



**ATTORNEY PERSPECTIVES ON MICHIGAN'S
CRIMINAL INDIGENT DEFENSE SYSTEM**
A REPORT OF THE MICHIGAN INDIGENT DEFENSE COMMISSION

June 2017

Attorney Perspectives on Michigan's Criminal Indigent Defense System
June 2017
Jonah Siegel, Ph.D., Research Director

Copyright © 2017 by the Michigan Indigent Defense Commission



ABOUT THE MICHIGAN INDIGENT DEFENSE COMMISSION

The Michigan Indigent Defense Commission shall develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and with the Michigan Indigent Defense Commission Act. We will identify and encourage best practices for delivering the effective assistance of counsel to indigent defendants charged with crimes. We will collect data, support compliance and administer grants to achieve these goals. We will accomplish our mission through collaboration, transparency and accessibility to all partners in the criminal justice community.

200 North Washington Square, Lansing, MI 48913
(517) 657-3066
info@michiganidc.gov

Highlights

The Michigan Indigent Defense Commission (MIDC) is tasked with developing and overseeing the implementation of minimum standards to ensure that all indigent adults within the state have access to quality criminal defense services. To guide implementation and measure compliance with these standards, the MIDC is also responsible for conducting research that illuminates current practices and stakeholder perspectives. As the backbone of indigent representation, publicly appointed criminal defense attorneys must be at the center of systemic reform efforts. To learn more about their experiences representing indigent clients, the MIDC surveyed attorneys who take adult criminal indigent cases in Michigan's 83 counties.

The MIDC received 341 survey responses from attorneys currently accepting trial-level, adult indigent criminal cases and 59 additional responses from attorneys who formerly accepted cases or currently practice at the appellate level. Findings indicate the following:

- Publicly appointed criminal defense attorneys are extremely experienced and knowledgeable, with 48% reporting that they have been practicing criminal defense in Michigan for 20 or more years.
- Attorneys value training and education even though most courts do not require publicly appointed attorneys to complete annual continuing legal education. Many attorneys express concern about the financial burden of attending local and national training events.
- Attorneys encounter considerable difficulties meeting with in-custody clients related to the lack of confidential meeting space in jails and courthouses, the lack of payment for time spent conducting jail visits, and restrictive jail and prison visiting policies.
- Only 41% of courthouses in which surveyed attorneys practice and 56% of holding facilities visited by surveyed attorneys have meeting space that attorneys consider to be confidential.
- Attorneys struggle to obtain funding from their courts for expert witnesses and investigators. Between 14% and 17% of surveyed attorneys report that they are unfamiliar with the process of requesting funding for these professionals.
- In most counties, attorneys report extremely low rates of compensation and describe the consequences of current payment structures on their ability to provide effective representation. More than half of the 59 attorneys who are not currently taking assigned cases shifted their practice because of issues related to compensation.
- Only 28% of surveyed attorneys consider the system in which they work to be independent from the judiciary.

The experiences of publicly appointed attorneys provide compelling support for the MIDC's first set of standards and also offer insight into the selection and design of the next set of proposed standards.

Commissioners

Pursuant to MCL 780.987, the Governor appointed the following Commissioners as submitted by the person, group or organization listed below:

Hon. James Fisher, Chair, Michigan Judges Association

Frank Eaman, Criminal Defense Attorneys of Michigan

Derek King, local units of Government

William Swor, Criminal Defense Attorneys of Michigan

Nancy J. Diehl, State Bar of Michigan

Richard Lindsey, Speaker of the House of Representatives

Tom McMillin, Speaker of the House of Representatives

Brandy Robinson, those whose primary mission or purpose is to advocate for minority interests

Michael Puerner, Senate Majority Leader

Gary Walker, Prosecuting Attorneys Association of Michigan

Hon. Thomas Boyd, Michigan District Judges Association

John Shea, Criminal Defense Attorneys of Michigan

Shela Motley, Senate Majority Leader

Kevin Oeffner, Chief Justice of the Michigan Supreme Court

David Schuringa, the general public

Thomas P. Clement, ex officio member, Supreme Court

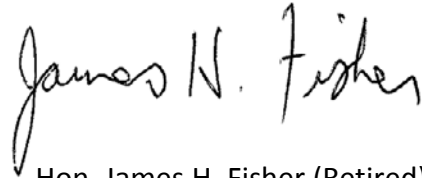
Statement from the Chair

In order to facilitate the provision of quality legal representation, the Michigan Indigent Defense Commission (MIDC) is statutorily responsible for collecting data on indigent defense systems across the state. In 2016, the MIDC released the findings of the first comprehensive statewide survey of public defense, which explored the provision of indigent defense representation in all circuit and district courts throughout Michigan. As a complement to this report, the MIDC conducted a follow-up survey with attorneys who take adult criminal indigent cases in Michigan's 83 counties. Publicly appointed criminal defense attorneys play a critical role in ensuring that defendants receive effective representation, and their experiences will continue to be used to guide implementation of the MIDC's current and future minimum standards.

The survey was made available to all attorneys accepting adult criminal indigent cases and was distributed between February and April of 2016. Through the cooperation of agencies including the Criminal Defense Attorneys of Michigan, the State Bar of Michigan's Criminal Law Section, the Criminal Defense Resource Center of the State Appellate Defender Office, and local county bar associations, the MIDC received 400 survey responses. Attorneys provided their perspectives on many of the same topics investigated in the first court survey: attorney education and qualifications, notification of assignments and client meetings, investigation and expert witnesses, independence, confidential meeting space, and future standards.

The results of the attorney survey have already provided a great deal of insight to the Commission, and we are eager to continue working in partnership with publicly appointed attorneys to improve indigent defense representation in Michigan. We hope that the report will offer local stakeholders and the general public a glimpse into the daily aspirations and struggles of the attorneys who diligently serve indigent clients on the front lines.

Respectfully Submitted,

A handwritten signature in black ink that reads "James H. Fisher". The signature is written in a cursive, flowing style.

Hon. James H. Fisher (Retired)

Chair

Michigan Indigent Defense Commission

Table of Contents

Highlights	1
Commissioners.....	2
Statement from the Chair	3
Table of Contents	4
Background	5
Data and Methods	5
Description of Surveyed Attorneys.....	6
ATTORNEY PERSPECTIVES ON THE FIRST FOUR STANDARDS.....	8
Training and Education of Defense Counsel.....	8
Confidential Meeting Space	9
Notification of Assignments and Client Meetings.....	11
Investigation and Expert Witnesses	14
ATTORNEY PERSPECTIVES ON FUTURE STANDARDS	15
Compensation Issues.....	16
Independence	18
Final Thoughts.....	19
Endnotes	20

Background

The Michigan Indigent Defense Commission (MIDC) is tasked with developing and overseeing the implementation of minimum standards to ensure that all indigent adults within the state have access to quality criminal defense services. To guide implementation and measure compliance with these standards, the MIDC is also responsible for conducting research that illuminates current practices and stakeholder perspectives. In its first official year of operation, the MIDC established relationships with stakeholders and completed the first statewide survey of local indigent defense systems. The results of this survey, articulated in a report entitled *"Snapshot of Indigent Defense Representation in Michigan's Adult Criminal Courts,"* provided immense insight into current practices from the standpoint of the courts.¹

With this information in hand, the MIDC designed a survey to solicit the perspectives of the publicly appointed defense attorneys who represent indigent adults facing criminal charges. As the backbone of the system, publicly appointed defense attorneys work in collaboration with clients, judges, other attorneys, and court administrators. With an estimated 900 attorneys eligible to take adult criminal indigent cases in Michigan's 83 counties, their daily experiences can offer a wide range of unique insight into both systemic challenges and best practices.

By gathering and analyzing information from criminal indigent defense attorneys, the MIDC hopes to shed light on the need for current standards and provide a platform for attorneys to weigh in on future standards. With this study, Michigan joins a handful of other innovative states including New York, North Carolina and Texas² that have conducted formal research seeking to understand the system from the perspective of attorneys.

Data and Methods

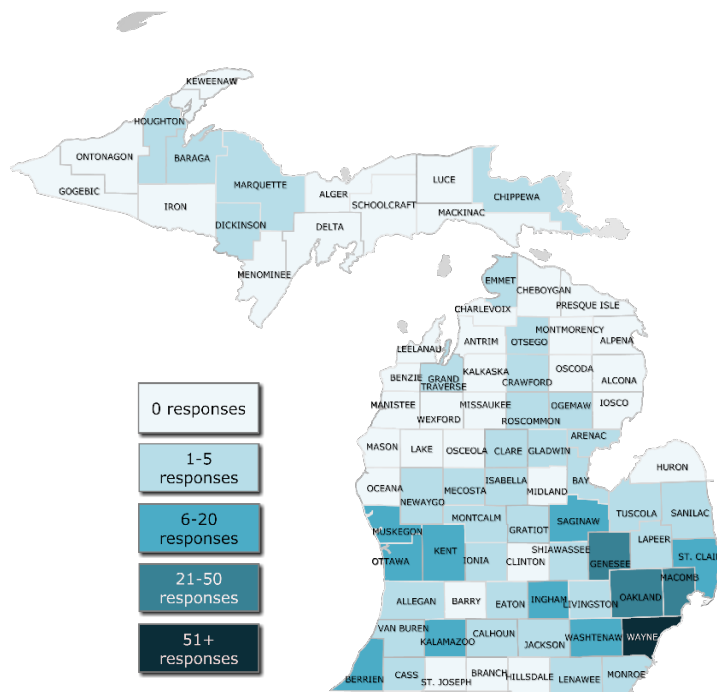
Consistent with its prior survey of local courts referenced above, the MIDC designed the attorney survey using an online survey tool. Michigan does not have a central repository of all attorneys in the state who are eligible to accept public defense cases, and so rather than selecting a random sample of attorneys to receive the survey, the MIDC made the survey available to all interested attorneys in an effort to gather the widest selection of experiences. The survey link was distributed to attorneys through a variety of channels between February and April of 2016. The MIDC's commission members, staff, and affiliated regional consultants shared the survey link in conversations with attorneys through word of mouth. This was an effective mechanism given the extent of contact

between the MIDC and front-line attorneys. The survey link was also posted on the MIDC's website, shared at criminal defense attorney conferences, and made available through the Criminal Defense Attorneys of Michigan, the State Bar of Michigan's Criminal Law Section, the Criminal Defense Resource Center of the State Appellate Defender Office, and local county bar associations. Attorneys were encouraged to capitalize upon the opportunity to lend their voices to the ongoing statewide conversation about indigent defense reform.

Using a combination of quantitative and qualitative prompts, the survey sought to explore attorney perspectives on many of the same topics investigated in the first court survey: attorney education and qualifications, notification of assignments and client meetings, investigation and expert witnesses, independence, confidential meeting space, and future standards. The survey was anonymous although respondents were asked to provide the county in which they most frequently practice as well as the approximate percentage of their caseload appointed by the court. Those who reported that their caseloads do not currently include any court appointed cases were directed to a condensed series of questions, while attorneys who reported carrying a court-appointed caseload of any size were asked to complete the full survey.

Description of Surveyed Attorneys

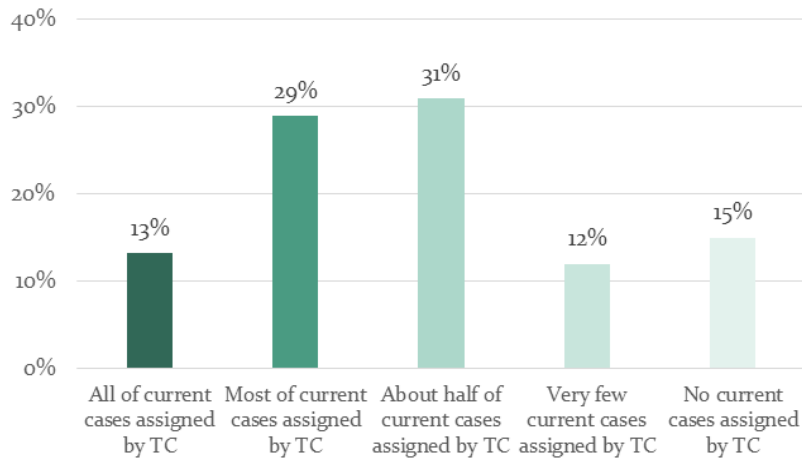
Figure 1. Counties in Which Surveyed Attorneys Practice (n=400 respondents)



In total, the MIDC received 400 survey responses from attorneys practicing in 47 counties. The map in Figure 1 illustrates the distribution of survey responses across the state by county. We received more than 50 responses from attorneys in Wayne County, and more than 20 responses per county from attorneys in Macomb, Oakland and Genesee counties. Attorneys from another nine counties submitted a total of six or more responses.

Figure 2. Proportion of Caseload Assigned by Trial Court (n=400 respondents)

As described above, attorneys were asked to identify the proportion of their state adult criminal caseload that is currently assigned by the trial court. Figure 2 illustrates the caseload breakdown, indicating that 42% of



surveyed attorneys receive “all” or “most” of their caseload from the trial court. Another 31% receive “about half” of their current caseload from the trial court, suggesting that most attorneys taking adult criminal indigent cases in Michigan dedicate a fair proportion of their caseload to this type of work. Fifteen percent of surveyed attorneys report that they currently do not receive any adult criminal cases from the trial court. These attorneys described their interest in indigent defense in a later survey question, indicating that many currently practice at the appellate level or took court appointed cases previously and were eager to express the concerns that caused them to leave this work. Unless otherwise indicated, these attorneys are not included in the figures and descriptions below since they only received prompts for a small number of questions.

Figure 3. Years of Experience Practicing Criminal Defense (n=341 respondents)

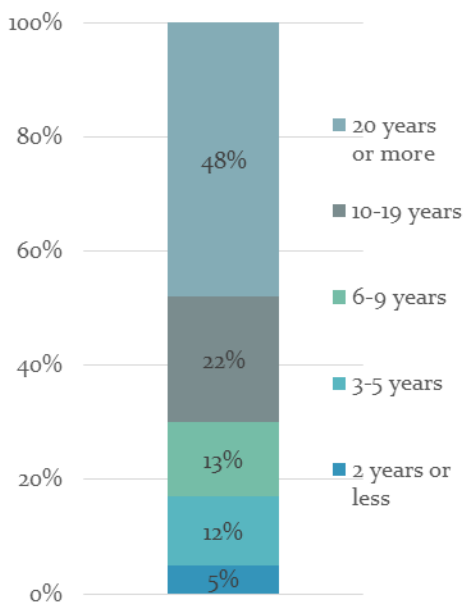


Figure 3 displays the experience levels of the remaining 341 attorneys, all of whom currently receive adult criminal cases from trial courts in Michigan. The graph indicates that the surveyed attorneys are an extremely experienced group, with **48% reporting that they have been practicing criminal defense in Michigan for 20 or more years.** Another 22% have been practicing for between 10 and 19 years. These results cannot be generalized across all publicly assigned criminal defense attorneys in Michigan, but it is clear that local attorneys have considerable institutional knowledge and are committed to defense representation.

ATTORNEY PERSPECTIVES ON THE FIRST FOUR STANDARDS

At the time of publication, the MIDC's first set of standards have been approved by the Department of Licensing and Regulatory Affairs. The standards address a variety of issues ranging from the provision of counsel at first appearance to timing requirements for when attorneys must conduct an initial interview of a client. The survey asked attorneys about four specific topics related to the first set of standards: the training and education of defense counsel, the availability and accessibility of confidential meeting space, attorney notification of assignments and client meetings, and the use of investigators and expert witnesses.

Training and Education of Defense Counsel

The state of Michigan has not historically required publicly appointed defense attorneys to complete continuing legal education (CLE) credits, despite national best practice recommendations that strongly suggest mandatory participation in such training.³ However, some counties have taken the initiative to require that attorneys complete CLEs or other forms of training in order to be eligible to take cases from their local courts. Indeed, the MIDC's prior survey of courts found that 15% of courts report that their local guidelines require indigent defense attorneys to complete CLEs. This survey similarly asked whether attorneys are held to such standards. A considerable number of attorneys (65%) confirm that they are required to attend continuing education or other forms of training in the court system in which they primarily practice. The high percentage of attorneys stating they are required to complete CLEs is a function of the proportion of surveyed attorneys who practice in locations that require CLEs, such as Wayne County.

Figure 4. Annually Completed CLEs as a Function of Local Requirements (n=332 respondents)

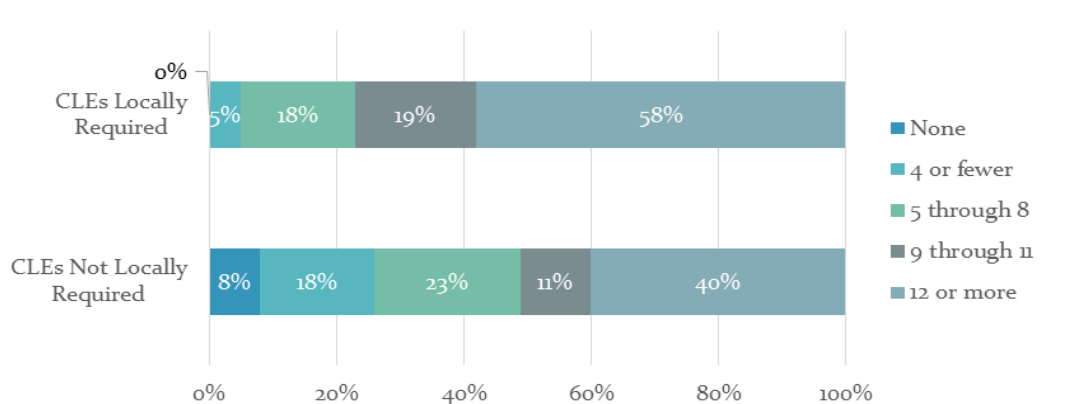


Figure 4 provides the distribution of annually completed CLEs based on whether attorneys are required by their local systems to attend training. The majority of attorneys who are mandated to attend training complete 12 or more credit hours annually. Even attorneys

without local requirements participate in training, with 40% reporting that they complete 12 or more credits annually relevant to the representation of the criminally accused.

Attorney perspectives on the education and training standard set forth by the MIDC are mixed. Many attorneys echo the sentiments expressed by court administrators and judges in the MIDC's prior court survey: standardized training requirements are necessary to ensure that attorneys hold a minimum level of knowledge, since the current requirement is "a law license and a heartbeat." In the following anecdote, an attorney discusses the importance of training.

"I strongly believe that indigent defense should not be a training ground for lawyers. The day that I was sworn in I was offered an assignment for an armed robbery case. I declined, telling the judge that I didn't think that I was ready for it. It was only a year and a half later, I got into it. A lawyer friend was joining a neighboring prosecutor's office, and asked if I wanted to take over his cases. I told him that I didn't know if I was ready. He said that he would go over the cases with me and help me if I had other questions. I took over 5 trials and 4 appeals. If I did have any questions, I could call him. I think that something like being in practice for 2 or 3 years should be a minimum requirement for obtaining assignments or even working in a defender's office."

Although attorneys believe in the importance of training, they express concern about the financial burden of paying for trainings and explain that they would be more likely to attend both local and national trainings if the costs are reimbursed or supplemented.

A handful of surveyed attorneys offer a different perspective on training, arguing that CLE requirements are perfunctory and a further burden on defense counsel. One writes, "I am offended by the notion that continuing legal education must be required for attorneys accepting criminal appointments. I have been accepting criminal appointments for 30 years, and I care about it... To require CLE for no other attorneys in the state, except those who do assigned criminal work, is to say that we alone are not to be trusted." Considering that only a handful of counties currently require attorneys to participate in CLE courses, and the MIDC Act requires continuing legal education for assigned counsel,⁴ compliance with the new standard on training will prompt widespread change across the state.

Confidential Meeting Space

The MIDC's second standard requires that all courthouses and holding facilities provide confidential meeting space for attorneys and clients. Both the United States Court of Appeals for the Sixth Circuit⁵ and the American Bar Association⁶ have recognized the importance of private meeting space in ensuring confidentiality and fostering the

conditions for the best possible representation. Although courts did not express considerable concern about the existence of confidential meeting spaces in the MIDC's prior survey, the findings of this survey confirm that many courts and holding facilities do not have adequate confidential meeting space for attorneys to convene with clients. According to surveyed attorneys, only 41% of courthouses and 56% of holding facilities in which they practice have a space that attorneys consider to be confidential.

Even more notable is the proportion of attorneys who report that they experience challenges to meeting confidentially with their clients *despite the existence* of so-called "confidential" spaces in their local facilities. **One-third of surveyed attorneys report concerns with the extent to which these spaces are actually private.** Attorneys report that "*conversations can be overheard easily*" by jail staff and other attorneys and clients who are meeting. Rooms or meeting booths may either be shared by other visitors, attorneys or defendants and may not be soundproofed. One attorney explains, "*The meeting rooms are not soundproof, and conversations outside the room can be heard on the inside, so presumably conversations inside the room can be heard on the outside by guards. This tends to make clients and myself nervous to have open conversations about case strategy, etc.*" Meeting rooms are also frequently multipurpose, often filled or booked for other purposes such as police interviews, prosecutor meetings, and even storage or inmate haircuts. Another attorney elaborates, "*There are only two private meeting rooms per courtroom. Typically at least one of those is taken up by the prosecutor and their witnesses. This leaves one room for 10 attorneys to meet with 25 clients.*" In addition to concerns regarding privacy, attorneys report that many of the holding facility policies make it difficult or impossible to bring in electronic materials, meaning they cannot review videos with clients. Attorneys note that past efforts to remedy their concerns have been unsuccessful.

"There is no confidentiality in the bullpen if there are other defendants present. There are also problems with confidentiality with the attorney telephone meeting room. Meetings can be observed and overheard from the adjoining rooms. Measures have been taken to alleviate soundproofing problems but whether or not it is effective remains to be seen. The ability to meet clients in the jail is difficult as there is no dedicated attorney-client room."

"They went to all this trouble to build three little rooms with doors on them for us to meet with incarcerated clients, but they won't let us shut the door, [there are] not enough rooms, and access is only allowed from 9:30 a.m. to 11:00 a.m."

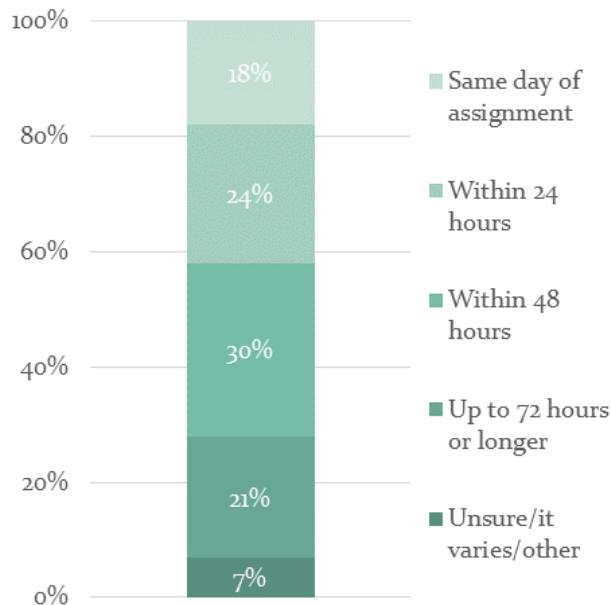
“There is not enough space/rooms available at the courthouse. There has been discussion of having an office across the street but this will lack security and require counsel and the defendant to leave the courthouse and return going back through security. Like every other governmental program, it has been designed by people who do not seek input from the people who actually do the work.”

These quotes echo the anecdotal evidence that the MIDC staff and commission members have gathered over the last year and confirm the importance of reform that prioritizes space for attorney-client meetings.

Notification of Assignments and Client Meetings

One of the issues addressed by the MIDC's first set of standards is the timeline on which defense attorneys are appointed to and notified of indigent cases. When attorneys are appointed and notified quickly, they can meet with clients sooner, facilitating trust in the attorney-client relationship and also allowing counsel to obtain critical information and evidence. Anecdotally, many attorneys have expressed concern that the appointment process moves slowly and presents obstacles to obtaining the most beneficial outcomes for clients. To explore this topic, the survey questioned attorneys about several aspects of the appointment and interview process.

Figure 5. Timing of Assignment Notification by Court (n=336 respondents)



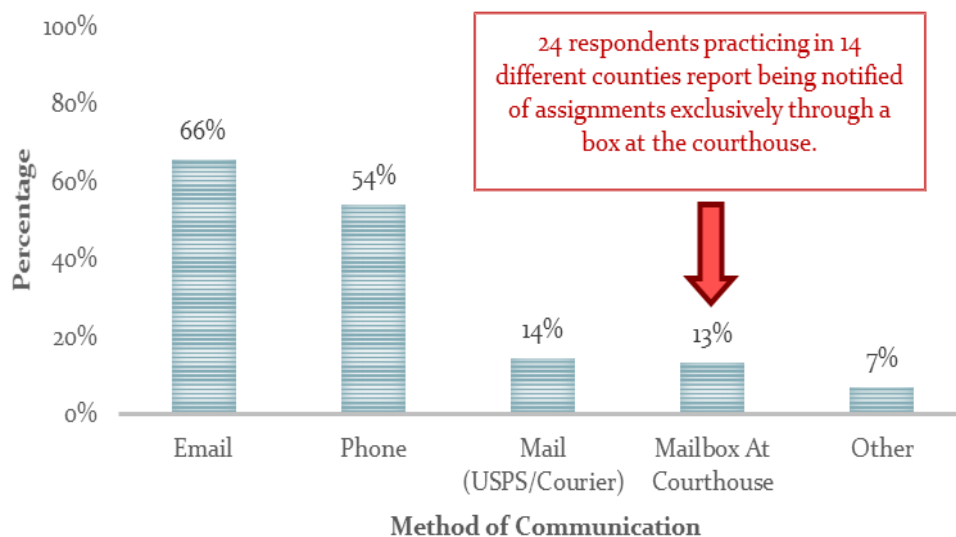
The MIDC's prior court survey suggested that the majority of courts attempt to complete the assignment process quickly, with 60% of courts reporting that they assign cases within the first 24 hours. Once cases are assigned, however, how quickly are attorneys notified of these assignments? Figure 5 illustrates that 42% of surveyed attorneys report being notified within 24 hours of assignment, a timeline that fosters immediate attorney involvement. The remaining attorneys are notified, on average, more than 24 hours after

appointment, with **21% indicating that notification takes up to 72 hours or longer.**

Courts send attorney assignment notifications through several different modes of communication including email, phone, and postal mail. Often, courts employ multiple methods when attempting to contact attorneys. Figure 6 illustrates that 66% of surveyed

attorneys are notified of assignments through email, with another 54% receiving assignments by phone. Less immediate forms of notification include postal mail and/or a mailbox at the courthouse. In written responses, attorneys explain that notifications through a courthouse mailbox are most problematic, as they are often not at the courthouse daily and, as a result, may not receive a notification for several days or weeks. In total, 24 attorneys practicing in 14 different counties report that a letter in their courthouse mailbox is the *only* way in which they are notified about assignments. Not surprisingly, **more time passes between assignment and notification for attorneys who are notified exclusively through a mailbox at the courthouse than attorneys who are notified through other means of communication.** Only 29% of attorneys receive notifications within 24 hours of assignment when they are notified exclusively through a courthouse mailbox, as compared to the 43% of attorneys who receive notifications within 24 hours when courts utilize other means of communication.

Figure 6. Method of Assignment Notification by Court (n=336 respondents)

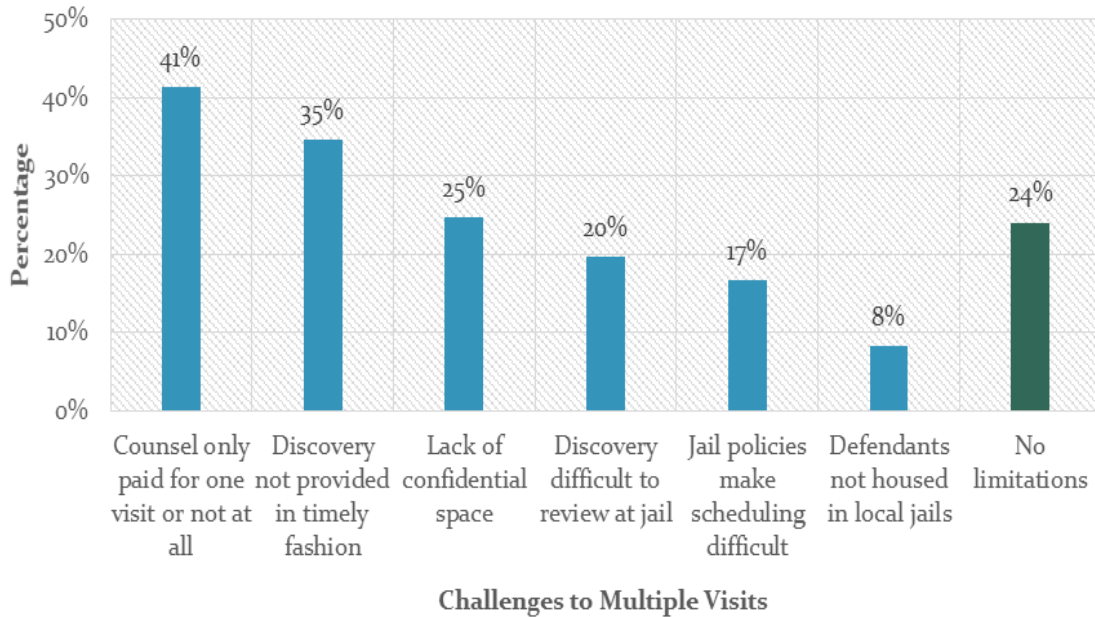


Once attorneys are notified of their case assignments, how quickly are they able to meet with new clients? Attorneys struggle to put an exact timeframe on this process because *“it varies by court and circumstance.”* For clients who are being held in custody, the timeframe is primarily dictated by their location. Meeting with clients who are not being held locally can make it difficult or impossible to meet in a timely fashion. One attorney explains, *“most of the district courts send in-custody defendants to county jails in the west or north of the lower peninsula, which makes it impractical for me to visit them before the first court appearance.”* State prisons and federal facilities often have complicated and narrow visiting policies, making it more difficult to schedule interviews. Even when clients are in local jails, attorneys can be delayed waiting to obtain discovery. When pressed to

specify a timeframe, 58% of surveyed attorneys report that they typically visit in-custody clients within three days of notification, with another 28% visiting between four and seven days. **Almost one-third of attorneys wait more than seven days before visiting in-custody clients.**

For many in-custody clients, their first meeting with their attorney is the only time they will meet with their attorneys outside of court. Three-quarters of surveyed attorneys report that although multiple client meetings would likely improve their clients' outcomes, the system is not set up to facilitate this type of ongoing communication. Figure 7 illustrates the frequency with which attorneys face challenges that hinder their ability to pursue client meetings beyond the initial interview. **Almost 40% of surveyed attorneys report that their courts' fee schedules either do not pay for any client visits or only allow payment for a single meeting.** Other attorneys report that they are unable to obtain discovery quickly and struggle to find confidential space in jails and prison facilities.

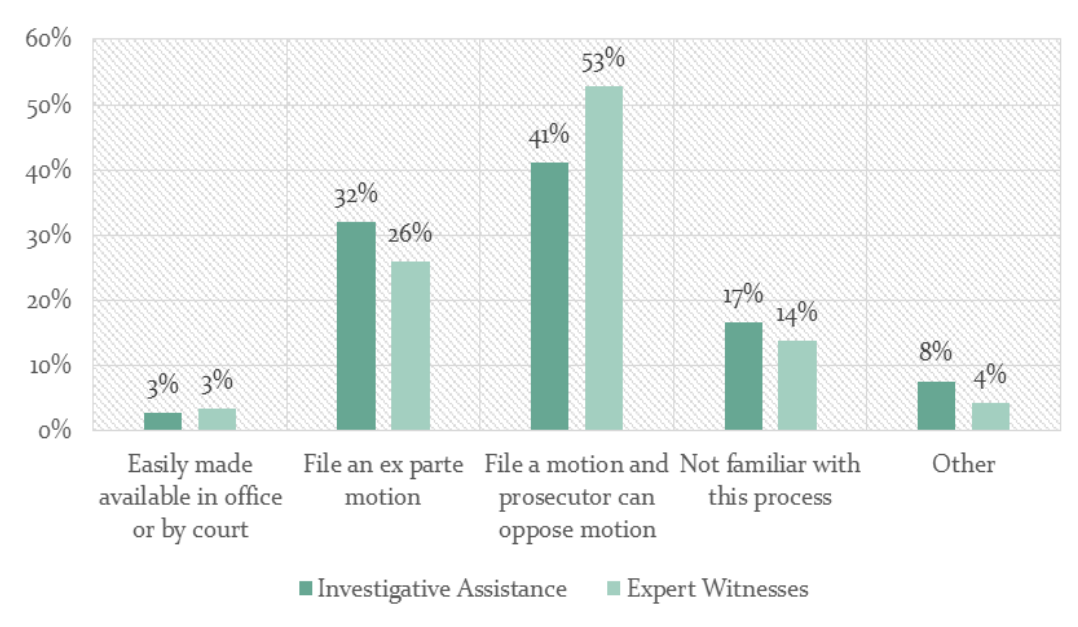
Figure 7. Attorney Challenges to Multiple Client Visits (n=341 respondents)



For a variety of reasons, meeting with clients who have been released into the community can pose an even greater challenge. Clients sometimes face challenges that require them to change telephone service providers and housing after being charged with a crime. They also may have significant work obligations that must be resolved after spending even a short amount of time in custody. As a result, only 27% of surveyed attorneys estimate that they meet with out-of-custody clients within three days of receiving an assignment.

Investigation and Expert Witnesses

Figure 8. Processes of Requesting Funding for Investigators and Experts (n=333 respondents)



The survey also explored the utilization of investigators and expert witnesses by defense counsel, a key issue in the MIDC's first set of standards. The MIDC's survey of court systems did not examine this issue in-depth, but comments from courts administrators and judges suggested that few courts include funds for such expertise into their budgets. In this survey, attorneys were asked to explain the process by which they ask for investigative assistance and expert witnesses. Figure 8 indicates that an overwhelming percentage of attorneys find the process to be difficult, with only 3% reporting that their offices or courts make these types of assistance easily attainable. One attorney laments,

"I do not like that I have to go begging to the court for money for experts or investigators. I once had a judge tell me when I presented a motion for an investigator that I did not need one. I did need an investigator. If it was a retained case, I would have used an investigator. This is problematic because the prosecutors have many investigators at their disposal."

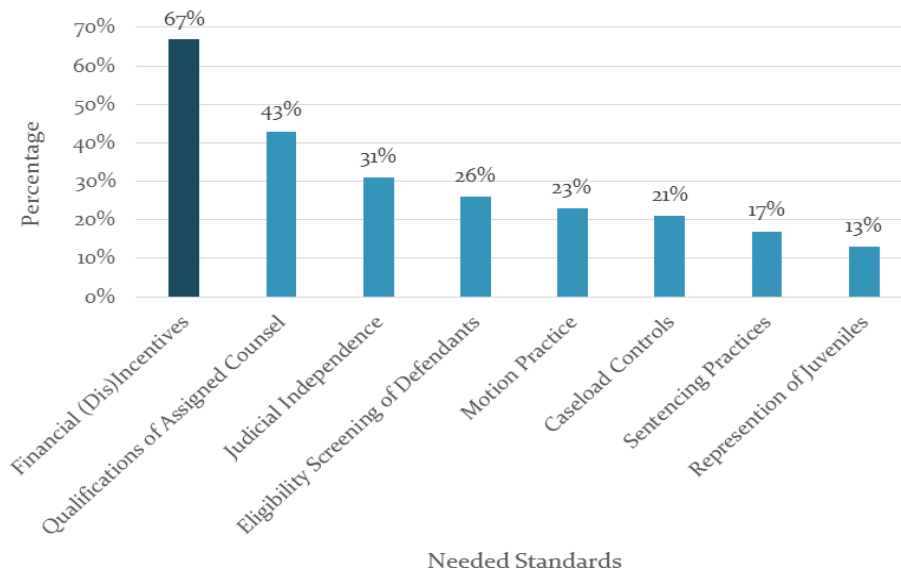
Further, **between 14% and 17% of surveyed attorneys report that they are not familiar with this process**, suggesting that a considerable number of attorneys have not ever attempted to ask for funds for either investigative assistance or expert witnesses in the courts in which they currently practice.

Despite the obstacles to utilizing investigators and expert witnesses, some assigned attorneys report using such assistance on their cases. Forty percent of publicly appointed defense attorneys report using investigative assistance on an assigned case in the last year, and of these attorneys, 60% report that “at least some” of these investigators were appointed by the court. Only 29% of attorneys report using an expert witness in a recently assigned case, and 66% report that “at least some” of these witnesses were assigned by the court. Attorneys should be commended for their utilization of investigative assistance and expert witnesses despite the apparent difficulty in seeking out and funding these professionals.

ATTORNEY PERSPECTIVES ON FUTURE STANDARDS

To help inform the MIDC’s work going forward, attorneys were asked to select potential future standards that they feel are critical for the MIDC to implement. Figure 9 shows that attorneys are most concerned about financial incentives and disincentives, which include low rates of pay and fee structures that encourage attorneys to act outside their clients’ interests. Forty-three percent of surveyed attorneys believe that the MIDC should further address the qualifications of assigned counsel, with some worrying that the favoritism practiced by some judges means that unqualified attorneys may receive more cases than experienced, qualified counsel. Approximately one-third of attorneys also emphasize the importance of judicial independence in the assignment process.

Figure 9. Directions for Future MIDC Standards (n=321 respondents)



Compensation Issues

Publicly assigned attorneys emphasize that the most pressing concerns in their practice are related to the abysmal compensation that they receive for representing indigent clients. Attorneys express frustration that their rates – which may be hourly, per event, or based on a flat-fee – pale in comparison to their retained rates and, in many jurisdictions, have not been increased in many years. One attorney states, “Our pay was cut 8% almost 10 years ago and never raised back up.” Another writes, “I think [the

“I think [the payment system] is fair for 1987. The pay has been the same since then, and in some cases we get paid less now.”

payment] system is fair for 1987. The pay has been the same since then, and in some cases

“You will never be compensated for the amount of time that you should spend on a case.”

we get paid less now.” The majority of surveyed attorneys echo this sentiment, highlighting how many courts have either cut their wages or failed to increase them over years or even decades. Appointed attorneys typically make a fraction of the amount they earn taking retained cases. One attorney

summarizes the situation across Michigan counties in the following quote: “Accepting assignments is a pro bono experience. You will never be compensated for the amount of time that you should spend on a case.”

Attorneys explain that the current compensation system has severe consequences for case outcomes. Although attorneys go to great lengths to ensure that they provide the best possible representation for their clients, compensation structures are not designed to incentivize quality representation. Flat-fee compensation systems, in particular, mean that attorneys are not financially encouraged to spend sufficient time on their cases. As one attorney states, “The flat fee system is a disincentive for time, effort and energies expended beyond the flat fee... The flat fee system does not represent what the case is worth to the lawyer or to the defendant.”

Another attorney explains,

“Attorneys are paid a set rate per case, plus a low hourly rate for conducting trials. There's no motivation to go to trial, no motivation to thoroughly prepare for trial, and every motivation to get the client to plead right away at the first meeting with the prosecutor. Copying costs and parking expenses are not reimbursed.”

Attorneys who work for court systems that reimburse by case event face their own set of challenges, as described by one attorney below.

“Being paid only for the first pretrial encourages attorneys to plea their clients on that day, which is disturbing. Being paid for one jail visit makes it difficult to meet with in-custody clients. No pay for defense motions also creates issues. I understand paying for several pretrials or motions might encourage some attorneys to file frivolous motions or set unnecessary pretrials, but to think someone plead guilty or didn't have a motion filed on their behalf because an attorney did not want to go to court without compensation isn't right and isn't what the 6th amendment requires.”

Attorneys also note the lack of parity between resources for defense counsel and for prosecutors. They report that prosecutors not only get paid a higher wage to handle fewer cases but also have substantially more resources at their disposal, including clerical support and investigators. *“There is no parity with prosecution resources in any sense, as there is no second chair in capital cases, no resources for video presentation or gathering witnesses or contacting experts or other investigation. The inequality ensures that defendants are left at a great procedural disadvantage at trial and at critical stages of discovery.”* Although public defender offices make an effort to provide these types of centralized resources, the lack of funding for these offices means they struggle against many of the same challenges as assigned counsel and contract defenders.

“The inequality ensures that defendants are left at a great procedural disadvantage at trial and at critical stages of discovery.”

The extent to which publicly appointed criminal defense attorneys are outraged by compensation scales is evidenced by the 15% of surveyed attorneys (15%, Figure 1) who used to take assigned cases or are unwilling to accept assigned cases despite their interest. Most of them reference the compensation scale in their explanation for these decisions.

“I will not again take assigned cases unless and until a system of fair, and adequate, payment is developed for all the necessary work that a defense attorney should do to properly represent a client, including meeting with clients as necessary, preparation for hearings or trial, and time spent waiting for a judge to call the case when the attorney could otherwise be working productively elsewhere.”

Although not explored extensively in this survey, low rates of compensation and payments that are delayed not only shape client outcomes but also have tremendous

impacts on the personal lives of attorneys. Several attorneys alluded to these concerns, explaining that the pay is so low that they cannot consistently afford rent, health insurance, or household bills. *"It would really be refreshing to be able to represent a client without being burdened by the concerns of whether or not you can afford to put gas in your car, pay the electric, gas, phone and other expenses necessary to practice law at the end of every month."* Attorneys also describe how the lack of adequate compensation reduces morale in the field, arguing that defense attorneys must be paid at a rate commensurate with prosecutors in order for the system to attract qualified attorneys. The impact of low pay on the lives of attorneys was recently explored in great detail in a report by the North Carolina Office of Indigent Defense Services,⁷ and the MIDC hopes to further explore the personal impact of the current pay scale on attorneys in the future.

Independence

National indigent defense agencies emphasize that the selection, funding, and compensation of defense counsel should all be independent from judicial supervision in a quality indigent defense system.⁸ Some court systems have responded to the MIDC Act by starting to create more independent public defense and assignment systems. To examine attorney perspectives on current levels of independence in Michigan's local courts, the attorney survey asked a series of questions on judicial involvement in the case assignment process. **Only twenty-eight percent of surveyed attorneys confirm that, in their experience, the appointment processes in their court(s) are independent from the judiciary.** These attorneys explain that in their local courts, assignments are made on a fair rotating basis and if discretion is allowed, it is never or rarely used.

Among remaining attorneys, the majority articulate a variety of concerns about how attorneys are appointed to cases. Overwhelmingly, they report that if there is any room in the system for discretion in assignments, it is certain to be abused. One attorney explains, *"Who receives cases is arbitrary. Despite qualified individuals asking to receive capital case assignments, they are denied for invalid reasons while unqualified attorneys who have had repeated complaints continue to receive appointments."* Regardless of the

"If I file motions, ask for experts, or go to trial, I am punished. I no longer get assignments."

type of case in question, attorneys practicing in many of Michigan's courts observe that a handful of attorneys are awarded the vast majority of the cases while the remaining attorneys receive only a few.

The attorneys describe a number of factors that influence the distribution of cases. In some cases, judges preferentially offer cases to friends or family. Other times, the assignment process is clearly and consistently tied to how quickly attorneys are willing to push their cases

through the system. One explains, *"If I file motions, ask for experts, or go to trial, I am punished. I no longer get assignments."* Another attorney elaborates on this concern:

"Attorneys who are not qualified or who don't want to be bothered to do their job continuously receive the most appointments because they just push clients through. It seems that the courts don't want to give appointments to attorneys who will hold hearings/trial or file motions. The more you are willing to do for your clients, the less appointments you seem to receive."

Speed rather than quality is reportedly incentivized: attorneys who are willing to plead out their defendants are more likely to be offered cases in the future. Ultimately, in systems that do not utilize a random rotation, many attorneys feel that appointments are based on favoritism rather than merit or fairness, with case assignments *"dependent on staying in good graces with the judge."* This principle applies both to assigned counsel and contract defender systems that do not exclusively assign cases in an ordered fashion.

Final Thoughts

The MIDC's first survey of publicly appointed criminal defense attorneys provides a wealth of insight into how front-line practitioners experience the indigent defense system. Not surprisingly, attorneys report deep frustration with the operation of the system and the slow pace of reform efforts. The findings confirm that attorneys share the MIDC's concerns regarding judicial independence, education and training, and financial incentives and disincentives. Although a handful of attorneys express satisfaction with their local indigent defense systems, the majority feel overwhelmingly undercompensated and underappreciated. Their responses provide compelling evidence for the negative impacts of current practices on client outcomes, and it is clear that the well-being of both clients and front-line attorneys depends on pervasive system-wide change.

In reflecting on the work of the MIDC to date, many attorneys express their appreciation for the upcoming reform. One respondent writes, *"Thanks for doing what you're doing. I know you're going to receive a lot of push back from all involved – administration and attorneys – and I want you to know what you do is appreciated."* Others expressed their frustration with what they perceive to be many years of work with little actual change. *"Your work is taking a long time to complete and the longer you delay in getting solutions, the more defendants receive poor representation. When did this start? Seven years ago?"*

Underscoring fears that have been expressed to the MIDC, attorneys also emphasize their concern that new standards will increase the burden on overworked and underfunded defense attorneys. *“Please keep in mind when creating these standards that you are creating more obligations for attorneys who work hard to keep their clients well represented.”* And, *“I hope that the Commission will push for more resources, instead of piling on already underpaid and overworked indigent defense attorneys.”*

Overall though, respondents *“applaud the Commission’s work”* since *“the present system is a disgrace to our constitution.”* As stakeholders who work in the trenches, attorneys hope that their perspectives and opinions will be taken into consideration in each stage of the reform process. The MIDC’s first set of standards were approved by the Department of Licensing and Regulatory Affairs in May, 2017, and the Commission has started assisting local indigent defense systems with the development of compliance plans to address these standards. In response to national best practices and the perspectives discussed by court appointed attorneys in this survey, the MIDC has also released its second set of standards that address independence from the judiciary, attorney workload, qualifications and review, and compensation.⁹ The MIDC will continue to seek the perspectives of indigent defense providers and other stakeholders as Michigan moves ahead with system reform.

Endnotes

¹ Michigan Indigent Defense Commission (2016). *Snapshot of Indigent Defense Representation in Michigan’s Adult Criminal Courts: The MIDC’s First Survey of Local Court Systems*. Lansing, MI: MIDC.

² New York State Office of Indigent Legal Services (2016). *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*; North Carolina Office of Indigent Defense Services (2015). *State Defender Survey Results: Impact of Budget Constraints*; Allan K. Butcher & Michael K. Moore (2000). *Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas*, Committee on Legal Services to the Poor in Criminal Matters.

³ American Bar Association (2002). *Ten Principles of a Public Defense Delivery System*. Chicago, IL: American Bar Association.

⁴ MCL 780.991(2)(e).

⁵ *United States v Morris*, 470 F3d 596 (CA6, 2006).

⁶ American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *supra* n.3.

⁷ North Carolina Office of Indigent Defense Services, *supra* n.2.

⁸ American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *supra* n.3; MCL 780.991(1)(a).

⁹ <http://michiganidc.gov/standards/>.