

2012 ANNUAL REPORT

MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM

2012 APPELLATE DEFENDER COMMISSION

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MISSION STATEMENT

MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM (MAACS)

As stated in MAACS Regulation Section 1(1): The duty of this office shall be to compile and maintain a statewide roster of attorneys eligible and willing to accept criminal appellate defense assignments and to engage in activities designed to enhance the capacity of the private bar to render effective assistance of appellate counsel to indigent defendants.

MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM GOALS and OBJECTIVES

MAACS is charged with ensuring that criminal appeal and post-conviction cases are assigned in a systematic way to qualified attorneys, that these attorneys received appropriate training and resource materials to enable them to provide effective representation for their clients, and that the attorneys comply with the MAACS Regulations and the performance standards outlined in the Minimum Standards for Indigent Criminal Appellate Defense Services, and the MAACS Comments thereto, when representing their clients.

EXECUTIVE SUMMARY and HIGHLIGHTS

Consolidation of Operations Underway between SADO and MAACS

In December of 2012 the Appellate Defender Commission approved a two-year plan to create and implement a physical and operational merger of SADO and MAACS. The Commission directed that the operational merger begin with IT and attorney training. The plan also includes the gradual expansion of the MAACS roster to qualified applicants, the creation of a marketing and recruitment plan to facilitate roster expansion, a limitation on annual MAACS roster attorney case assignments and the physical merger of MAACS and SADO Lansing office space. Both MAACS and SADO were charged with creating a time line to measure their progress toward the plan's goals and to provide reports to the Commission on that progress at each Commission meeting.

2012 Appellate Case Assignments

Appellate counsel was assigned in 3185 cases. This figure represented a reduction from the 3267 cases assigned in 2011; a decrease of 82 cases, or less than one per cent.

MAACS Roster

As of January 1, 2012 there were 105 roster members: 44 Level I attorneys, 31 Level II attorneys and 30 Level III attorneys. As of December 31, 2012, there were 97 roster members: 42 Level I attorneys, 29 Level II attorneys and 26 Level III attorneys.

MAACS Attorney Assignments

MAACS roster attorneys were assigned in 2671 cases; 19 fewer than assigned in 2011.

2012 Roster Performance Complaint Investigation and Resolution Statistics

In 2012 MAACS administrative staff investigated and resolved 115 correspondence matters which involved complaints concerning roster representation. Those 115 matters represented 45% of the total number of correspondence (257) MAACS received and that involved any area of case-related agency responsibility. After investigation, MAACS administrative staff resolved the matters which involved complaints concerning roster representation as follows:

58 of these matters were determined to not implicate a violation of the Standards: 50% of the performance complaints investigated.

29 of these matters involved complaints from clients concerning the nature and sufficiency of attorney-client communication: 25% of the performance complaints investigated. All of these matters were resolved by the involved attorneys and, thus, did not result in a violation of the Standards.

One matter involved a complaint regarding a roster attorney who no longer represented the complainant because of withdrawal and the appointment of substitute counsel and this action had resolved the complaint.

27 matters resulted in a determination that a violation or violations of the Standards occurred: 23% of the performance complaints investigated.

The determinations involved 19 either current or former roster attorneys. Implicated violations of Standards 2, 3, 5, 6, and 7 were investigated. 36 individual Standards violations were determined to have been demonstrated. No roster members were removed from the roster based on complaint determinations. One roster member resigned from the roster in response to the complaint investigations being conducted and after direct contact from the administrator. Two lawyers investigated had previously resigned from the roster; one as a result of complaint investigations being conducted at that time.

2012 CLIENT COMPLAINTS AND STANDARDS VIOLATIONS

Total MAACS Correspondence	257
Total Attorney Performance Complaints Investigated	115
Number of Attorneys Investigated	19
Complaint Determinations Finding a Standard Violation	27
Number of Standard Violations Found	30
Violations Found by Standard	

Minimum Standard 1	1	Minimum Standard 4	0	Minimum Standard 7	4
Minimum Standard 2	1	Minimum Standard 5	14	Minimum Standard 8	0
Minimum Standard 3	3	Minimum Standard 6	7	Minimum Standard 9	0

Roster Attorney Retention Re-application Review and Resolution Statistics

Pursuant to Regulations Section 4(1) and (2) and 4(6)(g), each attorney already on the roster, and wishing to remain on the roster, must re-apply for roster retention every three years. 2011 was one of these years. Some retention decisions were finalized in 2011 and were described in the 2011 Annual Report. The review process was concluded in 2012. All of the results of the 2011-12 triennial re-application retention review process appear in this Report.

2011-2012 Roster Retention Review and Resolution Statistics

Total Retention Investigations Conducted	110
Non-Reapplication After MAACS Contact (Regulations)	2
Re-application Withdrawn After MAACS Contact (Regulations)	1
Resigned During Retention Investigation	2
Resigned After Notice of Conditional Retention	1
Retained on Roster without Conditions	34
Retained on Roster with Specified Conditions (Regulations or Standards)	49
Retained on Roster with Specified Conditions and Notice of Contemplated Removal	1
Retained on Roster with Improvement Suggestions	19
Retained on Roster at Lower Level	1

Roster Attorney Continuing Legal Education (CLE) Compliance

At the conclusion of 2012 all but 9 roster attorneys were in compliance with MAACS Regulation Section 4(6)(f) requirements regarding CLE. As of the 2013 date of this report, all roster attorneys had demonstrated CLE compliance. Eight of those attorneys had viewed the DVD version of the full 2012 program. The remaining attorney, based on this and other representational performance issues addressed personally with the attorney by the MAACS administrative staff, had resigned from the roster.

IT Improvement and Case Assignment System

MAACS and Supreme Court Judicial Information Services implemented a completely reworked and internet-based Case Assignment System for use by all of the Circuit Courts and the agency through the Michigan Courts Application Portal. Orders of appointment may be created at any time, which provides substantial efficiencies to the Circuit Courts. MAACS remains available for consultation with and assistance to Circuit personnel. Should it prove necessary, MAACS is still able to complete the entire appointment process from its office. Attorney address, telephone, and level information are also accessible to the trial courts through the MAACS database and the MCAP site. Circuit Court response to this new system has been uniformly positive. And, the implementation of this system allowed MAACS to eliminate reliance on outdated equipment necessary to maintain the former system. This will allow MAACS to improve its general IT capability by allowing use of upgraded hardware and software.

HISTORY AND GENERAL OVERVIEW

Indigent Michigan felony defendants who submit requests within certain time limits and in certain circumstances are entitled to have publicly funded counsel appointed to represent them on appeal. The overall system for providing indigent appellate felony defense is governed by the seven-member Appellate Defender Commission, pursuant to MCL 780.711 *et seq.*

In Administrative Order 1981-7, the Supreme Court approved the MAACS Regulations (Regulations or Regulation) and the Minimum Standards for Indigent Criminal Appellate Defense Services (Standards). These were developed by the Appellate Defender Commission for the creation and operation of the Appellate Assigned Counsel System. These Regulations govern the duties of the MAACS administration, the operation of the state-wide appellate case-assignment system and regulatory responsibilities which roster attorneys must meet. The Standards set the representational benchmark for all roster attorneys. MAACS began its administration in 1985.

The system has two components. Indigent appeals are assigned to the State Appellate Defender Office (SADO), the state-funded appellate public defender office established in 1969. The remaining appeals are assigned to members of the MAACS roster of attorneys. These attorneys are private assigned counsel. They are paid through County appropriations to the Circuit Courts and pursuant to fee schedules set by the Circuit Courts.

In 2002, the Appellate Defender Commission amended the Regulations to require a triennial review process for all roster attorneys. Based on a review of a renewal application, the applicant's work on prior felony appeals, and the assessment of any supplementary materials, the Administrator then notifies the re-applicant whether he or she will be retained at Level 1, 2 or 3, or not be retained on the roster. Non-retention may be for specified good cause or administrative reasons. An attorney who is not retained has the right to appeal the Administrator's decision to the Commission.

In 2004, the Supreme Court revised the Standards (Administrative Order 2004-6). The revisions combined some former Standards with one another and slightly modified others. The nine revised Minimum Standards became effective on January 1, 2005. This same date, additions to the Standards and to the MAACS Regulations became effective. The Appellate Defender Commission added Comments to the revised Minimum Standards. These Comments guide MAACS in its evaluation of roster attorney compliance with the revised Standards. The Appellate Defender Commission also added Section 5 to the MAACS Regulations. Section 5 defines the confidentiality policy with regard to MAACS files and records. On June 15, 2011, the Appellate Defender Commission amended Regulation 1(6) to reflect that the MAACS file retention policy is in compliance with MCL 18.1284-1292.

Budget History

In 2002, reductions to MAACS funding resulted in the layoff of one full time administrative staff member and two half time paralegal/clerk positions.

In 2006-2007, further funding reductions occurred. Furlough days were avoided only because a MAACS employee required a long term medical leave in 2007, which created sufficient savings to meet personnel costs.

In 2007-2008, more funding reductions were imposed. All MAACS employees took 12 furlough days.

In 2008-2009, the legislature restored the funding reductions, allowing MAACS to continue its staffing levels without the need to take furlough days.

In 2009-2010, a funding reduction was addressed by implementing a variety of non-personnel cost reductions.

In 2010-2011, MAACS staff was reduced from 7 to 5 when two MAACS employees, the Systems/Financial Manager and the Case Assignment Coordinator, retired under the State Incentive Retirement Program. MAACS reorganized its staff structure and the responsibilities of retired staff were assigned to remaining staff members.

In 2011-2012, the MAACS FY appropriation allowed MAACS to provide salary increases to the three reorganized MAACS support staff and in conformance with the Supreme Court's Compensation Study structure.

MAACS Personnel

In 2012, MAACS staff consisted of the following people.

Two of the positions are administrative, and must be filled by members of the Bar:

Administrator: **Thomas M. Harp**

Deputy Administrator: **Lyle N. Marshall**

The three re-organized staff positions remained as follows:

Administrative Assistant/Office Manager/Systems and Financial Manager: **MariaRosa Juarez Palmer**

Roster Manager/Legal Secretary: **Mary Lou Emelander**

Case Assignment Coordinator /Receptionist: **Jane Doyle**

MAACS REGULATORY STRUCTURE

The MAACS regulatory structure has four primary components.

First, MAACS maintains the statewide roster of attorneys eligible and willing to receive assignments.

Second, and in conjunction with the trial courts, MAACS oversees the case assignment process. It ensures that cases are appropriately matched to qualified attorneys and that they are correctly distributed between roster attorneys and SADO. It responds to correspondence from a variety of sources regarding the operation of the assigned counsel system: courts, other branches of government, defendants and appellants, and the public.

Third, MAACS engages in roster oversight regarding the quality of representation provided by roster attorneys. It addresses concerns or complaints about the quality of roster performance. It regularly conducts wide-ranging attorney performance investigations. It also makes specific determinations regarding allegations of roster attorney noncompliance with the Minimum Standards. Triennially, it conducts a “re-application review” of the performance of all roster members. It provides annual training to roster members and insures roster attorney compliance with annual CLE requirements. And it provides responsive assistance to the roster concerning representational, procedural or roster membership questions and concerns brought to MAACS.

Finally, MAACS performs a number of other functions important to its mission to provide high-quality, efficient and effective indigent appellate defense, including activities designed to enhance the capacity of the private bar to render effective assistance of appellate counsel to indigent defendants.

Roster Maintenance

Regulation Section 4(2) classifies roster attorneys into three eligibility levels, depending on their qualifications.

A Level I attorney may only represent a defendant who was convicted at a jury trial of an offense carrying a statutory maximum sentence of 5 years or less, or by plea or at a waiver trial of an offense carrying a statutory maximum of 10 years or less.

A Level II attorney may only represent a defendant who was convicted at a jury trial of an offense carrying a statutory maximum sentence greater than 5 but not greater than 15 years, or by plea or at a waiver trial of an offense carrying a statutory maximum sentence greater than 10 years.

A Level III attorney may represent defendants convicted at trial or by plea of any felony, but may elect to represent only those convicted at trial. (For administrative purposes, “trial-only” Level III attorneys are designated “Level IV” attorneys.)

A Level II or III attorney may be assigned a Level I case only if no Level I attorney is

available or when the attorney represents the defendant on a currently pending appeal of another conviction.

Regulation Section 4(6)(f) requires that roster attorneys complete seven hours of relevant continuing legal education (CLE) each year.

Roster attorneys who seek reclassification to a higher level must first meet “experience” requirements outlined by the Regulations. If those requirements have been met, MAACS conducts an in-depth performance review of the attorney’s work. If that review demonstrates eligibility for reclassification, it is implemented. The reclassification review process is discussed, below, at Roster Oversight.

Attorneys advise MAACS when they wish to join or leave local lists, as well as when their postal and e-mail addresses or phone numbers change. This information is then provided to the Circuits.

Roster Admission

Pursuant to Section 2 of the Regulations, the administrator must compile a roster of attorneys eligible under Section 4 and willing to accept appointments to serve as appellate counsel for indigent criminal defendants. In determining the size of the appropriate size of the roster the administrator must consider the total appointments available at each level, the number assigned to SADO and the distribution of cases among roster attorneys.

Pursuant to Section 4 of the Regulations, all attorneys interested in joining the MAACS roster must file an application and a writing sample with MAACS. The application to join the roster must contain information regarding the attorney’s prior criminal appellate experience, the jurisdictions from which the attorney wishes to receive appointments, a writing sample, and such other pertinent matters as the Appellate Defender Commission deems appropriate. The writing sample must consist of a brief or memorandum of law, on any subject, personally prepared by the applicant. A writing sample prepared in law school will suffice if no other is available.

Based on the information contained in the applications, the assessment of any supplementary materials, and review of the applicants’ work on prior felony appeals, attorneys who are also members in good standing of the State Bar of Michigan may be admitted to the roster and classified at Level I, Level II or Level III.

Because applicants admitted as Level I attorneys may have little or no prior appellate defense experience, these applicants must complete an orientation training program.

Regulation Section 4(2)(b)(i) requires that a Level II attorney “must have conducted through submission for decision on the merits separate appeals of at least nine felony convictions, at least two of which arose from trials, including one jury trial, in Michigan or federal courts, during the three years immediately preceding the date of application.” Regulation Section 4(2)(c)(i) requires that a Level III attorney “must have conducted through submission for decision on the merits separate appeals of at least eighteen felony

convictions, at least six of which arose from trials, including four or more jury trials, in Michigan or federal courts, during the three years immediately preceding the date of application.”

If admitted as a Level II or Level III attorney, an applicant may be required to complete an orientation program.

An additional method for roster admission is also available to Level II or III applicants. In exceptional circumstances, the Appellate Defender Commission may waive the requirements for Level II or III when it determines that an applicant has acquired comparable experience. If admitted as a Level II or Level III attorney on this basis, an applicant may be required to complete an orientation program.

2012 Roster Statistics

As of December 31, 2012, there were 97 roster members: 42 Level I attorneys, 29 Level II attorneys and 26 Level III attorneys; 6 Level III attorneys accepted trial-only appointments.

In 2012 no one was admitted as a Level I roster attorney.

On March 22, 2012 the Appellate Defender Commission admitted one attorney to the roster, at Level II, based on comparable experience and denied requests for admission at Level II of three attorneys.

In 2012 one roster attorney was reclassified from Level II to Level III, effective May 30, 2012. One attorney’s request for reclassification from Level I to Level II and two attorneys’ requests for reclassification from Level II to Level III were denied by MAACS. These attorneys had failed to meet the number of claim of appeal cases required by the Regulations.

An attorney’s request to be assigned trials-only Level III cases became effective August 29, 2012.

Three roster attorneys died during 2012 (one Level I and two “trials-only” Level IIIs). No other attorneys left the roster for reasons unrelated to professional performance.

MAACS addressed and resolved 123 correspondence matters regarding the maintenance of the roster in 2012. This correspondence included questions from inmates or the public regarding the roster, questions from prospective roster applicants, questions from roster clients regarding the parameters of roster attorney representation, questions regarding records, manuals and other matters.

Assignment Coordination

The MAACS Regulations permit the circuit courts to determine whether appointed appellate counsel will be selected by the chief judge or by the “local designating authority” (LDA). All Michigan circuit courts use an LDA.

All assignments are made to SADO or to MAACS roster attorneys who are members of a circuit’s local list. Subject to a few regulatory exceptions, assignments are made on a strictly rotational basis. These exceptions include the appointment of SADO in a way that reflects assignment to it of a percentage of cases set by the Appellate Defender Commission. SADO may also be selected “out-of-sequence” for appointment in unusually long or complex cases.

An eligible attorney at the top of the rotated list may be “passed over” only for specified reasons, such as a conflict of interest or the fact that another eligible attorney is already representing the defendant on an active appeal. The name of the attorney appointed “out-of-sequence” then drops to the bottom of the selection list.

A computerized assignment system has been fully operational since 2002. That initial system was, however, a “dial-up” system. Trial court LDAs could not prepare orders of appointment without being directly “on-line” with MAACS.

2012 Roster Management Developments

In late-July 2012, MAACS, with significant assistance from Supreme Court Judicial Information Services (JIS), transformed the case assignment system into one entirely accessible on the internet.

The MAACS case assignment system is now accessible through the Michigan Courts Application Portal (MCAP). As a result, trial court LDAs may create orders of appointment at any time.

The MAACS assignment coordinator remains readily available for consultation with and assistance to the LDAs. Should it prove necessary, MAACS is still able to complete the entire appointment process from its office. Attorney address, telephone, and level information are also accessible to the trial courts through the MAACS database and the MCAP site.

Trial court personnel have been uniformly positive about this new appointment process and the substantial efficiencies it provides to the individual LDAs and generally to the trial courts. And JIS has provided rapid and effective assistance to resolve the inevitable, though actually quite rare, glitches which occurred in the “roll-out” of this new system. And this system has streamlined the record-keeping functions of MAACS as well.

The new assignment system has facilitated a significant improvement regarding assignment of cases to the State Appellate Defender Office. Assignments in both

numbers of cases and at case-levels and-types can now be nearly instantly controlled based on SADO's staffing levels and other administrative needs of that office.

The general process of appointing an appellate assigned attorney is as follows. Once basic information is entered in the on-screen order, the computer selects the next, correct, attorney's name for appointment from the circuit's local list. Once the proper order is generated, the LDA then prints the order at the trial court's end, obtains the judge's signature, and distributes copies of the order as the court rules require. The assigned attorney's name is rotated to the bottom of the list.

If a permitted "exception" to this regular assignment process is necessary, the new system has built-in prompts to facilitate implementation of the "exceptional" appointment.

Infrequently, a review of the local list fails to produce an eligible attorney willing to accept a particular appointment. In such cases, the LDA refers that case to the MAACS administrator. The administrator identifies an attorney on the state-wide roster willing to accept the case and the appointment is then facilitated by MAACS through this computerized system.

In addition to the regular support provided by MAACS to circuit court assignment personnel, MAACS addressed and resolved 61 correspondence matters involving the operation of the appellate assigned counsel system in 2012. The vast majority of these matters involved correspondence from inmates. Most of that correspondence concerned pending or delayed requests for the appointment of counsel on appeal. The internet supported interrelationship between MAACS and the circuit courts allows rapid and efficient resolution of those concerns.

2012 Case Statistics

In 2012, appellate counsel was assigned in 3185 cases. This figure represented a reduction from the 3267 cases assigned in 2011; a decrease of 82 cases, or less than one per cent. In 2012, SADO was assigned in 514 cases, or 16.1% of the total number of assignments. MAACS roster attorneys were assigned in 2671 cases: 83.9%.

Included with this report are "MAACS Appendices." The Appendices contain a series of Metrical Reports for 2012, prepared by MAACS, which describe the following:

1. Total Appellate Assignments.
2. Assigned Appeals, by Case Type and Level, by Circuit
3. Changes in Appellate Assignments 2010-2012, by Circuit.
4. Appeals by Jurisdictional Type, by Circuit.
5. SADO Assigned Appeals, by Case Type and Level.
6. Appeals of Resentencings, by Circuit.

Roster Performance Oversight

General Roster Performance Oversight

MAACS employs a variety of methods in oversight regarding the quality of representation provided by roster attorneys and their compliance with the Regulations and Standards.

MAACS investigates all complaints regarding dissatisfaction with roster attorney representation or which involve allegations of implicated noncompliance with the Standards and takes appropriate action.

MAACS reviews all roster attorney representational performance during triennial membership reapplication reviews.

MAACS reviews the work of each attorney seeking to be admitted to the roster, or reclassified, at Levels II or III.

MAACS provides the roster with continuing legal education (CLE). This includes annual CLE programs, reference materials, and legal, or MAACS policy, updates, as well as one-on-one assistance in individual cases. MAACS monitors roster attorney compliance with CLE requirements.

MAACS regularly reviews court and internal records for evidence of possible non-compliance with the Regulations and Standards.

MAACS reviews pleadings and briefs filed by roster attorneys in the courts and with MAACS.

Roster Performance Complaint Investigation and Resolution

Information concerning general dissatisfaction of roster attorney representation or that implicates violation of the Standards or the Regulations by roster attorneys comes to MAACS's attention from a variety of sources. These include client/defendant correspondence, defendant's family correspondence, court correspondence, other information from judges and court staff, court documents (i.e. register of actions), the Court of Appeals web site, orders involving remand for appointment of substitute counsel, information obtained per MAACS Regulations (i.e. Regulation 3(2)(a)), MAACS review of opinions, orders and pleadings, MAACS vouchers, MAACS roster attorneys, and other state bar members.

Information implicating a violation of the Standards or the Regulations is reviewed by the MAACS administrator, who either keeps it, or refers it to the deputy administrator, for investigation. The information is assigned a MAACS correspondence code.

The allegation is preliminarily investigated by gathering information through correspondence with the MAACS attorney, the client, the courts, and/or other appropriate parties.

If after initial investigation no violation of the Standards is found to be implicated by the complaint or allegations, the matter is closed with one of three correspondence codes, as outlined below. Notice of its resolution is communicated to the appropriate parties.

When a violation of the Standards is implicated by the complaint itself or after initial investigation, a complaint inquiry is issued to the attorney. The lawyer is asked to respond in writing to the allegation that a violation or violations of the Standards has or have been implicated by the complaint. The complainant (usually the attorney's client) is given the opportunity to respond to any answer the attorney provides.

Thereafter, MAACS conducts any independent investigation that may be necessary regarding the allegation(s), or regarding any additional information revealed during the course of this process which may implicate additional concerns, and then determines whether a substantial violation of the Standards has occurred.

Whether formally or informally resolved, where a violation is found to have occurred, the matter is assigned one of two correspondence codes, as outlined below. A complaint determination is written and sent to the appropriate parties. Whatever its resolution, an electronic record and hard copy of the determination are maintained in MAACS files.

A violation may result in the removal of the attorney from the roster, a notice of contemplation of removal from the roster, the suspension of case assignments, a personal consultation in the MAACS office with the attorney, or an admonition that the finding of a violation is very serious and although standing alone was not sufficient to result in removal from the roster, MAACS will maintain the findings for consideration regarding any future review of the roster member's continued eligibility for membership on the MAACS roster.

Where Standard violations are substantial and removal from the roster is contemplated, the administrator must give the affected attorney 30 days' notice of that contemplated removal. Any response to such notice is reviewed and considered relative to the removal decision. If an attorney is removed from the roster, the attorney has a right, within 30 days, to request a *de novo* appeal by the Appellate Defender Commission of the removal decision.

2012 Roster Performance Complaint Investigation and Resolution

In 2012 MAACS administrative staff investigated and resolved 115 correspondence matters which involved complaints concerning roster representation. Those 115 matters represented 45% of the total number of correspondence (257) MAACS received and that involved any area of case-related agency responsibility.

After investigation, MAACS administrative staff resolved the matters which involved complaints concerning roster representation as follows:

58 of these matters were determined to not implicate a violation of the Standards: 50% of the performance complaints investigated. These determinations are designated as RA2 or T findings and maintained in the MAACS correspondence system. ["T" findings involve complaints regarding provision of transcripts prior to the conclusion of the assigned representation; there were 10 of these in 2012.]

29 of these matters involved complaints from clients concerning the nature and sufficiency of attorney-client communication; these are primarily designated as RA3 matters: 25% of the performance complaints investigated. The roster attorneys involved are required by MAACS to address and resolve the communication issues raised by the client. In 2012 all of these RA3 matters were resolved by the attorneys.

Complaints regarding roster attorneys resolved by withdrawal and the appointment of substitute counsel or which were resolved by other action of the attorney or client are designated and as RA5 correspondence. In 2012 there was one such matter.

Complaints which result in either a formal or informal determination that a violation of the Standards has been demonstrated are designated as RA4 (formal) or RA6 (informal). In 2012 there were a combined 27 matters which resulted in a determination that a violation or violations of the Standards occurred: 23% of the performance complaints investigated. Three investigations determined that, while a violation or violations of the Standards had been implicated by the complaint, no violations had occurred.

The determinations involved 19 either current or former roster attorneys. Implicated violations of Standards 1, 2, 3, 5, 6, and 7 were investigated. 30 individual Standards violations were determined to have been demonstrated.

No roster members were removed from the roster based on complaint determinations. One roster member resigned from the roster in response to the complaint investigations being conducted and after notice from the administrator that the lawyer's removal was contemplated. Another two attorneys investigated had previously resigned from the roster; one as a result of complaint investigations being conducted at that time.

13 Standards violations were determined to have involved 3 attorneys who are no longer on the roster. One had resigned in 2011. One attorney resigned upon receiving notice that MAACS contemplated his removal from the roster as a result of the performance concerns. The third attorney was removed from the roster in early 2013.

2012 CLIENT COMPLAINTS AND STANDARDS VIOLATIONS

Total MAACS Correspondence	257
Total Attorney Performance Complaints Investigated	115
Number of Attorneys Investigated	19
Complaint Determinations Finding a Standard Violation	27
Number of Standard Violations Found	30
Violations Found by Standard	

Minimum Standard 1	1	Minimum Standard 4	0	Minimum Standard 7	4
Minimum Standard 2	1	Minimum Standard 5	14	Minimum Standard 8	0
Minimum Standard 3	3	Minimum Standard 6	7	Minimum Standard 9	0

Attorney Triennial Re-application for Roster Retention

Pursuant to Regulations Section 4(1) and (2) and 4(6)(g), each attorney already on the roster, and wishing to remain on the roster, must re-apply for roster retention every three years. The attorney must file a renewal application similar to the initial application. Each roster re-application is reviewed based on the criteria for continuing eligibility listed in Section 4(6). All roster attorneys wishing to remain on the roster were required to apply for retention between September 1 and October 31, 2011.

Re-application for Roster Retention Review Process

The renewal applications and submitted supporting material are first reviewed for completeness by the MAACS roster manager. Thereafter, the roster manager prepares a re-application review sheet and a profile of the attorney's roster membership. The profile includes information regarding historical performance, any known regulatory compliance issues, pleadings submitted to MAACS, annual fees paid and other information. The review sheet, profile and renewal application for each attorney are then provided to the administrator for distribution.

The administrator reviews all of this information for evident issues regarding each attorney's compliance with the MAACS Regulations. If such issues are identified the Administrator selectively contacts re-applicants about this information and regarding the appropriateness of the reapplication for renewed roster membership. In some instances this contact results in the attorney's withdrawal of the renewal application and/or resignation from the roster.

The reapplication information is then distributed between the administrator and the deputy administrator.

All requested material is carefully reviewed.

Requested pleadings are reviewed for overall quality, compliance with the Michigan Court Rules, issue identification, issue presentation, and writing quality.

The Court of Appeals website is accessed to review additional pleadings on-line, for timeliness of filings, preservation of oral argument, motions to remand, and other information.

MAACS files are reviewed for demonstrated compliance with the Regulations and Standards. Prior renewal and retention documents are reviewed.

Additional pleadings or other information may be requested from the attorney, the courts or others and also reviewed.

All MAACS decisions regarding renewal applications are in writing. An electronic record and hard copy of the retention determination are maintained in MAACS files.

If the reapplication for roster membership is granted, the attorney receives a letter to that effect. The letter customarily contains positive observations regarding the attorney's work, and retained attorneys are encouraged to continue roster membership.

Retention may be granted with specifically identified conditions. These conditions address identified non-compliance with the Standards or regulatory deficiencies.

Retention may also be granted with the additional and specific condition that the attorney will be retained on the roster at a Level below that which the roster attorney was at the time of the re-application. And in some instances a conditional retention is also accompanied by notice of MAACS's contemplation of the attorney's removal from the roster.

Retention may also be granted without conditions, but may include recommendations regarding identified representational concerns that require improvement.

If retention is granted with any imposed conditions or performance improvement recommendations, the administrator who made this decision regularly reviews the work-product of the affected attorney in regard to those conditions or improvement recommendations.

Where Standards or Regulations violations or deficiencies result in a decision to deny the reapplication for roster membership, the administrator must give the affected attorney 30 days' notice that non-retention on the roster is contemplated. Any response to such notice is reviewed and considered relative to the non-retention decision. If an attorney is not retained on the roster, the attorney has a right, within 30 days, to request a *de novo* appeal by the Appellate Defender Commission of the non-retention decision. Some of the early results of the retention review process were outlined in the 2011 Annual Report.

All of the results of the 2011-12 triennial retention investigation and resolution process are outlined below.

2011-2012 Roster Attorney Retention Re-application Review Resolution Statistics

Two attorneys provided with re-application packets did not reapply for roster membership. This resulted from contact with these attorneys by the administrator. These attorneys had failed to demonstrate compliance with Regulation 4(6)(b), which requires Level II and III attorneys to submit for decision at least four assigned appeals per year. After similar contact with the administrator, an additional lawyer withdrew his re-application for this same reason. These three attorneys were removed from the roster in January, 2012.

One attorney resigned in 2012 after contact from, and as a result of the retention investigation conducted by, the administrator.

One attorney resigned in 2012 after contact from, and during retention investigation by, the deputy administrator.

One Level I attorney was retained with specifically described conditions addressing identified non-compliance with the Standards and also provided with notice that MAACS was contemplating the attorney's removal from the roster. In late 2012, and after having demonstrated some improvement, that attorney was once again provided with notice that MAACS was contemplating the attorney's removal from the roster, based on re-occurring performance issues. As noted above, this attorney was removed from the roster in early 2013.

2011-2012 Roster Retention Review and Resolution Statistics

Total Retention Investigations Conducted	110
Non-Reapplication After MAACS Contact (Regulations)	2
Re-application Withdrawn After MAACS Contact (Regulations)	1
Resigned During Retention Investigation	2
Resigned After Notice of Conditional Retention	1
Retained on Roster without Conditions	34
Retained on Roster with Specified Conditions (Regulations or Standards)	49
Retained on Roster with Specified Conditions and Notice of Contemplated Removal	1
Retained on Roster with Improvement Suggestions	19
Retained on Roster at Lower Level	1

Admission to the Roster at Levels II or III

In exceptional circumstances the Appellate Defender Commission may waive the requirements for Level II or III roster admission when the applicant has acquired comparable experience. The application and supporting material are first reviewed by MAACS administrative staff; usually by the deputy administrator. Prior experience with criminal defense clients, particularly appellate clients, is analyzed. Additional legal

writings are frequently requested for review. Upon completion of the review, MAACS provides the Appellate Defender Commission a memo that summarizes the applicant's submitted information and offers a recommendation.

In 2012 the Appellate Defender Commission admitted one attorney at Level II based on exceptional circumstances and comparable experience.

Roster Attorney Re-classification

Roster attorneys seeking reclassification at Level II or III must make this request in writing to MAACS. The request must specify the cases being relied upon to establish the relevant experience requirement. If that requirement has been met, a thorough analysis of the attorneys' representational performance is conducted. Briefs are reviewed. Issue analysis, writing skills, and legal knowledge are assessed. Fee vouchers and Court of Appeals records are checked for any indication of problems, such as late or defective filings or an excessive number of motions to withdraw as counsel. Internal MAACS records are reviewed for confirmation of the attorney's compliance with the Regulations and Standards. Whether or not the request is approved, written feedback based on the review is provided to the attorneys. If the request is approved, MAACS and circuit court computer records are immediately changed to reflect the reclassification.

In 2012 one roster attorney was reclassified from Level I to Level II and one roster attorney was reclassified from Level II to Level III. One attorney's request for reclassification from Level I to Level II was denied. This attorney had a fewer number of claim of appeal cases than required by the MAACS regulations.

Continuing Legal Education and Other Educational Activities

The Regulations require MAACS to provide continuing legal education programs for all roster members. MAACS provides CLE annually.

Historically, these programs have been funded through grants from the Michigan Commission on Law Enforcement Standards (MCOLES). In October, 2012, MAACS provided MCOLES-funded CLE programs at the Thomas M. Cooley Law School (Cooley) campuses in Lansing and Auburn Hills. MAACS also provided this same program, with its own funds, at the Cooley campus in Grand Rapids.

In 2012, the program was entitled: *The Newly Designed SADO Web Page, Legal Research using the New SADO Web Page, Michigan Sentencing Law Update, , Incarcerated Clients and Department of Corrections Policy, Michigan's Sex Offender Registration Act, and Developments in Criminal Appellate Practice.*

The 2012 Training involved the following speakers:

Lyle Marshall, MAACS Deputy Administrator, who served throughout the programs as the Moderator, introduced the speakers and topics and facilitated questions from the attendees posed to the speakers.

One hour of training was provided by Eric Buchanan, the State Appellate Defender Office's (SADO) Database Manager, Webmaster, and Trainer, who created and launched the completely overhauled SADO web page in 2011. Mr. Buchanan reviewed and demonstrated the more user-friendly use and features of the new web site and demonstrated why it is an invaluable tool for the criminal appellate practitioner.

The second hour was presented by Marla McCowan, Manager of the SADO Criminal Defense Resource Center. Segueing from Mr. Buchanan's presentation about the new web site's features, Ms. McCowan "walked" attendees through a legal research project. She selected actual appellate issues to demonstrate how to research case law and other relevant legal authority on the new web page.

A third hour was presented by Daniel E. Manville, Assistant Clinical Professor of Law and Director of the Civil Rights Clinic at Michigan State University College of Law. Mr. Manville is an attorney specializing in prisoner rights, confinement conditions, and parole board cases. He presented training regarding the effect of Michigan's budget on MDOC and prisoner confinement and release, prisoner visitation policy, video visits, changes in MDOC's disciplinary process, prisoner rights issues, prisoner time computation, alternative incarceration programs, Michigan Prisoner ReEntry Initiative, telephonic communication with prisoners, and the parole process

A fourth hour of training presented an overview of Michigan's Sex Offenders Registration Act (SORA). The training was provided by Ms. Miriam Aukerman, West Michigan Regional Staff Attorney for the ACLU of Michigan, who has lectured widely on SORA matters and related areas of the law. Ms. Aukerman's presentation provided training regarding a newly instituted tier-based registry, the catch-all provision, changes affecting juvenile offenders, expungement, removal or reduction and their procedures, "Romeo and Juliet" provisions, required registrant information on public and private law enforcement databases, recapture provision, and notification requirements.

Another hour of training was devoted to an update of Michigan sentencing law. The training was presented by SADO attorney Anne Yantus, an expert in plea and sentencing law. Ms. Yantus' presentation focused on recently decided sentencing cases, including those involving the Michigan Sentencing Guidelines. This update was supplemented by a general discussion of various sentencing topics. The topics included: issue preservation; Presentence Investigation Report review, correction, follow-up on corrected reports, and the effect of the report on incarcerated defendants; sentence credit; financial penalties; alternative

sentencing; sentence enhancements; consecutive and concurrent sentences; and sentence bargaining.

Finally, MAACS Administrator Thomas Harp presented his annual survey of developments in criminal appellate practice. He discussed new and amended court rules and significant developments in case law important to a criminal appellate practice. He also discussed the application of, and necessary adherence to, the Standards and MAACS Regulations. He also provided information regarding MAACS policy and procedure and described MAACS plans to expand its capture of metrical information regarding roster attorney representational outcomes and performance.

The MCOLES grant also provided for the recording and preparation of digital video discs of this training. MAACS roster attorneys may demonstrate their compliance with the CLE Regulation requirement by viewing these electronically-preserved lectures.

In addition to the CLE programs, MAACS maintains copies of training manuals and electronically recorded materials for availability to the roster and provides updates to the roster on developments in appellate law and policy.

MAACS administrators also regularly consult with roster attorneys regarding specific and general questions about MAACS client representation or MAACS policy or regulatory requirements.

CLE Compliance Monitoring

Regulation Section 4(6)(f) requires each roster attorney to annually complete seven hours of CLE in subjects relevant to criminal appellate advocacy. Attendance by roster attorneys at MAACS CLE programs automatically satisfies this requirement. So too can proof of attendance at a comparable training program.

The only attorney without 2011 CLE credits resigned from the roster in early 2012.

In 2012, seventy-nine roster attorneys attended the live version of the MAACS CLE Training. Eight roster attorneys provided proof of attendance at a comparable training program. As of the end of December, 2012, nine roster members had not yet demonstrated CLE compliance. As of the 2013 date of this report, all roster attorneys had demonstrated CLE compliance. Eight of those attorneys had viewed the DVD version of the full 2012 program. The remaining attorney resigned from the roster after personal consultation with MAACS administrative staff.

Additional Oversight Methods

MAACS provides responsive assistance to the roster concerning representational, procedural or roster membership questions and concerns. MAACS administrators field

questions and provide advice to roster attorneys by telephone, electronic mail and in person.

MAACS regularly reviews Court and internal records for evidence of possible non-compliance by roster attorneys with the Regulations and Standards.

MAACS reviews pleadings and briefs filed in the courts and with MAACS by roster attorneys.

MAACS Roster Attorney Case Highlights

During 2012, MAACS roster attorneys represented clients in these selected and noteworthy cases:

U.S. Court of Appeals Sixth Circuit

Foster v Wolfenbarger, No. 10-2023, Decided July 20, 2012

Defendant's second-degree murder conviction was reversed where defense counsel was ineffective for failing to raise an alibi defense. The Court granted a conditional writ of *habeas corpus* giving the State of Michigan 180 days to retry defendant or release him.

Michigan Supreme Court

People v Mardlin, MSC No. 139146; COA No. 279699, January 24, 2012

After remand to the trial court for a *Ginther* hearing to determine whether defendant's trial counsel was ineffective for failure to renew a motion for appointment of an electrical engineering expert (unpublished order of the Court of Appeals, issued February 14, 2011), and after the Supreme Court ordered the Court of Appeals to consider the arguments defendant raised in his original appeal, *People v Mardlin*, 487 Mich 609, 630 (2010) (*Mardlin I*, reversing the Court of Appeals original decision and remanding for consideration of defendant's remaining arguments), the Court examined the briefs, motions, and transcripts from the trial, as well as from the first remand and the second remand, it concluded that cumulative errors occurred regarding the electrical engineering expert. The combined effect of the errors prejudiced defendant and the Court reversed Defendant's convictions for arson and burning insured property.

People v Harris, MSC No. 143630; COA No. 296631, April 18, 2012

Reversed in part the COA Opinion and remanded to COA to determine if Defendant is entitled to a new trial.

People v Hoffman, MSC No. 144235; COA No. 306314, Dec. 13, 2012

The Michigan Supreme Court remanded to the Court of Appeals for consideration as on leave granted “of the . . . issue regarding a claimed failure of the sentencing court to comply with the procedural requirements of MCL 28.724(5) and MCL 769.1(13) before ordering defendant to register as a sex offender.” *People v Hoffman*, 491 Mich 924; 812 NW2d 769 (2012). The Court of Appeals vacated Defendant’s sentence and remanded for resentencing.

People v Veilleux, MSC No. 145142; COA No. 302335, December 18, 2012

In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and remanded to the Oakland Circuit Court for it to correct the judgment of sentence by striking those provisions making the sentences for contempt consecutive to each other and consecutive to defendant’s sentence for the underlying felony. Because defendant had already served his concurrent sentences, the Court found it unnecessary to address whether under the circumstances of this case the trial court acted properly in holding Defendant in contempt multiple times.

Michigan Court of Appeals

People v Nan Lu, COA No. 300854, February 7, 2012

Reversed and remanded fourth degree criminal sexual conduct conviction for new trial.

People v Elliott, COA No. 301645, March 8, 2012, For Publication

Reversed Defendant’s armed robbery conviction and remanded for a new trial where the trial court’s failure to suppress Defendant’s statements was not harmless error.

People v Stephens, COA No. 302415, March 22, 2012

Remand to the trial court to correct judgment of sentence to delete lifetime monitoring.

People v Ricks, COA No. 301479, April 26, 2012

Defendant awarded 1,059 days credit.

People v Smith-Anthony, COA No. 300480, May 3, 2012

Reversed conviction and 4 to 20 year sentence because of insufficient evidence of larceny from a person.

People v Kloosterman, COA No. 303443, May 22, 2012, For Publication

Reversed racketeering conviction and 6 to 20 year sentence.

People v Franklin, COA No. 296591, July 3, 2012

Vacated convictions for indecent exposure and sexual delinquency, affirmed aggravated indecent exposure conviction, and remanded for further proceedings.

People v Kiel, COA No. 301427, July 17, 2012

Reversed the defendant's conviction and remanded for a new trial where the jury was not properly instructed concerning the applicable affirmative defense.

People v Watson, COA No. 306989, November 20, 2012

Remanded to the trial court to resentence Defendant for first degree murder consistent with *Miller v Alabama*, 132 S Ct 2455 (2012) and *People v Carp*, COA No. 307758.

Circuit Court

People v Matthew Phenix, Oakland Circuit Court No. 10-233079-FH, May 1, 2012

Reduced sentence from 15 to 50 years to 10 to 20 years.

People v Jones, Wayne Circuit Court No. 03-013861-01-FC, June 14, 2012

Resentencing with a four year sentence reduction for armed robbery.

People v Gillet, Eaton Circuit Court No. 11-020035-FH, June 28, 2012

Resentencing with a six month sentence reduction for controlled substance.

People v Shimel, Bay Circuit Court No. 09-11150, August 2012

New trial granted on plea-withdrawal motion based on ineffective assistance of counsel.

People v Wood-Steel, Grand Traverse Circuit Court Nos. 11-11337; 11-11339, October 11, 2012

Circuit court granted Defendant's Petition for Removal from the Sex Offender Registry.

Additional Agency Activities

MAACS performs a number of other functions important to its mission to provide high-quality, effective and efficient indigent appellate defense.

MAACS collects, analyzes and disseminates annual data regarding the number and type of appellate assignments and their distribution to roster attorneys and SADO.

MAACS compiles information about appellate assigned counsel fees.

MAACS promotes the payment of reasonable fees to roster members and alternative methods for the adequate funding of indigent appellate defense.

MAACS requests, where appropriate, that circuit courts appoint substitute counsel on behalf of indigents who received ineffective representation by former MAACS appellate counsel.

MAACS provides form pleading packets to defendants who wish to appeal a court's denial of a request for the appointment of appellate counsel.

MAACS provides form pleading packets to defendants who wish to seek available post-conviction relief, after appeal.

MAACS responds to numerous inquiries per year from defendants and their families involving issues outside the regulatory purview of MAACS.

MAACS responds to questions and concerns raised by other governmental entities and the general public involving indigent appellate defense, Department of Corrections matters, and others.

MAACS works with clients, the courts and others in order to address representational issues arising from roster attorney health-related problems.

MAACS works with clients, the courts, the survivors and their representatives and others in order to address representational issues arising from the death of a roster attorney.

MAACS has provided comments on proposed court rules and testify at Supreme Court public hearings regarding such proposals.

Administrators may also serve on committees, commissions, boards, or task forces devoted to the improvement of appellate representation specifically and/or criminal defense representation generally.

MAACS performs other duties in connection with the administration of the assigned counsel system as directed by the Appellate Defender Commission.

MAACS APPENDICES 2012

- 1. Total Appellate Assignments.**
- 2. Assigned Appeals, by Case Type and Level, by Circuit.**
- 3. Changes in Appellate Assignments 2010-2012, by Circuit.**
- 4. Appeals by Jurisdictional Type, by Circuit.**
- 5. SADO Assigned Appeals, by Case Type and Level.**
- 6. Appeals of Resentencings, by Circuit**