25% of the total amount of the nonexempt funds. For example, Defendant A has \$500 in nonexempt funds. Defendant A could be directed to make a single contribution payment totaling \$125. Funds from Social Security and other means-tested benefits are always exempt from contribution when in the hands of the benefits recipient.

The appointing authority may adjust the amount and/or timing of contribution payments as necessary to avoid causing defendant a substantial financial hardship. Under no circumstances will defendant be required to contribute more than the actual cost of defense. If defendant fails to pay any ordered contribution, the local funding unit may seek a wage assignment.

Defendant's obligation to make contribution payments ends at sentencing or when defendant's defense costs are paid—whichever is earlier. If at sentencing the sum of defendant's contribution payments are less than the cost of defendant's defense, the appointing authority can request reimbursement at defendant's sentencing. If defendant contributed more than the cost of their defense, if all charges against defendant are dismissed, or if defendant is found not guilty of all charges against them, the amount of defendant's contribution payments must be refunded to defendant. If defendant becomes indigent during the proceedings, defendant's contribution payments must be applied towards the costs of defendant's defense before they can be used to pay any assessment.

Judicial Review

(a) If defendant disagrees with the appointing authority's decision to deny defendant's request for appointed counsel, an expert, or an investigator or its decision concerning contribution, defendant can request a review of the determination by the judge assigned to defendant's case. This right of review also applies to Defendant's second or subsequent request for counsel and second or subsequent request for review of a contribution determination.

(b) Defendant can request a review by making an oral motion while on the record or by filing a Request for Review of Appointing Authority Determination form or other document seeking review with the court. The appointing authority shall provide defendant with a copy of the Request for Review of Appointing Authority Determination form with its denial of the request for appointed counsel.

(c) The prosecuting authority lacks standing to seek judicial review of the appointing authority's decision to appoint or deny counsel or the appointing authority's decision concerning contribution.

(d) Defense counsel lacks standing to seek judicial review of the appointing authority's decision to appoint counsel.

Determination of Reimbursement

The Michigan Supreme Court has determined that the U.S. Constitution does not require that defendant's foreseeable ability to pay be considered before a defendant can be directed to pay reimbursement for appointed counsel. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009). But "[t]he public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Adkins v E I DuPont de Nemours & Co*, 335 US 331, 339; 69 S Ct 85; 93 L Ed 43 (1948).

Local funding units should only seek reimbursement from defendants who have a meaningful ability to pay it. Thus, if a defendant is indigent, and is expected to remain indigent in the near future, the local funding unit should not seek any reimbursement for defense costs.

The amount of requested reimbursement cannot exceed the actual cost. Local systems with a public defender office, however, can use an average hourly cost that encompasses employee salaries, fringe benefits, and office overhead when determining attorney's fees. This average hourly cost cannot exceed the hourly rate paid to attorneys on the local system's roster of conflict attorneys for the same type of case.

The amount of a reimbursement request should not cause defendant substantial financial hardship. In deciding the amount of reimbursement to request, the local funding unit should consider defendant's current income, available assets, current monthly expenses, and dependents, as well as any reasonably anticipated changes to defendant's economic situation in the near future.

Many defendants will be unable to afford to repay their cost of defense in a lump sum payment. When that is the case, the local funding unit should suggest a payment plan based on what defendant could reasonably afford to pay towards defense costs for up to two years if defendant were convicted of a misdemeanor or up to five years if defendant were convicted of a felony. During the repayment period, the amount and/or timing of installment payments should be adjusted as necessary to avoid causing defendant a substantial financial hardship. If defendant has good cause for failing to pay the full amount of the requested defense costs by the end of the repayment period, the local funding unit should ask the court to waive the balance. Similarly, while it may be appropriate to have the probation department assist the court in collecting defense costs, it is inappropriate to make defendant's failure to pay a probation violation absent a determination that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order. See MCR 6.425(E)(3)(a).

Comments:

- 1. When assessing the reasonableness of a proposed plan for indigency screening, the Commission will generally look at whether the plan ensures that each defendant's financial situation is properly considered and the cost of the screening plan. The Commission also acknowledges that a screening plan should not require screening of defendants for whom there is no possibility of incarceration upon conviction. See MCL 780.983(f)(i).*
- 2. The MIDC Act provides that a rebuttable presumption of indigency arises when a defendant earns an income less than 140% of the federal poverty guideline. MCL 780.991(3)(b). Research and input from stakeholders, however, 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.*
- 3. A public defender office or managed assigned counsel coordinator who is screening for indigency should be mindful of the rules concerning conflicts of interest.*
- 4. This Standard should be liberally construed to favor the appointment of counsel and the granting of requests for expert and investigator fees. See People v Gillespie, 41 Mich App 748, 753; 201 NW2d 104 (1972) (ambiguities about defendant's ability to retain counsel should be resolved in defendant's favor).*