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Monday, July 13, 2015

Judge James H. Fisher, Chairperson
Michigan Indigent Defense Commission
info@michiganidc.gov

Re: Proposed Minimum Standards

Dear Judge Fisher:

Thank you for the opportunity to weigh in on your proposed Standards for the practitioners of criminal defense law here in the State of Michigan. Prior to my responding, your proposals were disseminated to all of our attorneys (13) with the request that comments and suggestions be submitted to me for organization and then forwarding to you. Here then, is the wisdom of 125 (collective) years of the practice of law. Thank you for your time and attention to our concerns.

FEEDBACK

Proposed Standard:

Standard 1
Education and Training of Defense Counsel

Response:

We are requesting a working definition of "Training" that is broad enough to allow us to design and implement our own. We believe that with shrinking budgets, our ability to travel and participate in training will contract in the foreseeable future. If we are allowed to design and implement programing ourselves we can use that home-grown training to augment those occasions when we can attend traditional training events. If, as we expect, the training we put on at this office will be free to the local bar, it will have the added benefit of attracting private defenders over whom MIDC standards will have only peripheral impact. Many of these

attorneys have not been to training/educational programing since they passed their bar examinations. Again, a broad definition of "training" is the key. Doing more with less requires innovation and experimentation.

We would also ask that some existing legal education be considered training. Allow me to list a few examples:

1. Section membership in addition to basic bar membership. In the case of this office, that would be criminal, family or probate law sections. This policy would have the side benefit of increasing section membership while providing educational tools and opportunities.

2. Credit for subscriptions to learned journals or memberships in organizations that provide the same (i.e.: SADO).

3. Case conferences. Those organizations that offer case conferences wherein lawyers meet, discuss cases, the law, processes, etc. are not given credit for being "educational" but those of us who are lucky enough to participate in them can vouch for their unsurpassed effectiveness in the training process. We believe we should be given credit for them.

4. Internal legal education. We are fortunate in having a dedicated researcher here at the Muskegon Public Defender. He provides us with summations/ interpretations/applications of Court of Appeals and Supreme Court rulings. Highly educational.

. . .

The proposed guidelines require public defenders to attend skills training within their first couple years of practice. We strongly support that position and we have the resources to make sure that happens. We are concerned however, for others not so fortunately situated. Desire for training is not an issue as far as we are aware. Participating in training has always included balancing economic and timing issues as well as the need to upgrade one's skills. As to timing, judges will have to embrace the culture of training by allowing adjournments and other dispositions for training as they now do for vacations and sick leave. Economically, access to scholarships and fee waivers is a must. Private sector attorneys are not earning income while

attending training and also paying fees and expenses to attend. We can argue that training is an investment but that fine, philosophical argument does not pay the secretary. Cost amelioration, it seems to us, must also be part of the package.

Proposed Standard:

Standard 1
Education and Training of Defense Counsel

> **A. Knowledge of scientific evidence and applicable defenses.** Counsel shall know all forensic and scientific issues that can arise in a criminal case, know all legal issues concerning defenses to a crime, and be able to effectively litigate those issues.

Response:

We would request the removal of the word, "all" from this proposed standard. We do not know any single or even group of attorneys who know *all* forensic, scientific and legal issues. This standard establishes a potential grievance issue in almost every representation. Perhaps a standard that requires an attorney to consider these issues and keep record that he/she has done so would be a more reasonable requirement. As long as the records each attorney keeps cannot be altered to thwart investigation, the objective of the proposed standard is served. The lawyer can be held responsible should he/she fail to exercise reasonable expertise.

Proposed Standard:

Standard 1
Education and Training of Defense Counsel

> **C. Knowledge of technology.** Counsel shall know how to utilize office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be able to thoroughly review materials that are provided in an electronic format.

Response:

We believe this requirement is not stringent enough. We do not believe the standard should be "office technology commonly used in the legal system." We believe that an attorney

should know how to use technology, period. Like forensic issues, knowledge of all technology is not necessary but a reviewable standard is appropriate. Further, we believe attorneys should be motivated. Require us to innovate. Require us to adapt. Require us to be on the cutting edge and not waiting until the technology comes into common use. Were we doctors, or engineers or auto mechanics, we could not survive in those business environments if we did not adapt until tools became common in our community.

Proposed Standard:

Standard 2
Initial Interview

> **A. Timing of the Interview:** . . . When a client is in custody, counsel shall conduct an initial client intake interview within 72 hours of appointment. . .

Response:

We are not always the kings and queens or our domains. We work with of prosecutors, judges, clerks, secretaries, our clients and their families to do our jobs as defense attorneys. The virtues and limitations of these others impact our ability to control our own calendars. Because of this reality we are concerned with hard timelines. When MIDC proposes we meet with our jailed clients within 72 hours of appointment, it follows that the visit is not just for social purposes. The expectation is that the visit is to be a meaningful visit wherein serious issues are addressed and fair questions answered. The problem is we have little or no control over the notification process that occurs after appointment. Our experience is that notification times vary between jurisdictions, with the volume of cases at the time, and even between individual judges in the same building. It is rare that the advocates are aware our appointments within 72 hours. Further, even when we are notified within the three-day goal, it is rare that our calendars are not

full. Not just our calendars, but the local county jail which requires an appointment prior to visitation is usually booked a minimum of 24 hours in advance.

Preeminent amongst the persons and agencies that would have to buy in to make the 72 hour deadline possible is the local prosecutor's office from which we receive the bulk of our discovery materials. In their defense, they have to be notified of our appointment by the same courts as we do. Only then do they send out discovery materials. Going out to the jail when one has not had access even to police reports means very little productive work can be done. Worse, it breeds contempt in the client toward her counsel. Already suspicious of our competency and loyalty because we are court appointed, arriving unprepared and uninformed would confirm negative stereotypes. Such a poor, per forma meeting means the attorney will have to find time to attend a second meeting when he/she has her act together.

Suggestion: Instead of hard timelines, we suggest a "best practice" requirement. We are suggesting language to the following effect:

> "Each attorney is to visit his/her incarcerated client as soon as practicable. In timing said visit, best practice is to balance preparedness for the meeting with the need to build confidence in the client as to the quality and earnestness of his/her representation; to allay as possible the stress of being incarcerated and charged; and, early enough to incorporate the client's wishes and interests into the defense strategy even if said meeting occurs before arraignment."[1]

. . .

[1] When in private practice, on occasion, I became aware of a pending representation before the official assignment was made at arraignment and sometimes waiting for the official appointment was not in my client's interest. For example: Sometimes the defendant who gets to the prosecutor first gets the best deal. In those circumstances, I am doing my client a disservice by waiting for official appointment. In those circumstances he lawyer who waits loses the race for his client. Sometimes a client has a parole hold and is doing "dead time." Moving as quickly as possible is often in her interests.

CONCLUSION

Overall the impression from this office is that the Standards are fair, appropriate and necessary. We agreed with the vast majority of the proposals, as is. We congratulate those involved in developing them on and support their enactment.

Respectfully,

Fred Johnson, Jr.
Director, Muskegon Office of the Public Defender

cc: Jonathan Sacks, Executive Director, MIDC