

Court-Appointed Attorney

TABLE OF CONTENTS

3-01	Defendant's Right to Court-Appointed Attorney	
	A. Authority	3-01-01
	B. When Entitled	3-01-01
3-02	Investigation to Determine Indigency	
	A. Role of Judge	3-02-01
	B. Role of Court Staff	3-02-01
3-03	Application for Indigency	
	A. Authority	3-03-01
	B. Process	3-03-01
	C. SCAO-Approved Forms	3-03-01
3-04	Recovering Expense	
	A. Authority	3-04-01
	B. Condition of Probation	3-04-02

Appendix

Court-Appointed Attorney

3-01 DEFENDANT'S RIGHT TO COURT-APPOINTED ATTORNEY

A. Authority

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney at all subsequent court proceedings if he or she wants one and is unable to pay for one. (MCL 775.16, MCR 6.005[A])

B. When Entitled

1. Pretrial Proceedings

a. Felony Cases

Even if a defendant waives the assistance of an attorney, the record of each subsequent proceeding (such as the preliminary examination, arraignment, revocation proceedings, hearings, trial, or sentencing) must affirmatively show that the court advised the defendant of the right to an attorney and the defendant waived that right. Before the court begins such proceedings, the defendant must reaffirm that an attorney is not wanted, or if the defendant requests an attorney and is unable to pay for one, the court must appoint one, or if the defendant wants to hire an attorney and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one. (MCR 6.005[E])

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney if he or she does not have the money to hire one. The court must also advise the defendant of the right to an attorney at all subsequent court proceedings and, if appropriate, appoint one. (MCR 6.104[E], MCR 6.610[H])

b. Misdemeanor Cases

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court-appointed attorney if he or she does not have the money to hire one and if:

- 1) the offense charged requires on conviction a minimum term in jail, or
- 2) the court determines that it might sentence the defendant to jail. (MCR 6.610[D] and [E], AO 2003-3)

2. Postsentencing Proceedings

a. Probation Violation

At the arraignment on an alleged probation violation, the court must advise the probationer that he or she is entitled to the assistance of a court-appointed attorney at the hearing and at all subsequent court proceedings, and that one will be appointed if he or she is unable to pay for one. (MCR 6.445[B]) Even if a probationer charged with probation violation waives the assistance of an attorney, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E). (MCR 6.445[D])

b. Postappeal Relief

If the court imposed a sentence of incarceration on a misdemeanor in district court, even if the incarceration is suspended and if the defendant is indigent, the court must enter an order appointing a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. (MCR 6.625[B])

3-02 INVESTIGATION TO DETERMINE INDIGENCY

A. Role of Judge

In all Michigan courts, the final decision to provide counsel for an indigent defendant lies with the judge having jurisdiction in the pending case. In some courts, the presiding judge will make a determination of indigency and, based upon information provided, appoint an attorney to represent a defendant. If the court determines the defendant is financially unable to retain counsel, it must promptly appoint an attorney and notify that attorney of the appointment. The court may not permit the defendant to waive the right to be represented without first:

1. advising the defendant of the charge, the maximum possible incarceration for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
2. offering the defendant the opportunity to consult an attorney. (MCR 6.005[D])

B. Role of Court Staff

Some courts refer a defendant to an investigator who will examine and verify information contained in a petition for a court-appointed attorney. A recommendation for or against appointment of counsel is then provided to the judge.

3-03 APPLICATION FOR INDIGENCY

A. Authority

If the defendant requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent. (MCR 6.005[B], *People v Studaker*, 387 Mich 698; 199 NW2d 177 [1972]) The appointment of counsel must be consistent with an adopted local administrative order that governs the process for selecting and appointing attorneys to represent indigent defendants. (MCR 8.123[B])

B. Process

The process for determining indigency is in MCR 6.005(B). These factors are a guide for determining indigency and are the minimum amount of information necessary to make an informed decision on the question of indigency. Every court shall require a defendant claiming indigency to submit a sworn statement setting forth his or her financial condition. The following factors shall be considered:

1. the defendant's present assets, employment, earning capacity, and living expenses,
2. the defendant's outstanding debts and liabilities, secured and unsecured,
3. whether defendant has qualified for and is receiving any form of public assistance,
4. availability of any personal or real property owned and whether it would cause undue financial hardship to the defendant or dependents if converted,
5. whether the defendant is incarcerated, and
6. any other circumstances that would impair the ability to pay an attorney fee as would ordinarily be required to retain competent counsel.

C. SCAO-Approved Forms

The Request for Court-Appointed Attorney and Order (MC 222) can be completed by an indigent defendant to request a court-appointed attorney. See the Section 3 Appendix for a copy of the form.

3-04 RECOVERING EXPENSE

A. Authority

1. Reimbursement After Sentencing

The authority for recovering costs is in MCL 769.1k, MCL 769.3, and MCL 771.3.

Pursuant to MCL 769.1k, if a defendant is found guilty or pleads guilty or nolo contendere, at sentencing the court may order the expenses of providing legal assistance to the defendant. These costs may also be ordered for defendants subject to a deferred judgment of guilt or delayed sentence.

Pursuant to MCL 769.3, costs of prosecution can be ordered as a condition of sentence only if the offense is punishable by either fine or imprisonment. If a charge is punishable only by imprisonment, costs cannot be imposed. (*People v Tims*, 127 Mich App 564; 339 NW2d 488 [1983])

Pursuant to MCL 771.3, costs are authorized as a condition of probation only. In addition, costs as a condition of probation are limited by the defendant's ability to pay, if the defendant raises the issue. (*People v Music*, 428 Mich 356; 408 NW2d 795 [1987])

According to *People v Neil*, 99 Mich App 677; 299 NW2d 23 (1980), a term or condition of a sentence not expressly authorized by statute is unlawful and must be vacated. If a defendant is acquitted of the charges, reimbursement for court-appointed attorney fees should not be ordered.

Before ordering repayment of attorney fees, the court should make a finding concerning the defendant's ability to pay. Reimbursement orders should be based on the circumstances of each case, not on a policy to require repayment in all cases. In a published opinion, *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), the Michigan Court of Appeals indicated that it is unnecessary to make a finding on the record regarding the ability to pay, unless the defendant specifically objects to the reimbursement amount at the time it is ordered. However, the court does need to provide some indication of consideration. In addition, the amount ordered for reimbursement of court-appointed attorney fees should bear a relation to the defendant's foreseeable ability to pay. A defendant's capacity for future earnings may be considered.

2. Contribution Before Sentencing

In criminal cases, as specified in MCR 6.005(C), the court can order a partially-indigent defendant to contribute toward the costs of defense under a specific plan. The purpose of MCR 6.005(C) is not to authorize reimbursement, but to ensure the defendant is not denied

the appointment of an attorney because of partial "ability to pay."

B. Condition of Probation

Payment of costs as a condition of probation is seen as reimbursement to the public and not as punishment. (*People v Teasdale*, 335 Mich 1, 5-6; 55 NW2d 149 [1952]) Therefore, statute allows a judge, without a hearing, to set an amount reflecting the costs "reasonably related to the expense of the prosecution." (*People v Blanchura*, 81 Mich App 399, 404; 265 NW2d 348 [1978])

Probation may not be revoked for failure to pay costs if the reason for nonpayment is the defendant's indigency. (*People v Terminelli*, 68 Mich App 635; 243 NW2d 703 [1976], *People v Lemon*, 80 Mich App 737; 265 NW2d 31 [1978])

The court may continue collecting unpaid fines, costs, and other fees once the probationer is discharged or the probation is revoked. (MCL 769.1k)

See also Section 6-10 for details.

APPENDIX 3

[Request for Court-Appointed Attorney and Order \(MC 222\)](#)