

**Minimum Standards for Indigent Criminal Appellate Defense Services
Including MAACS Comments**

*Approved by the
Michigan Supreme Court
Effective January 1, 2005*

Standard 1

Counsel shall promptly examine the trial court record and register of actions to determine the proceedings, in addition to trial, plea, and sentencing, for which transcripts or other documentation may be useful or necessary, and, in consultation with the defendant and, if possible, trial counsel, determine whether any relevant proceedings have been omitted from the register of actions, following which counsel shall request preparation and filing of such additional pertinent transcripts and review all transcripts and lower court records relevant to the appeal. Although the trial court is responsible for ordering the record pursuant to MCR 6.425(F)(2), appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.

MAACS Comment to Standard 1

In order to prepare an appeal properly, and to ensure that potential issues are examined, appellate counsel must review the relevant documents to become familiar with the case. This Standard emphasizes that it is counsel's responsibility to obtain and review the record, which may consist of more than the documents that are regularly provided, such as the register of actions and transcripts of proceedings in the trial court(s), including preliminary examination, motion hearings, trial or plea, and sentencing. See MCR 6.425(F)(2)(a)(iii); MCR 6.433(A) or (B); and MCR 7.210(B). Additional documentation may include transcripts of post-conviction hearings, charging documents, warrants, court orders, presentence reports, motion papers, sentencing information reports and sentencing memoranda. Counsel should request any additional documentation within a reasonable time after appointment, consistent with MCR 7.212(A), to ensure that all issues can be researched and all facts clarified in time to prepare and file the appropriate post-conviction or appellate motion(s) or brief(s) in the appropriate court(s).

Standard 2

Before filing the initial postconviction or appellate motion or brief and after reviewing the relevant transcripts and lower court records, counsel must consult with the defendant about the proposed issues to be raised on appeal and advise of any foreseeable benefits or risks in pursuing the appeal generally or any particular issue specifically. At counsel's discretion, such confidential consultation may occur during an interview with the defendant in person or through an attorney agent, by a comparable video alternative, or by such other reasonable means as counsel deems sufficient, in light of all the circumstances.

MAACS Comment to Standard 2:

Counsel must consult with the defendant about the appeal prior to filing the initial post-conviction motion or brief in the Court of Appeals or trial court. It is left to counsel's informed professional judgment as to what form such consultation shall take. Personal interviews remain the best and thus should be deemed the preferred form in the absence of countervailing considerations, but are not the only way to fulfill this obligation. If counsel concludes that the circumstances require a visit, whether because of crime or penalty or as a function of the defendant's limitations in communicating in writing due to illiteracy, mental illness, lack of English fluency, etc., then counsel's professional judgment will require one or more personal meetings, and counsel is entitled to be paid for such visits. See In re Mulkoff, 176 Mich App 82 (1989). If counsel after duly considering all pertinent factors concludes that adequate and confidential consultation can be conducted by mail and telephone, or by tele- or video-conferencing if available (bearing in mind that all correspondence must be enclosed in envelopes plainly marked "Confidential attorney-client communication" on the outside, and that all telephone and video communication with persons incarcerated may be monitored) MAACS will generally accede to counsel's independent, informed, and considered assessment of the situation as determinative.

What is most important is that there be consultation regarding the appeal before the initial post-conviction motion or brief is filed. Counsel is responsible for advising the defendant of the potential issues that have been identified, the appellate strategies available, their relative benefits and disadvantages, and whether there are risks evident that make it advisable to forego the appeal altogether. To assist the defendant in making an informed choice about pursuit of appellate remedies, counsel must explain the types of remedies that may be obtained and the potential disadvantages such remedies may incur.

Standard 3

Counsel should raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer reasonable prospects of meaningful postconviction or appellate relief, in a form that protects where possible the defendant's option to pursue collateral attacks in state or federal courts. If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required.

MAACS Comment to Standard 3:

Appellate counsel must bring to bear the considered, informed judgment of a professional familiar with the criminal law who, after becoming appropriately familiar with the particular facts of the case and a fair assessment of the law, can with an advocate's skill and zeal bring to the attention of the reviewing court those claims of error which may entitle the defendant to meaningful relief. Competent exercise of such professional judgment is the crucial duty owed by appellate counsel to the defendant.

This Standard does not require that every conceivable issue be raised in every case. Jones v Barnes, 463 US 745; 103 SCt, 3308; 77 L Ed 2d 987 (1983); People v Reed, 449 Mich 375 (1994). However, as was noted by Justice Patricia J. Boyle for the majority in Reed, reasonable attorneys can disagree about what issues are arguable:

“By adopting a standard of arguable merit, the Minimum Standards encourage lawyers representing indigent clients on appeal to err on the side of presenting all colorable claims for relief. Although the standard undoubtedly imposes a tax on the resources of the Court of Appeals, it is arguable that the burden is justified by the institutional need to assure that appellate attorneys paid by the taxpayers of Michigan do not err on the side of underrepresentation.” *Id.* at 387.

To promote the goal of seeking finality in judgments, this Standard encourages counsel to raise those claims that have arguable potential for success on the direct appeal. In weighing whether to raise an issue, counsel should take into account that, because of the default rules attendant on collateral attacks, as embodied in MCR 6.508(D)(3)) and which similarly limit petitions for habeas corpus relief in federal courts, the failure to raise an issue in the direct appeal to the Michigan Court of Appeals most likely means that review of that issue in any subsequent post-conviction proceeding is likely to be held procedurally barred irrespective of its merits.

Since Michigan has a unified appellate process which requires that both on-record and extra-record issues be raised in the direct appeal, counsel should also be alert to the possibility of extra-record claims, which imposes on appellate counsel a corresponding duty to verify and adduce competent proof of facts significant to post-conviction relief in any form, and to investigate circumstances which a criminal lawyer would recognize as potential grounds for meaningful appellate or other post-conviction relief. If investigation reveals facts not of record which would support an issue on

appeal, motion for new trial, or other post-conviction relief, it is appellate counsel's responsibility to develop a testimonial record as the court rules permit in order to preserve the issue for appellate review. See MCR 6.425(F)(1)(C); MCR 7.208(B); MCR 7.211(C)(1).

Standard 4

When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona*. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court. The defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days after the appellant's brief is filed by the attorney, but if the case is noticed for submission within that 84-day period, the filing must be received no later than 7 days before the date of submission, or within the 84-day period, whichever is earlier. The 84-day deadline may be extended only by the Court of Appeals on counsel's motion, upon a showing of good cause for the failure to file defendant's pleading within the 84-day deadline.

MAACS Comment to Standard 4:

This Standard operates as a safeguard and, by its mere existence, has a positive effect on the legal services provided by counsel. By permitting a defendant to raise issues that counsel has deemed to be without arguable merit, it protects the defendant's opportunity to have meritorious claims raised if counsel's assessment was mistaken. It promotes finality of judgments and conserves judicial resources by having all issues raised in the direct appeal rather than piecemeal in a separate post-conviction proceeding. It reduces grievances by providing an outlet for the defendant to maintain a favorable attorney-client relationship rather than seeking substitution of counsel. It also reduces substitution of counsel requests and actual substitutions which can delay the appeal.

The Standard permits a defendant to file a supplemental brief *in propria persona* directly with the Court, "with or without a motion," within the specified deadline. Counsel is required to "provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court." Counsel is not obligated to conduct legal research in support of the issues which the client desires to raise and which, in the judgment of counsel, lack arguable merit. Counsel should ensure, however, that the client is aware of the procedural rules necessary to meet the requirement that the supplemental brief be acceptable for filing in the Court of Appeals. Counsel is not ordinarily required, but it may be occasionally necessary, to supply secretarial support to conform the brief to the applicable court rule regarding the form and contents of briefs on appeal, including the supplemental brief. Counsel should also inform the client the Court of Appeals will accept only one *pro per* supplemental brief and issues in that brief cannot be the same or overlap issues raised in the brief on appeal. And the Standard does mandate that counsel prepare and file an appropriate motion to extend the filing deadline, "upon a showing of good cause" for the client's failure to file the supplemental brief within the deadline.

Standard 5

An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles.

MAACS Comment to Standard 5:

A defendant may decide, based on the advice of counsel, to voluntarily dismiss the appeal. This situation may arise where there are no arguable grounds for relief or where the defendant decides that the risks of proceeding make it advisable to forego the appeal altogether. Counsel is obligated to advise the defendant what dismissal means and why it is being recommended, or alternatively that the client appreciates the consequences of so acting against counsel's advice. The practical effect is that there is no judicial review on the merits and the appeal is abandoned. The practice of obtaining the defendant's written consent to dismissal of the appeal protects both counsel and the defendant and continues to be the preferred way to demonstrate "the defendant's informed consent." A separate, confidential document should reflect the details underlying counsel's advice and the client's understanding of the alternatives presented.

If counsel determines that there are no non-frivolous issues that can be raised, but the defendant declines to voluntarily dismiss the appeal, then counsel must file either a motion to withdraw or a motion to vacate the order of appointment. If the appeal is by right, the motion to withdraw shall be filed in the Court of Appeals pursuant to the requirements of MCR 7.211(C)(5). If the appeal is by leave and jurisdiction has not yet vested in the Court of Appeals, then the motion to vacate shall be filed in the trial court within the time for filing an application for leave to appeal. See People v Tooson, 231 Mich App 504 (1998). The effect of the Court of Appeals granting a withdrawal motion is that the conviction will be affirmed. The effect of a trial court granting a motion to vacate is that any post-conviction remedies must be pursued without the assistance of assigned counsel. If either the Court of Appeals or the trial court finds any legally arguable issue, it must deny the motion and direct counsel to file a pleading raising at least such issue.

Standard 6

Counsel should request oral argument, and preserve the right to oral argument by timely filing the defendant's brief on appeal. Oral argument may be waived if counsel subsequently concludes that the defendant's rights will be adequately protected by submission of the appeal on the briefs alone.

MAACS Comment to Standard 6:

This Standard emphasizes the need for counsel to request oral argument on the title page of the brief in accordance with MCR 7.214(A) and to preserve the right to present oral argument by filing a timely brief, MCR 7.212(A)(4). However, the standard leaves it to counsel's discretion whether to actually participate in oral argument, based on a review of all the briefs and other relevant considerations.

Oral argument provides the opportunity to present recent cases, including unpublished decisions outside the purview of MCR 7.212(F)(3), to counter the prosecution's position, and to respond to the Court's questions. In preparation for oral argument, counsel should review the briefs of both parties, file supplemental pleadings as warranted, and update the legal research. Counsel should not waive oral argument where (1) the prosecution filed a brief but a reply brief was not filed by appointed counsel or (2) where the prosecutor has not entirely waived or otherwise lost the right to oral argument. If counsel is satisfied that the defendant's rights will be adequately protected without conducting oral argument, as a matter of professional courtesy counsel should notify the Court of Appeals and opposing counsel within a reasonable time prior to submission of the case that oral argument is being waived.

Standard 7

Counsel must keep the defendant apprised of the status of the appeal and promptly forward copies of pleadings filed and opinions or orders issued by a court.

MAACS Comment to Standard 7:

This Standard reminds counsel of the responsibility to keep a defendant reasonably informed about the status of the appeal and to comply promptly with reasonable requests for information. See MRPC 1.4(a). Because most defendants are in prison and have limited access to their appellate counsel, they are dependent upon counsel for information. Counsel is obligated to send clients copies of all pleadings that are filed and court decisions rendered, and otherwise to keep them informed of the status of the appeal, and to do so with sufficient promptness that they may effectively protect and exercise their opportunities for further review with or without the assistance of appointed counsel.

Standard 8

Upon final disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued as a result of that disposition, and the scope of any further representation counsel may provide. If counsel's representation terminates, counsel shall cooperate promptly and fully with the defendant and any successor counsel in the transmission of records and information.

MAACS comment to Standard 8:

In most cases the order of appointment authorizes appellate counsel to provide legal representation through disposition of the case by the Court of Appeals. In some situations the scope of appellate counsel's responsibilities will include representation beyond those proceedings in the Court of Appeals. See MCR 6.425(F)(1)(c). At whatever point such responsibilities terminate, counsel is obligated to notify the defendant promptly that the representation has ended and, when appropriate, to advise the defendant of potential remaining courses of action that might be pursued. Such courses of action include providing the defendant with forms for filing a pro se application for leave to appeal in the Michigan Supreme Court together with information on filing deadlines. Defendants who have had their convictions reversed and are awaiting retrial should continue to be represented by appellate counsel until it is clear that no further appeals will occur and that trial counsel has been retained, appointed, or waived.

Even after the attorney-client relationship has terminated, certain ethical obligations remain. To the extent that counsel possesses transcripts, documents or information that the defendant needs to pursue retrial, remand, or other avenues of relief, counsel has a duty to transmit them promptly at the request of the defendant or successor counsel.

Standard 9

Upon acceptance of the assignment, counsel is prohibited from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

MAACS Comment to Standard 9:

Occasionally individuals interested in a defendant's welfare will approach appellate counsel offering supplemental fees, beyond those to be paid by the appointing court. In other situations, counsel may be asked to withdraw as assigned counsel outright and take over the case on a retained basis. Recognizing the inevitable temptation such offers might present, MAACS is emphatic in its position that no compensation may be solicited or accepted for any reason for representation which is included within the scope of the order of appointment.

It is permissible, however, for counsel to be retained for additional representation once the work performed under the order of appointment has been completed. For example, counsel could be retained to file an application for leave to appeal in the Michigan Supreme Court once the appeal to the Court of Appeals is concluded, provided counsel's attendant responsibilities under the order of appointment have been completed.