

# General Information About Determination of Indigency

## **Determination of Indigency**<sup>1</sup>

To qualify for appointment of counsel, and/or for state funds to hire an expert or investigator, a Defendant must be determined to be indigent. Once that determination is made, upon request, the Defendant can be appointed counsel and consideration for requests for an Expert or Investigator can be made.

## **Initial Determination of Indigency.**

In the Macomb County Indigent Defense System the determination of indigency is made by the Court. The Michigan Indigent Defense Commission has adopted an Indigency Standard which gives a description of when a person is indigent.

### *The Determination of Indigency.*

MCL 780.991(3)(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.”

The time for making an initial determination of indigency is after the request for appointed counsel. Once the request is made, the Court is required to question the Defendant about indigency. MCR 6.005(B). Many times this is done at the Defendants’ first appearance for arraignment in Court. The determination of indigency can be reviewed at any time. .

## **Role of the Macomb County Office of Public Defender**

The role of the Macomb County Office of Public Defender includes assigning attorneys to represent defendants in cases where indigency is determined. This role is confined to the systems managed by the Macomb County Funding Unit. The following are part of that Macomb County Funding Unit:

- Felonies filed in Macomb County
- Misdemeanors in Macomb County Operated District Courts
  - 42-1 District Court in Romeo
  - 42-2 District Court in New Baltimore



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<sup>1</sup> As part of indigent defense standards proscribed by the Michigan Indigent Defense Commission, (MIDC), the Indigency Standard was adopted by LARA Order issued 10-28-2021. Implementation was required by Indigent Defense Systems within 180 days. Detailed information about the determination of indigence is found in the standard in the MIDC website:

<https://michiganidc.gov/wp-content/uploads/2021/10/MIDC-Standards-October-2021-complete.pdf>

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The Macomb County Office of Public Defender also operates the Indigent Defense System for the Shelby Township Funding Unit:

- Misdemeanors in 41A-2 District Court Shelby Township (Through Inter-Local Agreement)

In each of the funding units managed by the Macomb County Office of Public Defender, determination of indigency is left to the Court. Other funding units which are outside Macomb County, (or even local funding units inside Macomb County managed by other entities), may have a system for determination of indigency which is separate from the Court.

## How to Determine Indigency

Indigency is determined on a case-by-case basis.<sup>2</sup> To assist both Judges and Local Funding Units to determine indigency, certain guidelines have been established. These are found in the MIDC Standard on Indigency.

### Presumptive Indigency – Poverty Guidelines

It is presumptive, under the MIDC Indigency Standard, that a person whose income is less than twice the poverty level has a rebuttable presumption of indigency.<sup>3</sup> For 2022, the chart reflects the amounts for twice the poverty level.<sup>4</sup>

The MIDC Standard has other rebuttable presumptions that a person is indigent, due to substantial financial hardship, including:

- Defendant currently serving a sentence in a correctional institution;
- Defendant receiving residential treatment in a mental health facility;
- Defendant receiving public assistance; or
- Defendant residing in public housing.<sup>5</sup>

<b>2022 Income Poverty Guidelines</b>			
Chart 2022 Income Poverty Guidelines (200%)			
<b>Family Size</b>	<b>Annual</b>	<b>Monthly</b>	<b>Weekly</b>
1	\$27,180	\$2,265	\$523
2	\$36,620	\$3,052	\$704
3	\$46,060	\$3,838	\$845
4	\$55,500	\$4,625	\$1,067
5	\$64,940	\$5,412	\$1,249
6	\$74,380	\$6,198	\$1,430
7	\$83,820	\$6,985	\$1,612
8	\$93,260	\$7,772	\$1,793
Each Add'l	\$9,440	\$787	\$182

<sup>2</sup> “Indigency is to be determined on a case-by-case basis and is determined by consideration of the defendant’s financial ability, not that of his family and friends.” *People v Taylor*, 2000 WL 41322643, (10-25-2002) citing MCR 6.005(B); quoting *People v Arquette* 202 Mich App 227, 230; 507 NW2d 824 (1993). Defendant’s ability to post bond does not mean that a person is able to financially employ counsel is not indigent and thereby not entitled to appointed counsel. *People v Gillespie* 42 Mich App 679, 682; 202 NW2d 552, 553-554 (1972). The question is whether a person is presently financially unable to provide counsel for his defense, and if so, they are indigent, even where there is a deliberate transfer or property. *People v Chism* 17 Mich App 196, 200; 169 NW2d 192, 194 (1969).

<sup>3</sup> This is a rebuttable presumption see MCR 6.005(B)(5); MCL 780.991(3)(b).

<sup>4</sup> The MIDC Act, 780.991(3)(b) uses 140% of the poverty guideline for a presumption of indigency.

<sup>5</sup> See MCL 780.981(3)(b).

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Consideration of income level involves use of “net income.” Net Income is defined as gross income minus deductions required by law, including but not limited to taxes, union dues, garnishments or support orders.

## **Factors To Consider When Determining Indigency**

The Court should consider certain factors when considering indigency. For a person to be found indigent it must be found that they cannot, without substantial financial hardship to themselves or their dependents, obtain competent qualified legal representation. Some of these factors include:

- Net income (gross income less taxed union dues, garnishments, support orders);
- Funds from employment or other sources;
- Property owned (considering only liquid assets);
- Exempt Assets (which should not be considered);
- Basic living expenses (e.g. costs to avoid serious harm, like housing food clothing childcare child support utilities medical insurance necessary transportation) Monthly expenses;
- Number and ages of defendant’s dependents;
- Employment/job training history;
- Level of education;
- Debts and outstanding liabilities (including things like minimum payments on credit cards and car loans); and/or
- Other pending cases.



## **Other Considerations When Determining Indigency**

The MIDC Standard sets out some additional considerations when a Court determines indigency. Certain things should be included or excluded when considering what amounts to available funds to retain competent legal representation. Considerations include:

- Presumption is made that defendant owns 50% of joint accounts;
- Seasonal Employment is adjusted;
- Self-Employment; and/or
- Scholarship/grants are not income unless they exceed tuition or are for room and board.

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## Use of Forms to Help Determine Indigency

The form traditionally used to help courts determine indigency is MC 222. This form seeks information from the Defendant including: Income, Employer, Take Home Pay, Other Income, Assets, and itemized monthly financial obligations. The information on this form is a great tool for Courts to review when questioning a Defendant about their indigency.

The image shows two versions of the MC 222 form. The left version is the front side, titled 'REQUEST FOR APPOINTMENT OF ATTORNEY AND JUROR'. It includes fields for the State of Michigan, Judicial District, and Case No. and Judge. It asks for the name of the defendant and the State of Michigan. Below this, it asks for the defendant's income, assets, and obligations. The right version is the back side, titled 'Request for Appointment of Attorney and Juror (MC 222)'. It contains checkboxes for various reasons why the request is denied, such as 'The defendant is referred to the local appointing authority for indigency screening and appointment of an attorney if appropriate'.

## Judicial Review of an Appointing Authority's Determination of Indigency

A Defendant can request ask that a determination of indigency be reviewed. This can occur among other things, when a defendant is denied appointed counsel, is ordered to pay contribution, or is denied a request for funds for an expert, or an investigator.

In both the Macomb County and Shelby Township Indigent Defense Systems, decisions about indigency and contribution are left to the Court. Appeal is to the Court of Appeals.

The initial grant or denial of a request for funds to hire an expert or investigator, is made by the Macomb County Office of Public Defender. The Court may be called upon to consider an appeal of a denial.<sup>6</sup>

## Summary:

As noted in *Gideon v Wainwright*, 372 US 335; 83 SCt 792; 9 Led2d 799 (1963), and its progeny, the right to counsel in a criminal case is a fundamental Constitutional right where a person's liberty is at stake.

The key to starting the process of appointing counsel and invoking this fundamental right to counsel begins with:

- i) criminal charges where a person's liberty is at risk; and
- ii) the person being determined "indigent."



"Clarence Earl Gideon"  
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[https://simple.wikipedia.org/wiki/Gideon\\_v.\\_Wainwright#/media/File:Clarence\\_Earl\\_Gideon.jpg](https://simple.wikipedia.org/wiki/Gideon_v._Wainwright#/media/File:Clarence_Earl_Gideon.jpg)  
<https://simple.wikipedia.org/wiki/Gideon>

Indigency must be determined prior to appointing counsel or approving requests for experts or investigators.

<sup>6</sup> A denial of a request for payment for an expert or investigator can be first, administratively appealed, and if still denied, can be appealed to the Court where the case is pending.

# General Information About Determination of Indigency

Determinations of Indigency are currently made by the Judge in the funding units managed by the Macomb County Office of Public Defender. This includes all felonies, and misdemeanor cases in the 41A-2 Shelby, 42-1 Romeo and 42-2 New Baltimore District Courts. The preliminary determination of indigency is made when a defendant requests an attorney. Many times this is at arraignment.<sup>7</sup>

Indigency is determined on a case-by-case basis. Courts are directed to consider certain factors which may support a finding that it would be a substantial financial hardship to a defendant or his/her dependents to obtain competent qualified legal representation.

A Rebuttable presumptions of indigency exist in certain circumstances including:

- income less than 200% of the poverty level
- Defendants incarcerated in a correctional facility
- Defendants who would suffer a substantial financial hardship to themselves or their dependents, obtain competent qualified legal representation

The decision to deny a request for an attorney can be appealed to the Court of Appeals. The denial of funds for an expert or investigator can first be administratively appealed, and if still denied, can be appealed to the Circuit/District Court where the case is pending

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<sup>7</sup> See MCR 6.005(B) which provides that the court must determine whether defendant is indigent and list of factors to guide the court.