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*Upgrades in Store for
Michigan's Indigent Appellate
Defense System:*

*The Vision to Increase Pay for
Appointed Appellate Counsel,
Advance Court Efficiencies, and
Improve the Quality of
Client Representation*

Editor's Note: The Author, Bradley R. Hall, became the Administrator of MAACS in January 2015. Since that time, he has implemented many changes aimed at improving the Indigent Appellate Defense System, with the goal of benefitting attorneys, courts, and most of all, clients. One example is the MAACS regional pilot project, adopted by the Supreme Court in Administrative Order 2015-9, 498 Mich. ___ (2015), which is the subject of this article.

On October 1, 2015, the Michigan Appellate Assigned Counsel System (MAACS) partnered with fourteen circuit courts to implement an innovative pilot project that will standardize the courts' attorney fee policies, consolidate their assignment lists by region, and transfer several administrative responsibilities from the courts to MAACS. These changes are designed to improve the administrative efficiency of the appointment process, the speed and accuracy with which appointment and transcript orders are issued, and the overall quality of appellate assigned representation. This important initiative represents a significant step in the ongoing review of MAACS operations. If successful, it could pave the way for a structural overhaul of the entire system—and may contain important lessons for indigent defense reform elsewhere.

A Brief History of the System

To appreciate why these changes carry so much promise, it helps to understand the history and structure of MAACS. The Appellate Defender Act, signed into law in 1978, created the Appellate Defender Commission to “develop[] a system of indigent appellate defense services which shall include . . . the state appellate defender [SADO] . . . and locally appointed private counsel.”¹ The Act requires SADO to accept at least 25% of assigned appeals statewide, with the remainder assigned to private counsel.² As to the latter, the Act directs the Commission to “compile and keep current a statewide roster of attorneys eligible for and willing to accept appointment by an appropriate court to serve as criminal appellate defense counsel for indigents.”³

Through administrative orders in 1981 and 1989, the Michigan Supreme Court adopted a bifurcated structure to administer the local appointment of private counsel. The court created MAACS to “compile and maintain” the “statewide roster” of appellate lawyers,⁴ but directed the “judges of each circuit” to “appoint a local designating authority,” or LDA, with the responsibility of “select[ing] assigned counsel from the local list” and “perform[ing] such other tasks in connection with the operation of the list as may be necessary at the trial court level.”⁵ These tasks include accurate list rotation, specific selection or exclusion of counsel, recordkeeping and reporting requirements, and the preparation and distribution of orders appointing counsel and requiring the production of transcripts.⁶

When first adopted, this was a sensible model, as it ensured consistency and independence in the assignment processes that took place in the 57 circuit courts—where rudimentary local lists consisted largely of truly local attorneys, rather than criminal appellate specialists handling cases around the state.

Over time, however, the model has outlived some of its usefulness and revealed a number of disadvantages, most significantly with respect to funding. Prior to the existence of MAACS, the circuit courts were accountable for their appellate attorney fee policies because they were obliged to ensure adequate representation in all appeals, either through contracts or by maintaining lists of familiar local attorneys. But the current MAACS model removes that accountability entirely. For example, although the circuit courts remain responsible for reimbursing counsel in MAACS cases, it is now

MAACS’s responsibility to ensure that counsel is available in every case, and the circuit courts are directed to “refer” cases to MAACS for assignment when the local list contains no attorneys who are “willing to accept” a case.⁷ Circuit courts are also permitted to refer a case to SADO based upon “the economic hardship the appeal would cause the county”⁸ While these policies ensure that counsel is provided in every case, the unintended consequences have been significant. With the state constitutionally prohibited from imposing unfunded mandates on local units of government,⁹ the counties have no financial incentive to pay reasonable attorney fees, or even pay attention to the issue at all.

The Resulting Shortfalls

As a result, some courts have not increased their attorney fees for over 40 years, and some chief judges were *not even aware* of their own fee policies until approached by new MAACS management earlier this year. There remain 57 unique and often idiosyncratic attorney fee policies throughout the state, most of which fail to provide reasonable compensation for this difficult but constitutionally required work. Some courts pay hourly rates as low as \$25 per hour, others pay flat fees as low as \$350 per case, others pay based on event schedules, and still others have adopted complex formulas based on transcript length. Policies differ as to payment caps, travel, and expenses.

The impact on quality is twofold. First, and most predictably, the attorney fees have had devastating consequences on roster attorney morale, retention, recruitment, and overall quality. The system is stretched to the breaking point, with too few lawyers handling far too many serious appeals. Second, and less obvious, is that the endless list of peculiarities and idiosyncrasies impacts the manner in which counsel complete payment vouchers, making it virtually impossible for MAACS to conduct apples-to-apples comparisons of time, performance, and cost data from cases assigned by different courts. In spite of thousands of cases per year, MAACS cannot say with any degree of confidence how many hours it should take to complete the average plea or trial appeal, or how much time it should take to read a page of transcripts. The value of this information should be apparent, not just to MAACS but to the circuit courts who are responsible for ordering payment in individual appeals.

But the existing attorney fee structure does not merely affect the quality of representation. It also

compels the persistence of an astonishingly inefficient administrative model. Fifty-seven different fee policies require 57 local lists, and 57 circuit court employees to manage them. In most circuit courts, the LDA is a court administrator or clerk who is pulled from his or her other responsibilities whenever a request for appellate counsel is filed. Instead of simply preparing accurate appointment orders on its own, MAACS must devote considerable energy training LDAs, correcting mistakes, and trying to ensure as much timeliness and consistency as possible. Meanwhile, technological advances have made a more centralized administration feasible—MAACS now hosts all of the rotating lists on its own computer servers, which circuit court personnel access remotely to create appointment orders and carry out their responsibilities. MAACS is often capable of accomplishing these tasks more quickly and accurately than the circuit courts—and frequently does so as a courtesy when the LDAs are occupied with the other responsibilities of their jobs.

Redundancy is not the only inefficiency. Compounding matters is the existence of so many rotating lists. The 57 circuit courts are divided into three levels based upon case severity, for a total of 171 lists for which MAACS must ensure adequate participation, a task that is complicated by the constant stream of attorney additions and removals, the only mechanism for caseload control. And because roster attorneys can accept assignments from as few as one or as many as 57 circuit courts, caseloads vary widely, with some attorneys accepting too few assignments, others accepting too many, and all attorneys facing an unpredictable stream of fits and starts. Simply put, the unwieldy model is incapable of self-regulation, creating ongoing administrative headaches and compounding quality control problems.

Reform is Here

While MAACS has struggled under these structural and financial obstacles, its state-funded counterpart, SADO, has thrived as a model provider of indigent defense services. SADO attorneys have secured 19 exonerations, argued multiple cases at the United States Supreme Court, and saved the state of Michigan over \$50 million in the past decade through successful sentencing error litigation. SADO has obtained millions of dollars in grant funding for successful projects dealing with wrongful convictions, the Detroit Crime Lab closure, post-conviction DNA testing, and technology for indigent defense. For these and other efforts, SADO has received numerous awards, including the NLADA's 2010 Clara Shortridge Foltz Award for outstanding

achievement by a public defender program. The contrast could hardly be clearer.

In September 2014, the Michigan Supreme Court took action, merging MAACS with SADO for management purposes under the leadership of the Appellate Defender, and directing the Appellate Defender Commission “to review operations of [] MAACS and submit a proposed administrative order that reflects the consolidation of the two offices and incorporates proposed updates or revisions that the commission recommends.”¹⁰ The review began in earnest, with a close examination of how MAACS could be restructured to remove the impediments to reform and encourage better practices, greater efficiency, and standardized attorney fees. Over several months in 2015, MAACS leadership held countless meetings with roster attorneys, circuit judges, court administrators, county executives and commissioners, appellate judges, and other stakeholders. The result of these meetings was a proposal to implement a series of interdependent reforms that would dramatically reshape MAACS, as well as a voluntary uniform attorney fee policy that would tie the pieces together.

In September 2015, the Supreme Court authorized “a one-year pilot project to assess the feasibility, costs, and benefits associated with structural reforms currently under consideration for permanent statewide implementation.” The reforms include a consolidation of local lists into “a smaller number of regional lists to be maintained and administered by MAACS,” as well as the circuit courts’ “voluntary adoption of a standard attorney fee and expense policy” to be approved by the Appellate Defender Commission.¹¹ The Commission in turn approved an attorney fee policy that would reimburse appellate counsel at hourly rates of \$50 or \$75 depending on the severity of the case. The policy includes presumptive maximum fees of 15 hours for plea appeals and 45 hours for trial appeals, though counsel may file a motion for excess fees if a case reasonably requires greater effort, and a judge must provide a statement of reasons if he or she declines such a request or otherwise reduces a fee. The policy provides for the payment of all necessary expenses, as well as reimbursement for travel time (which is excluded from the presumptive maximum). This fee policy was crafted with the advice of stakeholders from all sides of the issue, and is designed to be fair and predictable to attorneys and courts alike. While it would represent a significant increase for some courts, it falls well within the range of attorney fees already paid in many counties throughout the state.

The pilot was immediately implemented by fourteen circuit courts in two geographic regions. The Eastern Lower Peninsula Region consists of the following circuits: 16 (Macomb), 18 (Bay), 21 (Isabella), 24 (Sanilac), 31 (St. Clair), 40 (Lapeer), 42 (Midland), 52 (Huron), and 54 (Tuscola). The Upper Peninsula Region consists of the following circuits: 12 (Baraga/Houghton/Keweenaw), 25 (Marquette), 41 (Dickinson/Iron/Menominee), 47 (Delta), and 50 (Chippewa).

Under the pilot project, the local appellate assignment lists for these fourteen circuit courts have been abolished, and in their place are two regional lists administered by MAACS. Within days of the filing of a defendant's request for counsel, MAACS identifies appellate counsel, confirms counsel's willingness to accept the assignment, prepares an appointment order including *all* lower court transcripts, and provides the order to the circuit court judge for signature. Upon entry of the appointment order, MAACS provides copies to the defendant, appointed counsel, and the Court of Appeals. By streamlining the assignment process in this manner, MAACS substantially reduces the unnecessary delays, efforts, and costs associated with substitution of counsel orders and amended orders requesting additional transcripts.

In these two pilot regions, the assignment process is moving more quickly and efficiently than ever before, all because of the tremendous leadership and commitment by the participating circuit court judges and court administrators. In spite of likely cost increases in most of the courts (which MAACS was able to forecast based on financial data from prior cases) the courts recognized the value in these reforms, not only with respect to their own ability to reallocate local court resources, but also for the lasting improvements in the quality of Michigan's indigent defense system.

This is Just the Beginning

The response to this initiative has also been surprisingly positive even outside the participating circuit courts, with many chief judges and court administrators inquiring about when they might be able to adopt these policies in their own courts, and how much it would cost to do so. What this shows is that courts statewide appreciate the need for reform, and there may be more tolerance than expected for cost increases, so long as they accompany greater efficiency, uniformity, predictability, and quality. If the pilot project is successful, MAACS envisions expanding the project statewide, along with a

coordinated effort to convince all circuit courts of the value in a uniform fee policy. Although some courts may resist these efforts or prefer to maintain their own local lists, MAACS will work tirelessly to prove the usefulness of this new model, as well as the immense value in sharing the financial burden of reform among all circuit courts as well as the state.

The regional pilot project is just one example of the exciting developments at MAACS, which are made possible through its new partnerships with SADO and the Criminal Defense Resource Center (CDRC). These include Westlaw access for roster attorneys at a substantially reduced rate, federal grant funding to provide investigative services to the roster under the SADO model, and improved access to high quality training from the CDRC. MAACS has also undertaken an intensive review of roster attorney work product, and is actively litigating multiple attorney fee appeals in the courts, one of which recently resulted in the Michigan Supreme Court holding that trial courts must *explain* the denial of proper requests for reasonable fees—even requests above a county's payment cap.¹² It has been a busy year, but this is just the beginning.

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Endnotes

1. M.C.L. 780.712(4).
2. M.C.L. 780.716(c).
3. M.C.L. 780.712(6).
4. Administrative Order No. 1981-7, § 1(1), 412 Mich. lxx (1982).
5. While AO 1981-7 specifically allowed groups of "voluntarily combined circuits" to appoint a single LDA to administer a combined "rotating list" of lawyers, AO 1981-7, § 3(1), that option was omitted from a 1989 revision, thereby requiring each circuit

court to maintain its own list of roster attorneys willing to take assignments. Administrative Order 1989-3, § 3(1), 432 Mich. cxxvi (1989).

6. See AO 1981-7, § 3; AO 1989-3, § 3.

7. AO 1989-3, § 3(7).

8. AO 1989-3, § 3(15).

9. Const. 1963, art. 9, § 29.

10. Administrative Order 2014-18, 497 Mich. ____ (2014).

11. Administrative Order 2015-9, 498 Mich. ____ (2015).

12. *In re Attorney Fees of John W. Ujlaky*, ____ Mich. ____; ____ NW2d ____; 2015 WL 5779654 (Sep 30, 2015) (Docket No. 150887).

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