

Legislative Analysis



**MIDC ACT:
REVISE & REESTABLISH MIDC WITHIN LARA**

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

**House Bill 5842 as reported without amendment
Sponsor: Rep. Kurt Heise**

Analysis available at
<http://www.legislature.mi.gov>

**House Bill 5843 as reported
Sponsor: Rep. Martin Howrylak**

**House Bill 5845 as reported
Sponsor: Rep. Vanessa Guerra**

**House Bill 5844 as reported
Sponsor: Rep. Klint Kesto**

**House Bill 5846 as reported
Sponsor: Rep. David LaGrand**

**Committee: Criminal Justice
Complete to 9-21-16**

BRIEF SUMMARY: The bills amend various sections of the Michigan Indigent Defense Commission Act, which establishes a commission to develop and oversee the implementation of minimum standards for the effective representation of indigent adults by local indigent criminal defense systems, to address deficiencies in the act that may conflict with constitutional requirements for the separation of powers between branches of the government.

House Bill 5842 reestablishes the Michigan Indigent Defense Commission within the Department of Licensing and Regulatory Affairs; currently the MIDC is within the judicial branch of government. The bill also revises the process by which minimum standards for the local delivery of indigent criminal defense services are approved.

House Bills 5843-5846 make complementary revisions to other sections within the Michigan Indigent Defense Commission Act to conform to the changes made by House Bill 5842.

The bills are tie-barred to each other; a bill cannot become law unless a bill to which it is tie-barred is also enacted into law. Each of the bills would take effect 90 days after enactment.

FISCAL IMPACT: The bills will likely have a nominal fiscal impact on the Department of Licensing and Regulatory Affairs (LARA) and no fiscal impact on local units of government. HB 5842 transfers administration of the Michigan Indigent Defense Commission from the judiciary to LARA, but the increased administrative costs that are likely to arise will be offset by additional funding provided for the administration of the commission. LARA will be responsible for several administrative functions that will increase the department's costs; namely, holding public hearings for and approving proposed standards for the local delivery of indigent criminal defense services. Additionally, the department may experience increased costs due to challenges of adopted standards, which are subject to judicial review.

THE APPARENT PROBLEM:

Over fifty years ago, the U.S. Supreme Court ruled in *Gideon v Wainwright* that all individuals accused of a crime have the right to an attorney. That right to counsel was also embodied in the Michigan Constitution. However, according to many, the system of criminal defense for the poor operating in Michigan for decades has been rife with problems and underfunding, often resulting in ineffective representation that in turn results in inappropriate and longer incarceration, increased indigent appeals cases, and at the extreme, wrongful convictions. Several practices that often lead to ineffective counsel have been identified; these include appointed attorneys meeting clients minutes before going before the judge, attorneys forced to meet with clients in hallways and bathroom stalls where there is no privacy, attorneys assigned cases for which they have no knowledge or experience relating to the specifics of the case (e.g., an attorney with no knowledge of immigration law being assigned to represent an immigrant), high caseloads and low pay that discourage or make impossible adequate time to prepare a case, and, unlike prosecutors, having to ask the judge for funds to investigate a case.

In response, Governor Rick Snyder established the Indigent Defense Advisory Commission by executive order (EO 2011-12) and charged the commission with studying the state's current system (or systems) and making recommendations to the Governor and Legislature for improvements to the system that would be fair, consistent, effective, and cost-effective, among other things. Subsequently, Public Act 93 of 2013 was enacted to create the Michigan Indigent Defense Commission Act, which adopted many of the Commission's recommendations, created the Michigan Indigent Defense Commission, and also encompassed the "Ten Principles of a Public Defense Delivery System" previously adopted by the American Bar Association and the State Bar of Michigan.

Among other things, the new Michigan Indigent Defense Commission was charged with proposing minimum standards for the local delivery of indigent criminal defense services that would meet constitutional requirements for the effective assistance of counsel yet not infringe on the state Supreme Court's authority over practice and procedure in the state courts as protected by the state Constitution.

After public hearings and an opportunity for the public to provide feedback on draft proposals, the first of the newly developed minimum standards were submitted to the Michigan Supreme Court for approval earlier in 2016. The minimum standards address the training and education of counsel, the initial client interview, investigations and assistance of experts, and counsel at first appearance and other critical stages.

On June 1, 2016, the Michigan Supreme Court (MSC) announced that it *conditionally* approved the proposed minimum standards (Administrative Order No.2016-2). According to a press release by the MSC, "the Court's approval is subject to and contingent on legislative revision of the Michigan Indigent Defense Commission Act (the Act) to address provisions of uncertain constitutionality." The press release lists the three primary concerns of the MSC regarding the Act, all of which involve the potential for interference with Constitutional provisions pertaining to the separation of powers between branches of government. In particular, the Act:

- Places the Michigan Indigent Defense Commission (MIDC) within the judicial branch "but does not provide the Court the ability to supervise and direct the commission's activities and employment."
- Certain provisions in the Act "might present an unconstitutional usurpation of the Court's authority to 'have general superintending control over all courts.'"
- Though the Act allows the MIDC to regulate the legal profession, "the Constitution exclusively assigns regulation of the legal profession to the judiciary."

In order for the standards to take full effect by the end of the year, the above concerns must be sufficiently addressed. If not, the MSC's conditional approval will be automatically withdrawn as of December 31, 2016. Legislation to address the concerns identified by the MSC, and to avoid any disruption in the process to improve the State's indigent criminal defense system, has been offered.

THE CONTENT OF THE BILLS:

House Bill 5842

The bill amends Sections 3, 5, and 11 of the MIDC act (780.983, 780.985, and 780.991). Public Act 93 of 2013 created the MIDC act and placed the new commission within the judicial branch of state government. Instead, the bill places the commission within the Department of Licensing and Regulatory Affairs (LARA). Thus, the commission will be located in the executive branch of state government.

Minimum standards

One of the duties of the commission is to propose minimum standards for the local delivery of indigent criminal defense services. The minimum standards must be designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel. The bill adds that these minimum standards must not infringe on the state Supreme Court's authority over practice and procedure in the state courts as set forth in Section 5 of Article VI of the state constitution.

The bill also deletes numerous references to oversight currently provided by the state Supreme Court in the approval process for minimum standards and instead references LARA. In addition, the bill adds the following regarding approval of a minimum standard for the local delivery of indigent criminal defense services:

- An indigent criminal defense system that objects to a recommended minimum standard on the ground that it would exceed the MIDC's statutory authority must state specifically how that recommended minimum standard would exceed the commission's authority.
- A minimum standard approved by LARA is not subject to challenge through the appellate procedures contained in Section 15 of the act. Further, an approved minimum standard for the local delivery of indigent criminal defense services within an indigent criminal defense system is not a rule as defined in Section 7 of the Administrative Procedures Act. (Under that act, "rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the

agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.)

- Approval of a minimum standard proposed by the MIDC is considered a final LARA action subject to judicial review under Section 28 of Article VI of the state constitution to determine whether the approved minimum standard is authorized by law. Jurisdiction and venue for the judicial review is vested in the Court of Claims.

An indigent criminal defense system could file a petition for review in the Court of Claims within 60 days after the date of mailing notice of LARA's final decision on the recommended minimum standard. Filing a petition for review does not stay enforcement of an approved minimum standard; however, LARA may grant, or the Court of Claims may order, a stay upon appropriate terms.

Definition of "indigent criminal defense system":

Currently, the term is defined to mean either a local unit of government that funds a trial court *combined with each and every trial court funded by the local unit of government* or if a trial court is funded by more than one local unit of government, those local units, collectively, *combined with each and every trial court funded by those local units of government*. The italicized portions would be eliminated.

Adherence to stated principles:

In establishing the minimum standards, rules, and procedures, certain principles as stated in the act must be adhered to. The bill revises two of those principles. Instead of requiring defense counsel to attend continuing legal education relevant to their indigent defense clients, the bill requires indigent criminal defense systems to employ only defense counsel who have attended the relevant continuing legal education.

In addition, the principles include that defense counsel be systemically reviewed at the local level for efficiency and for effective representation according to MIDC standards. The bill specifies that indigent criminal defense systems systematically provide the reviews.

Indigent Criminal Defense Services and Determination of Indigency:

The act establishes requirements for the application for, and appointment of, indigent criminal defense services. For instance, a preliminary inquiry regarding, and the determination of, the indigency of a defendant must be made by the court no later than at the defendant's first appearance in court, though the court could review that determination at any other stage of the proceedings. In determining whether a defendant is entitled to the appointment of counsel, the court must consider whether the defendant is indigent and the extent of his or her ability to pay, as outlined in the act. The bill deletes references to the "court" and instead references the indigent criminal defense system.

In addition, the bill adds that a trial court could play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the state Supreme Court, consistent with Section 4 of Article VI of the state constitution.

Nothing in the act could prevent a court from making a determination of indigency for any purpose consistent with that Article.

House Bill 5843

The bill amends Section 9 of the act, which prescribes the duties and authority of the MIDC (MCL 780.989). Currently, the duties include establishing procedures for the mandatory collection of data concerning the operation of the MIDC, *each individual attorney providing indigent criminal defense services*, each indigent criminal defense system, and the operation of indigent criminal defense services. The bill deletes the italicized portions. The bill also deletes as a duty of the MIDC collecting data from all individual attorneys providing indigent criminal defense services to adults.

House Bills 5844 and 5845

The bills amend Sections 13 and 15 of the act (MCL 780.993 and 995, respectively). The bills delete references to the state Supreme Court and instead reference LARA.

House Bill 5846

Currently, every local unit of government *and every trial court* that is part of an indigent criminal defense system is required to comply with an approved plan under this act (MCL 780.997). The bill deletes the italicized portion of the provision.

ARGUMENTS:

For:

Critics say that Michigan has long been characterized as having one of the worst indigent criminal defense systems in the country, as detailed in the 2008 publication by the National Legal Aid & Defender Association entitled, "A Race to the Bottom Evaluation of Trial-Level Indigent Defense Systems in Michigan Speed & Savings Over Due Process: A Constitutional Crisis."

PA 93, which created the Michigan Indigent Defense Commission and charged it with creating statewide minimum standards for fair and equal representation for the state's poorest citizens, was the start needed to begin to fix the broken system. Now, after years of study and public input, the first minimum standards have been developed and submitted to the state Supreme Court (MSC) for review and approval.

However, in reviewing the proposed standards, the MSC identified several issues that have the potential to violate state and federal constitutional separation of powers requirements. For example, the Act currently requires the MIDC to require defense counsel to attend continuing legal education relevant to their indigent defense clients. However, only the MSC has constitutional authority over the employees of the judicial branch. Amending the MIDC Act to instead require the MIDC to place the onus on the indigent criminal defense systems to only hire defense counsel who have received the training solves any separation of powers issues on this point. Along with the other proposed amendments, the bill package should resolve any potential separation of powers concerns.

Having future standards approved by the Court of Claims, rather than the MSC, avoids the possibility of the approval process being akin to the MSC giving an advisory position.

Further, as far back as 2002, the American Bar Association (ABA), in its "Ten Principles of a Public Defense Delivery System," advocated that the public defense function, including the selection, funding, and payment of defense counsel, be independent from political influences and subject to judicial supervision in the same manner and to the same extent as attorneys hired by their clients. By removing oversight of the judiciary from the Commission and placing it within the executive branch, the indigent criminal defense system that evolves from PA 93 may more closely embody the ABA's principles.

The minimum standards are scheduled to take effect at the end of the year, but only if the constitutional concerns of the MSC are resolved by amendments to the MIDC Act. Thus, enacting the bill package in a timely manner will allow the goal of providing effective assistance of counsel to the poor in criminal cases to move forward without disruption.

Against:

Oversight of the MIDC is moved from the judicial branch to LARA within the executive branch. House Bill 5842 states that approved minimum standards for the Commission would not be considered departmental rules as the term is defined in the Administrative Procedures Act. Apparently, however, the APA needs to be amended directly, not by reference in a bill amending a different statute. To exempt the minimum standards from the definition of rule, a separate bill amending the APA will be needed.

In addition, some concerns have been raised over public access to the minimum standard approval process after the MIDC becomes part of LARA. For example, since the minimum standards will not be considered departmental rules, but the Commission will be part of a department, will the public have the same potential for input as other agencies within LARA? As part of the rule process information regarding proposed rules and public hearings are printed in the Michigan Register and final rules in the Administrative Code (available on the state's website). That will not be true in this case: where will the public go to find information regarding MIDC policies and public hearings if not found with other LARA-related information?

Also, it appears the MIDC would be a hybrid agency, a cross between a traditional departmental branch and a branch of the judiciary. So, though the MIDC would be exempted from the rule-making process, would the Commission be subject to executive orders once it becomes part of the executive branch? What could be the impact if a future governor is not as supportive of the MIDC and effective criminal defense for the state's poorest? Could a stroke of the pen of a future government wipe out the autonomy envisioned in the reforms that created the framework for an independent, state-wide system of indigent criminal defense?

Further, the bill places final approval (with limited ability to appeal that decision) with a very large bureaucratic state department that currently regulates occupations and health professionals, liquor laws, workers compensation, and houses the Michigan Public Service Commission, among other agencies, bureaus, and divisions. Will the department, which has a regulatory focus, adequately oversee an agency that is service oriented, as well as

have the expertise to decide whether a proposed minimum standard meets the statutory requirements of the MIDC act and meets constitutional requirements for effective assistance of counsel? Will the MIDC become caught in "budget wars" with other agencies within LARA?

Though an obvious deadline looms regarding final approval of the first of the minimum standards, some person believe that perhaps a short pause could provide a second look to see other tweaking to ensure the autonomy and mission so long envisioned for the MIDC would be protected.

Response:

Regarding the concern over transparency of MIDC publications and policies, the MIDC is required by its enabling act to maintain a website that publishes the proposed and final minimum standards, as well as any scheduled public hearings. In addition, the statute requires that MIDC publish a manual of its policies. The manual is required to be available on the website, and made available to all attorneys and professionals providing services, the Supreme Court, the governor, and various offices within the legislature, including the Senate Majority leader and Speaker of the House, Senate and Appropriations committees, and both fiscal agencies. The website is: michiganidc.gov.

POSITIONS:

- A representative of the Michigan District Judges Association testified in support of the bills. (9-13-16)
- A representative of the Michigan Indigent Defense Commission testified in support of the bills. (9-13-16)
- A representative of the ACLU of Michigan testified in support of the bills. (9-13-16)
- The Criminal Defense Association of Michigan indicated support for the bills. (9-13-16)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.