From: Mardi Crawford <emcpeace@verizon.net>
Sent: Sunday, May 01, 2016 9:47 PM
To: ADMcomment
Subject: Corrected Comments on Proposed Minimum Standards for Appointed Counsel ADM File No. 2015-27

The ADM File Number was inadvertently left off when the comments below were emailed on Friday; I have inserted the number. As I needed to resend for that reason, I also corrected two or three typos in my original comments. Please accept the corrected email.
-Mardi Crawford

Begin forwarded message:

From: Mardi Crawford <mcrawfor@nysda.org>
Subject: FW: ADM File No. 2015-27
Date: April 29, 2016 at 6:07:52 PM EDT
To: Mardi Crawford <emcpeace@verizon.net>

From: Mardi Crawford
Sent: Friday, April 29, 2016 6:07 PM
To: 'ADMcomment@courts.mi.gov'
Subject: Comments on Proposed Minimum Standards for Appointed Counsel ADM File No. 2015-27

Re: Comments on Proposed Minimum Standards for Appointed Counsel ADM File No. 2015-27

Standards are vital to creating and maintaining effective and efficient services of many types. The minimum standards for appointed counsel submitted by the MIDC constitute a positive step toward ensuring that public defense clients in Michigan receive quality legal representation. This step is welcome and long-awaited.

The *Performance Guidelines for Criminal Defense Representation* of the National Legal Aid and Defender Association (NLADA), published in 1994, referred in commentary to *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel* published at 72 Michigan Bar Journal (#8 August 1993). As a former staff attorney at Michigan's State Appellate Defender Office, and as the drafter of the NLADA commentary just mentioned, I maintain a deep interest in the current Michigan effort to implement standards.

The New York State Office of Indigent Legal Services (ILS) has promulgated a series of standards to improve public defense services. Having been fortunate enough to assist in drafting some of those standards, as well as other, earlier standards at NLADA and standards for my current office, the New York State Defenders Association (NYSDA), I have experience with the creation of public defense standards. I offer the following informal and non-exhaustive comments with the hope of aiding Michigan in its efforts.

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Comments on Proposed Minimum Standards for Appointed Counsel ADM File No. 2015-27

Standard I.C. Knowledge of technology.

Comment: Knowing how to use office and court system technology should include knowing and avoiding pitfalls with regard to confidentiality of client information and other ethical issues posed by technology. For example, the American Bar Association has issued an ethical opinion on the "Duty to Protect the Confidentiality of E-mail Communications with One's Client" (ABA, Formal Opinion 11-459 August 4, 2011). Other issues can include the need to redact certain information in electronically-filed pleadings (e.g. Social Security numbers), ethical constraints on using technology to research/contact witnesses, etc.

[I understand that this and other of my comments may be made obsolete by additional standards in the future; cross-referencing in that instance would be helpful.]

Standard I.D. Continuing education.

Comment: National conferences should be included along with local and statewide trainings/conferences. Cutting-edge issues may be offered on a national level before they are covered in state and local events – attorneys who have, or are likely to have, cases involving hot issues (such as particular forensic "science" evidence that has recently been debunked) should not be precluded from meeting their continuing education requirement by attending a relevant, otherwise qualifying training out of state. Cost of out-of-state events may be a factor in the limitation in the standard as drafted; but requiring attorneys to access lower-cost, similar training when available is one thing, barring (by omission) assigned counsel systems from funding any attendance at national events goes too far.

Standard 2.A. Timing of the [Initial] Interview.

Comment: First, three business days is an inadequate limit. Much damage to a lawyer's ability to provide a defense, and much personal damage to clients, can occur if that length of time passes before counsel can speak with a client. Systemic efforts to reduce delays in assignment should not be declared successful when longer delays are reduced to three days; counsel is needed as soon as a government entity moves against a potential client. Having no specific limit would be preferable to stating an overly-long time. For example, New York's ILS *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* [extended to apply to all trial level public defense cases] say that systems must: "Provide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined or verified."

Second, in commentary and practice, if not in the blackletter, it should be made clear that "as soon as practicable" is not code for allowing current systemic barriers to excuse recurring delays in initial interviews. As the

commentary to NLADA *Performance Guideline* 2.2 noted, delay in talking to a client "can hinder overall case preparation, as memories fade, witnesses [identified by the client to counsel] become unavailable ... etc." [Footnote omitted.] If delay is beyond assigned counsel's control, counsel should consider ways to mitigate damage, from seeking adjournments to locate witnesses to creating a record for appeal of defense opportunities lost (perhaps in camera or under seal to protect work product confidentiality).

The staff comment that "MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody" client fails to add that counsel providing public defense services should, however, seek to understand and ameliorate barriers to communication that arise from clients' poverty and circumstances, whether those barriers are lack of transportation to scheduled meetings, lack of access to phone service that provide confidentiality, or a lack of trust in "government funded" services based on prior experiences. Trust is built by an attorney who, In the words of the *Client-Centered Representation Standards,* "is culturally sensitive, appreciates the dimensions of the client's life, and becomes familiar with the communities from which his or her clients come."

MIDC is absolutely correct that more than an initial client interview will be needed and that compliance plans "need to guarantee funding for multiple visits" with clients. Determining facts, learning the client's goals, and constructing a theory of defense and creating strategies to support it require client input and can rarely if ever be accomplished in one meeting. [Many other MIDC comments are similarly correct and not always mentioned here.]

Standard 2.C. Preparation.
Comment: Obtaining relevant documents is not enough; counsel must read them. And while that may seem too obvious to state in a standard, the experience of clients indicates that the obvious must be stated. The New York State Defenders Association (NYSDA) has adopted *Client-Centered Representation Standards* produced by its Client Advisory Board that reflect clients' experiences. These standards include that clients want a lawyer who "10. Thoroughly and carefully reads all documents, discusses them with his or her client, and provides the client with copies."

Standard 3.B. Investigation and Experts [Funds]
Comment: The limiting phrase, "When appropriate," applied to use of an investigator, should itself be quite limited. Deciding that no investigation is needed based primarily on a client interview – "the client's version of the facts," as the staff comment says – and whatever the prosecution has provided in the way of discovery is unlikely to be all there is to know about a case. Investigation – and obtaining the resources to conduct it – is appropriate in all but a few cases. The NLADA *Performance Guidelines* recognized over 20 years ago in Guideline 4.1 that "[c]ounsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt." But this guideline has too long been ignored in a plea-bargain driven culture that has contributed to mass incarceration, wrongful convictions, and other criminal justice issues of growing public concern. As the National Association of Criminal Defense Lawyers noted in its report, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts,* defenders who "have no time to fully investigate the client's case" (p 8) contribute to the fact that an "extraordinary number of misdemeanor defendants plead guilty at their first appearance in court, whether or not they committed the crime."

Standard 4.A. Counsel at First Appearance and other Critical Stages.
Comment: In New York, new *Criteria and Procedures for Determining Assigned Counsel Eligibility* issued by the New York ILS office require that "Counsel shall be assigned at the first court appearance or immediately following the request for counsel, whichever is earlier," call for eligibility determinations to "be done in a timely fashion so that assignment of counsel is not delayed," and further call for counsel to "be provisionally appointed for applicants whenever they are not able to obtain counsel prior to a proceeding which may result in their detention, or whenever there is an unavoidable delay in the eligibility determination." (XII, XII.A, and XII.B.).

The background to the new standards is this: New York State was sued in 2007 for its failure to provide constitutionally adequate public defense services and settled that suit in 2015. Along the way, the highest court in New York recognized, in denying summary judgment to the defendant, that under U.S. Supreme Court precedent (*Rothgery v Gillespie County*, 554 US 191 (2008) and New York law, initial arraignments at which issues of pretrial liberty are decided is a critical stage requiring counsel. *See Hurrell-Harring et al v State of New York,* 15 NY3d 8 (May 6, 2010). A portion of the settlement focuses – limited to five counties that, originally named as examples of the State's overall failure, were brought in as defendants by the court – on ensuring counsel at arraignment. The ILS Office, which is charged with implementing the settlement, has also, more broadly, begun providing grants to counties for the purpose of ensuring counsel at first appearance in court. ILS issued the new criteria and procedures under both its power to implement the settlement and its broader statutory authority.

If the MIDC statute is read as prohibiting, in Michigan, provisional appointment of counsel pending final eligibility determinations, which interferes with potential clients' rights to counsel at first appearance under the *Rothgery* case cited by MIDC, the statute should be changed. Having counsel at arraignment argue de novo any bond set prior to that time, per the MIDC staff comment, is preferable to no mitigating action, but having counsel available for all bail determinations is preferable.

Additionally, public defense systems should be able to fulfill constitutional guarantees of counsel such as those in effect when individuals are interrogated while in custody, which provision of counsel no earlier than at arraignment cannot do.

It is good that a future standard will address vertical representation.

[In case links above do not work, URLs are listed below in the order they appear as links in the text above. Note: links to NLADA standards, normally available at www.nlada.org , were not available at the time of this writing due to website redesign; hopefully that will be remedied soon.]

- https://www.ils.ny.gov/
- http://www.americanbar.org/content/dam/aba/publications/YourABA/11_459.authcheckdam.pdf
- https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf
- http://c.ymcdn.com/sites/www.nysda.org/resource/resmgr/PDFs--Resolutions/05_ClientCenteredStandards.pdf
- https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf
- https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf
- https://www.ils.ny.gov/content/counsel-first-appearance