Criminal Defense Attorneys of Michigan

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March 2, 2011

Mr. Corbin Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File #2006-38, Proposed Amendment of Chapter 9 of Michigan Court Rules and Proposed Amendment of MCR 8.110

Dear Mr. Davis:

On behalf of the Criminal Defense Attorneys of Michigan (CDAM), I write to comment on the proposed amendments to Chapter 9 of the Michigan Court Rules and MCR 8.110. As to the proposed amendments to subchapter 9 of the Michigan Court Rules, CDAM joins the comments and suggestions of Kenneth M. Mogill, Esq. received by this Court on February 15, 2011.

With regard to the proposed amendment of MCR 8.110, CDAM joins in the comments and suggestions submitted by Dawn Van Hoek, Acting Director of the State Appellate Defender Office. In addition to the points raised by Ms. Van Hoek, CDAM is concerned that the proposed reporting of a finding that a lawyer has provided "incompetent representation" will intimidate criminal defense attorneys from providing the zealous representation required in criminal cases.

The Sixth Amendment of the U.S. Constitution and Article I, Sec. 17 of the Michigan Constitution require criminal defense attorneys to provide zealous representation. Of course, such representation is limited by the ethical parameters which apply to all Michigan attorneys. But in any given case or any given courtroom, there may be heated disputes between judges and practitioners about the "competent" course of criminal representation. These disputes may have more to do with the goals and personalities of the people involved than with professional "competence" or constitutional "competence" of the attorneys' actions. The threat that a chief judge will notify the AGC that there has been a finding that a lawyer has provided "incompetent representation" is a threat to good faith zealous representation and, thus, will have an inappropriate chilling effect on the responsibilities and the efforts of the criminal defender.

As noted by Ms. Van Hoek, there is already in place an effective framework for trial level and appellate review of claims of ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 US 668 (1984), which has been adopted by Michigan courts in *People v. Pickens*, 446 Mich 298 (1994). The proposed creation of "incompetent representation," and a mandated referral to the Attorney Grievance Commission, creates an unnecessary, separate, apparently different, and ill-defined criteria by which a criminal defense attorney must now govern and defend herself. For these reasons, CDAM urges the Court to delete the language regarding "incompetent representation" from the proposed amendment to MCR 8.110.

Thank you for your consideration of these comments and for the opportunity to provide them.

Respectfully submitted,

Margaret Sind Raben
Co-Chair, CDAM Rules and Law Committee
CDAM Immediate Past President