

The Oakland County Indigent Defense Services Office (IDSO) expects every attorney on our appointment roster to provide competent, caring, and effective legal representation. Michigan Indigent Defense Commission (MIDC) Standard 7 requires the IDSO to monitor and regularly assess the quality of the representation provided by our roster attorneys. Because long-standing best practices strongly encourage indigent defense systems to publicize their criteria for evaluations,¹ the IDSO will evaluate attorney performance in accordance with the **National Legal Aid & Defender Association's Performance Guidelines for Criminal Defense Representation (2006)²—subject to the amendments and additions below.**

It's important to note that the guidelines do not modify an attorney's obligations under the law, the Michigan Rules of Professional Conduct, or the MIDC Standards. Additionally, the guidelines are not a substitute for an attorney's professional judgment. As the guidelines frequently acknowledge, there may be times when it is better for the client if the attorney does not follow a guideline.

Guideline 1.2 Education, Training and Experience of Defense Counsel

Add: Counsel must comply with MRPC 1.1 and MIDC Standard 1.

Guideline 2.2 Initial Interview

Add: NEW (3)(D) the nature of the allegations, what the prosecution must prove, and maximum potential sentence;

(3)(F) the importance of maintaining contact with counsel and the need to notify counsel of any change of address;

(3)(G) when counsel will see the client next;

(3)(H) realistic answers, where possible, to the client's questions, and

(3)(I) any arrangements that will be made or attempted for the satisfaction of the client's needs, including medical or mental health attention and contact with family or employers.

Largely taken from Guideline 3.4, OADC *Guidelines on Indigent Defense*.

¹ See *Guidelines for Legal Defense Systems in the United States* (1976), Guideline 5.4.

² <https://www.nlada.org/defender-standards/performance-guidelines>.

Remember: Counsel must comply with the requirements of MIDC Standard 2—even if they do not have all of the necessary information or documents for the case.

Guideline 2.2A Duty to Keep Client Informed and Advised About the Representation

(a) Counsel should actively work to maintain communication and an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody. Counsel should also attempt to learn about challenges and personal circumstances hindering or affecting their client's ability to participate in the case or their goals. For example, the client lacks reliable internet access or just wants to plead guilty to get home to their children.

(b) Counsel should keep the client reasonably and currently informed about developments in, and the progress of, the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(c) In communicating with a client, counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(d) Counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client's access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, there is good reason not to do so.

This guideline is largely taken from Standard 4-3.1 and Standard 4-3.9, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017).

Guideline 2.3 Pretrial Release Proceedings

Add: Where appropriate, counsel should not hesitate to appeal the bond determination to a higher court.

Guideline 3.1 Presentment and Arraignment

Add: NEW Guideline 3.1 Arraignment

(1) Counsel should preserve the client's rights at the first appearance on the charges by entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so.

(2) Counsel should also explain the criminal justice process, advise on what topics to discuss with the judge, focus on the potential for pre-trial release, and, when reasonable, try to achieve dispositions outside of the criminal justice system via civil infraction or dismissal.

See MIDC Standard 4.

Guideline 3.2 Preliminary Hearing

Note: In Michigan, the preliminary examination is the hearing that most closely fits the underlying purpose of Guideline 3.2.

Guideline 4.1 Investigation

Add: Where appropriate, counsel shall request funds to retain an investigator. Where it is reasonably necessary to prepare the defense and/or rebut the prosecution's case, counsel shall request the assistance of an expert. *See* MIDC Standard 3.

Guideline 4.4 Preparation for Court Proceedings, and Recording and Transmitting Information

(a) Counsel should prepare in advance for court proceedings. Adequate preparation depends on the nature of the proceedings and will often include: reviewing available documents; considering what issues are likely to arise and the client's position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If a case is scheduled for trial, counsel should diligently prepare to conduct the trial on the date scheduled. However, counsel should not hesitate to make a record and request an adjournment if circumstances outside of counsel's control have prevented counsel from being adequately prepared to conduct the trial on the date scheduled.

(b) Counsel should appear at all hearings in cases assigned to them, unless they have good cause and a substitute counsel is arranged. A defense attorney who substitutes at a court proceeding for another attorney should be adequately informed about the case and issues likely to come up at the proceeding and should adequately prepare.

(c) Counsel handling any court appearance should document what happens at the proceeding, to aid counsel's own memory and the client's future reference, and so that necessary information will be available to counsel who may handle the case in the future.

(d) Counsel should take steps to ensure that any court order issued to the defense is transmitted to the appropriate persons necessary to effectuate the order.

This guideline is largely taken from Standard 4-4.6, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017).

Guideline 4.5 Diligence, Promptness and Punctuality

(a) Counsel should act with diligence and promptness in representing a client, and should avoid unnecessary delay in the disposition of cases. But counsel should not act with such haste that quality representation is compromised.

(b) When providing reasons for seeking delay, counsel should not knowingly misrepresent facts or otherwise mislead. Counsel should use procedural devices that will cause delay only when there is a legitimate basis for their use. Counsel should not accept a representation for the purpose of delaying a trial or hearing.

(c) Counsel should know and comply with timing requirements applicable to a criminal representation so as to not prejudice the client's rights.

(d) Counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. Counsel should emphasize to the client, assistants, and defense witnesses the importance of punctuality in court attendance.

This guideline is largely taken from Standard 4-1.9, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017).

Guideline 6.2 The Contents of the Negotiations

Note in 6.2(c)(1) Language regarding *Alford* pleas omitted as they are not applicable in Michigan State courts.

Guideline 8.3 Preparation for Sentencing

Add: (a)(4) Counsel will review the presentence report with the defendant when they are unable to competently review the presentence report on their own.

Guideline 8.4 The Official Presentence Report

Add: Preparation of a presentence report is an integral part of a criminal case. Counsel should attend the presentence interview unless they are confident that their failure to attend will not adversely affect the client's case.

Guideline 8.5 The Prosecution's Sentencing Position

Delete 8.5(c) as likely inapplicable in Michigan.

Guideline 9.2 Right to Appeal

Delete: Subsection (a) after first sentence.

Add: At the conclusion of the case, counsel must comply with their obligations under the Michigan Court Rules. In addition, counsel must comply with their obligations under MRPC 1.16 upon termination of representation.

Guideline 10.1 Role of Defense Counsel Representing a Client with a Mental Disorder or Other Disability

(a) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, counsel should also consider whether a mental examination or other protective measures are in the client's best interest.

(b) Counsel who represent clients with mental disorders should provide client-centered representation that is inter-disciplinary in nature. Counsel should be familiar with local

providers and programs that offer mental health and related services to which clients might be referred in lieu of incarceration, in the interest of reducing the likelihood of further involvement with the criminal justice system.

(c) Counsel who represent clients with mental disorders or other disabilities should work particularly closely with their clients to ensure that the clients understand their options. They should be prepared to deal with difficulties in communication that can result from the client's mental disorder (including from transfers to a different locale necessitated by treatment needs) or other disability.

(d) Counsel who represent clients with mental disorders should explore all mental state questions that might be raised, including whether the client's capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant's mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.

(e) Counsel who represent clients with mental disorders should seek relevant information from family members and other knowledgeable collateral sources. Attorneys should share information about their clients with family members and knowledgeable collateral sources only with their clients' assent, and in a way that does not compromise the attorney-client privilege.

(f) Counsel who represent defendants in specialized courts should recognize that they have a particularly important role because a defendant may relinquish substantial rights in a specialized court.

(g) Counsel should make any ADA accommodation request to the court's ADA coordinator as soon as possible. Counsel should also confirm with the judge's chambers to make sure the court is aware of the request for accommodation. (If the case moves to circuit court, counsel should contact the circuit court judge's chambers before the arraignment to ensure that the court is aware of the accommodation.)

(h) Counsel should not make assumptions about the type of accommodation their client needs based solely on the nature of their disability. For example, some people who are blind do not read braille and some people who are deaf do not sign. It is important to ask the client how they would like to be accommodated.

This guideline is largely taken from Standard 7-1.4, *ABA Criminal Justice Standards on Mental Health* (2016) and Standard 4-3.1, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017). *See also* MIDC Standard 2; *Initial Interview: A Guide to Implementation of the Minimum Standards for Delivery Systems Prepared by the Michigan Indigent Defense Commission* (2017), p 7.

Guideline 10.2 Role of Defense Counsel Representing a Client with Limited English Proficiency or Who is Deaf or Hearing Impaired

(a) When language barriers exist, Counsel must take whatever steps are necessary to fully explain the proceedings in a way the client can understand and maintain meaningful communication with the client throughout the case.

(b) Counsel should reach out to the court as soon as possible to have an interpreter appointed. They should also confirm with the court in advance of all proceedings to ensure that an interpreter will be present.

(c) When in court, Counsel must insist that every word spoken during the proceeding be interpreted for their client by a provisionally or fully certified interpreter unless not doing so is in the client's best interest.

(d) Counsel should always insist that the interpreter use consecutive (verbatim interpretation after something is said) or simultaneous (verbatim interpretation while something is being said) interpretation—not summary (general description of what was said).

(e) If a proceeding is expected to be long, Counsel should consider whether to request a second interpreter for the proceeding to give the primary interpreter breaks. Studies have shown that the quality of interpretation can decline as an interpreter becomes fatigued.

(f) Counsel should remember when working with clients who are deaf or hearing impaired that an ASL interpreter may not be what a particular client needs. Some people who are deaf or hearing impaired prefer a variation of transliteration or a variation of tactile interpretation. *See* Guideline 10.1(h).

(g) Counsel should not make assumptions about the client's native language based on where the client is from. For example, a person can come from a Spanish-speaking country but speak an indigenous language. Similarly, a person may speak a dialect of a language.

(h) Counsel should not use interpreters as paralegals or expect the interpreter to act in place of the attorney. For example, counsel should never give the interpreter forms or an advice of rights and leave. The interpreter is there to provide language support, not litigation support. Counsel should always be prepared to answer questions and ensure that legal concepts are explained in a way that the client can understand.

See MCR 1.111; MIDC Standard 2(D)(d); <https://nationaldeafcenter.org/resources/access-accommodations/coordinating-services/interpreting/>.

Guideline 10.3 Improper Bias Prohibited

(a) Counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity or expression, height, weight, familial status, marital status, or socioeconomic status. Counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of counsel's authority.

(b) Counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of counsel's work.

This guideline is largely taken from Standard 4-1.6, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017).

Guideline 10.4 Defense Counsel's Duty to Provide Culturally Competent Representation

(a) Counsel should ensure that they have the awareness, attitude, skills, knowledge, and resources necessary to provide assistance in a culturally competent manner and in order to be responsive to, and aligned with, the interests of those clients most affected by poverty, racism, discrimination, and other forms of structural oppression. Counsel should avoid making assumptions about clients based on things like sex, gender, sexual orientation, race, national origin, and class.

(b) Counsel should be mindful that their client's cultural background might make them uncomfortable disagreeing with counsel, the court, or the police. It could also make the client hesitant to ask questions or talk about certain matters involving the case.

This guideline is largely taken from Standard 4.4, *ABA Standards for the Provision of Civil Legal Aid* (2021).

Guideline 10.5 Civility with Courts, Prosecutors, and Others

- (a) As an officer of the court, counsel should support the authority and dignity of the court by adherence to rules of professionalism and by manifesting a courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors, courtroom staff and others. In court as elsewhere, counsel should not display or act out of any improper or unlawful bias.
- (b) In all contacts with judges, counsel should maintain a professional and independent relationship.
- (c) When court is in session, unless otherwise permitted by the court, counsel should address the court and should not address other counsel directly on any matter relating to the case.
- (d) In written filings, counsel should respectfully evaluate and respond as appropriate to opposing counsel's arguments and representations and avoid unnecessary personalized disparagement.
- (e) Counsel should comply promptly and civilly with a court's orders or seek appropriate relief from such order. If counsel considers an order to be significantly erroneous or prejudicial, counsel should ensure that the record adequately reflects the events. Counsel has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, counsel may take other lawful steps to protect the client's rights.
- (f) Defense counsel should develop and maintain courteous and civil working relationships with judges and prosecutors.

This guideline is largely taken from Standard 4-7.2, *ABA Criminal Justice Standards for the Defense Function* 4th ed (2017).

Guideline 10.6 Defense Counsel Serving as Post-Arrest Docket Attorney

- (a) *Before Shift*: Depending on the stage of the case, counsel should contact the prosecutor to obtain discovery and information about a potential plea offer or the court/probation department to obtain the presentence report. Counsel must attempt to contact each assigned client to discuss their case—even if counsel does not have key documents like the presentence report or discovery. If counsel cannot reach a client, they should promptly check whether the client is in the Oakland County Jail. Counsel should speak

with in-custody clients before court. When possible, counsel should have any paperwork for the court submitted at least 24 hours before their shift.

(b) *During Shift:* Docket clients are entitled to the same competent, caring, and effective legal representation counsel provides to their other clients. Counsel should be diligent about seeking out clients that they were not able to speak to before their shift and clients who might have been recently added to their docket. Counsel should take notes about what happens during each hearing in case their client has questions or needs additional instruction. It is important for counsel to ensure that each client understands what happened and what their next steps are, if any. If the case is not resolved, subsequent counsel may also have questions.

(c) *After Shift:* If they have good contact information, counsel must attempt to let clients who failed to appear for court know about any warrants or new court dates.