STATE BAR OF MICHIGAN
STANDING COMMITTEE ON ASSIGNED COUNSEL STANDARDS

RECOMMENDATION

That the Representative Assembly approve the proposed Standards for Assigned Counsel as revised August 17, 1996. (Copy attached to this Report)

REPORT

BACKGROUND AND PRIOR ASSEMBLY ACTION

In Administrative Order 1981-7, the Michigan Supreme Court adopted "Regulations Governing a System for Appointment of Appellate Counsel," providing minimum standards for indigent criminal appellate services. Because there were no comparable standards for trial counsel, the Defender Systems and Services Committee developed proposed standards and presented them to the Board of Commissioners in 1985. The Board of Commissioners then created a Task Force on Assigned Counsel Standards in 1986 and "Proposed Minimum Standards for Court-Appointed Trial Counsel" were presented by the Task Force to the Representative Assembly at its September, 1987, meeting. The proposed standards had been published in the September, 1986, Michigan Bar Journal for comment, and were circulated to Assembly members and to interested committees and sections. The report accompanying the proposal noted that Michigan had no standards for assigned trial counsel, and that other states had developed such standards. The proposed standards were approved by the Assembly for forwarding to the Supreme Court for its action.

There was some discussion that rather than adopting such specific standards by administrative order, the Court might prefer to adopt an enabling court rule which would designate the State Bar as authorized to develop and amend standards. A second proposal seeking adoption of a proposed court rule delegating such authority was presented by the Task Force, approved by the Board of Commissioners at the Board's September, 1989, meeting, and forwarded to the Supreme Court.

In September, 1990, former Chief Justice Dorothy Comstock Riley advised (see letter attached) that the Supreme Court would not take action at that time concerning the standards for assigned trial counsel but commented that the State Bar might undertake the development and administration of such standards.

In response to the Court's suggestion, the Standing Committee on Assigned Counsel Standards was authorized at the January 24, 1992, Board meeting. The Committee had among its members all of the public defenders in Michigan. The jurisdiction of the Committee was formulated as follows:

> "To develop minimum standards for assigned counsel in criminal cases and separate standards for assigned counsel in death penalty cases."

The Committee has worked diligently to modify the 1987 standards. Efforts were made to avoid standards that could create nuisance claims against defense attorneys. For instance, one 1987 standard would have suggested that normally an attorney should hold a preliminary examination unless strategic considerations dictated a waiver; that standard was rewritten to remove the presumptive suggestion.

Unlike most proposals which the State Bar circulates to interested sections or committees for comment, the Committee's revised standards were also published in the August, 1993, Michigan Bar Journal to allow every member of the Bar to comment again.

The new draft of standards was presented to the Board of Commissioners at its July, 1994, meeting. State Bar President Jon Muth communicated the Board's request that the Committee review the standards with consideration of whether they were applicable to juvenile delinquency and misdemeanor cases. The membership of the Committee was reconstituted to include members with experience in misdemeanor and juvenile cases.

The third draft of the Proposed Standards was again published for comment in the July, 1995, Michigan Bar Journal, not in the section where court rules are usually published, but as a featured article.

This draft of the standards was forwarded to the Board for its April, 1996, meeting. The standards were again circulated to interested sections and committees and the proposal was rescheduled for the July, 1996, Board meeting. Comments were received from the Judicial Conference and from the Ethics Committee. At the July meeting, concern was first expressed that any proposed standards would create additional duties for lawyers and impact their professional liability exposure and insurance rates. The Board deferred action to the September meeting to allow the Committee an opportunity to discuss and respond to this concern.

On August 17 the Committee addressed the comments received on the proposed standards from the Ethics Committee. The Committee made several changes in the standards and then unanimously recommended the attached standards.

At the September Board of Commissioners' meeting, the Board declined to approve the standards but instead referred them to the Representative Assembly for approval.

SUPPORT FOR THE STANDARDS

Several committees were asked to comment on the standards. Three written responses were received, two from the State Trial Court's Administration Committee, which commented that the content of the standards was "fine," but the Committee believed that the standards should better be titled "guidelines." That Committee also suggested that the standards should be compared to those set by the Michigan Assigned Appellate Counsel System, the State Appellate Defender Office and Public Defender offices. In response, these standards were generated in response to the administrative order setting standards for assigned appellate counsel, and it is believed that the State Appellate Defender Office and Public Defender Offices in the state do not have specific standards.

The Ethics Committee made six comments regarding standards and their consistency with ethical rules. Five of those comments resulted in changes being made to the standards, with the sixth comment being deemed by the committee not to require a change in the standards. Those changes were accomplished at the August 17, 1996, meeting of the committee.

Telephone comments were received from four committees. The Grievance Committee chairperson noted that the proposed standards were circulated to committee members but no comments were returned. The chairperson stated he did not believe the State Bar should hesitate to provide guidance in this area and thought that the depth and thoughtfulness of the proposal made it worthy of serious consideration.

One of the co-chairpersons of the Defender Systems and Services Committee advised that the consensus of the Committee was to approve the proposed standards. The chairperson communicated that compliance with the standards should not cause any qualified criminal defense lawyer any serious concern and the standards would help to defend against frivolous allegations.

The Civil Liberties Committee chairperson responded that the proposal had been circulated to committee members but no comments had been returned. The chairperson observed nothing in the proposal caused her any concern.

The chairperson of the Judicial Conference reported that the conference took no official position but the chairperson found nothing in the proposal which merited concern.

The Michigan Supreme Court, which returned the proposed standards to the Bar suggesting that this be a matter addressed by the State Bar, must be considered as being a supporter of these standards. (see letter of former Chief Justice Riley attached)

FISCAL AND STAFFING IMPACT

The standards should have no fiscal or staffing impact either on the State Bar or on individual attorneys. The standards are designed to provide a minimum level of assigned counsel services that must be provided by the trial courts. It is hoped the standards will have an impact on trial court funding of assigned counsel services, since the standards themselves recommend that trial courts implement funding to insure compliance with the standards.

COMMENTS AND AMENDMENTS

The Committee (and the Task Force before it) has been responsive to all comments received. Each time the Committee's work product was circulated for comment and comments were received, changes were made in the standards. For instance, although only three comment letters were recieved in 1995, one of those was a lengthy letter from Barbara Levine, the Administrator of the Michigan Appellate Assigned Counsel system and the person who is responsible for administering the appellate standards. Her comments resulted in several substantive changes to the standards. Most recently, comments received from the Ethics Committee resulted in changes to the standards at an August 17, 1996, meeting of the Committee.

Concern was expressed at the July Board meeting about whether adoption of the Proposed Standards would subject a lawyer to an actionable claim of violating those standards.

This concern has been addressed by the Committee in developing the proposed standards. The standards themselves provide that a violation "is not necessarily equivalent" to an ethical violation nor results in ineffective assistance of counsel. The Michigan Supreme Court has ruled that a violation of the appellate standards by criminal defense counsel does not equal ineffective assistance of counsel. People v Reed, 449 Mich 375 (1995). While not dispositive of malpractice claims, this holding of the Supreme Court and the proposed preamble should assist in protecting the members of the bar from frivolous claims.

These standards are not ethical rules, although they are not inconsistent with a lawyer's ethical obligations. Ethics rules state in MRPC 1.0(b) that a violation does not give rise to a separate civil or criminal cause of action. Still, Michigan courts have held that a violation of ethics rules is rebuttable evidence of malpractice. Beattie v Firnschild, 152 Mich App 785 (1986)[1]; Lipton v Boesky, 110 Mich App 589 (1981); Sawabini v Desenberg, 143 Mich App 373(1985); see also, Joos v Auto-Owners Ins Co, 94 Mich App 419, 424 (1979), lv den 408 Mich 946 (1980).[2]

The Committee is very sensitive to a concern regarding abuse of these standards. The "standards" recommended by the highest organization of the profession, even when voluntary, are perceived as the conduct to which lawyers should ascribe. Whether the claims are truthful or frivolous, and regardless of whether the lawyer eventually prevails, the lawyer's reputation is affected and liability insurance rates may be increased. Currently, lawyers who practice criminal law are subject to very low insurance rates and are protected from lawsuits by a restrictive reading of the statute of limitations. See, Gebhart v O'Rourke, 444 Mich 535 (1994). An erroneous strategy decision of a criminal defense lawyer is not actionable. See, Simko v Blake, 448 Mich 648 (1995).

COMMITTEE RESPONSE AND RECOMMENDATION

The State Bar has a tradition of guiding its members in competence, quality lawyering and risk prevention. Standards promote the Bar's mission stated in Rule 1: "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state." The lawyer's paramount duty is to his or her client. Indigent defendants are vulnerable clients.

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[1] The Court of Appeals considered whether a malpractice claim, which alleged a violation of the former Michigan Code of Professional Responsibility in representing multiple clients, merited a directed verdict for defendant when no expert testimony was produced to support the claim. The Court rejected the argument that a violation of the Code of Professional Responsibility is negligence per se in a lawyer malpractice case, and endorsed the concept that a code violation is rebuttable evidence of malpractice.

[2] Held: Expert testimony addressing the standard of practice is not required in lawyer malpractice cases when the facts allege a breach well within the ordinary knowledge and experience of a layman jury to recognize.

The proposed Standards are minimums. Lawyers involved in assigned counsel cases who have worked tirelessly with the Committee are concerned that adequate standards be in place to provide competent representation in cases where attorneys are appointed to represent indigent defendants in district, circuit or probate court. The proposed Standards are basic, and should not be violated by reasonably competent attorneys.

Unlike the ethics rules which are promulgated by the Michigan Supreme Court and are mandatory rules for all lawyers, the proposed standards would be voluntary. The State Bar neither has authority to promulgate rules, nor to require lawyers to comply with its standards, models or guidelines, nor to discipline lawyers who fail to meet those standards.

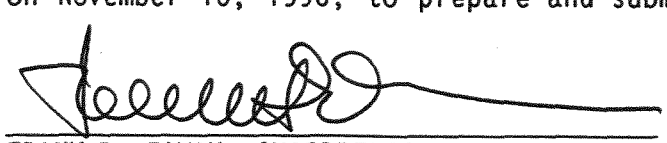
In 1976 and again in 1993, the Board of Commissioners appoved "Michigan Guidelines for Utilization of Legal Assistant Services", purporting to explain how lawyers should supervise and delegate work to nonlawyer employees. The Guidelines are still being distributed, and include cross-references to rules of conduct, ethics opinions, the law on unauthorized practice, and caselaw. In 1995, the Task Force on Establishing Law Practices in cooperation with Law Practice Management Section published "Top Ten Checklists" covering everything from permissible marketing, to fee arrangements, to trust accounts, to computer equipment. The Committee is unaware that either of these efforts have had the undesirable effect of promoting claims against attorneys. There are probably numerous other examples of such State Bar efforts.

CONCLUSION

The proposed Standards do not duplicate any other Court or Bar proposal. They are consistent with ethics duties, statutory duties, relevant court rules and cases.

It is the Committee's designated mission to "develop minimum standards for assigned counsel". The Committee has worked hand-in-hand with professionals at all levels of the criminal justice system to develop proposed standards. The proposed standards in a prior format have been approved by the Representative Assembly. The proposed standards have been to the Board on three separate occasions - first as a proposed court rule recommended by the Board, then as standards to be "tweaked" to include misdemeanors and juvenile matters, and this September where they have been referred to the Representative Assembly for action. The proposed standards have been circulated to interested entities three times, and three times were published for comment from all members of the State Bar.

The Committee recommends approval of the proposed Standards. This report and recommendation are submitted to the Representative Assembly by the chairperson of the Assigned Counsel Standards Committee, who was delegated by the Committee at its meeting on November 16, 1996, to prepare and submit this report and recommendation.



FRANK D. EAMAN, CHAIRPERSON
Committee on Assigned Counsel Standards

As revised 8/17/96

STANDARDS FOR ASSIGNED COUNSEL

These standards are recommended to all trial courts for their assigned counsel in felony, misdemeanor and juvenile delinquency cases. It is also recommended that trial courts ensure funding that is sufficient to permit counsel to meet these standards. All trial counsel should familiarize themselves with these standards and make every effort to comply with them, with the understanding that the practice of law consists of a case-by-case experience and the standards may not apply equally to each and every case. A violation of these standards is not necessarily equivalent to a violation of any ethical obligation of an attorney, nor does violation of a standard necessarily result in ineffective assistance of counsel.

I. LAWYER-CLIENT RELATIONSHIP

1. Declining Appointment. Counsel shall decline an appointment from the court to represent an indigent client if the nature or extent of counsel's existing caseload is likely to prevent effective representation of that client.

COMMENT: The term "counsel" in this standard means private assigned counsel or the chief counsel of a defender office.

2. Substitute Counsel Restrictions. Substitute counsel shall not be utilized at any proceeding unless the client consents and the consent is placed on the record. Unless the proceeding involves matters which are merely ministerial or perfunctory in nature, substitute counsel normally should not be utilized.

COMMENT: Assignments to defender offices include assignment to any staff attorney. The internal substitution of defender office personnel is not governed by this standard.

3. Declining Representation - Conflict from Joint Representation. A lawyer or lawyers associated in practice shall not represent two or more defendants who have been jointly charged or whose cases have been consolidated.

COMMENT: This standard is consistent with MCR 6.005(F).

4. Disclosure of other Conflicts. When counsel identifies an actual or potential conflict of interest arising from circumstances other than the joint representation of co-defendants, counsel shall advise both the cient and the court that such a conflict exists. Counsel shall explain the basis of the conflict to the extent possible without divulging privileged communications or jeopardizing the legal rights or physical safety of any person. Thereafter, counsel shall withdraw from the case unless the court has elicited from the client, on the record, a knowing and voluntary waiver of the right to proceed with conflict-free counsel.

COMMENT: Conflicts of interest may arise from a great variety of situations, including counsel's relationship with, or representation of, or receipt of information from or about a person involved in or affected by the prosecution of the case. While full disclosure to the court and the client is theoretically desirable whenever counsel seeks to withdraw because of a conflict, the standard recognizes that it is not always practical. If, for instance, the conflict arises from the privileged communications of another

client, or if the revelation of information by counsel might threaten the safety or welfare of a witness or co-defendant, counsel must limit disclosure accordingly. The standard therefore defers to counsel's judgment the extent to which the basis of the conflict should be explained to either the client or the court. Within these constraints, counsel must move to withdraw whenever a conflict is perceived and must make a record for appellate review if the motion is denied.

5. Preservation of Attorney-Client Privilege. Counsel shall preserve the attorney-client privilege and not disclose any form of confidence without the client's permission.

COMMENT: While the importance of confidentality is well understood, it is quite easy to violate the attorney/client privilege through careless conversation or an effort to gain some strategic advantage. Defense counsel must consciously avoid divulging privileged communications in casual discussions with police, prosecutors, other lawyers, or court personnel and must be particularly sensitive to efforts by police or prosecutors to obtain confidential information during the process of plea negotiations.

6. Acceptance of Fees. Counsel shall not seek or accept fees from an indigent client or from any other source on the client's behalf other than fees authorized by the appointing authority.

II. PRETRIAL PROCEEDINGS

7. Client Interview. Counsel shall conduct a timely interview of the client after being appointed and sufficiently before any court proceedings so as to be prepared for that proceeding.

COMMENT: The most obvious function of the client interview is gathering information necessary to provide representation at the early stages of the case. Thus, counsel should obtain from the client facts regarding the offense, the arrest, any searches, interrogations, lineups or other evidence-gathering procedures, the identity and location of potential witnesses, and the nature and location of physical evidence which should be seen or preserved quickly. Counsel should also obtain information such as family and community ties, employment and educational history, prior criminal record, pending charges, present probation or parole status, physical and emotional health, and the financial resources available for posting bail. Counsel should prepare for the client interview to the extent possible by reviewing charging documents, police reports, and the reports of pretrial service agencies regarding bail.

Counsel should bear in mind that the client interview also presents the first opportunity to establish a relationship of trust and confidence with the client. Among the other important tasks that can be accomplished at that point are the following: explaining the attorney/client privilege and the necessity of full disclosure by the client of all potentially relevant facts: advising the client not to discuss the case with police officers, cellmates, co-defendants, or anyone else; explaining the procedures involved in a criminal case, how and when counsel can be reached, and when counsel will see the client next; and attempting to answer the client's most urgent questions realistically and to arrange for the satisfaction of incarcerated client's most pressing needs, e.g., for medical attention, clothing, or contact with relatives or employers.

8. Securing Client's Release. Counsel shall take reasonable steps to secure the client's release from custody under the least restrictive conditions possible.

9. Filing Appearance; Arraignment on Complaint or Preliminary Hearing on Petition. Counsel shall promptly file an appearance and shall be present at the arraignment on the complaint or preliminary hearing on petition, unless counsel is not appointed until after that proceeding has occurred, or unless counsel and the client have made other satisfactory arrangements.

10. Preliminary Review and Discovery. Counsel shall conduct a preliminary review of the available evidence and applicable law; and, in felony and delinquency cases, this review should be before the preliminary examination or probable cause hearing.

COMMENT: Although counsel may have little time to conduct any independent investigation before any initial hearing is held, counsel must review whatever information is available in order to cross-examine prosecution witnesses effectively. Such information should include, at a minimum, facts provided by the client at the initial interview, the complaint, and the preliminary police report. It may also include autopsy, ballistics, chemist's, or other scientific reports, search warrant returns, statements given by the client to the police, and statements provided counsel by potential defense witnesses. Counsel must know the elements of any offense charged and any included offenses.

11. Conducting Preliminary Examinations or Probable Cause Hearings. In a felony or delinqency case, counsel should evaluate the client's best interest in deciding whether to hold or waive the preliminary examination or probable cause hearing and discuss with the client the considerations relevant to that decision.

COMMENT: The preliminary examination or probable cause hearing serves several functions from the defense perspective. If the prosecutor cannot establish that there is probable cause that the charged offense was committed or that the defendant committed it, the charge may be dismissed or reduced at this point. Cross-examination of prosecution witnesses at the preliminary examination creates a record which may prove valuable for impeaching the testimony of those witnesses at trial. The preliminary examination or probable cause hearing may also aid counsel in the discovery of the prosecution case and will allow counsel to assess the demeanor and credibility of key prosecution witnesses. These hearings may also provide the occasion to raise initial challenges to illegally obtained evidence and to seek the reduction of bail. These hearings should be waived only for strategic reasons which outweigh these considerations.

Such strategic reasons may include: avoiding the preservation of testimony by witnesses who are likely to become unavailable at trial, avoiding the discovery by the prosecution of a defect in its case, avoiding the elicitation of facts which would lead to additional or more serious charges, consummating a favorable plea agreement or settlement that the client desires.

12. Appearance at Arraignment on Information. In a felony case, counsel shall appear at the arraignment on the information unless a written waiver of arraignment has been filed in conformity with the applicable court rule.

13. Insuring Propriety of Evidentiary Procedures. Counsel shall take reasonable steps to ensure that police or prosecution procedures for obtaining non-testimonial evidence are properly conducted.

COMMENT: Police and prosecution procedures for gathering non-testimonial evidence may involve, for instance, lineups, photo showups, voice identifications, handwriting exemplars, or specimens of blood, semen, urine, and the like. Counsel should raise appropriate objections to requests for non-testimonial evidence and should insist on appropriate safeguards when these procedures are to occur. Counsel should also prepare the client for participation in such procedures.

14. Discovery. Counsel shall pursue discovery of the prosecution case, by informal methods if available, and by formal methods if necessary. In felony cases, counsel shall comply with applicable rules for reciprocal discovery.

COMMENT: Typical items counsel may seek to obtain through discovery include the following:

(1) The names, addresses, prior statements, and criminal records of prosecution witnesses;
(2) Any oral or written statements made by the client, co-defendants, or accomplices and details regarding when, to whom, and under what circumstances the statements were made;
(3) The client's prior criminal or juvenile record and any similar act evidence the prosecution intends to produce;
(4) Books, papers, photographs, tangible objects, and the location of relevant buildings and places; and
(5) Reports of physical or mental examinations or scientific tests.

Counsel may also request a bill of particulars which, although technically not true discovery, may provide helpful information for preparation of the defense. This is particularly true in a misdemeanor case, as there is no preliminary examination.

15. Defense Investigation. Counsel shall conduct a timely investigation of the prosecution case and potentially viable defense theories.

COMMENT: While the extent of the investigation may vary depending on the facts and circumstances of the case, the duty to investigate exists regardless of the client's admission of facts indicating guilt or the client's expressed desire to plead guilty. Timely investigation is crucial, since witnesses and objects may disappear and memories fade rapidly. Once located, witnesses must be asked to provide information which will enable counsel to locate them again at the time of trial. To preserve the availability of impeaching testimony without requiring counsel to withdraw from the case in order to testify, it is recommended that counsel attempt to interview prospective witnesses in the presence of a third person or to have initial written statements obtained from witnesses by an investigator. When appropriate, counsel should attempt to visit personally the scene of the alleged offense and other locations that may have bearing on the case, such as the scene of an arrest or search.

16. Keeping Client Informed. Counsel shall keep the client apprised of the progress of the case and shall timely inform the client of pleadings filed in the client's behalf and orders and opinions issued by the court in the case.

17. In-depth Interview. Counsel shall conduct an in-depth client interview before trial or plea.

COMMENT: Although counsel has a continuing duty to keep the client apprised of the progress of the case, counsel must also plan on conducting at least one in-depth interview after counsel has had the opportunity to engage in discovery, factual investigation, and any necessary legal research. Such an interview provides the opportunity to review with the client the strengths and weaknesses of the prosecution case, to clarify the client's version of events in light of other known facts, to assess potential defense strategies for trial, to discuss any plea negotiations that may have occurred, and to provide the client with an objective appraisal of his or her situation. Counsel should also describe the proceedings in which the client may have to participate, e.g., trial, plea, evidentiary hearing, or sentencing, and fully explain the client's role in them.

18. Obtaining Expert and Investigative Assistance. Counsel shall seek to obtain expert assistance, including investigation, needed to meet the prosecution case or prepare a defense.

19. Reviewing Applicable Law. Counsel shall be familiar with the law applicable to the offense(s) charged, lesser included offenses, potential defenses, and the admissibility of potential prosecution and defense evidence.

20. Obtaining Transcripts of Prior Proceedings. Where necessary for preparation of the defense, counsel shall obtain and read transcripts of prior proceedings in the case or in related proceedings.

COMMENT: Transcripts of the preliminary examination or probable cause hearing and any pretrial evidentiary hearings should routinely be obtained for their potential utility as impeachment tools at trial. Prior trial transcripts should be obtained if there has been a mistrial in the case. If the client is being retried after an appeal, or if the client has been separately tried on the related charges, such transcripts may be invaluable not only for impeachment but for analyzing the prosecution's trial strategy. For the same reasons, attempts should be made to obtain transcripts of the proceedings involving co-defendants who have been separately tried for the offense(s) with which the client is charged.

21. Consideration of Pretrial Motions. Whenever there exists a good faith reason to believe that the applicable law may entitle the client to relief which is within the court's discretion to grant, counsel should consider filing an appropriate motion.

22. Consulting Client on Pretrial Motions. After consultation with the client, counsel shall decide whether to file a motion or to refrain from filing a motion and inform the client of any motions filed.

23. Filing Pretrial Motions. The motions counsel should consider filing include:

(a) pretrial motions reasonably available on the facts which might lead to reduction or dismissal of the charge(s);
(b) motions to suppress illegally obtained evidence;

(c) motions to exclude arguably inadmissible substantive or impeachment evidence which is damaging to the defense unless there is strategic benefit to the client in having evidence admitted;
(d) procedural motions required by the facts of the case to ensure the fairness of the proceedings and to preserve claims for appellate review.

COMMENT: (a) Pretrial motions which may lead to reduction or dismissal of the charge(s) include motions to quash, motions to dismiss based on double jeopardy, speedy trial grounds, or applicable rules setting time limits for the commencement of proceedings including the Interstate Agreement on Detainers, and challenges to the constitutionality of the applicable statute, the exercise of the prosecutor's charging discretion, or the waiver of a juvenile client to the circuit court.

(b) One of counsel's most important tasks is to minimize damaging evidence available to the trier-of-fact. Therefore, counsel should normally make any available motion to suppress unconstitutionally obtained evidence and conduct evidentiary hearings necessary to develop a record in support of such motions. The evidence susceptible to suppression may include the fruits of illegal searches or seizures, statements or confessions obtained in violation of the client's right to counsel or privilege against self-incrimination, and identification testimony obtained in violation of the client's right to counsel or as the result of suggestive identification procedures.

(c) Counsel should analyze the admissibility of anticipated prosecution evidence and should resolve evidentiary questions through pretrial motions in limine when possible. In particular, motions in limine should be employed to determine the availibility of a client's prior convictions for impeachment purposes so that the client may make an informed decision about whether to testify.

(d) Counsel has a continuing duty to ensure that proceedings are conducted in a fair, unbiased manner. Circumstances may arise at any stage of the proceedings requiring action by counsel to protect the client's right to a fair trial. Among the more common procedural motions that may be needed are those which concern the following subjects: the client's competence to stand trial, changes of venue, challenges to the jury array, the joinder or severance of charges or defendants, continuances, enforcement of discovery orders, disqualification of the trial judge, the competence of prosecution witnesses, sequestration of witnesses, the client's appearance in shackles or jail clothes, or mistrials required by the conduct of trial participants.

24. Developing Trial Strategy. Counsel shall strive to develop a legally correct and factually plausible strategy for trial.

25. Filing Notices of Affirmative Defenses. Counsel shall file timely notices of affirmative defenses if required by law.

COMMENT: Common affirmative defenses which require filing with the court and notice to the prosecution include insanity, diminished capacity and alibi.

26. Negotiation of plea. Where appropriate, counsel shall attempt to negotiate the most favorable plea agreement possible under the circumstances.

COMMENT: To negotiate a plea effectively, counsel must be familiar with the strengths and weaknesses of the prosecution case, with the value to the client

of any concessions the prosecution may offer, and with the risk to the client of any concessions the defense may make. Counsel must also consider the various pleas that may be available, including pleas of guilty, nolo contendere, guilty but mentally ill, and conditional pleas. Although the ultimate decision whether to plead guilty is the client's, counsel may investigate the possibility of a favorable plea offer despite the client's stated intention not to plead guilty.

27. Informing Client of Plea Negotiations. Counsel shall accurately evaluate and promptly convey to the client any offers of a negotiated plea; the decision whether to accept or reject a plea is the client's.

COMMENT: Counsel should not recommend acceptance of a plea bargain until an investigation of the facts has been completed and counsel has analyzed the controlling law and the evidence likely to be introduced at trial. Counsel shall explain to the client the rights that would be waived by a plea and the potential consequences the client would face, including the probable minimum and maximum sentences, any mandatory minimum sentences, any sentences that could be consecutive, the probable conditions of probation, the likely amount of fines or restitution, and any other potential consequences, such as forfeiture of assets and deportation. Counsel shall advise the client of the actual value of any concessions offered by the prosecution.

III. TRIAL

28. Preserving Right to Jury Trial. If the case proceeds to trial, counsel should evaluate the client's best interests in deciding whether to waive a jury trial and discuss with the client the considerations relevant to that decision. The decision whether to waive a jury is ultimately the client's.

COMMENT: Counsel must appraise the factors relevant to that decision and advise the client accordingly. Counsel should never recommend waiving a jury solely because a bench trial is a faster, less difficult proceeding for counsel to conduct.

29. Voir Dire. Counsel should seek personal information regarding prospective jurors, either through voir dire or examination of jury questionnaires. Counsel shall ask voir dire questions pertinent to the case. Where required, counsel should submit voir dire questions to the court.

30. Opening Statement. Counsel shall make an opening statement consonant with the overall defense strategy, either at the beginning of trial or the beginning of the defense case, unless strategic reasons dictate otherwise.

31. Cross-Examination. Counsel shall cross-examine and impeach prosecution witnesses to the extent and in the manner which reasonably appears likely to benefit the defense.

32. Waiving Prosecution Witnesses. Counsel may waive the production of prosecution witnesses only where the appearance of those witnesses has no strategic benefit to the defense and the client is informed of the waiver.

33. Client's Decision to Testify; Counsel's Recommendation. Counsel shall discuss with the client the considerations relevant to the client's decision whether to testify and shall recommend the decision which counsel believes to

be in the client's best interest. The ultimate decision whether to testify is the client's.

COMMENT: In considering whether the client should testify, various factors should be evaluated. These factors include the client's constitutional right to testify, his or her right not to testify, the nature of the defense, the client's susceptibility to impeachment with prior convictions or out-of-court statements or evidence that has been suppressed, the client's demeanor, and the availibility of other defense or rebuttal evidence. The defendant's right to testify does not include the right to commit perjury, Harris v New York, 401 US 222 (1971). Where counsel has concrete evidence of the client's intent to testify falsely (as opposed to mere personal opinions about the client's credibility), counsel must attempt to dissuade the client from so testifying. In addition to counsel's own ethical obligations not to participate in the presentation of perjured testimony, perjury may subject the client to damaging impeachment at trial, to an increased sentence if convicted, or to future prosecution on a perjury charge. If the client insists on testifying falsely, counsel should proceed in accordance with the applicable rules of professional conduct.

34. Preparation of Defense Witnesses. Counsel shall strive to prepare defense witnesses for direct and cross-examination and advise them regarding appropriate courtroom dress and demeanor.

35. Objections; Offers of Proof. Counsel shall object to damaging inadmissible evidence unless the benefit to the client from its admission outweighs the harm, and shall make such other objections as are necessary to protect the client's right to fair trial and to appellate review. Where defense evidence is excluded, counsel should make such offer of proof as is necessary to protect the record.

36. Production of Defense Evidence. Counsel shall make reasonable efforts to produce witnesses and evidence necessary to present the defense case persuasively.

37. Directed Verdict. Counsel shall move, outside the jury's presence, for a directed verdict at the close of the prosecution's proofs if appropriate reasons for such motion exist. The motion should be repeated at the close of the defense case. If the verdict is unfavorable to the client, counsel should repeat the motion after verdict as a motion for judgment of acquittal.

COMMENT: Since moving for a directed verdict is a simple thing for counsel to do which may have overwhelming benefit to the client, the standard requires that a motion be made whenever reasonable arguments in support are available. Such motions must be made outside the jury's presence because of the adverse inferences that may be drawn if a jury hears the court denying a directed verdict. While an appellate court may always review the record for insufficiency of evidence, the argument that the verdict was against the great weight of the evidence may not be raised without giving the trial court the opportunity to review the evidence. People v Patterson, 428 Michigan 502 (1987).

38. Closing Argument. Counsel shall present a closing argument which explains why the client should not be found guilty as charged.

39. Jury Instructions. Counsel shall request jury instructions which present the applicable law in a manner most favorable to the defense. Counsel shall object to instructions which are legally erroneous or which, on the facts of the case, are unfairly damaging to the defense and shall place on the record or in the court file requests for instructions which were denied by the court.

IV. SENTENCE OR DISPOSITION

40. Preparing Client for Presentence or Dispositional Investigation. Counsel shall aid the client in preparing for a presentence or dispositional interview and shall advise the client of the potential consequences of making any previously undisclosed admissions of guilt.

41. Providing Information to Probation Officer. Where appropriate, counsel shall provide to the probation officer favorable information about the client and information about the availability of suitable alternatives to incarceration or detention.

42. Review of Sentencing or Dispositional Information. Counsel shall review with the client the accuracy of any information to be presented to the sentencing judge, including any dispositional reports, the presentence report and the sentencing information report.

43. Correcting Sentencing or Dispositional Information. Counsel shall seek at or before sentencing or disposition to have incorrect, unfavorable information in any report corrected or stricken, to have information added to any report, and where applicable, to have harmful miscalculations of the sentencing guidelines score recomputed.

COMMENT: Sometimes counsel may be able to correct errors in the presentence or dispositional report through informal contact with the probation officer; this may prevent misinformation from being presented to the sentencing judge. If errors must be brought to the court's attention, counsel should recognize the importance to the client of having the report itself corrected, even if the judge elects to disregard the misinformation in sentencing or disposition. Upon imprisonment or detention, the presentence report is forwarded to the Department of Corrections or Department of Social Services and will be used in determining the client's security classification, treatment program, and parole or release eligibility. Where multiple changes are needed, counsel should request preparation of a new report. Counsel shall make a reasoable effort to obtain a copy of the presentence report before the day of sentencing or disposition.

44. Presenting Information at Sentencing or Disposition. Counsel shall present to the sentencing court information favorable to the client and suitable dispositional alternatives to incarceration or detention, where appropriate.

45. Preparing Client for Sentencing or Disposition. Counsel shall aid the client in preparing for allocution at sentencing or disposition.

MICHIGAN SUPREME COURT
1200 COMERICA BUILDING
DETROIT, MICHIGAN 48226

September 28, 1990

Mr. James K. Robinson, President
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933-2012

Dear Mr. Robinson,

Reference is made to the proposal submitted to the Court by the State Bar of Michigan requesting that the Court adopt a court rule that would authorize the formation of a committee to consider and promulgate minimum standards for trial attorneys in criminal cases.

This request was considered at the Court's administrative conference on September 27, 1990. The Court views with favor the undertaking of the State Bar in this regard. The Court believes that this is an activity well within your authority to address without the imprimatur of a court rule. To that end we would encourage you to promulgate such standards (and others in areas of the law which in the judgment of the State Bar could profit from the adoption of standards of practice). In keeping with the spirit in which such standards would be offered, we are of the view that they should be adopted by the State Bar only after publication for comment and that such standards would be advisory only. We would expect that subsequent modification of these standards would be accomplished by the same procedure which resulted in their adoption.

The Court continues to take pride in the efforts of the organized bar to improve the standards of practice in our courts and thereby improve the quality of advocacy and the quality of representation for the people whom we all seek to serve.

Sincerely,

Dorothy Comstock Riley

Dorothy Comstock Riley
Chief Justice

State Bar of Michigan

Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

Telephone (517) 372-9030

JUDICIAL CONFERENCE

March 10, 1997

D. Larkin Chenault
Executive Director
State Bar of Michigan
306 Townsend St.
Lansing, MI 48933-2083

Re: Proposed Assigned Counsel Standards

Dear Larkin:

At its meeting of March 7th, the Judicial Conference voted to approve the proposed Assigned Counsel Standards in accordance with the Memo submitted by Judge Kenneth Post. I have attached a copy of Judge Post's memo for your review. If you have any questions, please give me a call.

Yours very truly,

James C. Kingsley
Chairperson
Judicial Conference

JCK:sp

cc: J. Thomas Lenga

County of Ottawa

Memo

To	Hon. James C. Kingsley, Chairperson
	Judicial Conference
From	Non. Kenneth D. Post
	58th District Court
Date/Time	2/17/97
Subject	Proposed Assigned Counsel Standards

I have reviewed the Proposed Standards for Assigned Counsel (SAC), the Recommendation to adopt the same from the State Bar Standing Committee on Assigned Counsel Standards, and the September 28, 1990 letter of then Chief Justice Riley. My recommendations concerning SAC are as follows.

Provision #15 entitled Defense Investigation states that "Counsel shall conduct a timely investigation of the prosecution case and potentially viable defense theories".

In the comments following this section state the "...extent of the investigation may vary depending on the facts and circumstances of the case, the duty to investigate exists regardless of the clients admission of facts indicating guilt or the clients' expressed desire to plead guilty" empties supplied.

This is an undue burden for defense counsel. It could lead to lengthy delays in the resolution of cases which are largely with out merit. Defense counsel would be challenging their own clients intentions concerning the resolution of the case many times and without good cause to do so, i.e. mental illness or incompetency. Defense counsel are capable of sorting the evidence to determine the level of investigation that is necessary.

I suggest the language "... regardless of the clients admission of facts indicating guilt or the clients' expressed desire to plead guilty" be eliminated and replaced with "...the duty to investigate is important."

County of Ottawa

I see nothing else in the SAC that is objectionable.

It is noted that the State Bar has been working on this since 1976. It has been redrafted numerous times and appears headed for passage. The State Trial Court's Administration Committee recommended that this be adopted as "guidelines" rather than standards. I believe this has merit. This would be in keeping with Justice Rileys' suggestions in 1990 "that such standards ... be advisory only."

The Judicial Counsel should consider that taking a favorable position on the SAC may result in higher cost for court appointed counsel when contracts are negotiated.

I trust this will assist the Judicial Conference in formulating a response to the Representative Assembly.