ADMINISTRATIVE ORDER NO.1981-7

Pursuant to 1978 PA 620, MCL 780.711-780.719; MSA 28.1114(101)-28.1114(109), the Appellate Defender Commission submitted to this Court regulations governing a system for appointment of appellate counsel for indigents in criminal cases and minimum standards for indigent criminal appellate defense services. The Court has considered the submissions and after due consideration we approve them. However, the operation of the system and enforcement of the standards pursuant to the system requires that the Legislature appropriate funds necessary to implement the system. When funds sufficient to operate the system are appropriated, this Court will promulgate an administrative order implementing the system and requiring adherence to it.

The approved regulations governing the system for appointment of appellate counsel for indigents in criminal cases, together with the commentary of the Appellate Defender Commission are as follows:

Introduction by the commission: In order to meet its charge under MCL 780.711 et seq.; MSA 28.1114(101) et seq., to design an appointment system and develop minimum performance standards, the State Appellate Defender Commission, seeking the broadest possible input, established an advisory committee, which met during 1979 and developed a set of initial proposals. After review by the commission, the proposals were circulated among the bar, presented at public hearings, further refined on the basis of the advice received, and passed on to the Supreme Court for its review, revision, and approval. The commission comments, which follow the sections of the regulations and standards, are designed to briefly present some of the thinking behind the regulations and standards as distilled from these sources.

Section 1. Establishment of the Office of the Appellate Assigned Counsel Administrator

(1) The Appellate Defender Commission shall establish an Appellate Assigned Counsel Administrator's Office which shall be coordinated with but separate from the State Appellate Defender Office. 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.

(2) An appellate assigned counsel administrator shall be appointed by and serve at the pleasure of the Appellate Defender Commission.

(3) The appellate assigned counsel administrator shall:

(a) be an attorney licensed to practice law in this state,

(b) take and subscribe the oath required by the constitution before taking office,

(c) perform duties as hereinafter provided, and

(d) not engage in the practice of law or act as an attorney or counselor in a court of this state except in the exercise of his duties under these rules.

(4) The appellate assigned counsel administrator and supporting personnel shall be considered to be court employees and not to be classified civil service employees.

(5) The salaries of the appellate assigned counsel administrator and supporting personnel shall be established by the Appellate Defender Commission.

(6) The appellate assigned counsel administrator and supporting personnel shall be reimbursed for their reasonable actual and necessary expenses by the state treasurer upon the warrant of the state treasurer.

(7) Salaries and expenses attributable to the office of the appellate assigned counsel administrator shall be paid out of funds available for those purposes in accordance with the accounting laws of this state. The auditor general, under authority of Michigan Const 1963, art 4, §53, shall perform audits utilizing the same policies and criteria that are used to audit executive branch agencies.

(8) Within appropriations provided by law, the Appellate Defender Commission shall provide the office of the appellate assigned counsel administrator with suitable space and equipment at such locations as the commission considers necessary.

Commission Comment: MCL 780.711 et seq.; MSA 28.1114(101) et seq., mandates development of a mixed system of appellate defense representation containing both

public defender and private assigned counsel components. The assigned counsel component is to be structured around a statewide roster of private attorneys, which the Appellate Defender Commission is to compile and maintain. The commission as an unpaid policy-making body must delegate the performance of ongoing tasks. Since establishing and administering the newly authorized roster is a large, permanent job, the first issue addressed is the organizational entity to which responsibility for the roster should be delegated.

Two administrative models for mixed systems are widely recognized and approved. The defender-administered model makes supervision of the assigned counsel panel a function of the defender office and is currently used in some states which have statewide trial defender offices. The independently administered model makes each component of the system autonomous while encouraging coordination of training and support services. See ABA Standards for Criminal Justice (2d ed, 1980), 5-1.2 (ABA Standards); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (National Legal Aid and Defender Association, 1976), pp 124-135 (hereafter nlada); Report of the Defense Services Committee, 57 Mich St B J 242 (March 1978), recommendation 9d, p 260; Goldberg / Lichtman, Guide to Establishing a Defender System (May 1978), pp 71-79.

The independently administered model was perceived to be most compatible with the statute and the desires of private attorneys. It promotes the independence of assigned attorneys from the defender office and provides them with an administration which can focus exclusively on their special needs. It nonetheless permits the efficient sharing of such resources as training materials, information retrieval systems and supportive services through the coordinating efforts of the Appellate Defender Commission to which both components are ultimately responsible.

Section 2. Duties of the appellate assigned counsel administrator.

The appellate assigned counsel administrator, with such supporting staff as the commission deems appropriate, shall:

(1) After reasonable notice has been given to the members of the State Bar of Michigan, compile a roster of attorneys eligible under §4 of these regulations and willing to accept appointments to serve as appellate counsel for indigent criminal defendants.

(a) The roster shall be updated semiannually and circulated among all probate, circuit, and appellate courts of the state. It shall also be provided, on request, to any interested party.

(b) The roster shall appear in two parts. Part one shall contain an alphabetized listing by name of all attorneys in the state who are eligible and willing to accept criminal appellate assignments. Part two shall be subdivided according to the circuits in which the attorneys' primary practices are maintained and shall contain the following information regarding each attorney: name, firm's name, business address, business telephone, and level of assignments for which the attorney is eligible.

(2) Place in the issue of the Michigan Bar Journal to be published after the results of the bar examinations have been released an announcement specifying the procedure and eligibility criteria for placement on the assigned counsel roster.

(3) Distribute by November 1 of every second year to all attorneys on the roster a standard renewal application containing appropriate questions regarding education and experience obtained during the preceding two years and notice that the completed application must be forwarded to the administrator's office within 30 days.

(a) The eligibility level of every attorney on the list shall be reviewed every second year based on the information contained in the renewal application.

(b) Where a renewal application has not been filed or reveals deficiencies in complying with any requirement for continuing eligibility, the administrator shall notify the affected attorney in writing of such deficiencies. The names of all attorneys who fail to correct deficiencies in their continuing eligibility within 60 days after the issuance of notice shall be removed from the roster, except that the administrator shall have the discretion to extend the deadline for correcting deficiencies by an additional 60 days where good cause is shown. Such extensions shall be requested and granted only in writing and shall include a summary of the pertinent facts.

(4) Notify all recipients of the roster of any change in the eligibility of any attorney within 20 days after the date on which a change occurs. Publication of a semiannual roster which reflects such changes within the time specified shall constitute adequate notice for purposes of this provision.

(5) Receive and take appropriate action as hereafter set forth regarding all correspondence forwarded by judges, defendants, or other interested parties about any attorney on the roster.

(6) Maintain a file for each case in which private counsel is appointed which shall contain:

(i) the order of appointment,

(ii) the cover page and table of contents of all briefs and memorandums filed by defense counsel,

(iii) counsel's voucher for fees, and

(iv) a case summary which shall be completed by counsel on forms provided by the administrator and which shall contain such information about filing dates, oral arguments, case disposition, and other pertinent matters as the administrator requires for statistical purposes.

(7) Forward to the Legal Resources Project copies of all briefs filed by assigned counsel for possible placement in a centralized brief bank.

(8) Select an attorney to be appointed for an appeal when requested to do so by an appellate court or by a local designating authority pursuant to §3(4).

(9) Compile data regarding the fees paid to assigned counsel and take steps to promote the payment of reasonable fees which are commensurate with the provision of effective assistance of appellate counsel.

(10) Provide, on request of an assigned attorney or an appointing authority, information regarding the range of fees paid within the state to assigned counsel or to expert witnesses and investigators who have been retained by counsel with the prior approval of the trial court. On the request of both the attorney and the appointing authority, the administrator may arbitrate disputes about such fees in particular cases according to prevailing local standards.

(11) Take steps to promote the development and delivery of support services to appointed counsel.

(12) Present to the commission within 90 days after the end of the fiscal year an annual report on the operation of the assigned counsel system which shall include an accounting of all funds received and disbursed, an evaluation of the cost-effectiveness of the system, and recommendations for improvement.

(13) Perform other duties in connection with the administration of the assigned counsel system as the commission shall direct.

Commission Comment: The appellate assigned counsel administrator's duties described in §2 go beyond the performance of ministerial tasks. Other functions include directing focus on efficient systems for delivery of services, adequate support services and other matters of concern to appellate practitioners. The eligibility requirements for the roster are intended to be a vehicle for upgrading as well as organizing the services of private assigned counsel. It is also important, however, that private attorneys who are willing to maintain their eligibility for the roster benefit from an organizational structure dedicated to rationalizing and improving the conditions under which they receive, perform, and are compensated for criminal appellate assignments. The view that the director of the assigned counsel system must be a competent criminal defense attorney as well as a sensitive administrator is widely shared. ABA Standards, 5-2.1; nlada,pp 236-239; Guide to Establishing a Defender System,

Subsections 2(1)-(4) specify the mechanics of compiling and circulating a roster which is both current and convenient. The semiannual notice and updating provisions are designed especially for new lawyers. Those who pass each bar examination will see the notice in the bar journal in time to seek placement on a semiannual roster. Eligible attorneys may join, withdraw, or be removed from the list at anytime.

Subsection 2(5) recognizes that once an institutional entity with overall responsibility for assigned counsel exists, it will become the recipient of comments requiring a

response. This subsection also reflects a commitment to passive rather than active review of attorneys' performance. Therefore, while the administrator is nowhere charged with overseeing the content of assigned counsel's work on a regular basis, he or she is directed to act when substantive problems come to light. Appropriate action may range from writing a letter of inquiry or clarification to removing an attorney from the roster in accordance with the due process safeguards specified in §4. See ABA Standards, 5-2.2 and accompanying commentary.

Subsection 2(6) requires the administrator to collect such information as is needed to promote the goals of the assigned counsel system without unduly duplicating the tasks performed by other entities. The items listed in subsections (6)(i)-(iv) are adequate to inform the administrator that a case has been assigned, work is ongoing, and a case has been closed. Tracking of all pleadings in each case for timeliness is not necessary since such oversight is already provided by the courts. Should additional information be needed regarding a particular case, it can be obtained from the appropriate court file. The costly and time-consuming handling of excess paperwork is thus eliminated. On the other hand, the completion of uniform summaries after cases have been closed is a convenient way for the administrator to gather data on the operation of the system as a whole. Such data has not been collected and analyzed to date.

Subsection (7) makes the administrator's office the conduit for assigned counsel's contributions to the Legal Resources Project's brief bank. The brief bank currently serves assigned counsel but primarily contains pleadings prepared by the State Appellate Defender's staff attorneys. By performing this pass-through role, the administrator's office will have a ready means of collecting the items mentioned in subsection (6)(ii).

Subsection (8) functions are fully discussed in the commentary to §3.

Subsections (9) and (10) reflect the commission's grave concern about the adequacy of current assigned counsel fees. Quality representation is inevitably tied to reasonable compensation. Low fees make it economically unattractive for competent attorneys to seek assignments and expend all the time and effort a case may require, and economically tempting to accept an excessive number of assignments in order to maintain a desirable income. Flat fees per case discourage attorneys from undertaking certain responsibilities, such as client visits or oral arguments, since they will be paid the same amount regardless of the work done.

While the commission recognized that specific suggestions regarding fees were outside the scope of its mandate, it also recognized that setting minimum performance standards without addressing the issue of compensation is unrealistic. Similar views have been expressed by others. See ABA Standards, 5-2.4; *Report of the Defense Services Committee,* recommendation 5, p 249; nlada, pp 271-275. In addition, over half of the Court of Appeals judges responding to a questionnaire felt that increased fees would significantly enhance the quality of indigent defense representation. Some judges suggested rates believed to be substantially above those now being paid. Therefore, the commission included among the administrator's enumerated duties the active representation of the interests of assigned counsel and their clients in securing reasonable compensation for assigned counsel.

In subsection (10) the term "arbitrate" was substituted for the originally proposed term "mediate" at the State Bar's request.

Subsection (11) addresses counsel's need for support services in such areas as legal research, factual investigation, expert consultations and witnesses, and prison inmate problems. Some of these needs are already being filled by the Legal Resources Project and the State Appellate Defender Office. It is anticipated that close cooperation between the assigned counsel and defender components will lead to the development of additional shared services as well as continuing legal education programs. See ABA Standards, 5-1.4.

Section 3. Selection of Assigned Counsel.

(1) The judges of each circuit or group of voluntarily combined circuits shall appoint a local designating authority who shall be responsible for the selection of assigned appellate counsel from a rotating list and shall perform such other tasks in connection with the operation of the list as may be necessary at the trial court level. The designating authority may not be a judge, prosecutor or member of the prosecutor's staff, public defender or member of the public defender's staff, or any attorney in

private practice who currently accepts trial or appellate criminal assignments within the jurisdiction. Circuits which have contracted with an attorney or group of attorneys to provide representation on appeal for indigent defendants must comply with these regulations within one year after implementation by the Supreme Court.

(2) Each local designating authority shall compile a list of attorneys eligible and willing to accept criminal appellate assignments as indicated on the statewide roster. In order to receive appellate assignments from a trial court, an attorney's name must appear on that circuit's local list. The local lists shall be compiled in the following manner:

(a) The name of each attorney appearing on the statewide roster who has identified the circuit in question as his or her circuit of primary practice shall automatically be placed on the local list.

(b) The name of each attorney appearing on the statewide roster who submits a written request to the local designating authority shall also be placed on the local list.

(c) The name "State Appellate Defender Office" shall be placed in every fourth position on each local list.

(3) On receiving notice from a trial judge that an indigent defendant has requested appellate counsel, the local designating authority shall select the attorney to be assigned by rotating the local list in the following manner:

(a) The opportunity for appointment shall be offered to the attorney whose name appears at the top of the list unless that attorney must be passed over for cause.

(b) When the attorney accepts the appointment or declines it for reasons other than those hereafter specified as "for cause," the attorney's name shall be rotated to the bottom of the list.

(c) When an attorney's name is passed over for cause, his or her name shall remain at the top of the list.

(d) An attorney's name must be passed over for cause in any of the following circumstances:

(i) The crime of which the defendant has been convicted carries a possible life sentence or a statutory maximum sentence exceeding 15 years and the attorney is qualified only at Level I as described in § 4(3) of these regulations.

(ii) The attorney represented the defendant at trial or plea and no exception for continued representation as specified in §3(8) is to be made.

(iii) Representation of the defendant would create a conflict of interest for the attorney. Conflicts of interest shall be deemed to exist between codefendants whether they were jointly or separately tried. Codefendants may, however, be represented by the same attorney if they express a preference for such representation under §3(7) of these regulations, provided that there is no apparent conflict of interest.

(iv) The attorney did not represent the defendant at trial or plea and an exception for continued representation by trial counsel as specified in §3(8) is to be made.

(v) The defendant's request for an attorney on the list who is neither trial counsel nor next in order for appointment is to be honored pursuant to §3(7).

(vi) The appeal to be assigned is from an habitual offender conviction and the designating authority, pursuant to §3(9), desires to select the attorney assigned to appeal the underlying conviction.

(e) When an attorney is passed over for cause under subsections 3(d)(i), (ii), or (iii), the local designating authority shall continue systematic rotation of the list until reaching the name of an attorney willing and able to accept the appointment.

(f) When an attorney is passed over for cause under subsections 3(d)(iv), (v), or (vi) and an attorney whose name appears other than at the top of the list is selected, on accepting the appointment the latter attorney's name shall be rotated to the bottom of the list.

(g) The local designating authority shall maintain records which reflect all instances where attorneys have been passed over and the reasons therefor.

(4) Where a complete rotation of the local list fails to produce the name of an attorney willing and able to accept appointment in a particular case, the local designating authority shall refer the case to the appellate assigned counsel administrator for assignment.

(5) After selecting an attorney to be assigned in a particular case, the local designating authority shall obtain an order of appointment from the appropriate trial judge and shall forward copies of this order to the attorney named therein, the defendant, and the appellate assigned counsel administrator.

(6) All assignments other than those made to the State Appellate Defender Office shall be considered personal to the individual attorney named in the order of appointment and shall not be attributed to a partnership or firm.

(7) When advising defendants of their right to assigned counsel on appeal pursuant to GCR 1963, 785.11, trial judges shall explain that the defendant may indicate on the written request for the appointment of counsel a preference for a particular attorney. Trial judges shall further explain that the defendant's preference is not controlling and that the eligibility and willingness of the desired attorney to accept appellate assignments are controlling. When the defendant expresses a preference for counsel whose name appears on the local list, the local designating authority shall attempt to honor it.

(8) When the defendant specifically requests the appointment of his or her trial attorney for purposes of appeal and the trial attorney is otherwise eligible and willing to accept the assignment, the defendant shall be advised by the trial judge of the potential consequences of continuous representation. If the defendant thereafter maintains a preference for appellate representation by trial counsel, the advice given and the defendant's waiver of the opportunity to receive new counsel on appeal shall be by waiver on the record or by written waiver placed in the court file.

(9) Where a designating authority treats an habitual offender conviction as a separate assignment, such an assignment may be given to the attorney handling the appeal of the underlying conviction.

Commission Comment: The procedures for utilizing the statewide roster which are outlined in this section reflect a number of significant policy decisions. Foremost is the legislature's rejection of the ad hoc system of appointing counsel. This method, which involves the random selection by trial judges of attorneys who happen to be available, has been universally criticized for offering no control over the quality of representation, no basis for organizing and training a private defense bar, and no barriers to reliance on patronage or discrimination as selection criteria. See, for instance, ABA Standards, 5-2.1. MCL 780.711-780.719 meets these criticisms by requiring the selection of counsel from a roster of attorneys screened for eligibility and willingness to serve.

One incident of the ad hoc system which has been particularly troublesome in the appellate context is the practice of having the trial judge in the case select the defendant's representative on appeal. Since claims on appeal frequently allege legal error or abuse of discretion on the part of the trial judge, assigned counsel are put in the delicate position of having to criticize their "employer." Trial judges face the temptation of choosing attorneys willing to be uncritical. Defendants naturally question whether their interests are being vigorously protected. For detailed critiques see ABA Standards, 5-1.3; nlada, p 142; Report of the Defense Services Committee, recommendation 9a, p 260.

MCL 780.712(6); MSA 28.1114(102)(6) states: "The appointment of criminal appellate defense services for indigents shall be made by the trial court from the roster provided by the commission or shall be referred to the office of the state appellate defender." The commission concluded that a significant difference exists between "appointment by the trial court" and "selection by the trial judge." It therefore suggested a system whereby selection of appellate attorneys from the roster would be made by nonjudicial personnel according to standardized procedures. Once designated, the attorney would still be appointed by the trial court, as opposed, for instance, to an appellate court. This method conforms to the legislative framework while avoiding potential conflicts for lawyers and judges alike. It has the added advantage of efficiency. Delegation of the selection process to a single designating authority in each circuit or in voluntarily combined circuits will relieve judges of what should be a largely ministerial task and will provide a centralized means of using the roster in multi-judge circuits.

Separate use by each circuit of the entire roster obviously would be cumbersome. Moreover, lawyers and judges would presumably be dissatisfied with a system that regularly matched attorneys and courts which are hundreds of miles apart. On the other hand, subdividing the roster into arbitrary geographical sections would preclude an attorney from seeking assignments in any circuit he or she chose. These competing concerns are both met by having shorter local lists drawn from the statewide roster in a manner which leaves to the attorney the choice of which and how many lists include his or her name. The commission assumed that normal laws of supply and demand would assure an adequate distribution of eligible counsel among the circuits. See ABA Standards, 5-2.2; nlada,pp 239-240.

Simplicity and evenhandedness in the allocation of cases to private counsel is assured by automatically rotating the local list with limited exceptions for cause. The commission's rotation scheme parallels those suggested in numerous published reports. ABA Standards, 5-2.3; nlada, p 241; *Guide to Establishing a Defender System,* pp 82-83. Rotation has the inherent side effect of limiting the number of assignments available to any one attorney, and the commission chose not to adopt any additional measures for controlling caseload size. Any numerical limitation on the number of appellate assignments would be difficult to enforce and would be inevitably arbitrary since it could not account for the remainder of a private attorney's practice.

Exceptions to strict rotation were limited to those enumerated in order to avoid reintroducing the kind of discretionary decision-making rotation is meant to eliminate. Two of these exceptions bear special mention. In general, trial counsel should not represent defendants on appeal since, like the trial judges, their performance is subject to review. While continuous representation by trial counsel may be preferred by some defendants and be desirable in some cases, it is presumptively disfavored unless the defendant makes an intelligent waiver of the right to a new attorney. Defendants considering such a waiver should therefore be advised that an appellate attorney's role includes identifying errors to which trial counsel may have failed to object and errors made by trial counsel in the first instance. If such errors exist, trial counsel may find it difficult to perceive them or to assert them most effectively on appeal. This view comports with those expressed in Report of the Defense Services Committee, recommendation 9b, p 260, and nlada, p 352.

Another exception is meant to allow consideration of a defendant's preference for particular appellate counsel. While the desired attorney would have to be otherwise willing and eligible to accept the assignment, there is no reason not to accommodate the defendant's choice when possible. But for their indigency the defendants involved would have complete freedom in selecting their own attorney. Minimizing to the extent possible disparities among defendants which result from differences in financial status is a concern which has also been addressed by other groups. See Report of the Defense Services Committee, recommendation 2, alternative F, p 245, and nlada, pp 477, 481-484.

Section 4. Attorney Eligibility for Assignments.

(1) Attorneys who wish to be considered for appointment as appellate counsel for indigent defendants shall file an application with the assigned counsel administrator. Based on the information contained in the application, eligible attorneys will be identified in the statewide roster as qualified for assignments at either Level I or Level II.

(2) All applicants who are members in good standing of the State Bar of Michigan and who:

(a) have been counsel of record in at least six or more appeals of felony convictions in Michigan or federal courts during the three years immediately preceding the date of application, or

(b) in exceptional circumstances, have acquired comparable experience as determined in the discretion of the Appellate Defender Commission, shall be designated as Level II and may accept appointments to represent indigent defendants convicted of any felony and juveniles appealing their waiver decisions regarding any felony.

(3) All applicants who are members in good standing of the State Bar of Michigan who have not been designated Level II attorneys shall be designated as Level I. A Level I attorney may not be appointed to represent a defendant on appeal if the crime of which the defendant was convicted carries a possible life sentence or a statutory

maximum sentence exceeding 15 years or, similarly, on appeal of juvenile waiver decisions where the maximum possible sentence for the felony charged is a life sentence or a statutory maximum exceeding 15 years.

(4) A Level I attorney shall be designated as Level II if the attorney has been counsel of record in at least two appeals of felony convictions within an 18-month period.

(5) Attorneys who are employed full time by the State Appellate Defender Office at or above the status of assistant defender need not individually prove their qualifications as Level II attorneys in order to perform the duties of their employment and may not individually appear on the statewide roster as eligible for accepting assignments during the course of their employment at the State Appellate Defender Office.

(6) In addition to demonstrating eligibility for a particular level of practice, attorneys who wish to maintain their names on the roster shall, by the filing of an application, agree to comply with the following regulations:

(a) Each attorney shall meet and shall strive to exceed the Minimum Standards for Indigent Criminal Appellate Defense Services approved by the Supreme Court and adopted by the Appellate Defender Commission.

(b) Each Level II attorney shall demonstrate continued participation in the field of criminal appellate practice by appearing as counsel of record in two felony appeals during the two years immediately preceding each eligibility renewal statement.

(c) Each attorney, in each case to which he or she is assigned as appellate counsel, shall timely forward to the assigned counsel administrator copies of the following:

(i) all briefs and memorandums filed in the defendant's behalf,

(ii) his or her voucher for fees,

(iii) a completed case summary as described in §2(6).

(d) Each attorney shall file an eligibility renewal statement as required by §2(3) of these regulations within 30 days after receipt of the appropriate forms from the appellate assigned counsel administrator.

(e) Each attorney shall respond promptly to notice from the appellate assigned counsel administrator that defects in the attorney's eligibility exist or that complaints about the attorney's performance have been received. Deficiencies in eligibility must be corrected within 60 days subject to the grant in writing of one 60-day extension by the administrator for good cause shown.

(f) Each attorney shall complete an educational program in criminal appellate advocacy to be prepared by the administrator and approved by the Supreme Court.

(7) Pursuant to §3(2)(a) and (b) each attorney on the statewide roster will automatically be placed on the local list of the circuit he or she has designated for primary practice and may, in addition, request placement on the local lists of his or her choice.

(8) The name of an attorney may be removed from the roster by the administrator for failure to comply with the preceding regulations. The administrator must give the affected attorney 60 days' notice that removal from the roster is contemplated. The attorney shall have a de novo appeal of right from the administrator's decision to the Appellate Defender Commission. If the right to appeal is exercised within the 60-day notice period, removal from the roster shall be stayed pending decision by the commission. The administrator's recommendations to the commission and the commission's findings shall be in writing.

(9) Any attorney whose name is removed from the roster for a reason other than a finding of inadequate representation of a client shall complete his or her work on any cases pending at the time of removal and shall be entitled to voucher for fees in those cases in the usual manner. Where removal is predicated on a finding of inadequate representation of a client as defined in the Minimum Standards for Indigent Criminal Appellate Defense Services, the appellate assigned counsel administrator shall move the trial court for substitution of counsel, with notice to the defendant, in any pending case assigned to the attorney affected. If substitution of counsel is granted, the trial court shall determine the amount of compensation due the attorney being replaced. No attorney may accept criminal appellate defense assignments after such time as removal of his or her name from the roster has become final.

(10) Any attorney whose name has been involuntarily removed from the roster may apply for reinstatement at any time after a period of six months from the removal date has elapsed and shall be reinstated whenever renewed eligibility has been demonstrated to the satisfaction of the administrator. Refusals to reinstate by the administrator are appealable de novo to the commission. The reasons for the administrator's refusal and the commission's findings shall be in writing.

(11) Any attorney formerly eligible for assignments at Level II who has allowed his or her eligibility to lapse solely for failure to meet the continuing participation requirement of §4(5)(b) may, on application, be reinstated at Level II if the administrator finds on review of the circumstances that reinstatement at Level I is not required to protect the quality of representation received by defendants.

Commission Comment: Establishing criteria for eligibility for the roster posed difficult and controversial questions. Criteria which were arbitrary, subjective or discriminatory in effect had to be avoided. Those which had no clear relationship to ability or which could prove misleading or unduly burdensome had to be identified. As a result, such indicators as years of membership in the bar, references, written examinations and a complicated point system were all considered and rejected. Criminal appellate experience was selected as the sole criterion which is both relevant and readily measurable.

The eligibility requirements accomplish the single but important purpose of preventing the least experienced attorneys from representing the defendants facing the most serious consequences. They serve only to prohibit attorneys with little or no criminal appellate experience from representing defendants convicted of crimes which carry an actual or potential maximum prison sentence in excess of 15 years. Attorneys who have handled a total of six felony appeals during the three years immediately preceding their initial application are automatically "grandfathered in" at Level II, i.e., they are eligible for assignment in any case. All other applicants are eligible for assignments only at Level I, i.e., to cases with actual or potential maximum sentences of 15 years or less. But the move to Level II may be made rapidly. A lawyer need only be counsel in two "Level I" appeals within an 18-month period to attain the designation "Level II."

Drawing the line dividing Levels I and II at 15 years is arbitrary and troublesome. It is not suggested that defendants with relatively lower maximum sentences are somehow less deserving of effective representation or that their appeals necessarily raise less complex legal issues. The 15-year breakpoint was selected for purely practical reasons. The most common offenses tend to divide between those which carry maximum sentences of 15 years or less, and those which have "floating" maximums (life or any term of years). While the desire to safeguard defendants is the paramount object of the entire regulatory scheme, if a sufficient number of cases is not defined as Level I, attorneys may be denied the opportunity to gain the experience required for Level II. If movement from Level I to Level II were thus systematically discouraged, the number of Level II attorneys available for appointment could become inadequate and defendants, as well as lawyers, would suffer. The 15-year demarcation is meant to ensure a large enough pool of Level I appeals while still limiting the assignment of cases involving the most serious offenses and longest sentences to the more experienced appellate counsel.

Subsection (5) exempts staff attorneys employed by the State Appellate Defender Office from having to prove their qualifications as Level II attorneys for two reasons. First, they are by definition not private assigned counsel subject to the operation of the roster. They are prohibited by MCL 780.711-780.719 from accepting outside employment and therefore cannot appear on the roster as individuals. The courts' appointments in the cases they handle are made to the State Appellate Defender Office as an entity, not to them personally. Second, the State Appellate Defender Office has internal hiring and promotional procedures which provide far greater quality control than the assigned counsel system is designed to afford. Pursuant to the statute, assistant defenders must, of course, conform to the minimum standards of performance.

Having achieved eligibility for the roster, an attorney must meet certain minimal requirements in order to remain eligible. Level II attorneys are required to handle at least two felony appeals (assigned or retained) during the two years immediately preceding each eligibility renewal statement. All participating attorneys are expected to complete a course in criminal appellate advocacy. They are also expected to perform those tasks necessary to maintain the assigned counsel system as a whole,

e.g., completing case summaries and renewal applications and contributing to the brief bank. Finally, they must continue to represent their clients in conformity with the minimum standards.

Failure to maintain eligibility obviously has significant consequences to the affected attorneys. Due process safeguards are built into the administrative design through the mechanisms of written notices and findings of fact and de novo appeals to the Appellate Defender Commission. It must be remembered, however, that the potential consequences are limited to the attorney's eligibility for criminal appellate assignments. Civil work, criminal trial work, and even retained criminal appeals are not implicated. The ability of the state to set conditions on eligibility for appellate assignments stems from both the state's right to select and pay for attorneys in appointed cases and its responsibility to ensure the effectiveness of counsel it selects to represent indigent defendants. The eligibility criteria and continuing participation requirements selected by the commission are in accord with the recommendations of its predecessor groups. See ABA Standards, 5-2.2; nlada, pp 239-241; Report of the Defense Services Committee, recommendation 10, pp 260-261.

The approved minimum standards for indigent criminal appellate defense services, together with the commentary of the Appellate Defender Commission, are as follows:

1. Counsel shall, to the best of his or her ability, act as the defendant's counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.

Commission Comment: The standard was adapted from the ABA Standards for Criminal Justice (2d ed, 1980), 4-1.1(b) and 4-1.1(c) (ABA Standards). It is meant to remind counsel of their ethical and professional responsibilities as the defendant's representative in an adversary system. The United States Supreme Court has emphasized that appellate defense counsel's task is to be an advocate, not amicus curiae. *Anders v California,* 386 US 738, 744; 87 S Ct 1396; 18 L Ed 2d 493 (1967). Speaking for a majority of the Michigan Supreme Court, Justice Williams has stated: "We hold as a fundamental precept that a lawyer's duty to his client in a criminal case is judged by the same standard regardless of the fact that his client may be indigent. * * * The application of our Code of Professional Responsibility and Canons is not dependent upon the size of the retainer which an attorney receives." *Holt v State Bar Grievance Board,* 388 Mich 50, 60 (1972).

2. Counsel shall not represent more than one of multiple codefendants on appeal regardless of whether the codefendants were jointly or separately tried, unless the codefendants express a preference for joint representation and there is no apparent conflict of interest.

Commission Comment: This standard parallels GCR 1963, 785.4(4), which is intended to avoid conflicts of interest arising from the joint representation of codefendants at trial. Appellate counsel, like trial counsel, must scrupulously avoid being placed in a position where promoting the interests of one client requires minimizing or violating the interests of another client. See *State Appellate Defender v Saginaw Circuit Judge,* 91 Mich App 606 (1979). Just as at trial, arguments about the relative culpability of codefendants may be relevant to claims about the sufficiency of the evidence or the propriety of a sentence. If conflicts of interest are not investigated adequately in advance, defendants may have to face the difficulty of receiving substitute counsel weeks or months after a claim of appeal has been filed. The disrupted attorney-client relationship then must be replaced and substantial time may be added to the appellate process.

3. Except in extraordinary circumstances, counsel shall interview the defendant in person on at least one occasion during the initial stages of representation.

Commission Comment: Client interviews serve numerous purposes. They may reveal significant facts not on the record or even the fact that parts of the record are missing. They may confirm or eliminate claims of error. Interviews serve to alert counsel to circumstances which make dismissing the appeal the defendant's wisest choice. They afford the defendant the opportunity to meet the person upon whose performance his or her future depends. Personal interviews are crucial to establishing the trust and rapport which are the essence of a successful attorney-client relationship. Meeting one's client for a discussion of the case seems on its face to be a fundamental aspect of professional conduct. The commission felt

strongly that attorneys must be prepared to visit their clients wherever they may be incarcerated. Compensation for travel expenses must be considered a basic cost of providing assigned appellate counsel. Court of Appeals judges who responded to a questionnaire also felt that client interviews are important to effective representation on appeal.

4. Counsel shall fully apprise the defendant of the reasonably foreseeable consequences of pursuing an appeal in the particular case under consideration.

Commission Comment: The decision whether or not to appeal belongs to the defendant, but it is a decision that can only be made intelligently with the advice of counsel. In certain circumstances, success on appeal may expose a defendant to the risk of a longer sentence or conviction on higher or additional charges. An attorney who obtains reversal of a client's conviction but fails to foresee that the client will be worse off as a result does not "conscientiously protect his client's interest." *Beasley v United States,* 491 F2d 687, 696 (CA 6, 1974). To help the defendant make a realistic choice about appealing, counsel must explain the nature of the appellate process, the average time involved, the kind of remedies which may result, and the potential disadvantages such remedies may present. In accord see: ABA Standards, 4-8.2; *Stewart v Wainwright,* 309 F Supp 1023 (MD Fla, 1969); *Smotherman v Beto,* 276 F Supp 579, 585 (ND Tex, 1967).

5. In any appeal of right, counsel shall comply with the applicable court rules regarding the timely and proper filing of claims of appeal and shall take any other steps which may be necessary to protect the defendant's right to review.

Commission Comment: Once a defendant chooses to exercise his state constitutional right to appeal, counsel's first duty must be to take the procedural steps necessary to protect the continued existence of that right. Despite their general reluctance to find counsel ineffective, appellate courts have not hesitated to do so when a lawyer's negligence has caused a defendant to lose even the opportunity for an appellate review provided by law. See Const 1963, art 1, §20; GCR 1963, 803; ABA Standards, 4-8.2(b) and 4-8.4(a); *Boyd v Cowan,* 494 F2d 338 (CA 6, 1974); *Chapman v United States,* 469 F2d 634 (CA 5, 1972).

6. Counsel shall promptly request and review all transcripts and lower court records.

Commission Comment: While the necessity to review the record in order to perfect an appeal is self-evident, this standard reminds counsel of two additional points. First, promptness in obtaining and reviewing the record is necessary if all issues are to be researched and all facts clarified in time to prepare a thorough brief. Second, the record includes more than the bare transcript of the trial or guilty plea. Such items as docket entries, charging documents, search warrants, competency and sanity evaluations, judicial orders and presentence reports may reveal or support claims of error. Familiarity with the total record is therefore crucial to effective appellate representation. See GCR 1963, 812, and *Entsminger v Iowa,* 386 US 748; 87 S Ct 1402; 18 L Ed 2d 501 (1967).

7. Counsel shall investigate potentially meritorious claims of error not reflected in the trial court record when he or she is informed or has reason to believe that facts in support of such claims exist.

Commission Comment: Some attorneys feel that appellate representation is bound by the four corners of the record and that there is no place for factual investigation on appeal. Such a view is belied by GCR 1963, 817.6, which establishes the procedure for developing a record for appeal when the existing record is inadequate to support a claim of error. Information provided by the defendant or trial counsel or unanswered questions raised by the existing record may lead conscientious appellate counsel to the identification of potentially reversible error. This standard does not place on counsel the duty to actively search for every off-record claim that might conceivably be developed. It does, however, require counsel to be alert to the possibility of off-record claims, to verify facts which would be significant if proven, and to investigate circumstances which a criminal lawyer would recognize as potentially prejudicial to his or her client. Ignoring nonrecord claims on appeal when a procedure exists for asserting them is the equivalent of failing to "investigate all apparently substantial defenses" at trial. *Beasley v United States, supra.* See also ABA Standards, 4-4.1.

8. Counsel shall move for and conduct such evidentiary hearings as may be required to create or supplement a record for review of any claim of error not adequately supported by existing records which he or she believes to be meritorious.

Commission Comment: This standard is a necessary corollary to the preceding one. If investigation reveals facts off the record which would support a claim on appeal, it then becomes appellate counsel's duty to develop a testimonial record for review as GCR 1963, 817.6 provides. See *People v Ginther,* 390 Mich 436, 443-444 (1973).

9. Counsel should assert claims of error which are supported by facts of record, which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.

Commission Comment: The fundamental purpose served by providing counsel on appeal is to interpose between client and court the judgment of a professional familiar with the criminal law, who has assessed the facts and brought to the court's attention any errors which might entitle the defendant to relief. Competent exercise of this professional judgment is the crucial duty owed by appellate counsel to the defendant. The standard does not require that every innovative issue conceivable be raised in every case. It is addressed to the level of competence which can reasonably be expected of a conscientious criminal appellate practitioner who is not a full-time specialist. It does, however, stress the assertion of all arguably meritorious claims rather than the preselection by counsel of the one or two issues which in counsel's own opinion will in fact be successful. The "reasonableness" test of *Beasley v United States, supra,* was expressly adopted by the Michigan Supreme Court in *People v Garcia,* 398 Mich 250, 266 (1976). Although *Beasley* specifically addresses the conduct of trial counsel, its references to the assertion of "all apparently substantial defenses" and to "strategy and tactics which lawyers of ordinary training and skill would not consider competent" are useful and have been applied to appellate counsel. See *Rook v Cupp,* 18 Or App 608; 526 P2d 605 (1974).

Before enunciation of the *Beasley* standard, the Michigan Supreme Court remanded for consideration by the State Bar Grievance Board a defendant's complaint against his assigned appellate counsel. The lawyer had failed to assert as error a claim identical to one then pending consideration by the Supreme Court, even though the defendant himself had pointed out the problem. Emphasizing the need for "proper legal research," the Court found "substantial evidence that suggests the defendant may have been inadequately represented." *Holt v State Bar Grievance Board, supra,* 62. The California Supreme Court requires appellate counsel to raise "all issues that are arguable." *People v Feggans,* 67 Cal 2d 444, 447; 62 Cal Rptr 419; 432 P2d 21 (1967). The United States Supreme Court has said that indigent defendants must be afforded counsel to argue on appeal "any of the legal points arguable on their merits." *Anders v California, supra.*

10. Counsel should not hesitate to assert claims which may be complex, unique, or controversial in nature, such as issues of first impression, challenges to the effectiveness of other defense counsel, or arguments for change in the existing law.

Commission Comment: This standard complements the preceding one. While recognition of unique or complex issues cannot be required, assertion of such issues when recognized is encouraged. The attorney who, through expertise or inspiration, identifies a claim which may be conceptually difficult or controversial is obligated to pursue it in the defendant's behalf. This standard also specifically cautions appellate lawyers against avoiding legitimate ineffective assistance of counsel claims out of undue deference to their peers. In accord, see ABA Standards, 4-8.6(a) and 4-8.6(b).

11. When a defendant insists that a particular claim be raised on appeal against the advice of counsel, counsel shall inform the defendant that he or she has the right to present that claim to the appellate court in propria persona. Should the defendant choose to proceed in such manner, counsel shall provide procedural advice and such clerical assistance as may be required to conform the defendant's pleadings for acceptability to the court.

Commission Comment: This standard is the product of three strongly felt concerns. One is that the case belongs to the defendant and clients should not be foreclosed from the opportunity to act upon disagreements with their professional representatives. Nonindigent defendants who wish to have particular claims asserted are able to select retained counsel based upon the lawyer's willingness to comply with their wishes. Indigent defendants should at least be provided the aid minimally necessary to present such claims by themselves. The second concern is that in every dispute between defendants and lawyers about the merits of a claim, the defendant is not necessarily wrong. *Holt v State Bar Grievance Board, supra,* is a case on point. This standard is intended to protect not only the defendant's dignity, but his or her right to prevent meritorious claims from being buried by an attorney's mistake. On the other hand, the attorney's role is to exercise professional judgment, and appellate counsel cannot be required to pursue claims which he or she had in good faith rejected as lacking any arguable merit. Counsel is only expected to provide such assistance as an indigent client, particularly one who is incarcerated, may reasonably need to place such claims before the court. The commission anticipates that compliance with other standards, particularly those that serve to promote trust and rapport between attorney and client, will result in this standard being implemented infrequently.

12. Assigned counsel shall not take any steps towards dismissing an appeal for lack of arguably meritorious issues without first obtaining the defendant's informed written consent.

Commission Comment: This standard addresses the situation where, based on the advice of counsel that no arguable grounds for relief exist, the defendant agrees to dismiss his or her appeal. Unlike cases in which an *Anders* brief is filed or a brief raising some but not all potential claims is submitted, a stipulation dismissing an appeal results in no judicial review on the merits. Nor does it result in substitution of counsel. The defendant's right to appeal is simply abandoned.

The decision to dismiss, like the decision to proceed, is ultimately the client's. Thus, counsel is prohibited from taking any unilateral action to dismiss. Counsel is obligated to be certain that the defendant understands what dismissal means and why it is being recommended. All relevant legal and factual considerations should be explored. The defendant's questions about any aspect of the proceedings which led to conviction should be answered. The practice of obtaining written consent protects the lawyer as well as the client. See ABA Standards, 4-8.2(a) and 4-8.3.

13. Counsel should seek to utilize publicly funded support services designed to enhance their capacity to present the law and facts to the extent that such services are available and may significantly improve the representation they can provide.

Commission Comment: This standard encourages counsel to avail themselves of publicly funded defense support services, e.g., the Legal Resources Project, investigative services, expert witness files. To the extent that services are provided at state expense in order to equalize the opportunities of indigent and nonindigent defendants, clients should not be denied the benefits of these services by the ignorance or negligence of attorneys who have also been provided at public expense.

14. Counsel shall be accurate in referring to the record and the authorities relied on in both written and oral presentations to the court.

Commission Comment: Accuracy is, of course, required by both court rule and professional ethics. Counsel's personal reputation for accuracy may also affect the credence given by the court to defendants' cases. Court of Appeals judges responding to a questionnaire ranked accurate representation of the facts as the most crucial aspect of appellate representation and accurate representation of the law as only marginally less crucial. See also GCR 1963, 813, and ABA Standards, 4-8.4(b).

15. Counsel shall comply with all applicable court rules regarding the timely filing of pleadings and with such other timing requirements as may be specified by the court in a particular case.

Commission Comment: It is apparent that minimum performance must include compliance with court rules and orders specifying filing dates for pleadings,

hearing dates, etc. Failure to comply can have consequences to the defendant ranging from loss of oral argument to dismissal of the appeal for lack of progress. See GCR 1963, 815-819.

16. Counsel should request and appear for oral argument. In preparation for oral argument counsel shall review the briefs of both parties, file supplemental pleadings as warranted, and update his or her legal research.

Commission Comment: While opinions vary about the extent to which oral arguments affect the outcome of most appeals, defendants are entitled to have their attorneys pursue every available avenue of persuasion. Argument provides the opportunity for counsel to present recent cases, counter the prosecution's position, and answer the court's questions. Utilizing this opportunity obviously depends upon preparation. At the other extreme, counsel's failure to appear not only precludes these potential benefits but diminishes the apparent seriousness of claims which the defendant's own lawyer does not think worthy of argument.

17. Counsel shall keep the defendant apprised of the progress of the case and shall promptly forward to the defendant copies of pleadings filed in his or her behalf and orders and opinions issued by the court in his or her case.

Commission Comment: Assigned criminal appellate defense counsel represent poor clients who are usually in prison. It is an inherently unequal relationship, with the clients having little control over, and limited access to, their lawyers. It is easy for well-intentioned but busy attorneys to lose sight of the significance of a particular appeal to an individual defendant. Correspondence may be put off, phone calls unanswered, delays left unexplained. This standard reminds counsel that their clients are wholly dependent upon them for information and requires them to minimize their client's inevitable anxieties by providing such information as it becomes available. It also ensures that defendants will have the opportunity to assess the work being performed on their behalf and to express satisfaction or dissatisfaction at appropriate times on an informed basis. In accord see ABA Standards, 4-3.8, and nlada, p 353.

18. Upon disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action which may be pursued as a result of that disposition, and the scope of any further representation counsel will provide.

Commission Comment: This standard requires appellate attorneys to complete the tasks of the counselor as well as those of the advocate. It prohibits abrupt abandonment of the attorney-client relationship upon judicial disposition of the case without due regard to the defendant's need for information and guidance. It does not require counsel to provide legal representation beyond the scope of the original order of appointment. It does assume that the original order includes a responsibility to explain the consequences of the representation already provided. When appropriate, the means and advisability of pursuing such avenues as applications to the Supreme Court or habeas corpus petitions in federal court should be discussed. Clients who have had their convictions reversed and are awaiting retrial should be represented by appellate counsel until it is clear that no further appeals will occur and trial counsel has been obtained. The goal of the standard is to prevent defendants from losing potential sources of relief because they have been left ignorant of available procedures. See ABA Standards, 4-8.5

19. At whatever point in the postconviction proceedings counsel's representation terminates, counsel shall cooperate with the defendant and any successor counsel in the transmission of records and information.

Commission Comment: This standard merely reminds counsel that even after the attorney-client relationship has been terminated certain ethical obligations remain. To the extent that counsel possesses transcripts, documents or information which the defendant needs to pursue other avenues of relief, counsel has the duty to transmit them promptly and fully at the defendant's request.

20. Counsel shall not seek or accept fees from the defendant or from any other source on the defendant's behalf other than those authorized by the appointing authority.

Commission Comment: Throughout their discussions commission members expressed deep concern about the low rates at which assigned counsel are compensated. Individuals interested in a defendant's welfare occasionally

approach appointed attorneys offering supplemental fees as an incentive to hard work. Recognizing the inevitable temptation such offers present, the commission believed that the obvious ethical point made by this standard was worthy of separate attention.

To provide adequate notice of the Court's approval of the minimum standards for indigent criminal defense services, the minimum standards will apply to all counsel appointed to represent indigents on appeal after February 1, 1982.

We repeat here that the implementation of the regulations governing the system for appointment of appellate counsel for indigents in criminal cases requires legislative appropriation of funds sufficient to operate the system. In such event, another administrative order will be promulgated implementing the system and requiring adherence to it.

We further note that the comments of the commission are not a construction by the Court. The comments represent the views of the commission.

ADMINISTRATIVE ORDER NO.1989-3

In re the Appointment of Appellate Assigned Counsel

On order of the Court, 1978 PA 620 authorized the Appellate Defender Commission to develop a system of indigent appellate defense services to include services provided by the Office of the State Appellate Defender and locally appointed private counsel. This legislation also authorized 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.

The Legislature provided that the appointment of criminal appellate defense attorneys for indigents was to be made by the trial court from the roster provided by the Commission or should be referred to the Office of the State Appellate Defender. Since that time the Appellate Defender Commission has adopted the Michigan Appellate Assigned Counsel System Regulations. We have examined those regulations, as adopted by the Appellate Defender Commission effective November 15, 1985 and as amended January 28, 1988, and, pursuant to our power of general superintending control over all courts under Const 1963, art 6, §4, we order the judges of each circuit and of the Recorder's Court of the City of Detroit to comply with §3 of those regulations. The text of §3 follows:

(1)The judges of each circuit and of Recorder's Court shall appoint a local designating authority who may be responsible for the selection of assigned appellate counsel from the local list provided by the appellate assigned counsel administrator pursuant to §2(2) of these regulations and who shall perform such other tasks in connection with the operation of the list as may be necessary at the trial court level.

(a)The designating authority may not be a judge, prosecutor or member of the prosecutor's staff, public defender or member of the public defender's staff, or any attorney in private practice who currently accepts trial or appellate criminal assignments within the jurisdiction.

(b)Circuits which have contracted with an attorney or group of attorneys to provide representation on appeal for indigent defendants shall comply with these regulations within one year after the statewide roster becomes operational.

(2)Appellate assignments shall be made by each trial court only from its local list or to the State Appellate Defender Office except pursuant to §3(7) of these regulations or an order of an appellate court.

(a)Each trial bench shall review its local list and, within 56 days of an attorney's appearance on that list, shall notify the appellate assigned counsel administrator if it has actual knowledge that the attorney has, within the last three years, substantially violated the Minimum Standards for Indigent Criminal Appellate Defense Services or the Code of Professional Conduct. Each bench shall thereafter notify the administrator[Revised 7/90]of such violations by attorneys on its list within 56 days of learning that a violation has occurred.

(b) Upon receiving notice from a trial court that an attorney has substantially violated the Minimum Standards or the Code of Professional Conduct, the administrator shall promptly review the allegations and take appropriate action. Any determination that an attorney should be removed from the roster shall be made in compliance with §4(8) of these regulations.

(3) Appellate counsel shall be assigned within 14 days after a defendant submits a timely request.

(4) In each circuit and Recorder's Court, the chief judge shall determine whether appellate assigned counsel are to be selected by the chief judge or by the local designating authority.

(a) If the chief judge chooses to retain the discretion to select counsel, he or she shall personally exercise that discretion in all cases as described in §3(5).

(b) If the chief judge chooses to delegate the selection of counsel, the local designating authority shall, in all cases, rotate the local list as described in §3(6).

(5) The chief judge may exercise discretion in selecting counsel, subject to the following conditions:

(a) Pursuant to §2(2)(d), every third, fourth, or fifth assignment, or such other number of assignments as the Appellate Defender Commission may determine, shall be made to the State Appellate Defender Office. That office may also be assigned out of sequence pursuant to §3(13) or 3(15).

(b) All other assignments must be made to attorneys whose names appear on the trial court's local list.

(i) The attorney must be eligible for assignment to the particular case, pursuant to §4(2).

(ii) Where a Level I attorney has received an even-numbered amount of assignments and any other Level I attorney has less than half that number, an assignment shall be offered to each of the latter attorneys before any additional assignments are offered to the former.

(iii) Where a Level II or Level III attorney has received an even-numbered amount of assignments and any other Level II or Level III attorney has less than half that number, an assignment shall be offered to each of the eligible latter attorneys before any additional assignments are offered to the former.

(iv) If an order of appointment is issued and the attorney selected refuses the appointment for any reason not constituting a pass for cause as defined in §3(6)(c), the assignment shall be counted in the attorney's total.

(6) When directed to select counsel by the chief judge, the local designating authority shall select the attorney to be assigned in the following manner:

(a) The local designating authority shall first determine whether assignment is to be made to the State Appellate Defender Office, to a particular attorney on the local list pursuant to §3(6)(f), 3(12), or 3(13), or by rotation of the local list.

(i) Pursuant to §2(2)(d), every third, fourth, or fifth assignment, or such other number of assignments as the Appellate Defender Commission may determine, shall be made to the State Appellate Defender Office. That office may also be assigned out of sequence pursuant to §3(13) or 3(15).

(ii) An attorney whose name appears on the local list may be selected out of sequence pursuant to §3(6)(f), 3(12), or 3(13). That attorney's name shall then be rotated to the bottom of the list.

(iii) All other assignments shall be made by rotating the local list.

(b) Local lists shall be rotated in the following manner:

(i) The local designating authority shall identify the first attorney on the list who does not have to be passed for cause and shall obtain an order appointing that attorney from the appropriate trial judge.

(ii) The name of the attorney appointed shall be rotated to the bottom of the local list.

(iii) The names of any attorneys passed by the local designating authority for cause shall remain in place at the top of the list and shall be considered for the next available appointment.

(c) An attorney's name must be passed for cause in any of the following circumstances:

(i) the attorney is not qualified at the eligibility level appropriate to the offense as described in §4(2). A Level II or III attorney may be assigned a Level I case only if no Level I attorney is available.

(ii) The attorney represented the defendant at trial or plea and no exception for continued representation as specified in §3(12) is to be made.

(iii) Representation of the defendant would create a conflict of interest for the attorney. Conflicts of interest shall be deemed to exist between codefendants whether they were jointly or separately tried. Codefendants may, however, be represented by the same attorney if they express a preference for such representation under §3(6)(f) of these regulations,provided that there is no apparent conflict of interest.

(d) An attorney's name may be passed for cause if the defendant has been sentenced only to probation or incarceration in the county jail, and the attorney's office is located more than 100 miles from the trial court.

(e) If the attorney selected thereafter declines appointment for reasons which constitute a pass for cause, the attorney's name shall be reinstated at the top of the list. If the attorney selected declines the appointment for any other reason, his or her name shall remain at the point in the rotation order where it was placed when the order of appointment was issued.

(f) When the defendant expresses a preference for counsel whose name appears on the local list, and who is eligible and willing to accept the appointment, the local designating authority shall honor it.

(7) Where a complete review of the local list fails to produce the name of an attorney eligible and willing to accept appointment in a particular case, the local designating authority shall refer the case to the appellate assigned counsel administrator for selection of counsel to be assigned from the statewide roster.

(8) When an attorney has declined to accept three consecutive assignments for which the attorney was eligible under these regulations, the local designating authority may request the appellate assigned counsel administrator to remove the attorney's name from the jurisdiction's local list.

(9) The trial court shall maintain, on forms provided by the Appellate Assigned Counsel System, records which accurately reflect the basis on which all assignments have been made, whether by the chief judge or the local designating authority, and shall provide duplicates of those records to the Appellate Assigned Counsel System at regular intervals specified by the administrator.

(10) The local designating authority shall provide copies of each order appointing appellate counsel and written evidence of each defendant's request for counsel, including any waiver executed pursuant to § 3(12).

(11) All assignments other than those made to the State Appellate Defender Office shall be considered personal to the individual attorney named in the order of appointment and shall not be attributed to a partnership or firm.

(12) When the defendant specifically requests the appointment of his or her trial attorney for purposes of appeal and the trial attorney is otherwise eligible and willing to accept the assignment, the defendant shall be advised by the trial judge of the potential consequences of continuous representation. If the defendant thereafter maintains a preference for appellate representation by trial counsel, the advice given and the defendant's waiver of the opportunity to receive new counsel on appeal shall appear on a form signed by the defendant. Appropriate forms shall be supplied to the trial courts by the Appellate Assigned Counsel System.

Where counsel represents the defendant on a currently pending appeal of another conviction, or represented the defendant on appeal of a prior conviction for the same offense, the designating authority may select that attorney out of sequence to conduct a subsequent appeal on the defendant's behalf if that attorney is otherwise eligible and willing to accept the additional appointment.

(14)Where the trial judge determines that a Level I or II case is sufficiently more complex than the average case of its type to warrant appointment of an attorney classified at a higher level than required by §4(2), the judge shall provide to the chief judge or the local designating authority a written statement of the level believed to be appropriate and the reasons for that determination. The local designating authority shall, and the chief judge in his or her discretion may, select counsel accordingly.

(15)When, in exceptional circumstances, the complexity of the case or the economic hardship the appeal would cause the county makes the selection of private assigned counsel impractical, the State Appellate Defender Officer may, after confirmation of that office's ability to accept the assignment, be selected for appointment out of sequence. When such an out-of-sequence assignment is made, it shall be treated as a substitute for the next in-sequence assignment the State Appellate Defender Office would have otherwise received.

[Statement by Boyle, J., appears at 432 Mich cxxvii.]

ADMINISTRATIVE ORDER NO.2004-6

Minimum Standards for Indigent Criminal Appellate Defense Services

On order of the Court, this is to advise that the Court has considered revised minimum standards for indigent criminal appellate defense services proposed by the Appellate Defender Commission pursuant to 1978 PA 620, MCL 780.711 to 780.719. The Court approves the standards with some revisions replacing those adopted in Administrative Order No. 1981-7, effective January 1, 2005.

PREAMBLE:

The Michigan Legislature in MCL 780.712(5) requires the Appellate Defender Commission to develop minimum standards to which all criminal appellate defense services shall conform. Pursuant to this mandate, these standards are intended to serve as guidelines to help counsel achieve the goal of effective appellate and postjudgment representation. Criminal appellants are not constitutionally entitled to counsel's adherence to these guidelines. Hence, counsel's failure to comply with any standard does not of itself constitute grounds for either a claim of ineffective assistance of counsel or a violation of the Michigan Rules of Professional Conduct, and no failure to comply with one or more of these standards shall, unless it is independently a violation of a rule of professional conduct, serve as the basis for a request for investigation with the Attorney Grievance Commission.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Order

Michigan Supreme Court
Lansing, Michigan

September 17, 2014

ADM File No. 2014-36

Administrative Order No. 2014-18

Merger of the State Appellate Defender Office (SADO) and Michigan Appellate Assigned Counsel System (MAACS)

1978 PA 620 authorized the Appellate Defender Commission to develop a system of indigent appellate defense services to include services provided by the State Appellate Defender Office and locally appointed private counsel. In Administrative Order No. 1981-7, the Court authorized the Appellate Defender Commission to establish an Appellate Assigned Counsel Administrator's Office to operate the roster of private attorneys providing appellate defense services. SADO and the Michigan Assigned Appellate Counsel System have operated separately until now. On order of the Court, at the request of the Appellate Defender Commission, effective immediately, to promote efficiency and improve the administration of assigned appellate counsel for indigent defendants, the Court orders that operations of the two offices be merged. The State Appellate Defender shall serve as administrator of the Michigan Assigned Appellate Counsel System. Further, the Court directs the Appellate Defender Commission to review operations of the 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. The commission shall submit the proposed administrative order to the Court no later than March 31, 2015.

Staff Comment: MCL 780.711 *et seq*. charged the Appellate Defender Commission with development of a mixed system of appellate assigned defense representation, consisting of both a public defender office and roster of private attorneys qualified and willing to accept appellate assignments. The State Appellate Defender Office (SADO) was created in 1978 to function as the public defender office; in 1981, the Michigan Appellate Assigned Counsel System (MAACS) was authorized to function as administrator of the statewide roster of private attorneys. Administrative Order No. 1981-7 commentary recognized two administrative models for the system, one defender-administered and one with independent offices. Over time, the Appellate Defender Commission, overseer of both components, has recognized the benefits of the defender-

administered model; as in the federal system, this model produces cost-effective and coordinated management of resources. To better serve the interests of appellate defendants, the Appellate Defender Commission has recommended the change.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 17, 2014

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

January 21, 2015

ADM File No. 2014-36

Amendment of Administrative
Order No. 2014-18

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

On order of the Court, effective immediately, Administrative Order No. 2014-18 is amended by replacing the current "March 31, 2015" deadline with an "October 1, 2015" date, allowing more time for the Appellate Defender Commission to submit its proposed order regarding the merger of the State Appellate Defender Office and the Michigan Appellate Assigned Counsel System.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 21, 2015

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

September 16, 2015

ADM File No. 2014-36

Administrative Order No. 2015-9

Authorization of a One-year Pilot Project Related to the SADO/MAACS Merger

Robert P. Young, Jr., Chief Justice

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein, Justices

In Administrative Order No. 2014-18, the Court ordered the merger of the State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS), and further ordered the Appellate Defender Commission "to review operations of the 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."

On order of the Court, and upon the request of the Appellate Defender Commission, MAACS is authorized to implement a one-year pilot project to assess the feasibility, costs, and benefits associated with structural reforms currently under consideration for permanent statewide implementation. These reforms would consolidate the individual "local lists" of roster attorneys, which currently exist in all 57 circuit courts, into a smaller number of regional lists to be maintained and administered by MAACS. The pilot will assess the extent to which this consolidation results in greater speed and efficiency in the assignment process, by reducing the number of lists to maintain and allowing MAACS to assume the responsibility of prescreening counsel, preparing appointment orders, and sending notification of appointments to defendants and their attorneys.

The reforms under consideration will depend upon the standardization of appellate assigned counsel policies among the circuit courts, most notably including the voluntary adoption of a standard attorney fee and expense policy. The pilot will assess the extent to which uniformity in attorney fee policies allows more meaningful data analysis related to attorney performance and efficiency, as well as the potential financial impact of these reforms on the circuit courts and their funding units. The pilot will also assess the extent to which standardization of attorney fees affects MAACS's attorney recruitment and retention efforts.

The pilot shall begin as soon as possible as authorized by this order and when there is participation by a sufficient number of circuit courts to constitute two geographic regions, as identified and approved by MAACS. The pilot shall remain in effect for 12 months, unless extended with the approval of this Court and participating circuit courts. MAACS shall track the effectiveness of the reforms by quantitative and qualitative analysis, and shall make its findings available to the Michigan Supreme Court.

For the duration of the pilot project, all participating circuit courts shall comply with the following regulations, which supplement Section 3 of the MAACS regulations as adopted by this Court in Administrative Order No. 1989-3:

(1) Upon the consent of all affected circuit courts and MAACS, local lists of MAACS roster attorneys may be consolidated by geographic region in whatever manner MAACS deems appropriate, with MAACS assuming certain administrative responsibilities that have traditionally been handled by individual circuit courts.

(2) In order to facilitate the consolidation of local lists, any affected circuit court shall adopt the following administrative procedures:

(a) Within one business day after receiving a request for appellate counsel, the trial court shall provide a copy to MAACS, along with the judgment of sentence, the register of actions, and the identities of all court reporters not named on the register of actions.

(b) Within seven days after the filing of a timely request for counsel, MAACS shall provide to the trial court a proposed order of appointment naming a qualified attorney who has been selected by list rotation or approved specific selection, and directing the court reporter(s) to prepare and file all transcripts as required by MCR 6.425(G) within the time limits specified in MCR 7.210.

(c) Within seven days after receiving a proposed appointment order naming appellate counsel, and within the deadline provided by MCR 6.425(G)(1)(a), the trial court shall issue an order appointing counsel or denying the request for counsel. If the court denies the request for counsel, it shall accompany its ruling with a statement of reasons. The court shall provide copies of its order to MAACS, the prosecutor, and the court reporter(s). MAACS shall provide copies of the trial court's order to the defendant and appointed counsel, thereby satisfying the trial court's responsibilities under MCR 6.425(G)(2).

(d) Within 28 days after receiving a timely request for payment detailing the time and expenses related to the representation in a manner approved by

MAACS, the trial court shall order reimbursement pursuant to a standard attorney fee and expense policy that has been approved by the appellate defender commission and the trial court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 16, 2015

Clerk