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BILL ANALYSIS



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House Bills 5842 through 5846 (as passed by the House)

Sponsor: Representative Kurt Heise (H.B. 5842)
Representative Martin Howrylak (H.B. 5843)
Representative Klint Kesto (H.B. 5844)
Representative Vanessa Guerra (H.B. 5845)
Representative David LaGrand (H.B. 5846)

House Committee: Criminal Justice

Senate Committee: Judiciary

Date Completed: 12-6-16

CONTENT

The bills would amend the Michigan Indigent Defense Commission Act, which creates the Michigan Indigent Defense Commission (MIDC) within the judicial branch of State government; requires the MIDC to propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel; and establishes procedures for approval of the standards by the Michigan Supreme Court.

House Bill 5842 would re-establish the MIDC in the Department of Licensing and Regulatory Affairs, and do the following:

- Prohibit the minimum standards from infringing on the Supreme Court's authority over practice and procedure in the courts of the State.
- Revise the definition of "indigent criminal defense system" to refer to local units of government that fund trial courts, rather than such local units combined with trial courts.
- Require the MIDC to submit proposed standards to the Department, rather than the Supreme Court, for approval or rejection.
- Specify that an approved minimum standard would not be a rule under the Administrative Procedures Act.
- Specify that an approved minimum standard would be considered a final department action subject to judicial review to determine whether it was authorized by law, and vest jurisdiction for review in the Court of Claims.
- Revise MIDC principles regarding continuing legal education of defense counsel, and the review of defense counsel.
- Require a defendant's indigency to be determined by the indigent criminal defense system, rather than by the court, and state that a trial court could play a role in determining indigency.

House Bill 5842 would delete requirements concerning the collection of data by the MIDC from individual attorneys who provide indigent criminal defense services.

House Bills 5843 and 5844 would refer to approval of a standard by the Department, rather than the Supreme Court.

House Bill 5846 would delete a requirement that every trial court that is part of an indigent criminal defense system comply with an approved plan under the Act.

Each of the bills is tie-barred to all of the other bills.

House Bill 5842

Minimum Standards

The Act requires the MIDC to "propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state". The standards must be designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel.

The bill specifies that the minimum standards could not infringe on the Supreme Court's authority over practice and procedure in the courts of the State as set forth in Article VI, Section 5 of the State Constitution. (That section provides, "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.")

The Act requires the MIDC to convene a public hearing before a proposed minimum standard is submitted to the Supreme Court. A proposed standard must be submitted to the Court. Opposition to a proposed minimum standard may be submitted to the Court in a manner prescribed by it, but a standard approved by the Court is not subject to challenge through the appellate procedures under the Act.

The bill, instead, would require the MIDC to convene a public hearing before a proposed standard was recommended to the Department of Licensing and Regulatory Affairs (LARA). A proposed standard would have to be submitted to LARA for approval or rejection. Opposition to a proposed standard could be submitted to LARA in a manner prescribed by the Department. A minimum standard that was approved by LARA would not be subject to challenge through the Act's appellate procedures.

Currently, a proposed minimum standard is final when it is approved by the Supreme Court. If the Court does not approve or disapprove a proposed standard within 180 days of its submission, the standard is not approved. Under the bill, instead, a proposed minimum standard would be final when it was approved by the Department.

Also, under the bill, if an indigent criminal defense system objected to a recommended minimum standard on the ground that it would exceed the MIDC's statutory authority, the indigent criminal defense system would have to state specifically how the recommended standard would exceed that authority.

The Act defines "indigent criminal defense system" as either 1) the local unit of government that funds a trial court combined with each and every trial court funded by the local unit; or 2) 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 units. Under the bill, the term would refer to the local unit that funds a trial court or the local units that collectively fund a trial court.

In addition, the bill specifies that an approved minimum standard for the local delivery of indigent criminal defense services within an indigent criminal defense system would not be a rule as defined in the Administrative Procedures Act.

Judicial Review

The bill states that approval of a minimum standard proposed by the MIDC would be considered a final department action subject to judicial review under Article VI, Section 28 of the State Constitution to determine whether the approved standard was authorized by law. Jurisdiction and venue for judicial review would be 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 the Department's final decision on the recommended standard was mailed. The filing of a petition would not stay enforcement of an approved standard, but LARA could grant, or the Court could order, a stay upon appropriate terms.

(Article VI, Section 28 states that all final decisions, findings, rulings, and orders of any administrative officer or agency existing under the Constitution or by law, that are judicial or quasi-judicial and affect private rights or licenses, are subject to direct review by the courts as provided by law. The review must include, at a minimum, the determination of whether the final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether they are supported by competent, material, and substantial evidence on the whole record.)

Principles Related to Defense Counsel

The Act requires the MIDC to adhere to specified principles pertaining to defense counsel, in establishing minimum standards, rules, and procedures. These principles include the following, among others:

- Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
- Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.

The bill, instead, would require the principles to include the following:

- Indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.
- Indigent criminal defense systems systematically review defense counsel at the local level for efficiency and effective representation according to MIDC standards.

Determination of Indigency

The Act sets forth requirements that apply to the application for, and appointment of, indigent criminal defense services. These include a requirement that the court make a preliminary inquiry regarding, and determination of, the indigency of a defendant not later than at the defendant's first appearance in court. The court may review the 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 he or she is indigent and the extent of his or her ability to pay.

Under the bill, the indigent criminal defense system, rather than the court, would have to make a preliminary inquiry into, and determination of, a defendant's indigency no later than at the defendant's first court appearance; could review the determination at any other stage of the proceedings; and would have to consider whether the defendant was indigent and the extent of his or her ability to pay.

The bill specifies that the 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

Supreme Court, consistent with Article VI, Section 4 of the State Constitution. The bill also states that nothing in the Act could prevent a court from making a determination of indigency for any purpose consistent with Article VI.

(Under Article VI, Section 4, the Supreme Court has general superintending control over all courts; power to issue, hear, and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the Court.)

House Bill 5843

The powers and duties of the MIDC include establishing procedures for the mandatory collection of data concerning the operation of the Commission, each individual attorney providing indigent criminal defense services, and each indigent criminal defense system, and the operation of indigent criminal defense services.

Upon the appropriation of sufficient funds, the MIDC is required to establish minimum standards to carry out the purposes of the Act, and collect data from all indigent criminal defense systems and individual attorneys providing indigent criminal defense services to adults.

The bill would delete the references to individual attorneys in these provisions.

House Bill 5844

Under the Act, within 180 days after a standard is approved by the Supreme Court, each indigent criminal defense system must submit a plan to the MIDC for the provision of indigent criminal defense services in a manner determined by the Commission and submit an annual plan for the following State fiscal year.

The bill would refer to a standard approved by the Department, rather than the Court.

House Bill 5845

The Act establishes procedures for the resolution of a dispute between the MIDC and an indigent criminal defense system concerning the Act's requirements. The MIDC or a system may bring an action seeking equitable relief in the circuit court only as spelled out in the Act. The action may not challenge the validity, legality, or appropriateness of the minimum standards approved by the Supreme Court.

The bill would refer to standards approved by the Department, rather than the Court.

House Bill 5846

The Act requires every local unit of government and every trial court that is part of an indigent criminal defense system to comply with an approved plan under the Act. The bill would delete the reference to every trial court.

MCL 780.983 et al. (H.B. 5842)

780.989 (H.B. 5843)

780.993 (H.B. 5844)

780.995 (H.B. 5845)

780.997 (H.B. 5846)

BACKGROUND

Michigan Indigent Defense Commission

Public Act 93 of 2013 enacted the Michigan Criminal Defense Commission Act to create a new system for the appointment of counsel for indigent criminal defendants in Michigan, and to establish a new funding mechanism. The legislation followed decades of efforts to reform the State's indigent criminal defense system, which had been found to be constitutionally inadequate and among the most poorly funded in the nation.¹

In October 2011, Governor Snyder had issued Executive Order 2011-12 to establish the Michigan Advisory Commission on Indigent Defense. The Commission's charge was to analyze existing data needed to assist policymakers in deciding the appropriate funding and staffing levels to ensure effective public criminal defense services, and make recommendations to the Governor and the Legislature for improvements to the system of providing legal representation for indigent criminal defendants.

The Advisory Commission's report, issued in June 2012, contained 23 findings, including a finding that the obligation to provide counsel to indigent criminal defendants belonged to the State, not the counties, although Michigan's history had been to leave it to the counties to meet the obligation. The report also made 12 recommendations, including recommendations that a permanent commission on indigent defense should be created, and that any new funding requirements should be fulfilled by the State.

The enacted legislation requires the Michigan Indigent Defense Commission to consist of 15 voting members appointed by the Governor, plus the Chief Justice of the Michigan Supreme Court. As discussed above, the MIDC is required to propose minimum standards for indigent criminal defense services, and submit proposed standards to the Court after a public hearing. A standard will not be final until it is approved by the Court.

Within 180 days after the Court approves a standard, each indigent criminal defense system must submit to the MIDC a plan for the provision of indigent criminal defense services, as well as a cost analysis. The Commission must approve or disapprove the plan and the cost analysis. If a plan or cost analysis is not approved and a compromise is not reached, the dispute must be submitted to mediation.

Every local unit of government and every trial court that is part of an indigent criminal defense system has a duty under the Act to comply with an approved plan (contingent upon the receipt of a grant in the amount provided in the approved plan and cost analysis).

Initial Standards Proposed by the MIDC

The MIDC posted its first set of proposed standards in January 2016 and a public hearing was held in May. The standards pertain to the following:

- Education and training of defense counsel.
- Initial client interview.
- Investigation and experts.
- Counsel at first appearance and other critical stages.

¹ For a discussion of the history of the legislation, please see the Senate Fiscal Agency *State Notes* article, "Indigent Criminal Defense in Michigan: A New Approach", Summer 2013:

<http://www.senate.michigan.gov/sfa/publications/notes/2013notes/notessum13sl.pdf>

For a detailed description of the legislation, please see the Senate Fiscal Agency's Summary as Enacted of House Bill 4529 and Senate Bill 301, dated 7-2-13:

<http://www.legislature.mi.gov/documents/2013-2014/billanalysis/Senate/pdf/2013-SFA-0301-N.pdf>

On June 1, 2016, the Michigan Supreme Court issued Administrative Order No. 2016-2 conditionally approving the standards. According to the Order, "This approval is subject to and contingent on legislative revision of the MIDC Act to address provisions that the Court deems to be of uncertain constitutionality."

The Court identified the sections of the Act that contain these provisions. The first is the section that creates the MIDC as an "autonomous entity" and places it within the judicial branch, whose employees are subject to the Court's exclusive constitutional authority to exercise general supervisory control. According to the Court, placing the MIDC within the judicial branch, while denying the Court the ability to supervise and direct the Commission's activities and employment, "may contravene the general principle of separation of powers under the Michigan Constitution...and impinge upon the specific constitutional function of this Court to supervise the judicial branch".

Second, the Court pointed out that the Act defines "indigent criminal defense system" in a manner that includes trial courts, and combines trial courts with nonjudicial local governments. The Act also allows the MIDC to 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 consistently delivered to all indigent adults in the State; and allows the Commission to assure compliance with its minimum standards, rules, and procedures. The Court stated, "We are concerned that these provisions might contain enforcement mechanisms that present an unconstitutional usurpation of this Court's authority under Const 1963, art 6, § 4, which provides that the Supreme Court 'shall have general superintending control over all courts.'" The Court also stated that the provisions raise general separation of powers concerns.

In addition, Court expressed concern that certain provisions of the Act arguably allow the MIDC to regulate the legal profession, while the Constitution exclusively assigns regulation of the profession to the judiciary. The provisions in question pertain to the requirement for continuing legal education, the systematic review of defense counsel, and the collection of data from individual attorneys providing indigent criminal defense services.

The Administrative Order stated, "To promote the goal of providing effective assistance of counsel for indigent defendants in criminal cases without disruption, the Court urges legislative revision of the MIDC Act to address the constitutional concerns... If this Court determines before December 31, 2016, that legislative revisions of the MIDC Act have sufficiently addressed our concerns, the standards approved conditionally...will then take full effect. Otherwise, this Court's conditional approval of these standards will be automatically withdrawn on December 31, 2016."

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

In total, the bills would have a nominal fiscal impact on State government and no fiscal impact on local units of government. The bills would effectively transfer the Michigan Indigent Defense Commission from the Judiciary to the Department of Licensing and Regulatory Affairs. It is assumed that the financial resources used to support the Commission would be transferred as well.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.