The Michigan Indigent Defense Commission

and the

Saginaw County Bar Association

present the following training opportunity:

Skills Training for Criminal Defense Lawyers

Friday June 17th, 2016

Saginaw Circuit Court – Probate Courtroom

111 S. Michigan, Saginaw, 48602

MICHIGAN INDIGENT DEFENSE COMMISSION

SAGINAW COUNTY BAR ASSOCIATION
SAGINAW MICHIGAN

Skills Training for Criminal Defense Lawyers

Objective: Designed as a model for compliance with the *basic skills acquisition* requirement for the MIDC's *conditionally approved* Standard for the Education and Training of Defense Counsel, this training event is largely geared for new lawyers accepting appointments in adult criminal cases. Topics to be covered include initial interviews with clients, ethics and client-centeredness, preliminary exams, motion practice, advising clients in guilty pleas and an introduction to voir dire.

Schedule:

9:00 a.m. - 10:30 a.m. - Client communication essentials: early meetings, effective and ethical advocacy, advising your clients *(Barbara Klimaszewski and Marla McCowan, Michigan Indigent Defense Commission)*

(10:30 a.m. - 10:45 a.m. break)

10:45 a.m. - 12:00 noon - Skills training: interview and advocacy techniques demonstrated

(12:00 p.m. - 1:00 p.m. lunch - bring your own/on your own)

1:00 p.m. - 2:00 p.m. - Preliminary Examinations *(Attorney Andrea LaBean, Bay County Public Defender's Office)*

2:00 p.m. - 3:00 p.m. - Motion Practice *(Attorney James Piazza, Saginaw)*

(3:00 p.m. - 3:15 p.m. break)

3:15 p.m. - 4:00 p.m. - Voir Dire essentials *(Barbara Klimaszewski)*

4:00 p.m. - 5:00 p.m. - Skills training: voir dire techniques demonstrated

Order

Michigan Supreme Court
Lansing, Michigan

June 1, 2016

ADM File No. 2015-27

Administrative Order No. 2016-2

Regulations Governing a System for Appointment of Counsel for Indigent Defendants in Criminal Cases and Minimum Standards for Indigent Criminal Defense Services

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Pursuant to the Michigan Indigent Defense Commission Act, 2013 PA 93, the Michigan Indigent Defense Commission submitted to this Court proposed standards that would regulate the manner in which counsel would be appointed to represent indigent defendants in criminal cases, and would further impose specific training, experience and continuing legal education requirements on attorneys who seek appointment as counsel in these types of cases. The Court published the proposed standards for comment, and after due consideration, conditionally approves the standards as set forth below.[1]

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. These provisions include:

1. MCL 780.985 creates the MIDC as an "autonomous entity" and places it within "the judicial branch." Employees of the judicial branch are subject to this Court's exclusive constitutional authority to exercise general supervisory control. See Const 1963, art 6, §§ 1, 4, and 7; *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 298; 586 NW2d 635 (1998). We are concerned that 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, Const 1963, art 3, § 2, and impinge upon the specific constitutional function of this Court to supervise the judicial branch.

2. MCL 780.983(f) defines "indigent criminal defense system," an entity subject to the authority of the MIDC, in a manner that includes trial courts, and combines trial courts with nonjudicial local governments. In addition,

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[1] The conditional approval reflects the Court's ongoing authority to establish, implement, and impose professional standards. See Administrative Order No. 1981-7 (approving regulations and standards for the appellate indigent defense system); Administrative Order No. 2004-6 (altering the standards of AO No. 1981-7).

MCL 780.989(1)(a) allows the MIDC to "[d]evelop[] 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 this state;" and MCL 780.989(1)(b) allows the MIDC "to assure compliance with the commission's minimum standards, rules, and procedures." 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." They also raise general separation of powers concerns under Const 1963, art 3, § 2.

3. MCL 780.989(1)(f) and (2) and MCL 780.991(2) arguably allow the MIDC to regulate the legal profession. The Constitution exclusively assigns regulation of the legal profession to the judiciary. See Const 1963, art 6, § 5; *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000); *Attorney General v Michigan Public Serv Comm*, 243 Mich App 487, 517; 625 NW2d 16 (2000).

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 raised herein by this Court. If this Court determines before December 31, 2016, that legislative revisions of the MIDC Act have sufficiently addressed our concerns, the standards approved conditionally by this Court today will then take full effect. Otherwise, this Court's conditional approval of these standards will be automatically withdrawn on December 31, 2016. The Court will then determine what, if any, further action it may take to preserve its constitutional authority.

The conditionally approved standards and requirements, together with the commentary of the MIDC and the MIDC's description of the principles governing the creation of the standards, are as follows:

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to

counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposed a minimum standard for the education and training of defense counsel. The version conditionally approved by the Court is as follows:

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of the changes and developments in the law. "Reasonable knowledge" as used in this standard means knowledge of which a lawyer competent under MRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

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

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education. Training shall be funded through compliance plans submitted by the local delivery system or other mechanism that does not place a financial burden on assigned counsel. The MIDC shall collect or direct the collection of data regarding the number of hours of continuing legal education offered to and attended by assigned counsel, shall analyze the quality of the training, and shall ensure that the effectiveness of the training be measurable and validated. A report regarding these data shall be submitted to the Court annually by April 1 for the previous calendar year.

Comment:

The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

Standard 2

Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposed a minimum standard for the initial client interview. The version conditionally approved by the Court is as follows:

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. The purpose of the initial interview is to: (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and (6) advise that clients should not discuss the circumstances of the arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting. If confidential videoconference facilities

are made available for trial attorneys, visits should at least be scheduled within three business days. If an indigent defendant is in the custody of the Michigan Department of Corrections (MDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pre-trial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate, and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in- court proceedings, or other accommodations pursuant to MCR. 1.111.

Comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

6. The three-business-day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might provide for visits through confidential videoconferencing.

8. Systems without adequate settings for confidential visits for either in-custody or out-of-custody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

Standard 3

Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel…" MCL 780.985(3).

The MIDC proposed a minimum standard for investigations and experts. The version conditionally approved by the Court is as follows:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

Comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4

Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. MCL 780.991(3)(a); (3) …counsel

continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added).

The MIDC proposed a minimum standard on counsel at first appearance and other critical stages. The version conditionally approved by the Court is as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

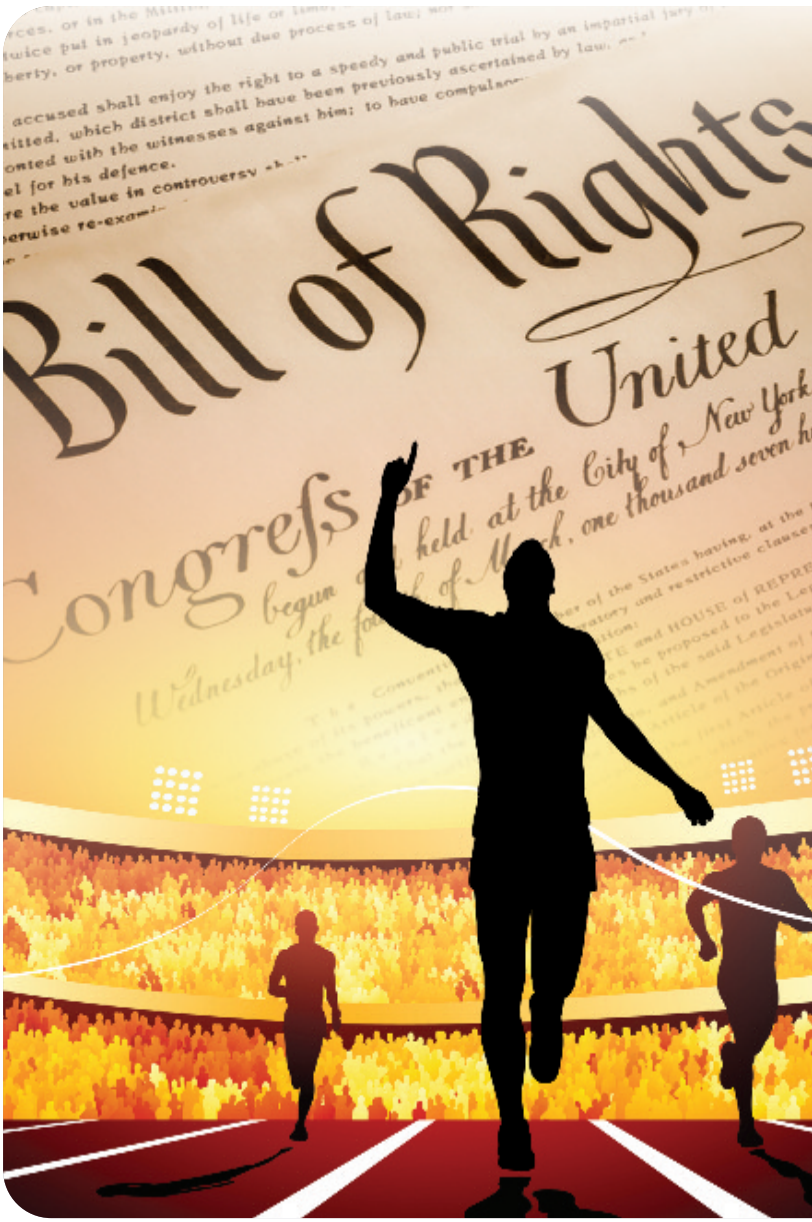
5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, 398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.

Redefining Success as a Public Defender:

A Rallying Cry for Those Most Committed to *Gideon*'s Promise

By Jonathan Rapping



Young public defenders express the following sentiments almost daily:
"What's the point?"

"I cannot make a difference."

"I'll never be the public defender my clients need me to be!"

As the 50th anniversary of the decision in *Gideon v. Wainwright* approaches, the criminal justice system is not close to fulfilling its promise. Public defenders are on the front lines of a battle for the country's very sense of justice. They are the ones most acutely aware of the nation's failure in indigent defense. Yet every day they fight on, without the resources necessary to do the job well. Often they internalize the country's failures, blaming themselves for not achieving the most basic tenets of justice for the poor and disenfranchised. As they watch injustices proliferate, they often see themselves as failures. Public defenders are far from failures; they are just so focused on a long-term ideal that they have trouble seeing the many successes they have achieved.

The Dilemma of the Conscientious Public Defender

What does it mean to be successful as a public defender? Every public defender has good days and bad, and how we distinguish between them has everything to do with how we answer this question. Eighteen years after beginning my career as a public defender, I am still redefining my view of what it means to be successful as a public defender. Of course, the conscientious public defender is focused on achieving his or her client's desired objective. But this narrow way of thinking of success may drive the most conscientious public defenders from the profession when they fail to achieve this singular goal. Thus, the answer must involve more than merely winning an acquittal,

earning a dismissal, or negotiating a great plea.

I began my career at the Public Defender Service for the District of Columbia (PDS) as a lawyer with the simplistic notion of success just described, a notion which, to be honest, nearly kept me from surviving my first year. I was five months into my new career when I was assigned to represent a 15-year-old boy who was playing with a gun when it accidentally discharged, killing his best friend. I spoke with him in his cell; it was not much of a conversation. The young man appeared almost comatose, unable to communicate, and grief-stricken over the role he played in his best friend's death. It was apparent that there was no punishment the juvenile justice system could visit upon this child that was greater than the punishment he was wielding on himself. Far from being a threat to society, he was a young man deep in the throes of remorse and sorrow. Yet he was charged with murder.

As my co-counsel and I prepared for trial, we got to know this young man well. He was smart, compassionate, and so appreciative to have us fighting for him. He desperately wanted to finish high school and go on to college, something that would be unlikely if the court committed him to Oak Hill, a juvenile detention facility where kids were more likely to be guided towards crime than higher education. He made a mistake, a costly mistake. But he grew up in an environment where guns were prevalent and easily accessible. He and his friends were curious teenagers. He never meant to hurt anyone, and would almost certainly have nothing to do with guns again. None of that seemed to matter to the prosecutor who charged him, or to the judge who handed down the conviction. The judge sentenced the teenager to Oak Hill until his 21st birthday. That boy's dreams ended at that moment. As he was led through the courtroom's back door towards the cellblock, and I walked through the front door, I felt defeated. I walked to my office, closed the door, turned out the lights, and cried. Intellectually, I knew I had done all I could for this young man, but viscerally I felt like I failed. I could not prevent what was clear to me to be a great injustice. I questioned my career choice: "This work is too hard," I told myself. "It is too hard watching terrible things happen to people you come to care about deeply." I knew this was part of the job, and I knew I could not change it. I decided to quit.

Fortunately I worked in a public defender office where I was surrounded by a community of committed, inspiring lawyers. They supported me. They helped me understand that the result would have been the same if this young man had any other lawyer, and that this young man benefitted from having a lawyer who cared, treated him as a person, and fought for him. They helped me understand that we cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

I survived the setback and continued as a public defender, but I still never dealt with "losing" very well. At that stage of my career, I equated losing with guilty verdicts. I still labeled this experience a failure. I was young. I had much to learn.

We cannot underestimate the importance of giving clients respect and a sense of their own deep humanity during the most trying time of their lives. This was my first lesson in the importance of having a community if one is to sustain himself as a public defender.

The Epiphany

I learned the true importance of that lesson six years later when I was assigned to represent a man accused of committing a series of sexual assaults. I was provided a police report and asked to go to the jail to meet my new client. As I read the report, I learned this man was accused of picking up women and brutally raping them. The violence involved was horrific, leaving the women horribly injured, both physically and psychologically. The evidence was overwhelming. DNA, hair, and clothing fibers linked the client, the crimes, and the victims (strangers to the client) to the van that he allegedly used to pick them up. The women all identified him as the perpetrator. Although he never admitted to committing the crimes, he made a statement that placed him at the relevant scenes at the relevant times.

At this stage in my career I had represented many people accused of serious felonies, including rape and murder. I had yet to meet a client I did not deeply connect with on a human level. A quote adorning my office wall, by Sister Helen Prejean, served as a constant reminder of the humanity of every person we represent: *"The dignity of the human person means that every human being is worth more than the worst thing they've ever done."* However, as I read about the horrific nature of the assaults on perfect strangers who could have been my mother, my sister, or my wife, I wondered who could do these things. As I considered the strength of the evidence pointing to the man I was about to meet, I wondered if this would be the first client I could not connect with on a human level. When I arrived at the jail, my expectations were proven wrong.

Upon walking into the visiting room, I met a man in his early 40s. He was soft-spoken and polite. He asked how I was; he asked about his family; and he expressed concern for the women who were his accusers. He showed concern for everyone but himself. My newest client was not what I expected. I was no longer convinced by the evidence as laid out in the police report. But if he committed these crimes, he proved the message that hung on my office wall. People are complex and we cannot define them based on their worst moments.

I soon met his family: a very concerned mother, three doting sisters, a loving and supportive wife, and two little children who loved their daddy very much.

Through each of them, I came to understand my client better. As our trial date approached, we became closer. He never seemed worried about his own fate, but was very concerned about how this ordeal would impact his family. The trial lasted a couple of weeks and, as expected, the evidence was quite damning. However, the jury deliberated for several days, giving the defense team increasing hope. Then the jury reached a decision.

As we stood in the courtroom, awaiting the verdict, I was hopeful. The foreperson was asked to share the jury's findings. The foreperson did – *guilty* on all counts. The judge sentenced this man to a term of imprisonment that would guarantee he died in prison. As my client was led through the back doors and I walked through the front, I had that same feeling that I remembered from six years earlier. "This work is just too hard. It is too hard watching terrible things happen to people you come to care for." That evening I collected myself and went to see my client at the jail.

As I entered the visiting room to meet him, I looked at him and said, "I am so sorry."

He interrupted me. "Mr. Rapping, thank you."

"Thank you?" I replied. "Maybe you don't understand what happened today, but things didn't go so well."

He smiled. "No, you don't understand," he told me. He continued:

> All my life I've been in the system. I went to D.C. public schools and never had a teacher who cared about me. I was in the juvenile system and never had a lawyer care about me. I've had adult charges before and no lawyer ever fought for me. But you, your co-counsel, your investigator, and your law clerks, you all cared about me. You fought for me. You gave me the kind of representation the Constitution says I deserve. And for that, I thank you. But even more importantly, my family sat through the trial. My mother, sisters, wife, and children heard what they said I did and are convinced that the jury got it wrong. I could easily spend the rest of my life in prison as long as my family does not believe I had anything to do with these awful crimes. For that, I thank you.

I went home that night and had an epiphany. For the first time in six years I had an understanding of what it meant to be successful as a public defender with which I was comfortable. It was not simply "not guilty" verdicts, dismissals, and great plea offers. It meant being able to look in the mirror each night and know on that day I had given each and every client the representation she or he deserved.

I had spent six years in an organization surrounded by public defenders who could do this work every day. Not only were these lawyers talented and committed, but they had reasonable caseloads and the resources necessary to represent every client well. We earned a fraction of what our law school classmates were earning in the private sector. We worked long hours and dealt with the emotional stress that comes along with being a lawyer for poor people accused of crimes. But at the end of any case we could always say we did everything we could for each client. My career to date had been filled with "good days" – as measured by this more nuanced understanding of my role. I continued to hold this as the standard for public defender success for the next three years.

I became the training director for PDS and continued my career surrounded by lawyers who worked long hours, suffered emotional fatigue, watched terrible things happen to people they cared about, but still could find that each day was a "good day." Poor people in the District of Columbia could not get better representation than they received through PDS.

Then I moved to the South. Over the next few years I would be intimately involved in efforts to reform indigent defense, in Georgia following legislation to develop a statewide public defender system there, and in New Orleans helping to rebuild the public defender offices in the wake of Hurricane Katrina. During this time I worked with public defenders and represented indigent clients in states across the southeast. Unlike my experience in Washington, D.C., these systems did not hold high expectations for their public defenders. Far too often, the expectation was merely that these defenders would process huge caseloads efficiently. There was little respect for thorough investigation, case-specific motions practice, client loyalty, or the need to develop relationships with the people we represented. For the public defender who wanted to do these things, crushing caseloads and too few resources made it impossible. I came to understand that the most basic constitutional and ethical obligations were seen as inconveniences in systems that prioritized processing a high volume of cases over all else. The pressure on public defenders to conform to this practice was intense. In this world it simply was not possible for a public defender to provide every client the representation to which she or he was entitled.

Idealism Shattered

In 2004 I agreed to serve as the first training director for Georgia's new statewide public defender system, and have spent the last eight years working with public defender offices across the Southeast. It is a region with a shameful history regarding indigent defense. For many years there were well over a hundred legal lynchings annually in the South.[1] Once accused of a crime, the sentence was pronounced, without the slightest pretense of due process. While a national outcry put an end to much of this blatantly illegal practice, to keep the lynch mobs at bay the system replaced lynchings with "speedy trials that reliably produced guilty verdicts, death sentences, and rapid executions."[2]

Common were cases like the infamous Scottsboro Boys in which nine illiterate black youths, accused of rape, escaped an Alabama lynch mob only to be rushed to trial 12 days later with a lawyer appointed the morning of trial.[3] The defense conducted no investigation, called no defense witnesses and made no closing arguments. The prosecution sought death sentences against eight of the boys. Eight death sentences were handed down.

The same year the Scottsboro Boys were tried in Alabama, John Downer was accused of rape in Elberton, Ga.[4] One week after being arrested, Downer was tried. Like the Scottsboro Boys, counsel for Downer was appointed the day of trial. No continuance was requested so that the lawyers could conduct an investigation or interview their client. Trial began around 11:00 a.m. and concluded that afternoon. The jury deliberated a mere six minutes before returning a guilty verdict. Downer was sentenced to die.

The year was 1931 and defense attorneys were used as mere window dressing to further the appearance of legitimacy, allowing the public to rest easy that justice had been served. The Supreme Court attempted to end this charade when it decided *Gideon v. Wainwright* in 1963,[5] but 21 years later,

in *Strickland v. Washington*,[6] the Court set such a low bar for what constitutes effective assistance of counsel that for many indigent defendants not much has changed. Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Consider the 14-year-old boy arrested in Union County, Miss., for allegedly taking $100 from an elderly woman. Despite his protestations of innocence, his lawyer never investigated his claims or even consulted with his client. Presumably concluding that the boy was guilty, and that he would lose at trial, the court-appointed lawyer advised him to plead guilty and told him that he was "looking at life" if he lost at trial. The lawyer assured the boy he would be eligible for parole in six years. The boy had spent months in jail with no meaningful access to counsel. Feeling he had no other option, he pled guilty. To add insult to injury, his lawyer's advice was wrong. Now 15, the boy was sentenced to 25 years and would not be eligible for parole until he served at least 10.[7]

Consider the countless clients of a defense attorney who held the contract to represent indigent defendants in Green County, Ga., for 14 years.[8] Although his position was only part time, and he continued to maintain a private practice, the attorney's annual appointed caseload was twice the recommended national standard. He began his public defender career as a young lawyer and quickly adapted to the expected standards of practice that prevailed in Georgia. The judges demanded that he process his cases quickly, and he obliged. In one four-year period he handled 1,493 cases, with 1,479 (more than 99 percent) resulting in pleas. Some days he would plead dozens of clients in a single court session, and he had little time to get the details necessary to negotiate on their behalf. He did not request investigative or expert services "claim[ing] not to need these resources, anyway, because most of his cases were 'pretty open and shut.'"[9] In addition he did not want to arouse public disapproval about spending the county's money. When clients complained about the limited time counsel spent talking to them, he chalked it up to "their [bottomless] need for attention," adding, "You have to draw the line somewhere."[10] He considered his high-volume, plea-bargain practice "a uniquely productive way to do business," and believed that he "achieved good results" for his clients.[11]

As shocking as these stories are, they are not isolated. They represent an embarrassingly low expectation of representation for poor people in much of the country. The lawyers who engage in this substandard practice are shaped by the systems in which they work. The judges who preside over these cases provide their tacit approval of the system. They are judges like Atlanta's Andrew Mickle who, when Georgia refused to fund its young public defender system a couple years after its birth, recommended a return to the days when indigent defense was localized and "starving" lawyers would handle a case for 50 dollars regardless of the time invested.[12] Although this policy would guarantee that no lawyer could afford to adequately represent a client, Mickle's concern was with processing people, not with justice.

Judges are often instrumental in creating this system of inadequate representation for the poor. Johnny Caldwell, for example, presided over the case of Jamie Weis in Pike County, Ga., who was charged with capital murder and appointed counsel experienced in death penalty litigation.[13] When the state did not have the funding to pay Weis' counsel for the preparation necessary to defend him, Caldwell removed his lawyers, over their objection, and appointed two local public defenders. The public defenders resisted, citing crushing caseloads that would make it impossible for them to adequately defend Weis. One had well over 200 cases already and the other more than 100 cases along with significant administrative responsibility. They further pointed out that the removed lawyers had represented Weis for over a year and they could not now recreate the attorney-client relationship. If Judge Caldwell were truly concerned with the right to counsel, these arguments would have been persuasive. He was not.

Many states have taken advantage of the standard for ineffectiveness established in *Strickland* and come to view the mere provision of a warm body as sufficient to meet their Sixth Amendment obligations.

Judges like Caldwell were common in New Orleans when I joined the management team charged with rebuilding the public defender office there after Hurricane Katrina. The scene I observed on my first courtroom visit was typical of what I observed throughout my stay there. It was chaotic. Lawyers wandered about the well of the court chatting with one another. The judge was on the bench and the prisoners were lined up in a row on the left side of the courtroom, wearing orange jumpsuits. The lawyers had no contact with the defendants and it was not clear that any of the lawyers had ever met any of the defendants.

When a case was called, one of the lawyers would speak for the accused. However, none of the men in jumpsuits would be brought to his spokesman's side and the lawyer often barely acknowledged his client. Then, the judge called a case with no lawyer. When it was clear that there was no representative for this particular man, the judge turned to the row of defendants and asked the man to stand. "Where is your lawyer?" asked the judge. "I haven't seen a lawyer since I got locked up," the man replied. "How long has that been?" asked the judge. "Seventy days," answered the man, seemingly resigned to the treatment afforded him. "Have a seat," was the judge's response as he moved on to the next case, completely unfazed by the answer.

In another instance in New Orleans, I was waiting to observe evening First Appearance Hearings when the magistrate took the bench at 6:35 p.m. There were approximately 40 arrestees whose cases needed to be heard that evening. A private attorney represented one of the defendants. The others were left to a team of two public defenders. As a professional courtesy, the judge called the private attorney's case first. After about 10 minutes of discussion, the judge granted the requested bond. Then, at 6:45, the judge turned to the public defenders in the courtroom and said, "You better talk fast because we are going to finish the rest of these by seven o'clock."

As I repeatedly witnessed judges showing such little concern for the rights of the people who rely on publicly funded lawyers, I often thought back to the first training I conducted when I moved to the South. One session focused on litigating basic

suppression motions: challenging searches and seizures, confessions, and identification on Fourth, Fifth, and Sixth Amendment grounds. The subject matter was foundational to the work of any criminal defense lawyer and there were many new public defenders present. I wanted to make sure all understood how to effectively litigate these issues. The first person to approach me after this session was a Circuit Public Defender, one of the nearly four dozen lawyers appointed to lead this new reform effort. He told me that he really enjoyed the session. He explained, however, that his lawyers could not do the things we were teaching. Confused, I assured him that they could do these things, and that the session was based entirely on federal and state principles that applied in his circuit. He then explained to me how things worked where he practices. The judges become very upset if the lawyers file motions, he explained. Because it slows down the docket, they would not allow his lawyers to litigate these issues. At the time I was dumbfounded. Over the next two years I trained and mentored young lawyers who would return from training sessions eager to demand hearings and litigate issues, only to encounter irate judges of the kind described. It was a daunting, but educational, experience for someone used to much different procedures in a well-functioning system.

It is a grueling task to spend every day pushing back against a system that harbors such low expectations for the quality of representation. It is not surprising that some lawyers enter this system full of idealism but ultimately resign themselves to the status quo. Others simply find it too difficult and leave before the pressure to conform overwhelms them. This is what happened to Marie, a young lawyer who came to Georgia in 2005 to be involved in the new reform effort.

Marie was a fiery lawyer who was part of a cohort of public defenders who was going to help transform indigent defense in Georgia. But Marie ultimately became discouraged as countless numbers of her clients fell through the cracks. In her final 13 months as a Georgia public defender, she resolved 900 cases, allowing her three hours per year to devote to each client if she worked 50-hour weeks without taking any vacation time or sick leave.[14] Given that these three hours included court time and client meetings, there was no time for her to be competent in every case. She struggled on as best she could under these conditions, until she found herself at a crossroads. Should she stay in Georgia, she saw herself becoming a desensitized lawyer resigned to processing poor people through an inhumane system. She left to become a public defender in a well-resourced system.

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My mother is an author who frequently writes about criminal justice. Marie's story reminds me of a dedication in one of my mother's books to "all the public defenders … who toil in the trenches every day, against the greatest odds, and with little financial or social reward, in the Sisyphean effort to make our government live up to the democratic rhetoric of its own Constitution."[15] Her reference to Sisyphus, the Greek mythological king condemned to endlessly push a boulder up a hill only to watch it roll back down, symbolizes the seemingly impossible task of advancing the cause of justice in the indigent defense arena. Many throw their hands up, accepting the current state of injustice. Others leave the important mission of trying to reform indigent defense in the most dysfunctional systems. But for those who remain energized and idealistic, they do move the cause of justice forward each day. This was a lesson I learned working in the South, which caused me to rethink my idea of success as a public defender. To explain what I mean, let me tell you about Janelle.

Like Marie, Janelle moved to Georgia to join the new statewide system in 2005. Despite her business suits and briefcase, as one of two African-Americans practicing in her county, it took some time before courthouse personnel stopped asking her where her lawyer was when she entered the courtroom. Undeterred, she threw herself into her new career, and quickly won over those with, and before whom, she practiced. Over time, she brought change to the courthouse. In one example, Janelle prepared a seemingly obvious release argument for her client that she had not heard made by any of the more experienced practitioners. One experienced lawyer advised her that the argument would be a waste of everyone's time. Unmoved, Janelle made her pitch to the judge against a chorus of snickers from some of the more experienced members of the bar. But the judge agreed with Janelle and released her client. Some of the lawyers who snickered subsequently adopted Janelle's argument. Janelle had acted on her duty to her client, not the corrupt ways of the existing system, and thus achieved the best outcome for the client. In the process she began to gradually change the practice in the courthouse. Even had the judge rejected her arguments, however, having the courage to challenge that system, in my newly evolving way of thinking, would have been success.

Today's Civil Rights Struggle

Given my experiences working in the South, I have come to understand something about the public defenders working in corrupt systems. That they fail to provide every client the representation they deserve does not necessarily mean they are worse lawyers than

those I practiced with at PDS. Rather, it indicates that even excellent lawyers, working in systems such as those I experienced in Georgia and Louisiana, have an impossible task. Over time, some do lose the will to continue to fight against the system. They come to accept the status quo and participate in injustice. But others, and they are heroic, never lose sight of our systems' ideals and their obligation to try to make them a reality for every client. They fight mightily every day to close the gap between those ideals and the reality of the American criminal justice system.

While there are some model public defender systems like PDS across the country, they are the exception. Most public defenders appear before judges who expect them to help process cases rather than fight for their clients. Most carry overwhelming caseloads and lack the resources necessary to do everything required of them. The most heroic public defenders find a way to maintain their ideals in the most broken systems, fighting every day to try to realize a modicum of justice for clients who otherwise would not have a chance. These lawyers are exceptional. But most are not able to maintain their values against the odds they fight each day. If we are ever to reform indigent defense in this country, we must find a way to steer the best public defenders to the systems that need them the most and provide them with training and support to help them maintain their idealism while raising the standard of representation where they work.

These experiences, and the need to train and nurture more public defenders committed to true justice, led me to create the Southern Public Defender Training Center (SPDTC). The driving goal of SPDTC is to groom a generation of public defenders in the South who will help raise the standard of representation across the region. We provide the training they need to have a strong sense of what their clients deserve. We provide mentorship and support to help reinforce these lessons when systemic pressures send the opposite message. Perhaps most importantly, we give these lawyers a community of like-minded colleagues to continually support and encourage them as they carry on the "Sisyphean effort" of rolling that seemingly immovable boulder of justice forward.

These ideas stemmed from my years at PDS. When I was a young public defender there, a group of my peers and I would meet regularly to remind ourselves of the reasons we chose this line of work. These gatherings connected us to one another, helping to build a much-needed support network, and kept us inspired as we shared and nurtured each other's idealism. It was this community to which we would turn to reassure us of the rightness of our mission when outsiders exhibited so little respect for our work and our clients.

In one such gathering a close friend, whose parents were active in the civil rights movement, told us that he chose to be a public defender because he always wanted to be a civil rights lawyer. In his mind, public defense was our generation's civil rights struggle. At the time I did not appreciate the importance and truth of this sentiment. I associated civil rights with efforts to desegregate the Woolworth's lunch counter in Greensboro, N.C., in 1960 or to register Black people to vote in Mississippi during Freedom Summer in 1964. I knew the work we were doing was important, but I did not see it as civil rights law. Now, after my experience in the South, the connection is clear and the realization that indigent defense is this generation's civil rights struggle has helped me to refine my view of what it means to be a successful public defender.

> Defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. This is a noble and heroic task.

The lawyers I work with today, given caseloads and inadequate resources, cannot live up to the standard of success held at PDS. Despite their incredible sacrifices, they cannot make *Gideon*'s promise a reality overnight. Law students frequently ask me whether they should go to a well-resourced office that can give their clients all they deserve or join the growing community of lawyers in the South who frequently fall short. Whenever I am asked this question, I am reminded of my friend's point about the civil rights movement and a segment of a documentary I watched in which a rabbi discussed her experience with Freedom Summer.[16] She describes being with a group of summer volunteers on a college campus in Ohio training for the summer's work. The day before they were to board the bus for Mississippi, news of the disappearance of three civil rights workers made its way North. The workers were out investigating a church bombing when they failed to return. They were feared dead (fears that were confirmed later that summer). One of the civil rights workers training the volunteers told the group the frightening news. The worker explained that protection of the volunteers could not be guaranteed, and that if any of them had second thoughts about boarding the bus the next day, the trainers would understand. The future rabbi then describes a phone call to her mother later that evening. After explaining the situation, her mother urged her not to get on the bus. The young woman reminded her mother of their family members who perished in the Holocaust. She questioned whether, if more Germans had "gotten on the bus," some of her family might have survived. Given that history, she asked, how could she not go to Mississippi?

I think of that documentary when students ask whether they should forgo an opportunity to join one of the model public defender offices in the country to work in the South. In the 1960s there was important work to be done all across the country, but the front line of the civil rights movement was in places like Mississippi, Alabama, and Georgia. Ultimately, that movement was successful because of the civil rights workers in those states. Likewise, there is important work to be done in public defender offices across the country. And the lawyers working in the best public defender offices help provide a model for what all poor people accused of crimes deserve. But if we are to ever realize meaningful indigent defense reform on a national level, we will have to win the battle to bring justice to places like Mississippi, Alabama, and Georgia. I explain to these students that we need good public defenders here. Then comes the inevitable follow-up: "Can I make a difference under such challenging circumstances?" Again, I am reminded of my friend's civil rights analogy.

Changing the World Without Realizing It

Last year I read a book called *Freedom Summer* about the Summer Project in Mississippi in 1964.[17] The author chronicled that summer through the stories of the young people who spent the summer in Mississippi. Some were civil rights workers from the South. Others were college students from across the country. They signed up to change the world. They planned to register voters and educate children and adults in Freedom Schools in Black communities across the state. The task proved more difficult than they imagined. They witnessed beatings and fire bombings. Many people were too afraid to be seen speaking to them. One after another, the workers wondered if they were making any difference at all. They wondered if the Summer Project was a waste of time. The author then flashes forward to 2008. John Lewis, one of the leaders of the Summer Project and later a member of Congress, explained that had it not been for Freedom Summer, Barack Obama would not have been elected president of the United States. While in the middle of the firestorm, these young activists did not realize they were changing the world.

As I read that book, I thought of the countless calls from public defenders in Tennessee, Louisiana, Mississippi, South Carolina, and Alabama. How frequently these heroic lawyers expressed frustration that they could not provide the representation they know their clients deserve. I recalled the desperate email from a Georgia public defender, who several years later continues to raise the standard of representation in his rural county, worrying that he was losing his idealism and that he was "becoming part of the machine." These lawyers do not have the time they need to meet with all of their clients as frequently as they should. They lack the investigative resources to pursue important leads. With caseloads that can be two to three times the recommended maximum, they often have to prioritize the cases that will get the attention they deserve, leaving other clients neglected.

Like those heroes of Freedom Summer, these lawyers do not see the difference they make every day. The next generation will know a very different criminal justice system thanks to the work they do. They are changing the world.

The Epiphany Revisited: A Good Day as a Public Defender

I ultimately tell prospective public defenders that they can make a difference in places with the greatest need for reform. But they will only survive if they refine their view of success. In a handful of public defender offices, the standard I came to understand six years into my career defines a good day as a public defender. For the vast majority of public defenders, it is not possible to realize this ideal. They simply cannot give all clients the representation to which they are entitled by the Constitution. They have caseloads that are too overwhelming, insufficient resources with which to do their jobs, and they work in environments that pressure them to process cases efficiently. But that does not mean they are not successful. Every day that they do everything they can to close the gap between what clients deserve and what the system tolerates, they are successful. At times, theirs may be the only voice reminding the system of our most sacred ideals. That is when the voice is most valuable.

The last chapter of my journey as a public defender has proven transformational. It has caused me to once again redefine how I think about good and bad days for a public defender in those jurisdictions where *Gideon*'s promise remains an aspiration. It has helped me to understand that to sustain oneself in these environments, defenders have to be able to forgive themselves for not being able to give all clients everything they deserve while continuing to resist the pressure to see the status quo as acceptable. Again, this is a noble and heroic task.

Bad days will always exist. They are the ones when the defender becomes discouraged and decides to leave, or becomes complacent and begins to conform. Good days are those in which the defender can continue to raise the standard of representation, however incrementally, without losing sight of the representation clients deserve.

As more committed public defenders choose to work in places where *Gideon*'s promise remains unfulfilled and are able to embrace this standard of success, we will move towards a day when the gap between reality and our ideals is closed. Perhaps our children will see that day. When they do, they should be reminded that it was committed lawyers working to represent one client at a time, incapable of understanding the global difference they were making as they struggled, that made this day a reality.

Notes

1. Michael J. Klarman, *Powell v. Alabama*: The Supreme Court Confronts 'Legal Lynchings,' Criminal Procedure Stories 1 (Carol S. Steiker ed., 2006).
2. *Id.*
3. *Powell v. Alabama*, 287 U.S. 45 (1932).
4. This account of John Downer's case is taken from Anne Emanuel, Elbert Parr Tuttle: Chief Justice of the Civil Rights Revolution 1-7 (2011).
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
6. *Strickland v. Washington*, 466 U.S. 668 (1984).
7. NAACP Legal Defense and Educational Fund, Inc., Assembly Line Justice, Mississippi's Indigent Defense Crisis 13 (Feb. 2003).
8. This account is taken from Amy Bach, Ordinary Injustice: How America Holds Court 12-17 (2009).
9. *Id.* at 15.
10. *Id.* at 17.
11. *Id.* at 13.
12. Andrew A. Mickle, *Is the Process Choking the PD System?*, Daily Report, Atlanta, Ga., April 11, 2008.
13. For a summary of the facts, see Appellant's Brief at http://www.schr.org/files/post/WEIS_BREIF_GaSCt_9-2-09_0.pdf.
14. *See* Marie Pierre-Py, *Public Defender System Fails Georgians and Their Lawyers*, Atlanta J.-Const., Mar. 30, 2009.
15. Elayne Rapping, Law and Justice As Seen on TV (2003).
16. The Jewish Americans, PBS Home Video (2008).
17. Bruce Watson, Freedom Summer (2010).

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The complete version of the Michigan Rules of Professional Conduct can be found online at this link:

http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf

Some of the rules most frequently referred to in the practice of indigent defense are:

1.1 Competence

1.2 Scope of Representation

1.3 Diligence

1.4 Communication

1.6 Confidentiality of Information

1.7 Conflict of Interest: General Rule

1.9 Conflict of Interest: Former Client

1.10 Imputed Disqualification: General Rule

1.16 Declining or Terminating Representation

3.1 Meritorious Claims and Contentions

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party and Counsel

3.7 Lawyer as Witness

4.1 Truthfulness in Statements to Others

4.2 Communication with a Person Represented by Counsel

4.3 Dealing with an Unrepresented Person

5.3 Responsibilities Regarding Non-Lawyer Assistants

(E) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

Rule 1.110 Collection of Fines and Costs

Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown.

Rule 1.111 Foreign Language Interpreters

(A) Definitions

When used in this rule, the following words and phrases have the following definitions:

(1)"Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.

(2)"Party" means a person named as a party or a person with legal decision-making authority in the case or court proceeding.

(3) A person is "financially able to pay for interpretation costs" if the court determines that requiring reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court. For purposes of this rule, a person is financially able to pay for interpretation costs when:

(a) The person's family or household income is greater than 125% of the federal poverty level; and

(b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter.

(4) "Certified foreign language interpreter" means a person who has:

(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) met all the requirements established by the state court administrator for this interpreter classification, and

(c) registered with the State Court Administrative Office.

(5) "Interpret" and "interpretation" mean the oral rendering of spoken communication from one language to another without change in meaning.

(6) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) met the requirements established by the state court administrator for this interpreter classification; and

(iii) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(i) both the entity and the person have registered with the State Court Administrative Office; and

(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(i) the entity has registered with the State Court Administrative Office; and

(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services

(B) Appointment of a Foreign Language Interpreter

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.

(2) The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding.

(3) In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under subrule (B)(1), the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record. If no such requests have been made, the court may conduct an examination of the person on the record to determine

whether such services are necessary. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(C) Waiver of Appointment of Foreign Language Interpreter

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings

The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) Avoidance of Potential Conflicts of Interest

(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c)The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety.

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)(4). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)(4) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)(4) within a reasonable time.

(b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by this rule and is not otherwise disqualified.

(F) Appointment of Foreign Language Interpreters

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)(6). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2) If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person.

(3) The court shall appoint a single interpreter for a case or court proceeding. The court may appoint more than one interpreter after consideration of the nature and duration of the proceeding; the number of parties in interest and witnesses requiring an interpreter; the primary languages of those persons; and the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding.

(4) The court may set reasonable compensation for interpreters who are appointed by the court. Court-appointed interpreter costs are to be paid out of funds provided by law or by the court.

(5) If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs.

(6) Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter.

(7) At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement. The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information.

(G) Administration of Oath or Affirmation to Interpreters

The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

(H) Request for Review

(1) Any time a court denies a request for the appointment of a foreign language interpreter or orders reimbursement of interpretation costs, it shall do so by written order.

(2) An LEP individual may immediately request review of the denial of appointment of a foreign language interpreter or an assessment for the reimbursement of interpretation costs. A request for review must be submitted to the court within 56 days after entry of the order.

(a) In a court having two or more judges, the chief judge shall decide the request for review de novo.

(b) In a single-judge court, or if the denial was issued by a chief judge, the judge shall refer the request for review to the state court administrator for assignment to another judge, who shall decide the request de novo.

(c) A pending request for review under this subrule stays the underlying litigation.

(d) A pending request for review under this subrule must be decided on an expedited basis.

(e) No motion fee is required for a request for review made under this subrule.

Defender Motions Book

2014

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PREFACE

The 2014 edition of the **Defender Motions Book** is an updated edition, part of a set including the **Defender Trial, Defender Plea, Sentencing & Post-Conviction**, and the **Defender Habeas Books**. The Motions Book focuses on motions commonly filed at trial by criminal defense attorneys practicing in Michigan courts. The Motions Book is intended to grow in contents and format, reflecting the dynamic nature of trial practice. Feedback from users is encouraged.

Format. Each chapter of the Motions Book contains its own table of contents, allowing quick identification of issues and location of useful material. Sample motions follow narrative text, and are linked numerically; for example, motion 2.4 relates to text 2-4, covering the same subject. Simpler motions contain highlighted fields which identify data which can be plugged in from a particular case. More complicated motions (search and seizure, for example) are more fact-driven, and data fields are not supplied. Instead, a sample appears for guidance on form.

Citations. Text and motions contain citations to court rules, statutes, and appellate decisions, updated through July, 2014. In all cases, attorneys are urged to update the authorities up to the date of filing. Summaries and full text of new developments are available on the SADO Web site, www.sado.org.

Additional resources for trial attorneys. Attorneys also should consult the online resources located on the State Appellate Defender Office's web site, www.sado.org. These include a database of constantly updated pleadings filed in trial and appellate courts, community pages for information about local practice in each circuit, a calendar of training events, new caselaw summaries, newsletters, and full text of all the Defender Books. A collection of trial motions, searchable by keyword and submitted by trial attorneys in Michigan, also is available exclusively to criminal defense lawyers.

Interactive version. The Defender Motions Book also is published in an interactive version, for use in word processing. This version, supplied on flash drive or Web-downloadable form, is meant to provide templates which can be customized for a particular case. Users may move from field to field, delete text, or add text as needed.

Archives of Earlier Editions. The most recent prior edition of the Defender Motions Book appears on the CDRC's web site, www.sado.org. Every edition is archived by CDRC and is available upon request. Older editions may contain material of continuing interest, for both comparison to new cases and direct application to older cases.

Questions or Comments. Users of the **Defender Motions Book** may address questions or comments to:

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CRIMINAL DEFENSE RESOURCES IN MICHIGAN

Attorneys who represent criminal defendants in Michigan's state or federal courts may take advantage of the comprehensive support services provided by the Criminal Defense Resource Center (formerly, the Legal Resources Project). For a quarter century, the CDRC has provided the tools needed for effective representation, all at very low cost due to generous funding from the Michigan Commission on Law Enforcement Standards, the Michigan State Bar Foundation, the Bureau of Justice Assistance, and the State Appellate Defender Office.

CDRC support services include:

- The Criminal Defense Newsletter, published monthly and distributed in hard and electronic copy, covering developing issues, new laws and court opinions, pleadings of interest, local successes and practice tips;

- The Defender Trial, Sentencing, Motions, and Habeas Books, comprehensive manuals that summarize, analyze and organize the law from arrest through appeal and beyond;

- Databases of the CDRC Web site, www.sado.org, including expert witness database. a completely updated brief bank, opinion summaries, the Defender Books, Criminal Defense Newsletter, and much more, all searchable by key word;

- Access to the Forum, the CDRC's online discussion group of hundreds of criminal defense attorneys, including a searchable archive of e-mail messages and a unique database of reposited materials ;

- Multiple training events each year, throughout the state, using a small-group, hands-on format to teach computerized legal research and writing skills.

Additional information about these services is available at www.sado.org, the Criminal Defense Resource Center's newly renovated web site, or by phone at (313) 256-9833.

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A note about the principal authors of the Defender Motions Book:

Neil Leithauser is a Michigan attorney admitted to practice in 1982, currently specializing in criminal appeals as a solo practitioner He is qualified at the highest level to accept assigned criminal appeals from the Michigan State Appellate Assigned Counsel System, and admitted to practice in the US Eastern District Court. Mr. Leithauser has provided research attorney services to the State Appellate Defender Office since 2001, and has served as an Associate Editor for SADO's *Criminal Defense*

Newsletter since 2007. He has trained criminal defense attorneys throughout Michigan on legal research techniques, and serves as a research attorney for criminal defense attorneys in Michigan's busiest court, the Wayne County Circuit Court.

Bridget M. McCormack [author through the 2010 edition] is a Justice of the Michigan Supreme Court since January 1, 2013. Prior to her election, she was Dean for Clinical Affairs at the University of Michigan Law School, where she taught and supervised students in the Criminal Defense Clinic. A graduate of New York University School of Law, Ms. McCormack worked in the Criminal Defense Division of New York City's Legal Aid Society, representing over one thousand indigent clients.

Andrea Lyon [co-author on original edition] is an Associate Professor of Law at DePaul University College of Law, where she directs the Center for Justice in Capital Cases and the Death Penalty Legal Clinic. She previously worked as Chief of the Homicide Task Force in the Cook County Public Defender's Office, and has tried over 130 homicide cases, including many capital cases. The National Legal Aid and Defender Association recognized her with its Reginald Heber Smith Award for best advocate for the poor in the country.

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Subchapter 6.300 Pleas

Rule 6.301 Available Pleas

(A) Possible Pleas. Subject to the rules in this subchapter, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor.

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be presumed innocent until proved guilty;

(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(d) to have the witnesses against the defendant appear at the trial;

(e) to question the witnesses against the defendant;

(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(g) to remain silent during the trial;

(h) to not have that silence used against the defendant; and

(i) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. If they have made a plea agreement, which may include an agreement to a sentence to a specific term or within a specific range, the agreement must be stated on the record or reduced to writing and signed by the parties. The parties may memorialize their agreement on a form substantially approved by the SCAO. The written agreement shall be made part of the case file.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agreed to; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) state why a plea of nolo contendere is appropriate; and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(F) Plea Under Advisement; Plea Record. The court may take the plea under advisement. A verbatim record must be made of the plea proceeding.

Rule 6.303 Plea of Guilty but Mentally Ill

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, at the time of the offense to which the plea is entered. The reports must be made a part of the record.

Rule 6.304 Plea of Not Guilty by Reason of Insanity

(A) Advice to Defendant. Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that subrule (C) of this rule, rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

(B) Additional Advice Required. After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time.

(C) Factual Basis. Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that

(1) the defendant committed the acts charged, and

(2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense.

(D) Report of Plea. After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime.

Rule 6.310 Withdrawal or Vacation of Plea

(A) Withdrawal Before Acceptance. The defendant has a right to withdraw any plea until the court accepts it on the record.

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,

(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves an agreement for a sentence for a specified term or within a specified range, and the court states that it is unable to follow the agreement; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under subsection (2)(a) or (2)(b) if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.

(C) Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(D) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

(E) Vacation of Plea on Prosecutor's Motion. On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement.

Rule 6.312 Effect of Withdrawal or Vacation of Plea

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

Subchapter 6.400 Trials

Rule 6.401 Right to Trial by Jury or by the Court

The defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury.

Rule 6.402 Waiver of Jury Trial by the Defendant

(A) Time of Waiver. The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.

(B) Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Rule 6.403 Trial by the Judge in Waiver Cases

When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record.

Rule 6.410 Jury Trial; Number of Jurors; Unanimous Verdict

(A) Number of Jurors. Except as provided in this rule, a jury that decides a case must consist of 12 jurors. At any time before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by a jury consisting of a specified number of jurors less than 12. On being informed of the parties' willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury consisting of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may accept the stipulation. Even if the requirements for a valid waiver have been satisfied, the court may, in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record. The stipulation and procedure described in this subrule must take place in open court and a verbatim record must be made.

(B) Unanimous Verdicts. A jury verdict must be unanimous.

Rule 6.411 Additional Jurors

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

Rule 6.412 Selection of the Jury

(A) Selecting and Impaneling the Jury. Except as otherwise provided by the rules in this subchapter, MCR 2.510 and 2.511 govern the procedure for selecting and impaneling the jury.

(B) Instructions and Oath Before Selection. Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn.

(C) Voir Dire of Prospective Jurors.

(1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.

(2) Conduct of the Examination. The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

(D) Challenges for Cause.

(1) Grounds. A prospective juror is subject to challenge for cause on any ground set forth in MCR 2.511(D) or for any other reason recognized by law.

(2) Procedure. If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.

(E) Peremptory Challenges.

(1) Challenges by Right. Each defendant is entitled to 5 peremptory challenges unless an offense charged is punishable by life imprisonment, in which case a defendant being tried alone is entitled to 12 peremptory challenges, 2 defendants being tried jointly are each entitled to 10 peremptory challenges, 3

defendants being tried jointly are each entitled to 9 peremptory challenges, 4 defendants being tried jointly are each entitled to 8 peremptory challenges, and 5 or more defendants being tried jointly are each entitled to 7 peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.

(2) Additional Challenges. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party.

(F) Oath After Selection. After the jury is selected and before trial begins, the court must have the jurors sworn.

Rule 6.416 Presentation of Evidence

Subject to the rules in this chapter and to the Michigan rules of evidence, each party has discretion in deciding what witnesses and evidence to present.

Rule 6.419 Motion for Directed Verdict of Acquittal

(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

(B) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial.

(C) Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.

(D) Conditional New Trial Ruling. If the court grants a directed verdict of acquittal after the jury has returned a guilty verdict, it must also conditionally rule on any motion for a new trial by determining whether it would grant the motion if the directed verdict of acquittal is vacated or reversed.

(E) Explanation of Rulings on Record. The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial.

Rule 6.420 Verdict

(A) Return. The jury must return its verdict in open court.

(B) Several Defendants. If two or more defendants are jointly on trial, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed. If the jury cannot reach a verdict with respect to any other defendant, the court may declare a mistrial as to that defendant.

(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts.

(D) Poll of Jury. Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A) Presentence Report; Contents.

(1) Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

(a) a description of the defendant's prior criminal convictions and juvenile adjudications,

(b) a complete description of the offense and the circumstances surrounding it,

(c) a brief description of the defendant's vocational background and work history, including military record and present employment status,

(d) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,

(e) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,

(f) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,

(g) if provided and requested by the victim, a written victim's impact statement as provided by law,

(h) any statement the defendant wishes to make,

(i) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,

(j) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,

(k) a specific recommendation for disposition, and

(l) any other information that may aid the court in sentencing.

(2) A presentence investigation report shall not include any address or telephone number for the home, workplace, school, or place of worship of any victim or witness, or a family member of any victim or witness, unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual. Upon request, any other address or telephone number that would reveal the location of a victim or witness or a family member of a victim or witness shall be exempted from disclosure unless an address is used to identify the place of the crime or to impose conditions of release from custody that are necessary for the protection of a named individual.

(3) Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, may retain a copy of the report or an amended report. If the presentence report is not made available to the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court’s decision to exempt part of the report from disclosure is subject to appellate review.

(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and

any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).

(D) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Proposed scoring of the guidelines shall accompany the presentence report.

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2),

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,

(e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and

(f) order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.

(2) Resolution of Challenges. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to file an application for leave to appeal,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.

(4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq.,* are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) In a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing.

(d) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

(i) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(ii) in postconviction proceedings in the Court of Appeals,

(iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(iv) as appellee in relation to any postconviction appeal taken by the prosecutor.

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request.

(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in subrules (G)(1) and (2) must be entered on a form approved by the State Court Administrative Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (G)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

Rule 6.427 Judgment

Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:

(1) the title and file number of the case;

(2) the defendant's name;

(3) the crime for which the defendant was convicted;

(4) the defendant's plea;

(5) the name of the defendant's attorney if one appeared;

(6) the jury's verdict or the finding of guilt by the court;

(7) the term of the sentence;

(8) the place of detention;

(9) the conditions incident to the sentence; and

(10) whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number.

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date.

Rule 6.428 Reissuance of Judgment.

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

Rule 6.429 Correction and Appeal of Sentence

(A) Authority to Modify Sentence. A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.

(B) Time For Filing Motion.

(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(C) Preservation of Issues Concerning Sentencing Guidelines Scoring and Information Considered in Sentencing. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Rule 6.431 New Trial

(A) Time for Making Motion.

(1) A motion for a new trial may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

(C) Trial Without Jury. If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.

(D) Inclusion of Motion for Judgment of Acquittal. The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal.

Rule 6.433 Documents for Postconviction Proceedings; Indigent Defendant

(A) Appeals of Right. An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(G)(2), must order the preparation of the transcript.

(B) Appeals by Leave. An indigent defendant who may file an application for leave to appeal may obtain copies of transcripts and other documents as provided in this subrule.

(1) The defendant must make a written request to the sentencing court for specified documents or transcripts indicating that they are required to prepare an application for leave to appeal.

(2) If the requested materials have been filed with the court and not provided previously to the defendant, the court clerk must provide a copy to the defendant. If the requested materials have been provided previously to the

defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3) If the request includes the transcript of a proceeding that has not been transcribed, the court must order the materials transcribed and filed with court. After the transcript has been prepared, court clerk must provide a copy to the defendant.

(C) Other Postconviction Proceedings. An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule.

(1) The defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant.

(2) If the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the defendant. If the requested materials have been provided previously to the defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3) The court may order the transcription of additional proceedings if it finds that there is good cause for doing so. After such a transcript has been prepared, the clerk must provide a copy to the defendant.

(4) Nothing in this rule precludes the court from ordering materials to be supplied to the defendant in a proceeding under subchapter 6.500.

Rule 6.435 Correcting Mistakes

(A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

(B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

(C) Correction of Record. If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected.

(D) Correction During Appeal. If a claim of appeal has been filed or leave to appeal granted in the case, corrections under this rule are subject to MCR 7.208(A) and (B).

Rule 6.440 Disability of Judge

(A) During Jury Trial. If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

(B) During Bench Trial. If a judge becomes disabled during a trial without a jury, another judge may be substituted for the disabled judge, but only if

(1) both parties consent in writing to the substitution, and

(2) the judge certifies having become familiar with the record of the trial, including the testimony previously given.

(C) After Verdict. If, after a verdict is returned or findings of fact and conclusions of law are filed, the trial judge because of disability becomes unable to perform the remaining duties the court must perform, another judge regularly sitting in or assigned to the court may perform those duties; but if that judge is not satisfied of an ability to perform those duties because of not having presided at the trial or determines that it is appropriate for any other reason, the judge may grant the defendant a new trial.

Rule 6.445 Probation Revocation

(A) Issuance of Summons; Warrant. On finding probable cause to believe that a probationer has violated a condition of probation, the court may

(1) issue a summons in accordance with MCR 6.103(B) and (C) for the probationer to appear for arraignment on the alleged violation, or

(2) issue a warrant for the arrest of the probationer.

An arrested probationer must promptly be brought before the court for arraignment on the alleged violation.

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) ensure that the probationer receives written notice of the alleged violation,

(2) advise the probationer that

(a) the probationer has a right to contest the charge at a hearing, and

(b) the probationer is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,

(3) if requested and appropriate, appoint a lawyer,

(4) determine what form of release, if any, is appropriate, and

(5) subject to subrule (C), set a reasonably prompt hearing date or postpone the hearing.

(C) Scheduling or Postponement of Hearing. The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.

(D) Continuing Duty to Advise of Right to Assistance of Lawyer. Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E).

(E) The Violation Hearing.

(1) Conduct of the Hearing. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence.

(2) Judicial Findings. At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403.

(F) Pleas of Guilty. The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

(1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(2)(b),

(2) advise the probationer of the maximum possible jail or prison sentence for the offense,

(3) ascertain that the plea is understandingly, voluntarily, and accurately made, and

(4) establish factual support for a finding that the probationer is guilty of the alleged violation.

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) Review.

(1) In a case involving a sentence of incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that

(a) the probationer has a right to appeal, if the underlying conviction occurred as a result of a trial, or

(b) the probationer is entitled to file an application for leave to appeal, if the underlying conviction was the result of a plea of guilty or nolo contendere.

(2) In a case that involves a sentence other than incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal.