

FACTORS CONSIDERED FOR DETERMINATION OF INDIGENCY

The determination of “Indigency” in the Macomb County System of Indigent Defense is left to the Court for determination. Courts are guided by the US Constitution, Michigan Constitution, Michigan Statutes, Case Law, and the Michigan Court Rules.

The US Constitution and Michigan Constitutions recognize the fundamental right to assistance of an attorney. The Michigan Court Rules require that entitlement to assistance of a lawyer at state expense be specifically stated to the Defendant.



RULE 6.005 RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant:

- (1) of entitlement to a lawyer’s assistance at all court proceedings, and
- (2) that the defendant is entitled to a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must ask the defendant whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one

Determination about whether a person is indigent and “financially unable to retain” an attorney, is made on a case-by-case basis. The determination requires a review of the defendant’s financial situation and consideration of different factors. Before considering these individual factors, inquiry should be made to see whether there is a rebuttable presumption that the defendant is indigent. This can be due to the defendant:



- receives public assistance;
- resides in public housing;
- earns less than 140% of the federal poverty level;
- is currently serving a sentence in a correctional institution; and/or
- is receiving residential treatment in a mental health or substance abuse facility.¹

The Indigency Standard adopted by the MIDC recognizes a similar rebuttable presumption of indigency when the defendant:

- receives public assistance;
- has net income less than 200% of the federal poverty level;

¹ (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. MCL 780.991(b).

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- is currently serving a sentence in a correctional institution;
- is less than 18 years old; and/or
- is receiving residential treatment in a mental health or substance abuse facility.²

Absent any presumption of indigency, the Court must ask whether the defendant qualifies for appointed counsel. It should look to factors to determine whether the defendant cannot afford “competent qualified legal counsel without substantial financial hardship to themselves or to their dependents.”³ Relevant factors to be considered when determining whether a person is partially or fully indigent are found in the Court Rules, Statute, and the MIDC Standard on indigency. The Michigan Court Rule MCR 6.005⁴ factors are:



- present employment, earning capacity and living expenses;
- outstanding debts and liabilities, secured and unsecured;
- whether the defendant has qualified for and is receiving any form of public assistance;
- availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned;
- the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and
- any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

² Indigency Determination

(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)

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³ Indigency Determination

(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)

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⁴ MCR 6.005 Right To Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission. If there is an appointing authority, the court must refer the defendant to the appointing authority for indigency screening. If there is no appointing authority, or if the defendant seeks judicial review of the appointing authority's determination concerning indigency, the court's determination of indigency must be guided by the following factors:

- (1) present employment, earning capacity and living expenses;
- (2) outstanding debts and liabilities, secured and unsecured;
- (3) whether the defendant has qualified for and is receiving any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned;
- (5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and
- (6) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer. The court reviews an appointing authority's determination of indigency de novo and may consider information not presented to the appointing authority.

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

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Factors found in the statute, MCL 780.991(c), include consideration of:



- funds available from employment or any other source, including public assistance
- property owned by defendant (or in which he/she has an economic interest)
- outstanding obligations of defendant
- number and ages of defendant's dependents
- employment and job training history or level of education⁵

The MIDC Indigency Standard lists factors that include:

- net income of defendant
- property owned or in which the defendant has an economic interest to the extent that it is an available asset
- basic living expenses of defendant

⁵ MCL 780.991....

(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

(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.

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- other monthly expenses
- outstanding obligations
- the number and ages of defendant's dependents
- employment and job training history
- level of education
- seriousness of the charges
- whether defendant has other pending cases
- whether defendant is contributing to the support and maintenance other than a dependent
- local private counsel rates⁶



The determination can be that the person is indigent or partially indigent. A person who is partially indigent is not able to afford the complete cost of legal representation but has an ability to contribute a monetary amount toward their representation.

Determinations of indigency or “partial indigency” can be deferred until “contribution” or “reimbursement” is requested or ordered. “Contribution” is the ongoing obligation to pay defense costs during the term of appointment and up to the end of appointment.

“Reimbursement” is an obligation which arises after the term of appointment has ended. See MIDC Indigency Standard, Definitions (approved 10-28-2021) referencing *People v Jose* 318 Mich App 290, 298; 896 NW2d 491 (2016). In appropriate cases, reimbursement is ordered at time of sentencing and collected as part of the sentence.

The determination of indigency may be reviewed by the indigent criminal defense system at any stage of the case. MCL 780.991(3)(a).

Where an appointing authority makes the determination of indigency and denies a defendant's request for counsel, the defendant can request a judicial review of the determination. (MIDC Indigency Standard). A Court's review of an appointing authority's determination of indigency is made *de novo*, and may consider information not presented to the appointing authority. MCR 6.005(B)

⁶ 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.

MIDC Standard on Indigency (Approved 10-28-21)