



**State Appellate Defender Office**

645 Griswold, Ste. 3300, Detroit, MI 48226  
(Phone) 313.256.9833 (Fax) 313.965.0372  
(Client calls) 313.256.9822 [www.sado.org](http://www.sado.org)

**Jonathan Sacks**  
Director

**Michael L. Mittlestat**  
Deputy Director

**Marilena David-Martin**  
Training Director

**Bradley R. Hall**  
MAACS Administrator

**Kathryn R. Swedlow**  
MAACS Deputy Administrator

**Michigan Appellate Assigned  
Counsel System (MAACS)**  
200 N. Washington Sq., Ste. 250, Lansing, MI 48913  
(Phone) 517.334.1200 (Fax) 517.334.1228

June 11, 2018

Michigan Indigent Defense Commission  
200 N. Washington Square, 3<sup>rd</sup> Floor  
Lansing, MI 48913  
Submitted via e-mail: [comments@michiganidc.gov](mailto:comments@michiganidc.gov)

**Re: Proposed Minimum Standards 5-8 for Indigent Criminal Defense Services**

Dear Commissioners:

The State Appellate Defender Office (SADO) represents indigent clients appealing their felony criminal convictions in Michigan. A public defender unit of nineteen state salaried attorneys handles approximately 25% of appeals, while an assigned counsel roster administered by SADO (MAACS – the Michigan Appellate Assigned Counsel System) receives the other 75% of appeals. SADO categorically endorses Proposed Standards 5, 6, and 8, and supports Standard 7 in principle, but suggests a more qualitative and holistic approach.

**Proposed Standard 5**

SADO supports the adoption of proposed Standard 5, Independence from the Judiciary. It is a bedrock principle of successful indigent defense that a lawyer's primary obligation is to her client, and proposed Standard 5 achieves that goal. Especially important is the recognition that independence from the judiciary includes not just the selection and payment of attorneys, but other defense expenses. At SADO, we frequently see cases in which trial counsel elected not to request necessary investigative or expert services because of a culture in which judges often deny these requests.

SADO strives to comply with proposed Standard 5. The Appellate Defender Act ensures that both MAACS and the public defender office at SADO are governed by an independent and non-partisan Commission. MCL 780.712. Moreover, all trial courts select felony appellate counsel by rotation of a local or regional assignment list independently administered by MAACS. SADO has two office investigators on staff and funds the initial investment of expert witness assistance, prior to seeking reimbursement. MAACS operates a grant-funded program to coordinate expert and investigative assistance to roster attorneys without involving the trial court. Finally, although trial courts remain directly involved in decisions about payment to appellate counsel, most courts have adopted a standardized fee policy that was designed in part to ensure greater independence of counsel.

Adoption of Standard 5 will allow trial-level indigent defense in Michigan to achieve independence and attorneys to focus solely on the needs of their indigent clients.

### **Proposed Standard 6**

SADO supports the adoption of proposed Standard 6, which would institute workload controls for appointed trial counsel.

As appellate counsel, we are witness to the impact that heavy caseloads have on attorneys' ability to serve and effectively represent indigent defendants, in spite of their best intentions and expertise. Our clients regularly report that their attorneys spend inadequate time meeting with them before trial or the entering of pleas. Meritorious pretrial motions and lines of investigation can be disregarded. Attorneys may neglect to propose important jury instructions, or fail to object to erroneous ones because they lacked time to conduct the necessary research. And defendants are routinely counseled to waive their jury trial rights in favor of shorter, simpler bench trials, with little strategic justification. We believe that such practices often stem from excessive caseloads.

SADO has had caseload standards and limits since its inception, and we have seen the benefit of having them in place. Our enacting statute requires us to handle at least 25 percent of the State's appointed appeals, but provides that we are to accept only the number of assignments and maintain a caseload that will ensure quality criminal defense appellate services consistent with the funds appropriated by the state. MCL 781.716(c). Additionally, we have adopted internal caseload limits based on national standards tailored to Michigan through extensive time-studies. The ABA recommends that an appellate attorney's caseload be limited to a raw number of 25 appeals per year. We utilize a case weighting system based on the length of the record and complexity of the case. Based on that, we currently have a targeted caseload limit of a weighted 26.4 cases per attorney per year.

Although it is not an exact science, the system has, overall, worked well and ensured that our attorneys and staff have the time and resources to effectively and zealously represent indigent appellants in a holistic and client-centered fashion. It also has allowed us to adequately supervise our staff, evaluate its performance, and identify areas of improvement.

SADO believes that the adoption of caseload standards tailored for individual jurisdictions is an essential tool in the state's efforts at improving the quality of indigent defense in Michigan. We wholeheartedly support adopting and implementing this proposal.

### **Proposed Standard 7**

SADO supports the adoption of a minimum standard to ensure that "counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed." MCL 780.991(2)(c). SADO also supports systematic review "for efficiency and for effective representation." MCL 780.991(2)(f).

As proposed though, Standard 7 sets both Basic Requirements (7.A), and specific Qualifications for attorneys who handle misdemeanors (7.B.1), low-severity felonies (7.B.2), high-severity felonies (7.B.3), and life offense cases (7.B.4). We share the concerns expressed by some of the other commenters that the rigid requirements set forth in Proposed Minimum Standard 7.B.1-4 may not be the best way to assess attorney performance, and may have the unintended effect of keeping quality attorneys from more complex cases where they are most needed. Our concerns derive from recent experiences at MAACS and practice and policy at SADO.

MAACS has always separated its attorneys into levels, based on experience. The more straight-forward appellate cases have been assigned to Level 1 attorneys, and more complex cases have been assigned to attorneys at higher levels. Until relatively recently, the MAACS Regulations set forth rigid algorithms that had to be met if an attorney wanted to either join the roster at a higher level or be re-classified from a lower level to a higher level. These algorithms were similar to those in MIDC proposed Minimum Standard 7, in that they referred to specific case numbers and case types.

However, more recently, the Appellate Defender Commission approved changes to the MAACS Regulations to modify these requirements, allowing MAACS to classify attorneys based on individualized, qualitative criteria that permit a more holistic view of the attorney, his past work, and his abilities. MAACS proposed these changes to the Commission after recognizing that the former Regulations had the effect of keeping some quality attorneys at Level 1, while allowing other less able attorneys to advance.

Now, under the new MAACS Regulations, MAACS classifies all new attorneys at Level 1 unless the attorney establishes “a significant record of consistently high quality criminal appellate representation and an ability to handle any type of MAACS assignment.” MAACS Regulations, § II(B)(2)(a). In making its assessment, MAACS evaluates the attorney’s “performance history, writing ability, familiarity with Michigan criminal law and procedure, client counseling skills, demonstrated interest in indigent defense, and reputation in the legal community.” *Id.* And, while the current MAACS Regulations allow an attorney to advance to a higher level “after completing separate appeals of at least 10 felony convictions through submission on the merits,” that requirement can be waived by the Administrator. *Id.* at § II(B)(2)(b). In addition, an attorney may only be re-classified from one level to the next after MAACS conducts a qualitative review of the attorney’s work. *Id.*

These modifications allow MAACS to more accurately assess attorney performance while still providing clear standards to attorneys and guidance to MAACS for classification. While we recognize that there are important differences between the trial and appellate systems, we think this more holistic approach could still apply to attorneys working in both systems.

The requirements outlined in the proposed standard also may not best serve the interests of public defender offices or their clients. SADO has earned an outstanding reputation amongst jurists and clients for providing high quality representation as guaranteed under the Sixth Amendment. At SADO, attorneys are deemed qualified to handle specific cases based on an individualized analysis of their abilities and skills and only after a customized and lengthy training period for new hires that involves intense supervision. Following this training period, supervisors and managers

review the attorney's skills, abilities, experience, and aptitude in order to determine if the attorney is capable of handling a full SADO caseload, which includes the highest severity felony cases.

It has been our experience that a lawyer's ability to properly handle a complex appeal for a client serving the harshest penalties is not always commensurate with the number of years practiced or the number of prior appeals handled. We believe Standard 7 should be amended to allow some flexibility in public defender offices, where entry-level attorneys are supervised by a supervising or senior attorney and where such an individualized assessment of an attorney's capability is feasible.

In sum, we believe that Standard 7 should combine qualitative review with less rigid qualifications, provided there is proper supervision and review. In order to determine if an attorney is qualified to handle a particular criminal case, reviewers should look to the number and type of trials handled in combination with an individualized assessments of skills. Qualified public defender office leaders or assigned counsel roster managers are in the best position to make this determination.

### **Proposed Standard 8**

SADO supports the adoption of proposed Standard 8, Economic Disincentives or Incentives, because it appropriately recognizes the inherent relationship between quality indigent defense services and reasonable compensation.

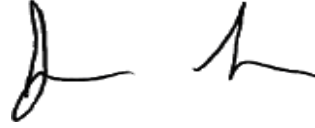
Our experience includes oversight of both salaried public defenders and county-funded private assigned counsel. As to the former, SADO has built and maintained a team of talented, conscientious, and hard-working appellate public defenders largely by ensuring pay and benefits that are equivalent, to the greatest extent possible, to those of our counterparts at the Michigan Attorney General's Office. For both practical and symbolic reasons, we believe it is essential that public defenders receive no less pay or respect than prosecutors.

In its role overseeing the MAACS roster, SADO also has substantial experience designing, implementing, and administering attorney fee policies for private assigned counsel. Without question, our experience has shown that hourly fee structures providing compensation for all necessary aspects of the representation are the most conducive to high quality indigent defense services and most likely to attract capable and promising attorneys to this work. And it appears that the trial courts agree; as of today, 37 out of 57 circuit courts have voluntarily adopted a standard attorney fee and expense policy featuring standardized hourly rates, reimbursement for necessary expenses, and reasonable presumptive limits that counsel may exceed with proper documentation and justification.

As we have seen for both MAACS roster attorneys and SADO Assistant Defenders, adoption of Standard 8 will provide trial attorneys with the incentives to most effectively represent indigent clients.

Congratulations to the MIDC! As the former Executive Director, it is extremely exciting for me to see these standards moving forward. SADO looks forward to providing any help or experience that indigent criminal defense systems request as they implement the minimum standards.

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a small 'h'.

Jonathan Sacks  
Director