

Minimum Standards for Indigent Criminal Appellate Defense Services Including MAACS Comments

Minimum Standards approved by the Michigan Supreme Court,
effective January 1, 2005.

MAACS Comments approved by the Appellate Defender Commission,
June 19, 2019.

Minimum Standard 1

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

MAACS Comment to Standard 1

To meaningfully consult with the client and properly prepare an appeal, appellate counsel must obtain and review all available case documents—including all transcripts, the full court file, and sentencing and discovery materials. Counsel should also obtain trial counsel’s file, recognizing that trial counsel is obliged to provide these materials. See MCR 6.005(H)(5); MRPC 1.16(d).

While the trial court is required to order “the full transcript of all proceedings,” MCR 6.425(G)(1)(f), appellate counsel bears the final responsibility to ensure that transcripts from all the trial court proceedings are ordered and prepared. Counsel must review the register of actions to confirm that all listed proceedings have been transcribed or ordered to be transcribed; consult with the client and, when possible, trial counsel, to determine whether any proceedings have been omitted from the register; and order any omitted transcripts. Additional transcripts should be requested within applicable deadlines.

Counsel should request case materials within a reasonable time after appointment to ensure that all facts can be clarified and all potential legal issues can be evaluated in time to prepare and file appropriate pleadings on the client’s behalf.

Minimum Standard 2

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

MAACS Comment to Standard 2

Counsel is responsible for advising the client of the potential issues that have been identified, the appellate strategies available and their relative advantages and disadvantages, and whether there are apparent risks that make it advisable to forego certain issues or the appeal altogether.

To meet these responsibilities, counsel must consult with the client before filing a substantive pleading for relief. MAACS recommends in-person interviews whenever possible, to establish trust and rapport. If counsel concludes that circumstances associated with the case or client require multiple interviews, counsel is entitled to be paid for such visits. *In re Mullkoff*, 176 Mich App 82; 438 NW2d 878 (1989). If counsel makes an informed professional judgment that an in-person interview is unnecessary, MAACS will generally defer to counsel's judgment as to the form of the consultation.

No matter how counsel consults with the client, counsel should ensure that the client's confidentiality is always protected. Counsel should request a confidential meeting room for meetings at prisons and jails, and before beginning a video-conference, counsel should verify that the client is seated in a confidential space. Counsel should mark legal mail as confidential and protected by the attorney-client privilege and should use email and JPay cautiously with incarcerated clients, as these forms of communication are not confidential. MAACS discourages the use of attorney agents for client consultation, unless used for ministerial tasks such as obtaining signatures.

Minimum Standard 3

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

MAACS Comment to Standard 3

Counsel should exercise professional judgment in determining what issues to raise on appeal and raise those claims that may entitle the client to relief. Counsel should use the considered, informed judgment of a professional familiar with Michigan's criminal and appellate procedure, the criminal law, and the facts of the case.

Since Michigan has a unified appellate process that requires that both on-record and extra-record issues be raised in the direct appeal, counsel should be alert to the possibility of extra-record claims. Counsel has a duty to investigate facts and issues that may present potential grounds for appellate or other post-conviction relief. If investigation reveals extra-record facts that would support an issue on appeal, motion for new trial, or other post-conviction relief, it is counsel's responsibility to develop a testimonial and evidentiary record in the trial court in order to preserve the issue for appellate review. See MCR 6.425(G)(2); MCR 7.208(B); MCR 7.211(C)(1).

Counsel should consider that the failure to raise an issue on direct appeal may act as a procedural default to future state or federal collateral review under MCR 6.500 or 28 USC § 2254, irrespective of the issue's merits.

This Standard does not require that every conceivable issue be raised in every case. *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983); *People v Reed*, 449 Mich 375; 535 NW2d 496 (1994). However, as the Supreme Court noted in *Reed*, reasonable attorneys can disagree about what issues are arguable and so "the Minimum Standards encourage lawyers representing indigent clients on appeal to err on the side of presenting all colorable claims for relief." *Id.* at 387.

Minimum Standard 4

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

MAACS Comment to Standard 4

This Standard permits the filing of a client's *pro per* supplemental brief anytime an "appellant's brief is filed by the attorney," which appears to include cases both appealable by right, and after leave has been granted and an appellate brief has been allowed. By allowing a client to raise claims counsel has deemed to be without arguable merit, this Standard protects the client's opportunity to have those claims evaluated by the Court of Appeals and, in some instances, to obtain relief on them. This same consideration is present in leave cases. Although this Standard does not directly allow the filing of *pro per* pleadings in leave cases, counsel should consider filing a motion asking the Court to accept a *pro per* application when a client so desires.

Counsel should inform the client that the Court will accept only one client's brief, and issues in that brief should not overlap with issues raised in the brief filed by counsel. While counsel is not expected to conduct legal research for the client's brief, counsel should provide clerical support if necessary. Where the client's brief will be filed beyond the filing deadline, counsel should prepare and file a supporting motion, explaining the requisite good cause for the late filing.

MAACS views Standard 4 as a mechanism that promotes a client's right to have input in the case and has the potential to strengthen the attorney-client relationship. Nonetheless, counsel should advise the client that some federal courts have held there is no prejudice from counsel's failure to raise claims on appeal, where the client has filed a *pro per* supplemental brief on appeal or had the opportunity to do so. See e.g., *Coffin v Napel*, 2017 WL 876378 (WD Mi 2017), pp 14-15 (collecting cases).

Minimum Standard 5

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

MAACS Comment to Standard 5

A client may decide, based on the advice of counsel, to voluntarily dismiss the appeal. This situation may arise where the client decides that the risks of proceeding are too great, or where counsel advises, and the client agrees, that an appeal would be wholly frivolous.

Counsel should advise the client why dismissal is recommended and that the practical effect of dismissal is that there will be no judicial review on the merits. Whenever possible, counsel should obtain the client's written consent to the dismissal. A separate, confidential document in counsel's file should reflect the details supporting counsel's advice and the client's understanding of the alternatives presented. Counsel should then conclude the representation on the record by filing within the requisite deadline either a motion to vacate the appointment order in the trial court or a stipulation to dismiss the appeal in the Court of Appeals, as appropriate.

If counsel believes that an appeal would be wholly frivolous but the client disagrees, counsel may proceed in one of two ways. First, counsel may move to withdraw in the trial court and seek substitute counsel, recognizing that substitute counsel may view the case differently, and may find a viable issue for appeal.

Second, counsel may file a motion to withdraw in the Court of Appeals, following the *Anders* procedures in MCR 7.211(C)(5)(a) (appeals by right) and 7.211(C)(5)(b) (appeals by leave). The effect of the Court granting a withdrawal motion is that the conviction will be affirmed. Due to the danger that mistakes can be made and issues missed on appeal, MAACS strongly disfavors such motions to withdraw, particularly in appeals after trial or where leave to appeal has been granted. Instead, MAACS encourages counsel to brainstorm and collaborate with colleagues to develop creative appellate arguments that do not risk harm to the client.

Minimum Standard 6

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

MAACS Comment to Standard 6

Oral argument provides the opportunity to counter the prosecution's arguments, to respond to the panel's questions, and to present recent cases, including unpublished decisions outside the purview of MCR 7.212(F)(3). As such, counsel should preserve the client's right to present oral argument by filing a timely brief and by requesting oral argument on the cover page of the brief. If counsel loses the client's right to oral argument, counsel should take appropriate steps to participate in argument by filing a motion for oral argument or an amended cover sheet.

In preparation for oral argument, counsel should review the briefs of both parties, file supplemental pleadings as warranted, and update the legal research. MAACS will generally defer to counsel's discretion whether to waive oral argument, based on counsel's review of all the briefs and other relevant considerations. But counsel should not waive oral argument in cases that present significant issues or where there is a possibility the Court of Appeals may have questions about the case. Given that it is nearly impossible to know what the Court is thinking, counsel should not waive oral argument lightly and should not waive oral argument as a matter of course.

If oral argument has not been preserved, counsel should notify the client of that fact. If oral argument is preserved and counsel elects to waive it, counsel should notify the Court, opposing counsel, and the client of the waiver within a reasonable time prior to submission of the case.

Minimum Standard 7

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

MAACS Comment to Standard 7

This Standard reminds counsel of the responsibility under MRPC 1.4(a) to keep the client “reasonably informed about the status of the appeal and to comply promptly with reasonable requests for information.” Because most MAACS clients are incarcerated and have limited access to resources, counsel must recognize the vital role they serve as a resource for case-related information.

To comply with this Standard, counsel must promptly introduce themselves in writing and provide the client with copies of all pleadings filed by counsel and the prosecutor, all court decisions, the status of ongoing investigations, notification of court hearings and outcomes, and otherwise keep the client informed of the status of the appeal. Counsel must do this in a manner that adequately protects the client’s opportunities for further review, regardless of whether represented by counsel.

Minimum Standard 8

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

MAACS comment to Standard 8

Counsel is authorized by the appointment order to provide legal representation through disposition of the case by the Court of Appeals. In some circumstances, such as when a prosecutor files an application in the Michigan Supreme Court, the appointment order requires counsel to continue. See MCR 6.425(G)(2).

At whatever point counsel's representation ends, counsel must notify the client promptly of this fact and of any potential remaining courses of action that might be pursued. If the client's next possible steps include seeking leave to appeal in the Supreme Court, counsel should calculate the filing deadline for the client and provide copies of the Court's forms for filing a *pro per* application. Clients who have obtained relief on appeal and are awaiting additional proceedings in the trial court continue to be represented by appellate counsel until it is clear that no further appeals will occur and that trial counsel has been retained, appointed, or waived.

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

Minimum Standard 9

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

MAACS Comment to Standard 9

During the course of an appellate appointment, a client or others may offer counsel supplemental fees, beyond those to be paid by the appointing court. In other situations, counsel may be asked to withdraw as assigned counsel and take over the case on a retained basis. Under no circumstances should counsel solicit or accept any compensation for representation included within the scope of counsel's appointment order.

Counsel may be retained for additional representation once the work performed under the appointment order has been completed. For example, counsel may be retained to file an application for leave to appeal in the Michigan Supreme Court once the appeal to the Court of Appeals is concluded, provided counsel's attendant responsibilities under the order of appointment have been completed. However, before accepting fees in these narrow circumstances, MAACS suggests counsel first determine whether the appointing authority will compensate counsel for that same work.