

## **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 Michigan Appellate Defender Commission, September 20, 2023.

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### **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, appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.

### **MAACS Comment to Standard 1**

Meaningful client consultation and appellate advocacy depend upon a thorough review of the full record, including all transcripts and the entire court file. While the trial court is required to provide “the full transcript of all proceedings” under MCR 6.425(G)(1)(f) or MCR 3.993(E), appellate counsel must nevertheless review the register of actions and consult with the client or others to confirm that all proceedings have been transcribed or ordered, and that no proceedings have been omitted from the register of actions.

In addition to the full lower court record, appellate counsel should obtain and review the following information as quickly as possible after appointment:

- Trial counsel’s file, which must be made available to appellate counsel under MCR 6.005(H)(5) and MRPC 1.16(d).
- All discovery materials, whether from trial counsel or the prosecution.
- All sentencing materials, including the presentence investigation report, victim impact statements, restitution reports, and related materials.
- All probation violation reports, if applicable.

*Special considerations for youth appeals:* Appellate counsel should make certain that the juvenile court record includes both the legal file and the social file, including but not limited to any evaluations, reports, and risk/needs assessments.

## **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**

Informed and productive client consultation is essential to appellate advocacy. At a minimum, counsel must review the entire record before advising the client of the potential appellate issues, the strategies available and their relative advantages and disadvantages, and any risks to the client.

But quality appellate representation can seldom be accomplished with a single client consultation. MAACS also encourages counsel to conduct an initial client meeting as soon as practicable after appointment to describe the appellate process and counsel's role, allow the client to explain their concerns and provide information, and ensure that a complete record is gathered for review. Additional meetings throughout the representation should be conducted as needed.

Technological advancements and policy changes have simplified the process for scheduling and conducting secure video client meetings, while in-person visits remain necessary in some circumstances, and may also be helpful in establishing trust and rapport with clients. Whatever the means of communication, counsel should ensure the protection of client confidentiality. This includes ensuring the privacy of in-person or video meeting rooms, identifying legal mail as confidential and protected by the attorney-client privilege, and avoiding the discussion of sensitive information with incarcerated clients by email, which is subject to monitoring.

Counsel should not rely on attorney agents beyond ministerial tasks such as obtaining signatures. Appellate counsel is entitled to reasonable compensation for as many client visits as the representation demands. See *In re Mullkoff*, 176 Mich App 82; 438 NW2d 878 (1989).

*Special considerations for youth appeals:* Appellate counsel should generally consult privately with clients, outside the presence of parents, guardians, or legal custodians. When appropriate, appellate counsel should also consult with parents, guardians, or legal custodians in a manner consistent with the client's wishes. Counsel should be informed and mindful of the differences between adolescents and adults, and communicate in a manner that maximizes clients' understanding of the proceedings.

### **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**

Issue selection and appellate strategy inherently depend on counsel's professional judgment. While counsel is entitled to considerable deference to make reasonable strategic decisions, those decisions should be fully informed by the facts of the case and controlling law. In the absence of undue risk or other unique circumstances, counsel should generally raise issues for which the facts and law give rise to a reasonable likelihood of meaningful relief to the client. This does not require that every conceivable issue be raised in every case, but "encourage[s] lawyers representing indigent clients on appeal to err on the side of presenting all colorable claims for relief." *People v Reed*, 449 Mich 375, 387; 535 NW2d 496 (1994).

Since Michigan's unified appellate process requires both on-record and extra-record issues to be raised on 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 relief as promptly as practicable. If investigation reveals 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 to preserve the issue for appellate review. See MCR 6.425(G)(2); MCR 7.208(B); MCR 7.211(C)(1). If investigative or expert services are necessary, appellate counsel should request funding from the appropriate local authority.

Counsel should be mindful 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.

*Special considerations for youth appeals:* In addition to traditional appellate review, appellate counsel should be alert to potential new issues related to a client's detention or residential placement. Those issues should generally be referred to trial counsel where possible, but may also be litigated in the trial court by appellate counsel if necessary. In all pleadings and public documents, appellate counsel should take appropriate steps to ensure the confidentiality of a client's identity by use of initials, redaction, etc.

## **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**

The ability to file a *pro per* supplemental brief promotes a client's ability to have input in the appellate process and provides reassurance of a thorough review of all issues of importance to the client. It can also help strengthen the attorney-client relationship.

A "Standard 4 brief" may be filed in situations in which an "appellant's brief is filed by the attorney" in the Court of Appeals which includes both cases appealable by right and cases in which leave has been granted. While *pro per* briefs are not directly permitted in support of an application for leave to appeal, counsel may move for leave to submit such a filing in appropriate circumstances, either contemporaneous with or immediately after the filing of an application for leave to appeal.

Counsel should inform the client that the Court will accept only one brief from the client, and issues in that brief should not overlap with issues raised in the brief filed by counsel. Counsel is not expected to conduct legal research for the client's brief, but clerical support may be necessary. Where the client requires additional time beyond the 84-day filing deadline, counsel should prepare and file a supporting motion.

Although the Michigan Court of Appeals has held that "a defendant who has supplemented appellate counsel's efforts with a Standard 4 brief does not per se waive their ability to later raise ineffective assistance of appellate counsel claims in a motion for relief from judgment," *People v Good*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (April 13, 2023) (on reconsideration) (Docket No. 349268); slip op at 5, some federal courts have ruled differently in habeas corpus cases. See, e.g., *Coffin v Napel*, 2017 WL 876378 (WD Mi 2017), pp 14-15 (collecting cases).

*Special considerations for youth appeals:* Standard 4 does not directly apply to youth appeals, but counsel may move for leave to file a *pro per* supplemental brief in appropriate circumstances.

## **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**

While the knowing abandonment of an appeal by counsel is extremely rare, abandonment by mistake occurs more frequently—such as where appellate counsel misses a jurisdictional filing deadline, thus depriving the client of the opportunity to appeal. In these circumstances, appellate counsel should promptly notify MAACS, as appellate rights can typically be restored without further harm or risk to the client.

A client may decide, based on the advice of counsel, to voluntarily dismiss the appeal because the risks of proceeding are too great, or because the appeal would be wholly frivolous. In these circumstances, 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. If possible, counsel should obtain the client's written consent to the dismissal with a separate, confidential document in counsel's file reflecting counsel's advice and the client's decision. If it is not possible to obtain the client's written consent to dismissal, counsel should confirm the client's wishes in a contemporaneous confidential letter. 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, who may view the case differently and/or 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 result of which would be affirmance of the judgment. MAACS strongly disfavors withdrawals under *Anders*, particularly in appeals after trial, due to the risk of mistakes or missed issues and because of the inherent inconsistency between *Anders* withdrawals and client-centered representation. Where counsel is considering a withdrawal under these circumstances, they should first consult with MAACS and brainstorm 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, respond to the panel's questions, and 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 oral argument by filing a timely brief including a request for oral argument on the cover page. If counsel loses the right to oral argument, counsel should file a motion to participate in oral argument or an amended brief cover sheet, as appropriate.

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 the court may have questions. Given that it is nearly impossible to know what the panel is thinking, counsel should generally participate in oral argument.

Technological advancements and policy changes have simplified the process for requesting and participating in remote oral argument by video. While in-person argument may be helpful in connecting with and persuading the panel, counsel should feel free to request remote argument where appropriate or necessary due to the time or cost of conducting in-person argument.

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**

Appellate counsel should remain mindful of their responsibility to keep clients reasonably informed of any developments in their cases, particularly since most MAACS clients are incarcerated and have limited access to resources and information. See also MRPC 1.4(a).

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.

*Special considerations for youth appeals:* Counsel should be informed and mindful of the differences between adolescents and adults, and communicate in a manner that maximizes clients' understanding of the proceedings. If a client remains represented by trial counsel, appellate counsel should keep trial counsel reasonably apprised of developments in the appeal and provide them with copies of pleadings, orders, and related information.

## **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. Counsel should also be mindful of their ethical obligations regarding the secure storage of client files, as well as the requirement under Rule 21 of the Rules Concerning the State Bar of Michigan for private practitioners to designate an interim administrator to protect clients in the event of an unexpected inability to practice law.

*Special considerations for youth appeals:* Counsel should be informed and mindful of the differences between adolescents and adults, and communicate in a manner that maximizes clients' understanding of the proceedings. If a client remains represented by trial counsel, appellate counsel should advise trial counsel of the outcome of the appeal and provide them with copies of pleadings, orders, and related information.



## **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 as appointed counsel have been completed. Before accepting fees in these narrow circumstances, however, counsel should first determine whether the appointing authority will compensate counsel for that same work.

*Special considerations for youth appeals:* Appellate counsel is prohibited from accepting any fees from the parents, guardians, or legal custodians of a minor client for services authorized under the appointment.