April 30, 2016

Office of Administrative Counsel
P.O. Box 30052,
Lansing, MI 48909

By email to ADMcomment@courts.mi.gov
Re: ADM File No. 2015-27

Dear Administrative Counsel and Justices of the Michigan Supreme Court:

I write in support of the Michigan Indigent Defense Commission's proposed Minimum Standards for Appointed Counsel.

As part of a U.S. Department of Justice-funded grant project, I have been consulting with the Commission staff and I have reviewed the proposed standards. I was a site team member on the 2008 NLADA evaluation of trial-level public defense in Michigan, I was a panelist at the Summit on Indigent Defense Services in Dearborn in 2007, and I made a presentation to the Commission in 2015.

I have worked on public defense standards nationally and in Washington State for more than 30 years. I have 42 years of experience as a criminal defense attorney, including 28 years as Executive Director of The Defender Association in Seattle, and nine years as a law professor. I helped to draft the Washington State Bar Association-endorsed Standards for Indigent Defense that have been adopted by the Washington Supreme Court in Rule CrR 3.1 Stds [available at https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CrR]. I am a member of the American Bar Association Indigent Defense Advisory Group and I chair a subcommittee for the National Association for Public Defense. I chair a subcommittee on standards for the Washington State Bar Association Council on Public Defense. I have been an expert witness in two systemic challenges to ineffective assistance of counsel and I have written and spoken widely about public defense issues.

Standard 4
Counsel at First Appearance and other Critical Stages

I will begin by discussing Standard 4 as it is perhaps the most important of the four proposed standards. I strongly endorse the proposed standard on providing counsel at first appearance and other critical stages, including plea negotiations. Early and effective representation, including advocacy for release from custody, can be crucial to the outcome of the case. Research has demonstrated that clients who are out of custody are more able to assist in their defense and more likely to obtain a more favorable sentence. When defenders are able to begin investigation quickly, they are more likely to be able to obtain helpful evidence and to prepare for trial or for plea negotiations more effectively. Having vigorous counsel from the beginning of the case also

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helps set a tone of attention to fairness and respect for the rights of the accused person.

This standard is totally consistent with case law and with the ABA Ten Principles of a Public Defense Delivery System. Principle 3 states: "Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel."

Providing counsel at first appearance hearings is critical to effective representation. For many defendants, particularly in misdemeanors when defendants are in custody, there is pressure to resolve the case at the first appearance. It is essential that accused persons have counsel to challenge probable cause if appropriate, to advocate for their release if they are in custody, to address any immediate health needs, to advise them of the possibilities of trial and the consequences of a guilty finding, and to assist them in evaluating guilty plea offers, negotiating a plea and in advocating at sentencing should they decide to plead guilty.

Other state appellate courts have recognized the importance of counsel at first appearance. The New York Court of Appeals has declared that "There is no question that a bail hearing is a critical stage of the State's criminal process." Hurrell-Harring v. New York et. al, 15 N.Y.3d 8, (2010).

In settling a lawsuit against it and five counties, the State of New York agreed to ensure that eligible defendants are represented by counsel at arraignments. [1]

The New Hampshire Supreme Court held that a defendant has a right to counsel at a hearing to determine whether to deny bail to a person charged with a crime punishable by life in prison. State v. Furgal, 161 N.H. 206, 218, 13 A.3d 272, 281 (2010).

The Court of Appeals of Maryland held that there is a statutory "right under the Public Defender Act to be represented at any bail hearing conducted before a Commissioner." DeWolfe v. Richmond, 434 Md. 403, 421, 76 A.3d 962, 972 (2012) on reconsideration, 434 Md. 444, 76 A.3d 1019 (2013). The Court later held that there is a state constitutional right to counsel: "… under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner." DeWolfe v. Richmond, 434 Md. 444, 464, 76 A.3d 1019, 1031 (2013).

The Connecticut Supreme Court, in addressing an ineffective assistance claim regarding bail advocacy at an arraignment hearing, wrote:

[1] Stipulation and Order of Settlement, Hurrell-Harring v. New York, Supreme Court of the State of New York, County of Albany, Index No. 8866-07,October 21, 2014, available at https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf.

> Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail. The fact that counsel's ineffective performance, as found by the habeas court, led to the denial of liberty for some seventy-three days, only exacerbates the classification that this was a critical stage of the proceedings.

Gonzalez v. Comm'r of Correction, 308 Conn. 463, 482-83, 68 A.3d 624, 637 (2013).

The Washington Supreme Court by court rule requires counsel to be provided at first appearances:

> RULE CrR 3.1
>
> (b) Stage of Proceedings.
>
> (1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.
>
> (2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review.

In 2009, the Washington District and Municipal Court Judges Association wrote to the state Supreme Court about the need for counsel at first appearance:

> The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction.[2]

That assessment underscores the need for the standard proposed by the MIDC.

While pleading guilty at the first appearance should be a rare occurrence, an accused person has the right to counsel to help make that decision. The United States Supreme Court has emphasized the need for effective counsel in plea bargaining in several cases, including Padilla v. Kentucky*: "*...the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, 373, 130 S.Ct. 1473, 1486 (2010).

The Court repeated in Missouri v. Frye that criminal defendants require effective counsel during plea negotiations. Missouri v. Frye, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (2012). And in Lafler v. Cooper, 132 S.Ct. 1376, 1386 (2012), the Court held: "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in deciding whether to accept it."

[2] Letter to Justice Charles W. Johnson from District and Municipal Court Judges Association President Judge Marilyn Paja, April 6, 2009.

The ABA Criminal Justice magazine has just published an article in which the author concludes:

> The initial bail hearing is a critical stage of trial because a lawyer can show the magistrate why the defendant is likely to appear at future proceedings, why the defendant is unlikely to be a danger, and why conditions of release are suitable and do not punish the defendant for lack of money. This is not something unrepresented defendants can do. As in all other pretrial proceedings that the Supreme Court has applied the Sixth Amendment right to counsel, lawyers are necessary at bail hearings.

Alexander Bunin, "The Constitutional Right to Counsel at Bail Hearings", Criminal Justice, Spring 2016 23,47.

I urge the Court to adopt the MIDC proposed standard so that the holdings of these cases can be fully implemented in Michigan.

Standard 1
Education and Training of Defense Counsel

I support the proposed standard requiring counsel to be knowledgeable about the law, familiar with forensic issues, knowledgeable about how to use technology relevant to the practice, and to attend annual continuing training. Representation of accused persons is a complicated and sophisticated practice and it is essential to stay current on changes in the law and scientific developments that affect the practice. This proposed standard is consistent with ethical rules such as Michigan RPC 1.1, Competence, the Comment to which states: "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances." Principle 9 of the ABA Ten Principles supports this standard: "Defense counsel is provided with and required to attend continuing legal education."

Standard 2
Initial Interview

I support the proposed standard requiring prompt, thorough, and confidential client interviews. It is essential that counsel establish good communication with the client, both to build trust with the client and to obtain and impart information necessary for the lawyer to provide effective representation and for the client to make informed decisions. Principle 4 of the ABA Ten Principles supports this standard: "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

Standard 3
Investigation and Experts

I support the proposed standard requiring prompt investigation, appropriate use of expert witnesses, and necessary funding for investigators and experts. The Washington Supreme Court,

in reversing a juvenile's guilty plea, discussed the ethical obligation to be thoroughly prepared and held:

> The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.
>
> State v. A.N.J., 168 Wn.2d 91, 112-112 (2010).

Independent and careful investigation often can demonstrate that a client is innocent or that the appropriate charge is a lesser one than the prosecution has filed. Expert witnesses can help to establish defenses and can guide the defense attorney in evaluating the state's witnesses, developing a theory of the case and in preparing for sentencing should there be one.

The U.S. Supreme Court recognized the need for investigation when it reversed the convictions in Powell v. State of Ala., finding among other things that when "no attempt was made to investigate" the defendants lacked "the aid of counsel in any real sense". The Court concluded

> … that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Powell v. State of Ala., 287 U.S. 45, 57, 53 S. Ct. 55, 59-60, 77 L. Ed. 158 (1932)

Conclusion

I urge the Commission to adopt the first set of standards proposed by the MIDC. Their proposals are thoughtful and a strong first step to establishing Michigan-specific expectations for public defense.

Thank you for your consideration.

Sincerely,

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Professor from Practice

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