



Features

Indigent Appellate Defense Reform..... 1

Departments

CAPPS..... 10
From Other States..... 15
Online Brief Bank 15
Reports and Studies 14
Spotlight On: Brett DeGross 8
Surveillance News..... 13
Training Calendar..... 24
Training Events..... 16
Trial Court Successes..... 9

Appellate Courts

Michigan Court of Appeals
Published Opinion Summary 19
Unpublished Opinion Summaries..... 20
Michigan Supreme Court
Order Summaries 18
United States Court of Appeals
Opinion Summary 18

***Indigent Appellate Defense Reform:
Michigan Appellate Assigned
Counsel System (MAACS)
Concludes Two-Year Pilot Project to
Standardize Fees and
Improve Efficiency***

On December 31, 2017, the Michigan Appellate Assigned Counsel System (MAACS) will conclude a two-year Regional Pilot Project that has standardized attorney fee policies among participating trial courts, consolidated appellate assigned counsel lists by region, streamlined the process for selecting and appointing felony appellate counsel, and improved the quality of appellate representation for indigent criminal defendants. After launching in two geographic regions consisting of 14 courts, the pilot has now expanded into all corners of the state, with participation from the majority of Michigan’s 57 felony trial courts.

Based on the success of the pilot and overwhelming approval by courts and assigned counsel, MAACS has rewritten its Regulations, implemented an innovative new case assignment system, and proposed a Supreme Court administrative order and court rule amendments that would cement these reforms into the appellate counsel assignment process statewide. At the same time, MAACS has engaged with courts and other stakeholders to explore ways in which these lessons might be applied to court appointed civil appeals.

This article begins with a history of felony appellate assigned counsel in Michigan, including past reforms. It then describes how MAACS has managed to leverage its limited mandate and resources to overcome unique funding and structural obstacles and enhance operational efficiencies for the trial courts and the

quality of appellate representation for indigent criminal defendants. Finally, the article discusses some of the parallels between different types of appointed appellate representation — and how these reforms to the criminal appellate process might be applied to child welfare and other indigent appeals as well.

A. History of Felony Appellate Assigned Counsel in Michigan

In Michigan, when a defendant requests the appointment of counsel to appeal a felony conviction, the trial court is responsible for appointing an attorney.¹ Historically, each trial court had its own method of selecting appellate counsel. Many courts relied on ad hoc systems in which judges would “pick private attorneys ... on whatever basis the judges choose.”² At times this included “simply ... select[ing] a lawyer who happens to be in the courtroom when the defendant requests counsel,” but more frequently it involved selection from a formal or informal list of lawyers “based on merit, patronage, personal relationships or their willingness to help move the docket by not gumming up the works”³ While some courts attempted to address these concerns with rotating assignment lists, access to those lists often depended on the same influences.⁴

Other courts would contract with a single local attorney to handle all appointed felony appeals for a flat annual fee. County funding units tended to prefer these contract appellate schemes because they “provide budget predictability and encourage low bidding.”⁵ Not surprisingly, however, they also “promote a high volume practice in which lawyers cannot afford to devote the necessary time to each case.”⁶

Both of these assignment schemes led to wide disparities in caseloads and the quality of representation — which were compounded by natural impediments to vigorous appellate advocacy, such as a lawyer’s reluctance to be too critical of the appointing court. A primary problem was the lack of independence for appointed counsel. Indeed, according to the American Bar Association, the First Principle of a Public Defense Deliver System is that “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.”⁷ “Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”⁸

But the lack of independence was not the only problem. Exacerbating that concern was the lack of funding for court-appointed appellate counsel. Just as the trial courts are responsible for the appointment of appellate counsel, their county funding units are responsible for attorney compensation. And although rates and fee schedules have historically varied widely, virtually none were commensurate with high quality appellate representation. As a result, too many appeals were handled by untrained and unsupervised novices or overburdened regulars handling cases in volume just to make ends meet. “Except for a dedicated handful, most well-qualified, experienced criminal appellate lawyers declined appointments in favor of more lucrative work.”⁹ The result “was seriously deficient performance in many cases,” including neglected appeals, the absence of client consultation, pro forma briefs, missed issues, and questionable billing practices.¹⁰

B. Creation of the State Appellate Defender Office

The system took a step forward in 1970, when the State Appellate Defender Office (SADO) began accepting felony appellate assignments from trial courts throughout the state.¹¹ For the cases in which SADO was appointed, this represented a vast improvement in terms of both independence and funding, as SADO was state-funded and staffed by salaried public defenders who did not depend upon trial court judges for their livelihood. SADO was immediately able to provide consistently high-quality appellate representation to its clients.

This quality was not evenly distributed, however. While many rural trial courts welcomed the opportunity to appoint SADO as appellate counsel and shift the financial burden to the state rather than the counties, other courts — including some of the largest — preferred to maintain greater local control over appellate representation and therefore appointed SADO in fewer than ten percent of indigent appeals. As a result, “taxpayers and defendants in some counties received a disproportionate share of SADO services while those in other counties derived little or no benefit from that agency.”¹²

C. Passage of the Appellate Defender Act and Creation of MAACS

In 1978, the Legislature addressed these inconsistencies by passing the Appellate Defender Act, which mandated “a system of indigent appellate

defense services which shall include ... the state appellate defender ... and locally appointed private counsel” — both overseen by an Appellate Defender Commission.¹³ The Act requires SADO to accept at least 25% of assigned appeals statewide, with the remainder assigned to private counsel whose names appear on a “statewide roster” approved by the Commission.¹⁴ Trial courts could no longer appoint whomever they wished on felony appellate matters, but instead were required to appoint “from the roster provided by the commission or ... to the office of the state appellate defender.”¹⁵

Recognizing that “[t]he appearance of justice is better served if the judge about whose decisions claims of error may be raised is not called upon to select the lawyer who is charged with raising those claims,”¹⁶ the Commission proposed a scheme in which control over the “statewide roster,” as well as the selection of counsel from that roster, would be independent from the trial court judiciary. This required distinguishing between the *selection* of appointed appellate counsel, which the Commission sought to place in the hands of nonjudicial personnel acting under standardized procedures,¹⁷ and the *appointment* of appellate counsel, which by statute is the responsibility of the trial court.¹⁸

To administer the system, the Commission proposed an “Appellate Assigned Counsel Administrator’s Office,” which would be “coordinated with but separate from” SADO. The role of this new office would 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.”¹⁹

Under this scheme, lawyers approved for the statewide roster would specify the trial courts from which they were willing to accept appellate assignments, and the Administrator would compile and maintain a “local list” for each trial court.²⁰ A court staff person, called a local designating authority, or LDA, would “be responsible for the selection of assigned appellate counsel from a rotating list and ... perform[ing] such other tasks in connection with the operation of the list as may be necessary at the trial court level,”²¹ including the creation and service of appointment orders. The Administrator, in turn, would be responsible for ensuring the quality of appellate assigned counsel by enforcing a set of minimum standards and investigating possible violations of those standards.²² To comply with SADO’s statutory mandate and

ensure the even distribution of SADO cases, the regulations provided that SADO “shall be placed in every fourth position on each local list.”²³

In a 1981 Administrative Order, the Michigan Supreme Court approved these recommendations and instituted the Minimum Standards for Indigent Criminal Appellate Defense Services.²⁴ After the Legislature appropriated funds in 1984, the Commission oversaw the staffing and operations of a new agency known as the Michigan Appellate Assigned Counsel System, or MAACS. In 1985, MAACS solicited applications for the statewide roster, held orientation training programs around the state, and distributed local lists to each felony trial court.²⁵

The vast majority of courts immediately began appointing appellate counsel under the MAACS Regulations, though a few of the state’s largest courts were slow to comply.²⁶ Then, in 1989, the Supreme Court issued another administrative order relying on its general power of superintending control to direct all trial courts to select felony appellate counsel under the MAACS Regulations.²⁷ “The change was immediate,” and “[r]otational appointments of eligible roster attorneys became the norm for appellate assignments in every jurisdiction.”²⁸

D. The Compounding Problem of Fees

In many respects, MAACS has been a tremendous success. It ensured independence and consistency in the selection of appellate counsel, removing many problematic influences in the process. And, for the first time, it provided statewide standards for experience, training, and client representation — along with an entity to monitor compliance with those standards.

But “[f]or all its efforts to improve roster attorney services through eligibility screening, training, and complaint processing, MAACS has always been stymied by its inability to control the bottom line — fees.”²⁹ During the same year that the Appellate Defender Act was passed, Michigan voters approved the Headlee Amendment to the Michigan Constitution, which required the state to reimburse local government units for any new programs or expenses required by the state.³⁰ Thus, the state has been powerless to impose attorney fee standards on the trial courts without additional state funding.

In fact, the establishment of MAACS may have worsened the attorney fee problem by relieving the

trial courts of accountability with their local bars. By guaranteeing the availability of counsel for all indigent felony appeals from a statewide roster and allowing trial courts to refer costly appeals to SADO, MAACS has diminished trial courts' financial incentives to pay reasonable or uniform fees.³¹ As a result, most courts have failed to provide reasonable compensation in all but the simplest of cases. Some courts did not adjust their fee policies for over 40 years, until recently paying rates as low as \$25 per hour or \$350 per case.

The problems associated with low and disparate fees are twofold. First, and most obviously, they have had devastating direct consequences on attorney morale, retention, recruitment, and overall quality:

If assigned appeals are compensated at such low rates that attorneys cannot make a reasonable wage per hour, the attorneys have three choices. They can stop doing assigned appeals; they can increase their income by taking on more work, even if they cannot then devote adequate attention to each case; or they can do a responsible job for their clients despite the low fees and effectively subsidize the criminal justice system from their own pockets.³²

Compounding the quality concern, disparate fee policies lead to inconsistencies in payment vouchers, making it virtually impossible for MAACS to conduct meaningful analysis of the time, performance, and cost data from cases assigned by different courts.

Second, the existing disparate fee structure has compelled the persistence of a decentralized and inefficient administrative model, with each unique attorney fee policy depending on a separate local list and local court staff to rotate the list, select counsel, and create and serve appointment orders — all of which could otherwise be handled more quickly and efficiently by the MAACS administrative staff, particularly given the technological advances that have made a centralized paperless process more feasible.

These limitations have been apparent for some time, and as early as 1985, MAACS recommended structural changes to address both of them. As to fees, MAACS recommended that “[c]ompensation for appellate assigned counsel should be determined, funded and paid at the state level,” arguing that “[o]nly state-funding can correct the widely disparate, and often shockingly low, fees presently paid by the counties.”³³ Not only would state funding

“relieve the counties of a substantial and unpopular expense,” it would also “permit the centralization of functions now being performed by judges and clerks in 83 counties,” “concentrating responsibility in a single state agency would eliminate work for numerous trial court personnel.”³⁴

And as to administrative efficiency, MAACS recommended a centralization of the assignment process, recognizing that “the system is cumbersome because MAACS is responsible for maintaining the local lists while the trial courts are responsible for using them,” resulting in “[s]ubstantial duplication of effort.”³⁵

Centralizing the appointment process at the state level would not only streamline the tasks to be done, it would match administrative functions with actual responsibility. As a practical matter, the trial courts would have to begin preparing the orders of appointment with necessary information contained in their files. MAACS could then select counsel, complete the orders, obtain required signatures, and distribute copies.³⁶

In spite of the promise of these ideas, MAACS would struggle for the next 20 years under the same structural and financial obstacles, while its state-funded counterpart SADO would continue to grow and thrive.

E. Administrative Efficiency Through Voluntary Uniform Fees

In September 2014, the Michigan Supreme Court merged MAACS with SADO for management purposes and directed 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.”³⁷

The Commission began its review with a close examination of how MAACS could be restructured to remove impediments to reform and encourage uniform attorney fees, greater administrative efficiency, and better practices. Over several months in 2015, new MAACS leadership held countless meetings with roster attorneys, trial court judges, court administrators, county executives and commissioners, appellate judges, academics, and other stakeholders. The result was a proposal to implement a series of interdependent reforms that

would dramatically reshape MAACS — all made possible through the creative leveraging of limited state and county resources, but *without* the legislative reform and new state funding that had long been assumed necessary.

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.”³⁸ These reforms include:

- Trial courts’ voluntary adoption of uniform attorney fee and expense policy.
- Transfer of administrative burdens from participating trial courts to MAACS.
- Consolidation of independent trial court assignment lists into regional lists.
- Pre-screening of appellate counsel before entry of appointment orders.
- Electronic service of orders and related documents to MAACS and parties.

The pilot was implemented in fourteen circuit courts in two geographically and demographically diverse regions, the Eastern Lower Peninsula and the Upper Peninsula. In these regions, local trial court assignment lists were abolished and replaced by regional assignment lists consisting of roster attorneys who are willing to accept appellate assignments from any of the participating courts — provided that they will be compensated under a uniform attorney fee policy, regardless of the particular assigning court.

The consolidation of assignment lists has allowed for the transfer of many administrative tasks from local trial court personnel to MAACS. Under the pilot, a participating trial court transmits the request for counsel to MAACS electronically, along with the judgment of sentence and request for counsel. MAACS then electronically transmits these documents to the next-in-rotation roster attorney on the applicable regional list, who is given one business day in which to accept or decline the assignment before rotation to the next available attorney. After an attorney accepts the assignment, MAACS creates a proposed appointment order including all lower court transcripts, and provides the order to the trial court electronically for a judge’s signature. Once signed, MAACS serves the order on the defendant, the attorney, and the Court of Appeals, saving the court time and postage.

While these changes appear simple, they have reduced substitutions of counsel by 47% and

amended orders for additional transcripts by 70%, substantially alleviating unnecessary delays, efforts, and costs on the trial courts, Court of Appeals, roster attorneys, and MAACS.

The implementation of these reforms depends upon the trial courts’ voluntary adoption of a uniform attorney fee policy, developed in consultation with attorneys and courts and approved by the Appellate Defender Commission. The current policy features hourly rates of \$75 and \$50, depending on type of appeal and severity of sentence, as well as presumptive hourly maximums of 15 hours for plea appeals and 45 hours for trial appeals. Travel is compensated separately at \$25 per hour.

Given the disparities in trial court fee policies in the past, adoption of the pilot fee policy carries budget implications for most trial courts, the extent of which depends upon a court’s prior fee policy. While some courts can reduce overall costs or remain flat, most see some degree of increase. MAACS can reliably forecast the potential budget implications for any trial court by aggregating and analyzing pilot voucher data from multiple jurisdictions to assess the average hours, fees, and costs associated with appellate assignments of differing type, and comparing these averages with historical voucher data from the individual court.

In September 2016, the Supreme Court extended the pilot until December 31, 2017, allowing an expansion of regional assignment lists and the collection of more data and feedback. Shortly thereafter, MAACS launched a web-based case assignment system to accommodate the new assignment process in an even more efficient and user-friendly manner. This system delivers some of the most important features of the pilot to *all* trial courts statewide — including those that have not adopted uniform fees and joined regional assignment lists. The new system automates many of the processes that MAACS and trial court staff had undertaken manually in the pilot, including pre-screening of counsel by automated email notifications, the electronic transmission of appointment orders and related documents, and the ability for judges and court staff to e-sign appointment orders. To pre-screen counsel in all cases and accommodate both pilot and non-pilot courts, it divides the assignment process into multiple steps, with MAACS assuming responsibility for the creation and service of appointment orders — albeit only for pilot courts. Approximately 95% of trial courts and 91% of roster attorneys report overall satisfaction with the new case assignment system.

Trial court participation has grown steadily, and the pilot now includes over 30 trial courts divided into five regional assignment lists covering all corners of the state. Surveys reveal overwhelming trial court support for these reforms, with large majorities reporting an improved experience from MAACS's creation (94%) and service (100%) of appointment orders.

The significant financial implications do not appear to have lessened the courts' enthusiasm. All 14 original pilot courts reported that they were "satisfied with the overall fairness and reasonableness" of the new fee policy through the first year, and 86% of participating courts report overall satisfaction after year two. Surveys reveal that much of the courts' satisfaction with the fee policy is driven by a new sense of confidence in the reliability of vouchers. Unlike traditional MAACS vouchers, pilot vouchers contain substantially more detail as to services and expenses, and are not submitted to the trial courts until MAACS has reviewed them for accuracy and compliance. Several court administrators have observed that roster attorneys now treat vouchers with greater care and attention due to this additional layer of scrutiny. This gives the courts greater confidence that they are getting what they pay for. After one year, all 14 original pilot courts reported satisfaction with the pilot vouchering process. After the second year, the satisfaction level remained at 87% of all participating courts.

Even more important than the popularity and efficiency of the new process, these reforms are helping improve the quality of appellate representation for indigent defendants. The prompt appointment of pre-screened counsel, with a complete record, allows representation to begin immediately after sentencing, before the expiration of filing deadlines and while witness memories are fresh. The standardization of reasonable and predictable attorney fees boosts attorney morale and aids efforts to recruit and retain quality appellate lawyers, while allowing MAACS to monitor attorney performance and efficiency. And the regional consolidation of assignment lists reduces and regulates attorney caseloads.

Along with improved training, greater access to investigative and legal resources, and a rigorous new quality and retention review process, the changes implemented by this pilot represent an essential component to lasting and meaningful reform at MAACS.

F. Lessons for Other Court Appointed Appeals

To appreciate how far MAACS has come, one might look to the process for selecting appellate counsel in child welfare appeals, including those involving the termination of parental rights. The counsel selection process in these cases looks much like the process in criminal appeals prior to 1970, with no nonjudicial agency to ensure independence or regulate quality, and with most trial courts relying on ad hoc or contract schemes that inherently discourage vigorous appellate advocacy.

One example is appellate counsel's frequent inability to review the entire lower court record. While appointed counsel in criminal appeals are entitled to any transcript they request³⁹ — and do not risk the loss of future appointments by making such requests — appointed counsel in child welfare appeals are frequently limited to the "portions of the transcript" that are "require[d]" for the appeal.⁴⁰ Even where this determination falls to counsel and not the trial court itself — which the Rule does not explicitly require — the absence of an independent counsel selection process deters counsel from requesting costly transcripts, which might make an appointing court less inclined to appoint the same attorney on future cases.

In November 2016, the Appellate Practice Section of the State Bar of Michigan held a seminar entitled "The Economics of Court-Appointed Appeals," which focused largely on the underfunding of appointed appellate representation in criminal and child welfare cases, as well as the ongoing efforts to address this problem at MAACS. Throughout the one-day seminar, appointed appellate counsel, trial and appellate judges, and trial court administrators discussed common concerns and the ways in which the lessons described above could potentially be applied in other contexts, particularly including child welfare appeals.

The seminar focused new attention on many of the problems plaguing appellate assigned representation in Michigan. In light of these concerns, stakeholders have begun discussing ways in which lessons from the ongoing MAACS reform could potentially improve the child welfare appellate system as well. These conversations are already bearing fruit, as the Michigan Court of Appeals has proposed amendments to the Michigan Court Rules that "would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when

counsel is appointed by the court.”⁴¹ Consistent with the MAACS pilot experience, the Court believes that these changes “would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process.”⁴²

There are also discussions about whether MAACS — or a separate but similarly situated agency — should regulate the appointment of appellate counsel in child welfare appeals. Recognizing the need for reform, a number of trial courts have indicated their interest in exploring such a system through a new child welfare appellate pilot project, perhaps modeled on MAACS. Michigan Supreme Court Justice Bridget McCormack, for one, has said she is optimistic about the potential for further reform, explaining, “Since we have this working model, why not apply it in this other area where we know we have a similar problem?”⁴³

G. Conclusion

As the Supreme Court explained, the MAACS Regional Pilot Project was designed to assess “the extent to which this consolidation results in greater speed and efficiency in the assignment process” and “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 ... on the circuit courts and their funding units.”⁴⁴ By this measure, it has been a tremendous success.

The pilot has brought greater speed and efficiency to the assignment process, new county funding in the form of a reasonable and predictable attorney fees, and better overall appellate representation to indigent criminal defendants. These popular and innovative reforms have transformed the criminal appellate assigned counsel system and paved the way for improvements in other corners of Michigan’s appellate process as well.

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Endnotes

1. MCL 780.712(6).
2. Michigan Appellate Assigned Counsel System, *A Decade of Challenges* (1995), p 3 (on file with author).
3. *Id.*

4. See *id.*
5. *Decade*, p 4.
6. *Id.*
7. ABA, *Ten Principles of a Public Defense Delivery System, Principle 1 with commentary* (2002) (citing National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts, Chapter 13, The Defense* (1973), Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-1.3, 5-1.6, 5-4.1; Standards for the Administration of Assigned Counsel Systems (NLADA 1989), Standard 2.2; NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services, (1984), Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970), § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979), Standard 2.1(D)). Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (accessed Oct. 2017).
8. *Id.* (citations omitted).
9. *Decade*, p 6.
10. *Id.*
11. Michigan State Appellate Defender Office, *Annual Report* (1972), p 1. Available at http://www.sado.org/content/commission/annual_report/1972.pdf (accessed Oct. 2017).
12. *Decade*, p 5.
13. MCL 780.712(4).
14. MCL 780.712(6).
15. *Id.*
16. *Decade*, p 8.
17. *Id.*
18. MCL 780.712(6).
19. Administrative Order No. 1981-7, § 1(1), 412 Mich lxv (1982).
20. *Id.* at § 3(2), (3).
21. *Id.* at § 3(1).
22. *Id.* at § 4(6)(a).
23. *Id.* at § 3(2)(c).
24. *Id.* at § 1(1).
25. *Decade*, p 10.
26. *Id.* at 11-12.
27. Administrative Order No. 1989-3, 432 Mich. cxxvi (1989).
28. *Decade*, p 12.
29. *Id.* at 22.
30. Const 1963, art 9, § 29.

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31. AO 1989-3, § 3(7); 3(15).
32. *Decade*, p 22-23.
33. *Id.* at 30.
34. *Id.*
35. *Id.* at 29.
36. *Id.*
37. Administrative Order No. 2014-18, 497 Mich cvxii (2014).
38. Administrative Order No. 2015-9, 498 Mich cvi (2015).
39. MCR 6.425(G)(2)(a)(iii).
40. MCR 3.977(J)(1)(b).
41. Order regarding Proposed Amendments of MCR 3.977 and 6.425, ADM File No. 2017-08 (Staff Comment) (Oct. 17, 2017). Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2017-08_2017-10-

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42. *Id.*
43. Hinkley, *Attorneys get better pay, more oversight in state program*, Lansing State Journal (Dec. 5, 2016).
44. AO 2015-9.

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