

Ensuring Independence and Quality in a Managed Assigned Counsel System

Lessons Learned in Four Decades of the Michigan Appellate Assigned Counsel System



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Since its passage in 2013, the Michigan Indigent Defense Commission Act¹ is rapidly transforming the way in which trial-level indigent criminal defense counsel are trained, regulated, supported, and compensated. In response to the act's independence requirement² and a proposed related standard,³ many Michigan trial courts are transitioning away from traditional assigned counsel systems in which the court itself manages and selects counsel from a list of private attorneys. Instead, the courts are gravitating toward managed assigned counsel systems in which an independent outside entity regulates the assignment list and selects counsel.⁴ Along with the growth of public defender offices, this development has the potential to vastly improve the quality of indigent defense representation in Michigan.

This transformation will bring challenges. Trial courts must adjust to a loss of responsibility and control over panels and assignments, while counsel face heightened requirements for training, oversight, vouchering, and reporting. And although the act relies on state funding to alleviate local financial burdens,⁵ budget uncertainty remains given the scope and complexity of reform.

The Michigan Appellate Assigned Counsel System (MAACS) has been confronting many of the same challenges in the appellate context since its inception in 1978,⁶ and with renewed energy and success since its merger with the State Appellate Defender Office (SADO) in 2014.⁷ Because SADO provides resources, training, and expertise that would otherwise fall outside the capacity of a pure administrative office, this partnership has enhanced MAACS's ability to engage more efficiently and effectively in its core function of ensuring the independent appointment of quality private appellate counsel.

The MAACS experience is timely and relevant for trial-level assigned counsel reform. This article shares four lessons we have learned as MAACS administrators on how an independently managed assigned counsel system can most effectively serve the needs of indigent defendants and the courts.

Lesson 1: Be independent but flexible

The distinguishing feature of a managed assigned counsel system is its independence from the courts. But independence need not mean intransigence, and MAACS has learned that rotational assignment systems can best serve the interests of justice and efficiency when they maintain a level of receptiveness to the courts' concerns and flexibility in assignment decisions.

Historically, the appointment of felony appellate counsel in Michigan was similar to the appointment of trial counsel, with courts appointing whomever they wanted, however they wanted.⁸ Some courts appointed counsel ad hoc or through assignment lists, but access to these assignments sometimes depended on personal relationships or patronage rather than merit.⁹ Other courts contracted with a lawyer or firm to handle all appeals for a flat fee, which was cheap and predictable for the courts but discouraged attorney effort and time.¹⁰ A common thread was the lack of independence and lawyers' natural reluctance to be critical of the judges who appointed them or spend too much time on appointed cases.

In 1978, the legislature addressed these concerns with the Appellate Defender Act, which established an Appellate Defender Commission and required courts to appoint appellate counsel either from a "roster provided by the commission" or from SADO, a state-funded office that would handle at least 25 percent of cases.¹¹ MAACS was established to assemble and manage a statewide roster, compile local assignment lists for each trial court, enforce minimum performance standards, and take steps to ensure quality private appellate assigned counsel representation.¹² MAACS was to be "coordinated with but separate from" SADO, with both agencies reporting to the commission.¹³

Although most courts immediately began appointing appellate counsel through MAACS, a few refused until the Supreme Court mandated compliance in 1989.¹⁴ Since then, MAACS has

successfully insulated appellate counsel from excessive judicial influence, and courts have largely abstained from efforts to control assignment decisions or roster management.

This independence has evolved over time, providing important lessons about flexibility and control. The commission and Supreme Court originally envisioned a system of rigid list rotation with limited exceptions for cause (such as conflicts) and with SADO receiving exactly every fourth assignment.¹⁵ By 1989, however, these requirements were relaxed to give the commission greater flexibility to assign SADO a more appropriate percentage and type of cases and allow the appointment of SADO or any other attorney out of sequence for geographic considerations or case complexity.¹⁶

In 2017, the commission extended that flexibility further. "In the interests of justice or judicial economy," MAACS may now bypass rotating assignment lists and "select SADO or any roster attorney" as appellate counsel in "exceptional circumstances" such as "a prior attorney-client relationship, the avoidance of potential breakdowns or conflicts..., geographic factors, the unique complexity of an appeal, [or] the subject

At a Glance

As Michigan's trial courts and funding units look for new ways to deliver effective and efficient indigent defense services through Managed Assigned Counsel Systems, they may wish to look to the Michigan Appellate Assigned Counsel System (MAACS) for guidance. From its inception in 1978 through its recent reform and merger with the State Appellate Defender Office, MAACS has learned the value of flexible independence, trial court partnerships, public defender partnerships, and proactive oversight—all to the benefit of courts, assigned counsel, and indigent criminal defendants.



matter expertise of counsel.”¹⁷ Since trial judges may have first-hand knowledge of these issues, it makes sense to account for such concerns in the counsel selection process. As such, the MAACS regulations recognize that the interests of justice, economy, and common sense are not always served by blind adherence to rotating assignment lists and that courts may play a role in informing assignment decisions. Ultimately, however, those decisions must fall to MAACS and not the appointing courts.

Lesson 2: Partner with multiple trial courts

MAACS’s most significant structural reform began in 2015 with an innovative Regional Pilot Project that partnered MAACS with 14 trial courts in the Upper Peninsula and eastern Lower Peninsula to create two consolidated regional assignment lists operating under uniform fee and voucher policies. MAACS secured the courts’ voluntary participation—despite significant budgetary implications—by offering its own expertise and the economy of scale to absorb many of the frustrating administrative tasks otherwise required of trial court staff.

These interdependent reforms allowed MAACS to assume more responsibility in the assignment process, improving speed and efficiency while giving MAACS greater control over caseloads and the collection of meaningful productivity and fee data. Perhaps most importantly, the new scheme evened the playing field on fees, harmonized vouchering practices, and provided courts and attorneys alike with greater predictability and fairness while aiding recruitment and retention efforts.

The pilot’s popularity led to its expansion into most trial courts statewide and the establishment of five distinct regions. In 2017, the Supreme Court approved the permanent regional consolidation of assignment lists,¹⁸ and MAACS continues its efforts to secure voluntary statewide participation.

This experience has shown that a managed assigned counsel system operates most effectively when it serves multiple jurisdictions with shared interests and geography. An agency with ample expertise and resources, and with data and participation from many attorneys and stakeholders across jurisdictional lines, can support and supervise attorneys on a scale that would be impossible for a part-time consultant. In short, trial court partnerships foster innovation, efficiency, and quality to the benefit of all stakeholders.

Lesson 3: Partner with a public defender

Since its merger with SADO in 2014, MAACS has found that partnering with a public defender office has improved its capacity to provide necessary resources, training, and expertise to the private bar, resulting in better representation.

Most roster attorneys are solo practitioners or work in small offices, lacking access to many of the resources available to prosecutors or SADO attorneys. SADO’s training division, the Criminal Defense Resource Center, works to close that gap. For example, the center offers roster attorneys many online resources and tools that are available to SADO attorneys, and roster attorneys can also take advantage of video conferencing equipment at SADO’s Detroit and Lansing offices for confidential visits with incarcerated clients.¹⁹

The SADO partnership has also led to formation of the grant-funded Appellate Investigation Project under which experienced SADO staff attorneys team up with investigators to assist roster attorneys in developing and presenting extra-record claims in the same way that SADO is accustomed to doing.²⁰ By identifying and developing a record for meritorious claims and eliminating those lacking factual support, this model helps ensure justice for indigent defendants and confidence in case outcomes while saving the courts valuable time and resources. The project has achieved significant results

for MAACS clients, including new trials, remands for evidentiary hearings, and sentencing relief.²¹ It also provides a broad range of litigation support, including briefing assistance, second-chair support at hearings, moot oral arguments, and strategic consultation.

Although Michigan does not have mandatory CLE, MAACS has long required CLE for roster attorneys.²² Historically, its ability to provide live training seminars was limited and largely dependent on grant funding. MAACS administrative staff traditionally conducted trainings themselves or brought in external speakers for specific programs. But recent paradigm shifts in adult education demand more, as there is a significant difference between recognizing the need for CLE and producing quality programs for today's adult learner.²³

Since its merger with SADO, MAACS has increased the annual CLE requirement from 7 hours to 12 hours and improved the scope and content of available training.²⁴ By collaborating with the Criminal Defense Resource Center and relying on SADO's large staff of attorney-trainers, MAACS has been able to provide better and more diverse training, including an annual orientation for new attorneys, an annual training for all attorneys, an annual multi-day Appellate Writing Workshop, and monthly virtual-case rounds. The result is a vibrant collection of training programs that transforms mandatory CLE from a chore to an exciting learning experience, all to the benefit of roster attorneys, indigent clients, and the judicial system.²⁵

Finally, the SADO merger has provided MAACS with invaluable expertise. A managed assigned counsel system should be directed by attorneys "with substantial experience in the practice of criminal law and the ability to provide supervision and leadership for participating attorneys."²⁶ But just as practicing attorneys must stay abreast of the law, attorney supervisors must do so as well—even those who came into the job with subject-matter expertise. Knowledge and skills are not static, and even specialists require ongoing professional development. Just as roster attorneys benefit from the close affiliation with SADO, so too does the MAACS administration. This, in turn, aids in the effective supervision, training, and management of the roster.

Lesson 4: Engage in proactive oversight

Over time and through its partnership with SADO, MAACS has developed an approach to roster supervision that relies on a blend of formal periodic reviews and ongoing informal interaction and oversight. Formal reviews provide roster attorneys with notice of ongoing problems that require remediation, and informal supervision fosters communication and promotes the type of interaction more commonly seen in traditional public defender offices.

Before 2017, MAACS conducted formal performance reviews of roster attorneys every three years.²⁷ Those reviews



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required significant work²⁸ and did not allow much opportunity for additional oversight. Since its merger with SADO, MAACS has greater access to SADO support and resources, expanding opportunities for informal supervision and improving quality.

As before, MAACS provides roster attorneys with formal performance reviews every three years.²⁹ Reviews are based on as wide a range of work as possible, so that no single piece of work skews the overall evaluation. Reviews are based on both a qualitative evaluation of written work and an objective review of performance metrics such as late filings or other violations of the minimum performance standards.

MAACS also supervises its new roster attorneys on their first several assignments so they can start their work on solid footing. Oversight at this point is flexible, designed to match the attorneys' needs and abilities and caseload demands. Where possible, MAACS also connects its new attorneys with SADO attorneys, which helps expand the attorneys' networks and demonstrates the importance of working collaboratively. Working with attorneys early in their tenure helps MAACS correct misconceptions, prevent bad habits, and identify attorneys' strengths and weaknesses.

This focus on early supervision has other benefits as well. First, as with any managed assigned counsel attorney, MAACS roster attorneys are private practitioners. In contrast to a public defender office where supervisors regularly interact with attorneys, MAACS administrators do not often see attorneys in person. With the new focus on early supervision, relationships with new attorneys continue after the supervision period ends. This leads to ongoing communication, which helps catch potential problems before they spiral out of control. An attorney who only receives a written evaluation every few years may be reluctant to reach out to little-known supervisors with a problem, but an attorney who has a good rapport with supervisors will ask for help much earlier.

Second, because MAACS has developed strong relationships with its attorneys, it is better able to respond to and resolve outside inquires. In 2016, roster attorneys were assigned

to almost 2,400 criminal appeals;³⁰ as might be expected, the clients in some of these cases wrote MAACS with questions and concerns about their attorneys and cases. MAACS also occasionally hears from judges. Each inquiry is investigated and resolved, especially those that suggest a violation of the minimum standards of representation. Because MAACS has developed strong relationships with its roster attorneys, many of these inquiries are quickly resolved, leading to better representation and greater confidence in the judicial process.

Conclusion

The shift toward managed assigned counsel systems will present real challenges for courts, counsel, and funding units, but it will also present real opportunities for collaboration and innovation. As administrators who are familiar with the longstanding and deeply rooted problems with Michigan's indigent defense system, we are encouraged by the pace of reform and excited to see the fruits of this process. ■



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ENDNOTES

1. MCL 780.981 *et seq.*

2. MCL 780.991(1)(a).

3. Mich Indigent Defense Comm, *Proposed Standard 5, Independence from the Judiciary* <<http://michiganidc.gov/standards/#tab-id-5>> [<https://perma.cc/B9Z4-RGVH>]. All websites cited in this article were accessed November 20, 2018.

4. See generally Texas Indigent Defense Comm, *Primer on Managed Assigned Counsel Programs* (September 2017) <http://www.tidc.texas.gov/media/57814/tidc_primer2017.pdf> [<https://perma.cc/V744-QAWP>] and *Managed Assigned Counsels Programs in Operation* (February 2018) <http://www.tidc.texas.gov/media/57919/tidc_primersup2017.pdf> [<https://perma.cc/P4BD-HE6Y>].

5. MCL 780.993(6).

6. MCL 780.712(4) and Administrative Order No. 1981-7, § 1(1) (February 1, 1982) <<https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Administrative%20Orders.pdf>> [<https://perma.cc/2RCN-3TM7>], superseded by Administrative Order No. 2017-3 (November 15, 2017).

7. Administrative Order No. 2014-18 (amended January 21, 2015) <<https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Administrative%20Orders.pdf>> [<https://perma.cc/2RCN-3TM7>].

8. MAACS, *A Decade of Challenges* (1995), p 3 (on file with authors). See also Hall, *Indigent Appellate Defense Reform: Michigan Appellate Assigned Counsel System (MAACS) Concludes Two-Year Pilot Project to Standardize Fees and Improve Efficiency*, 41 SADO Crim Defense Newsletter 3 (December 2017), p 2 <http://www.sado.org/content/pub/10931_MAACS-Concludes-Two-Year-Pilot-Project.pdf> [<https://perma.cc/V2XC-BSXM>].

9. *Id.*

10. *Id.*

11. MCL 780.712(6).

12. AO 1981-7, §§ 1(1), 3(2)-(3), 4(6)(a).

13. *Id.* at § 1(1).

14. *A Decade of Challenges*, n 6, pp 11-12.

15. AO 1981-7, §§ 3(2)(c), (3)(3)(a).

16. Administrative Order No. 1989-3, §§ 3(6), (13), (14), (15) (March 15, 1989) <<https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Administrative%20Orders.pdf>> [<https://perma.cc/2RCN-3TM7>], superseded by AO 2017-3.

17. MAACS Regulations, § III(B)(2) (approved September 20, 2017), p 8 <http://www.sado.org/content/pub/10889_Regulations.pdf> [<https://perma.cc/GT7R-R7SK>].

18. AO 2017-3.

19. For additional information about these resources from SADO, see *Video Visit Information* <<http://www.sado.org/Page/84/MAACS-Resources-Video-Visit-Information>> and *What types of products are you looking for?* <<https://www.sado.org/Products/Start>>.

20. For additional information about SADO's Appellate Investigation Project, see <<http://www.sado.org/Page/83/MAACS-Resources-Appellate-Investigation-Project>>.

21. *People v Jenkins*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2018 (Docket No. 329846) (remand for new trial); *People v Hope*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2016 (Docket No. 324703) (remand for new trial); and *People v Higley-Zuehlke*, unpublished order of the St. Clair Circuit Court, entered April 15, 2016 (Docket No. 14-000467-FH) (granting motion for new trial).

22. Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 La L Rev 547, 580 (2017) <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3062&context=facpub>> [<https://perma.cc/X25TJG66>] and ABA, *Mandatory CLE* <https://www.americanbar.org/cle/mandatory_cle.html>. For a short while, Michigan required mandatory CLE for newer attorneys only, but that requirement was rescinded in 1994.

23. See, e.g., Shishkevish, *Continuing Legal Education: The Future is Now*, 96 Mich B J 36 (June 2017) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article3143.pdf>>.

24. MAACS Regulations, § II(D)(2).

25. For additional information about SADO's trainings, see *Upcoming Events* <<http://www.sado.org/Calendar/>>.

26. Texas Indigent Defense Comm, *Primer on Managed Assigned Counsel Programs*, n 2, p 3.

27. Former MAACS Regulations, §§ 4(1), 4(6)(g) (on file with authors).

28. Roster size has fluctuated over the years; currently it has approximately 150 attorneys.

29. MAACS Regulations, § II(C)(1).

30. 2016 SADO/MAACS *Annual Report*, p 10 <http://www.sado.org/content/commission/annual_report/10854_2016-Annual-Report.pdf>.