



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

## BILL ANALYSIS



Telephone: (517) 373-5383  
Fax: (517) 373-1986

Senate Bill 1109 (as enacted)  
Sponsor: Senator Rick Jones  
Senate Committee: Judiciary

**PUBLIC ACT 444 of 2016**

Date Completed: 1-5-17

**CONTENT**

The bill amended the Administrative Procedures Act to exclude from the definition of "rule" a minimum standard approved or established under authority granted by the Michigan Indigent Defense Commission Act.

The bill took effect on January 4, 2017.

MCL 24.207

**BACKGROUND**Administrative Procedures Act

The Act sets out the process for a State agency to adopt, or "promulgate", administrative rules, which generally are regulations that implement or apply law enforced by the agency. The process begins when an agency submits a request for rule-making to Office of Performance and Transformation (OPT) and ends when the OPT files the rule with the Secretary of State. During the process, various notice, certification, and public hearing requirements must be met, the agency proposing the rule must prepare certain regulatory impact statements, and the proposed rule must be submitted to the legislative Joint Committee on Administrative Rules. If the Committee objects to the rule on specific grounds within 15 legislative session days, legislation must be introduced to prevent the rule from taking effect or delay its effective date. If the legislation is not enacted, the OPT may file the rule with the Secretary of State.

Michigan Indigent Commission Act

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 Act created the Michigan Indigent Defense Commission (MIDC) as an autonomous entity within the judicial branch of State government. 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 Commission must hold a public hearing on a proposed standard. Originally, a standard could not take effect without approval of the Supreme Court. (As noted below, subsequent legislation recreated the MIDC in the Department of Licensing and Regulation, and requires Department approval of a standard.)

The MIDC posted its first set of proposed standards in January 2016 and a public hearing was held in May. The standards pertain to education and training of defense counsel; initial client interview; investigation and experts; and counsel at first appearance and other critical stages.

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

The first concern raised by the Court pertained to the creation of the Commission as an autonomous entity within the judicial system. Although judicial employees are subject to the Supreme Court's exclusive supervisory control under the Constitution, the law denied the Court the ability to supervise and direct the MIDC's activities and employment, which raised separation-of-powers concerns, according to the Court.

Second, the Court pointed out that the Act defined "indigent criminal defense system" in a manner that included trial courts, and combined trial courts with nonjudicial local governments. The Act also allowed the MIDC to develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures. The Court stated that these provisions could unconstitutionally usurp its general superintending control over all courts, as well as present separation-of-powers issues.

In addition, Court expressed concern that certain provisions of the Act arguably allowed the MIDC to regulate the legal profession, while the Constitution exclusively assigns regulation of the profession to the judiciary.

The Administrative Order stated that the standards approved conditionally would take full effect if legislative revisions that sufficiently addressed the Court's concerns were enacted before December 31, 2016. If not, the conditional approval would be withdrawn on that date.

#### Related Legislation

House Bills 5842 through 5846 (Public Acts 439 to 443 of 2016) were enacted to amend the MIDC Act. (The bills were presented to the Governor on December 27, 2016. They were signed by the Governor, and took effect, on January 4, 2017.) Specifically, House Bill 5842 re-establishes the Commission in the Department of Licensing and Regulatory Affairs, and does the following:

- Prohibits the minimum standards from infringing on the Supreme Court's authority over practice and procedure in the courts of the State.
- Revises 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.
- Requires the MIDC to submit proposed standards to the Department, rather than the Supreme Court, for approval or rejection.
- Revises MIDC principles regarding continuing legal education of defense counsel, and the review of defense counsel.
- Requires a defendant's indigency to be determined by the indigent criminal defense system, rather than by the court, and states that a trial court may play a role in determining indigency.

The bill also specifies that an approved minimum standard is not a rule under the Administrative Procedures Act.

House Bill 5842 deleted requirements concerning the collection of data by the MIDC from individual attorneys who provide indigent criminal defense services. House Bills 5843 and 5844 refer to approval of a standard by the Department, rather than the Supreme Court. House Bill 5846 deleted a requirement that every trial court that is part of an indigent criminal defense system comply with an approved plan under the MIDC Act.

Legislative Analyst: Suzanne Lowe

**FISCAL IMPACT**

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Ryan Bergan