



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: Approval of an amendment to the NYSBA *2015 Revised Standards for Providing Mandated Representation*.

Attached is a memorandum from the Committee on Mandated Representation recommending an amendment to the NYSBA Standards for Providing Mandated Representation, last revised in 2015. The proposed amendment, to Standard B-1(a), would provide for the pre-petition representation of parents in child welfare cases modifying the current provision mandating representations at the “early stages” of a Family Court proceeding.

Also attached for your reference are the 2015 Standards.

The report and recommendations will be presented by Linda Gehron, a member of the Committee on Mandated Representation.

**Memorandum in Support of an Amendment to the  
NYSBA Standards For Providing Mandated Representation**

**New York State Bar Association  
Committee on Mandated Representation  
3/26/18**

The Committee on Mandated Representation urges the New York State Bar Association to adopt a Resolution revising Section B-1(a) of the NYSBA *2015 Revised Standards for Providing Mandated Representation* to provide: “Effective representation includes representation during both the pre- and post-petition stages of a Family Court case, including, but not limited to representation in emergency removal hearings and advocacy for the provision of social work, counseling, mental health, and other services”.

The objective of the *Standards for Providing Mandated Representation* issued by the NYSBA Committee on Mandated Representation is to ensure quality representation in both criminal and family court cases. Quality of legal representation at the pre-petition stage of child welfare cases is critical for the protection of the fundamental and due process rights of families. During the pre-petition period, life-altering decisions are made that can result in the traumatic separation of a child from his or her parent and possibly the permanent destruction of the parent-child relationship.

Research has shown a direct connection between such enhanced representation of parents and improved results leading to permanency for children. When parents’ attorneys provide representation early in the case, they are able to work closely with the family and the social services agency to identify and access appropriate services. Under such circumstances, parents have a better chance for keeping their children out of foster care by maintaining them safely in their care at home. In many New York State jurisdictions, millions in foster care costs can be saved by preserving the family.

The proposed revision seeks to provide the same emphasis on the importance of pre-petition representation of parents in child welfare cases as the NYS Office of Indigent Legal Services *Standards for Parental Representation in State Intervention Matters* and thereby lend much needed support to practitioners who routinely face vigorous opposition and even hostility when defending family rights.

For all of the reasons given above, the Committee on Mandated Representation enthusiastically supports this Resolution, respectfully requesting a revision of the New York State Bar Association’s *2015 Revised Standards For Providing Mandated Representation* providing for the pre-petition representation of parents to preserve the fundamental and due process rights of New York State parents.



# NYSBA

## 2015 Revised Standards for Providing Mandated Representation

Prepared by the Committee to Ensure  
Quality of Mandated Representation  
Approved as Revised by the New York  
State Bar Association House of Delegates,  
March 28, 2015



## PREFACE

The 2015 Revised Standards for Mandated Representation reflect changes approved by the House of Delegates of the New York State Bar Association on March 28, 2015. Changes were made to Section I-7 Criminal Matters and Section I-10 Criminal Appeals.

New subdivisions (h) and (l) were added to Section I-7, resulting in the re-lettering of former subdivisions (h)-(j) which will now be (i)-(k). New subdivision (h) corrects an oversight in the original standards which failed to require trial counsel to preserve the record. New subdivision (l) codifies existing Court of Appeals case law which holds that the case file maintained by counsel belongs to the client and that (i) counsel has a duty to maintain the file under reasonably secure conditions for that period of time as required by law; and (ii) to promptly give the file to successor counsel upon request.

Ministerial changes made to former subdivisions I-7(i)(iv) and (j)(iii) were intended to better facilitate the appointment of appellate counsel. Previously, these provisions required only that counsel “assist” the client in applying for appellate counsel. The phrase “assisting the client” was removed from each subdivision to clarify that counsel has an affirmative duty to apply on behalf of the client for poor person relief so that appellate counsel may be assigned to represent the client either on direct appeal from a judgment of conviction or in an appeal brought by the prosecution. This change not only conforms to the Second Department’s rule (22 N.Y.C.R.R. § 671(b)(3)-(4)), but removes a substantial barrier to the appointment of appellate counsel, particularly for those individuals with limited comprehension or low literacy skills.

Three new subdivisions were added to Section I-10 Criminal Appeals. The new subdivisions (i) – (k) address: assigned counsel’s responsibility to the client if the case is remanded for other proceedings during or after the appeal; appellate counsel’s responsibility in the event s/he becomes aware of a credible claim of actual innocence during the course of appellate representation; and appellate counsel’s availability if asked by the trial court to represent a pro se defendant in an Article 440 or other post-conviction proceeding which would be compensated pursuant to Article 722 of the County Law. None of these issues were previously addressed in the original or Amended Standards.

Earlier revisions to the original 2005 Standards were made in 2010, and 2013. The 2010 revisions were the result of statutory changes in the Family Law which eliminated the designation of “Law Guardian” which was replaced with “attorney for the child”. 2010 revisions also were necessitated due to the promulgation of the New York Rules of Professional Conduct, effective April 1, 2009 which replaced the former Lawyers Code of Professional Responsibility. Another important change which occurred was that the Office of Court Administration (“OCA”) promulgated caseload standards for attorneys representing children in Family Court proceedings.

The Standards were revised again in 2013 to incorporate references to the Conflict Defender Standards which were developed by the Office of Indigent Legal Services and later made applicable to all delivery systems. The Conflict Defender Standards were in large part based on the NYSBA 2010 Revised

Standards. The 2013 Revised Standards adopted language from the ILS Standards where that language amplified or supplemented the language of the 2010 Revised Standards.

Consistent with each revision, the 2015 Revised Standards for Mandated Representation are intended to apply in any provider system, whether Criminal, Civil, or Family Court and whether the mandated provider is an attorney for the defendant, respondent/petitioner, parent or child, except where explicitly limited to a particular type of provider.

The Committee to Ensure Quality of Mandated Representation (CEQMR) is committed to undertaking periodic review of the Standards and will continue to revise same so as to reflect best practices.

The Committee is especially grateful to CEQMR member Robert S. Dean who worked tirelessly to revise Sections I-7 and I-10 so that they were consistent with case law and best practices.

## **MEMBERS OF THE COMMITTEE**

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# INTRODUCTION

Both constitutional and statutory laws require New York to provide counsel to certain individuals financially unable to obtain counsel. Most “mandated representation” is provided under a representation plan devised by each county in the state, and the City of New York,<sup>1</sup> pursuant to County Law Article 18-B.

County Law Article 18-B authorizes each county to choose one or a combination of several options for providing representation to eligible clients: a public defender office; a private legal aid bureau or society or, in Family Court matters, any corporation or voluntary association or organization permitted to practice law under Judiciary Law §495(7); or the assignment of private practitioners pursuant to an assigned counsel plan. County Law §722. The statute for providing representation to juveniles in various matters provides other options, including allowing the appropriate Appellate Division department to contract with one or more qualified attorneys to act as attorney for the child or establish panels to represent children, and provides for the Office of Court Administration to enter into contracts with legal aid organizations for children’s representation. *See*, Family Court Act §243. Other statutory directives mandating representation or governing its provision include Judiciary Law §§35, 35-a and 35-b and Surrogate’s Court Procedure Act §407.

The objective of any representation plan should be to ensure high quality legal services for every individual represented under the plan. A county or other governmental entity is entitled to consider costs as a relevant factor in devising its representation plan, but it cannot ignore its constitutional, statutory and moral duty to provide quality counsel to those who cannot afford representation.

Although the County Law currently allows each county to devise its own configuration for an adult provider system, in a great majority of cases, a proper representation plan will establish a mixed representation system that integrates the use of institutional providers and assigned counsel. Such mixed representation systems can combine the advantages of institutional providers with the advantages of assigned counsel plans to engage a broad segment of the bar in achieving the objective of the plan.

The following standards are designed for those devising, reviewing and working within representation plans to provide mandated representation. Unless a specific application or limitation is noted, these standards apply to all mandated representation, except capital defense, which has special requirements. The standards are designed to apply in any provider system, except where explicitly limited to a particular type of provider. The standards are designed to apply to representation by providers of mandated representation in existing systems and in systems developed in the future. It is the intention of the drafters that these standards be viewed and implemented as a whole. These standards do not define the ideal system or attempt to establish the norm. Rather they establish the minimum requirements for a mandated representation system.

The standards are also intended to apply to Family Court cases in which counsel is assigned to represent an adult or to represent a child. In Family Court proceedings, proceedings which differ significantly from criminal proceedings,

1. *Hereinafter the term “counties” includes the City of New York.*

such as child protective, child custody and juvenile delinquency, the duration of representation may be extremely lengthy, spanning several years including permanency hearings, modifications, and extensions of placement or supervision. In addition, the focus frequently relates to family treatment and other support services, the proceedings are divided into discrete fact-finding and dispositional phases, jury trials are unavailable, and, except in juvenile delinquency and persons in need of supervision cases, a civil standard of proof is applied.

Historically, the largest impediment to the provision of quality mandated representation is under-funding of the provider. It is vital that funding sources provide funding adequate to enable providers to meet or exceed the requirements of these standards.

## **DEFINITIONS**

**Mandated Representation** - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate's Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.

**Providers of Mandated Representation** - Attorneys who, or organizations of any form, that provide mandated representation, including, but not limited to, individual attorneys; public defender offices; legal aid bureaus or societies; corporations, voluntary associations or organizations permitted to practice law under the authority of Judiciary Law §495(7); and assigned counsel plans. The term "providers of mandated representation" includes both the individual attorneys and whatever entity employs those attorneys or by which those attorneys are assigned to provide mandated representation.

**Institutional Providers of Mandated Representation** - Providers of mandated representation identified in County Law §722(1) and (2), including public defenders; legal aid bureaus or societies; any corporation, voluntary association or organization permitted to practice law under the authority of Judiciary Law §495(7); and any legal aid organization, attorney or attorneys with whom an Appellate Division, The Office of Court Administration or any other governmental entity has contracted for the provision of mandated representation under the authority of Family Court Act §243. The term "institutional provider of mandated representation" is used to distinguish the institutions from the individual attorneys working for the institutional providers. An assigned counsel plan is not an "institutional provider of mandated representation."

**Assigned Counsel Plan** - A plan for the assignment of private attorneys pursuant to County Law §722(3).

**Assigned Counsel** - Private attorneys assigned to provide mandated representation pursuant to County Law §722(3).

## **A. INDEPENDENCE**

**A-1.** Providers of mandated representation shall be guided at all times by a commitment to quality representation of all clients and the integrity of the attorney-client relationship. The function of providing mandated representation, including the selection, funding and payment of counsel, shall be independent. In the performance of their legal duties, providers of mandated representation should therefore be free from political influence or any influences other than the interests of the client that erode the ability to provide quality representation,<sup>2</sup> and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers. Each provider of mandated representation shall have an independent board or other entity to protect professional independence.

**A-2.** The selection of providers of mandated representation, including the head of any institutional provider of mandated representation, shall be made solely on the basis of merit.

**A-3.** The selection of the individual attorney as part of an assigned counsel plan shall be made by someone outside the court system in order to ensure the independence of counsel. Assignments should be made on a rotational basis from a list created pursuant to a plan established under County Law Article 18-B and shall be motivated by the goal of providing high quality mandated representation. Where mandated representation is to be provided by assigned counsel, the selection of the individual attorney to whom cases are to be assigned shall not be made by a judge or court official except in an emergency or in exceptional circumstances.

## **B. EARLY ENTRY OF REPRESENTATION**

**B-1.** Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody. Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

**B-1(a).** Effective representation includes representation at the early stage of a Family Court proceeding, including the provision of social work, counseling, mental health, and other services.

**B-1(b).** Counsel must be present at arraignment or the first appearance in court in criminal cases.<sup>3</sup>

**B-2.** Eligible persons shall have counsel available for any court appearance.

**B-3.** Counsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated.

**B-4.** Systematic procedures shall be implemented to ensure that prompt mandated representation is available to all eligible persons, particularly those held in detention facilities and where a child has been removed by a governmental agency from the person's home.

2. *ILS 1*

3. *ILS 5a*



## C. ELIGIBILITY OF CLIENT

**C-1.** Any person who is financially unable to obtain counsel without substantial hardship or entitled to assigned counsel regardless of financial circumstances shall be eligible to receive mandated representation in all situations in which a constitutional, statutory or other right to counsel exists.

**C-2.** Mandated representation shall not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

**C-3.** A judge shall decide a person's initial eligibility and continuing eligibility for mandated representation.

**C-4.** Rules, regulations and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client's privacy and constitutional rights and to not interfere with the attorney's relationship with his or her client.

**C-5.** Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

**C-6.** Any attempts to obtain partial payment from any person for the costs of mandated representation or associated services shall be made in accordance with County Law §722-d.

## D. PARTIAL PAYMENT

**D-1.** No person shall be subject to a partial payment order under County Law §722-d<sup>4</sup>, unless that person was informed, prior to the offer of mandated representation, of any possible obligation to make any payment, as well as the standards that permit the court to order any such payment. No advice about partial payment shall be given in a way that discourages exercise of the right to counsel.

**D-2.** Partial payment shall not be imposed if doing so would cause financial hardship to the person or the person's dependents and unless satisfactory safeguards are provided.

**D-3.** Where partial payment pursuant to County Law §722-d is appropriate, the court shall determine the amount to be paid and such payment shall be made directly to the general fund of the county or other appropriate funding agency.

4. *This section of the County Law reads as follows:*

*Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.*

*Though the statute suggests that "counsel may report" information about the defendant's financial ability to the court, the Committee notes that the Rules of Professional Conduct prohibit an attorney from revealing "confidential information"; see Rule 1.6(a). Such confidences or secrets could include information regarding the client's financial status, which therefore cannot be revealed by a lawyer unless the client consents or some other exception exists under the Rules of Professional Conduct: Rules 1.6(a), 1.6(b), 3.3(c).*

**D-4.** The amount of payment to be made shall be decided objectively on a case-by-case basis in accordance with predetermined standards. The predetermined standards shall take into account the cost of living in the particular community in which the person provided mandated representation resides and in which the case is pending and shall also consider all aspects of the person's family circumstances, including but not limited to number of dependents, employment status, housing and health care costs and indebtedness. The standards shall be adjusted periodically to reflect increases in the cost of living. At a minimum, the person seeking counsel shall be given an opportunity to be heard and to present information to the court concerning whether the person can afford the partial payment.

**D-5.** No provider of mandated representation shall be responsible for collection of payment.

**D-6.** Payment toward the cost of representation shall never be a factor in the determination of bail and shall never be made a condition of probation or other sentence.

**D-7.** Failure to make any ordered payment shall not result in the denial of counsel at any stage of proceedings.

**D-8.** Partial payment shall only be ordered based on existing circumstances during the pendency of the matter for which mandated representation has been provided and shall not be ordered based on future ability to pay.

## **E. QUALIFICATION OF COUNSEL**

**E-1.** Attorneys who provide mandated representation shall have sufficient qualifications and experience to enable them to render quality representation to a client in each particular case. Providers of mandated representation shall never allow an attorney to accept a case if that attorney lacks the ability,<sup>5</sup> experience or training to handle it competently, unless the attorney is associated with another attorney on the case who does possess the necessary experience and training.

**E-2.** Institutional providers of mandated representation and assigned counsel plans shall have written minimum qualifications for attorneys who provide mandated representation. If mandated representation is to be provided in more than one category of cases, then, to the extent appropriate, there shall be different minimum qualifications for each category and, if appropriate, for different levels of cases within each category.

## **F. TRAINING**

**F-1.** All attorneys and staff who provide mandated representation shall be provided with entry-level and<sup>6</sup> continuing legal education and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical rules relevant to the area of law in which they are or will be practicing are sufficient to enable them to provide quality representation.

5. ILS 7a

6. ILS 7d

**F-2.** Continuing legal education and training programs shall be made available and affordable for attorneys and staff providing mandated representation, and public funds shall be provided to enable all attorneys and staff to attend such programs.

**F-3.** Attorneys who provide mandated representation shall allocate a significant portion of their annual mandatory continuing legal education credit requirement toward courses directly related to the subject matter of the mandated representation they provide.

## **G. WORKLOADS**

**G-1.** The objective of providing high quality mandated representation to all eligible persons cannot be accomplished by even the ablest and most industrious attorneys in the face of excessive workloads. To permit counsel to satisfy their ethical obligations to their clients, every institutional provider of mandated representation and every assigned counsel plan shall establish workload limits for individual attorneys. Workloads shall be at a level to allow counsel to meet the Performance Standards set forth herein and in Family Court cases shall comply with the Office of Court Administration workload standards for attorneys for the child (*see*, §127.5 of the rules of the Chief Administrator of the Courts) and for attorneys in criminal cases in New York City (*see*, §127.7 of the rules of the Chief Administrator of the Courts).

**G-2.** Where OCA has not promulgated a workload standard, each institutional provider and assigned counsel plan shall develop local numerical workload standards, taking into consideration different procedures, policies and circumstances in each locality. Among the factors that shall be considered in establishing maximum workloads are (a) the types of cases being handled; (b) the qualifications and experience of the attorney; (c) the workload and resources of the prosecutor or other attorney(s) handling such cases for the government; (d) the distance between court(s) and attorney offices; (e) the time needed to interview clients and witnesses, taking into consideration the travel time and the location of confidential interview facilities; (f) any other factors relevant to the local practice or the types of cases being handled; and (g) existing national and other recognized workload standards.

In no event, however, shall the local workload standards exceed the national workload standards established in criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973) Standard 13.12, which sets forth the following maximum cases per year: 150 felonies or 400 misdemeanors or 200 mental health matters or 25 appellate assignments.<sup>7</sup>

In cases other than criminal and juvenile delinquency proceedings, each provider of mandated representation is responsible to set its own numerical workload limits based on the factors noted above.

7. *These numerical standards do not apply to the defense of capital cases, which are unique. See, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (Judicial Conference of the United States, 1998); see also, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. 2003).*

Each provider's workload must be reviewed on a regular basis to ensure that the provider is not responsible for more cases than it can reasonably be expected to handle effectively, bearing in mind the factors set forth above.

**G-3.** Each provider's workload should be continuously monitored, assessed and predicted so that whenever possible, excessive workload problems can be anticipated and preventive action taken.

**G-4.** Whenever the workload of a provider of mandated representation exceeds maximum workload standards, it is the obligation of the provider to take appropriate steps, which may include, but are not limited to (a) declining additional cases; (b) seeking leave to withdraw from existing cases; (c) seeking additional funding to hire additional attorneys and/or support staff; (d) actively seeking the support of the judiciary, the private bar and the community in the resolution of the workload problem; and/or (e) seeking assistance from an appropriate state or national organization as a means of independently documenting the problem.

**G-5.** Courts shall not require providers of mandated representation to accept excessive workloads and shall take all steps necessary to ensure that excessive workloads are not imposed.

**G-6.** Government funders shall not require providers of mandated representation to accept excessive workloads and shall take all steps necessary to ensure that excessive workloads are not imposed.

## **H. SUPPORT SERVICES/RESOURCES**

**H-1.** The institutional provider of mandated representation shall provide counsel with the investigatory, expert, and other support services necessary to provide quality legal representation, including, but not limited to, social work, mental health and other relevant social services. The institutional service shall also provide secretarial, interpretation and other support services and facilities necessary to provide quality legal representation.

**H-2.** The facilities provided to counsel by institutional providers of mandated representation shall include professional quality office facilities that are comparable to a similarly sized private law firm, such as adequate working space for each attorney and staff member, private office and conference room space in which attorneys can meet with clients, sufficient library facilities and/or access to online legal research materials, and computers and other necessary technical and communication equipment.

**H-3.** The support services and facilities provided to counsel at institutional providers of mandated representation shall be at least comparable to the support services and facilities provided to attorneys for the government.

**H-4.** The administrative office of an assigned counsel plan shall be equipped with suitable staff, space, equipment and supplies to carry out its duties under County Law §722(3).

**H-5.** Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, so-

cial work, mental health and other relevant social services, and facilities necessary to provide quality legal representation. Such services and facilities shall include access to meeting facilities that ensure confidentiality, sufficient library facilities and/or online legal research materials, any necessary foreign language interpretation services, and sufficient technical and communications equipment and means, including a means for clients to contact the attorney telephonically without incurring long-distance charges. This does not mean that the assigned counsel plan itself is obligated to provide these support services and/or facilities.

**H-6.** Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding. In Family Court, attorneys should also ensure to the extent feasible that social worker and mental health personnel possess adequate qualifications, experience and training.

**H-7.** Institutional providers of mandated representation and assigned counsel plans shall establish means by which incarcerated clients can have confidential communication with their counsel, telephonically or otherwise. Correctional and detention facilities shall cooperate in establishing such means.

**H-8.** Support services and resources shall be available to all clients and used as needed and shall not be restricted by type or level of case.<sup>8</sup>

**H-9.** Providers of mandated representation shall establish and maintain data collection and evaluation systems.<sup>9</sup>

## **I. PERFORMANCE**

**I-1.** An attorney can provide zealous, effective and high quality representation only if the attorney has the time, resources, knowledge and expertise that a conscientious and professional attorney familiar with the particulars of the case would consider necessary.

**I-2.** If at any time during the representation the attorney concludes that he or she is not able to provide zealous, effective and high quality representation, the attorney must immediately seek to withdraw from the case, unless the attorney can associate with another attorney and thereby be able to provide zealous, effective and high quality representation.

The following are basic Performance Standards and are not intended to be exhaustive.

### **General Performance Standards**

**I-3.** An attorney must (a) interview the client as soon as possible, and in a setting in which client confidentiality can be maintained and an attorney-client relationship can be established;<sup>10</sup> (b) communicate with his or her client on a regular basis during the course of representation, preferably in a private face-to-face discussion; (c) communicate with family or friends of the client, to the extent that the client

8. ILS 3,4

9. ILS 10a

10. ILS 5b

waives the attorney-client privilege as to such communication; (d) communicate with professionals and service providers relevant to the case, including, but not limited to, physicians, mental health workers and caseworkers; (e) inform the client on a regular basis of the progress of the case; (f) ensure that the client sees copies of all documents prepared or received by the attorney and provide copies of such documents where appropriate;<sup>11</sup> and (g) provide the client with the opportunity to make an intelligent and well-informed decision in those instances when a decision is to be made by the client (e.g., whether to plead guilty or enter an admission, whether to be tried by a jury or judge and whether to testify).

**I-4.** An attorney shall abide by the Rules of Professional Conduct (Part 1200 of Title 22 of the New York Codes, Rules and Regulations), and in particular those Rules concerning conflicts of interest (Rules 1.7, 1.8, 1.9, 1.10, 1.11).

**I-5.** Under an assigned counsel plan, the assignment procedures must ensure that the same counsel will represent the client continuously from the inception of the representation until the initiation of the appellate proceeding, if any, unless a court determines that (a) there is a conflict of interest; (b) there is a breakdown in the attorney-client relationship that interferes with counsel's ability to provide zealous, effective and high quality representation; or (c) some unforeseen circumstance, such as illness, prevents counsel from continuing to provide zealous, effective and high quality representation. Similarly, counsel assigned at the appellate, post-conviction or post-disposition stage shall provide continuity of representation during that proceeding.

**I-6.** When a client has multiple pending proceedings, the attorney on any one of them shall immediately and thereafter regularly communicate with the attorney(s) on the other matter(s), to the extent that the client waives the attorney-client privilege as to such communication. If feasible, and with the approval of the client, the attorneys shall make every effort to transfer the representation on all pending matters to a single attorney.

### **Specific Types of Matters**

#### **I-7. Criminal Matters**

No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high quality representation. Such representation at the trial court stage means, at a minimum:

a. Obtaining at the earliest possible time<sup>12</sup> all available information concerning the client's background and circumstances for purposes of (i) obtaining the client's pretrial release on the most favorable terms possible; (ii) negotiating the most favorable pretrial disposition possible, if such a disposition is in the client's interests, including dismissal or pretrial diversion;<sup>13</sup> (iii) presenting character evidence at trial if appropriate; (iv) advocating for the lowest legally permissible sentence, if that becomes necessary; and (v) avoiding, if at all possible, collateral consequences including but not limited to deportation or eviction;

b. Investigating the facts concerning the offense charged, including: (i) interviewing the client; (ii) aggressively<sup>14</sup> seeking discovery and disclosure of the

11. ILS 6

12. ILS 5

13. ILS 5d

14. ILS 5e

People's evidence, exculpatory information and impeaching material; (iii) obtaining relevant information from other sources; (iv) interviewing witnesses to the relevant events; and (v) obtaining corroborating evidence for any relevant defenses;

c. Researching the law, including, as appropriate, state statutory and constitutional law and federal constitutional law relevant to (i) the offenses charged (and any lesser included offenses); (ii) any possible defenses; (iii) relevant sentencing provisions; and (iv) other matters such as issues concerning the accusatory instrument, the admissibility of evidence, the prosecutor's obligations, speedy trial rights and any other relevant federal or state, constitutional, common law or statutory issue;

d. Preserving the client's options at all stages of the proceedings, such as (i) to seek a jury trial; (ii) to proffer a defense; (iii) to seek dismissal of the indictment; (iv) to seek dismissal of the charges for denial of statutory or constitutional speedy trial rights; (v) to seek preclusion or suppression of evidence; (vi) to seek discovery, exculpatory and impeaching information; and (vii) to seek an appropriate disposition consistent with the client's best interests and instructions;

e. Providing the client with full information concerning such matters as (i) potential defenses and their viability; (ii) the weaknesses and strengths in the People's case; (iii) plea offers; (iv) potential sentence exposure under all possible eventualities, including the relationship to any other sentences, potential release dates and available correctional programs; and (v) immigration, motor vehicle licensing and other collateral consequences under all possible eventualities;

f. Filing prompt and<sup>15</sup> appropriate pretrial motions for, among other things, (i) dismissal of the charging instrument for facial or evidentiary insufficiency; (ii) joinder or severance; (iii) dismissal of the charges for denial of statutory or constitutional speedy trial rights; (iv) suppression or preclusion of evidence; and (v) additional resources not available due to the client's financial circumstances;

g. In the event of, and in advance of trial: (i) developing a legal and factual strategy, using whatever investigative and forensic resources are appropriate; (ii) preparing for cross examination of the People's witnesses and direct examination of defense witnesses; (iii) developing a foundation for the introduction of defense evidence; (iv) formulating an opening statement; and (v) drafting requests for jury instructions;

h. In the event of, and during the course of trial and all related proceedings: (i) make specific and timely objections where appropriate and consistent with trial strategy; (ii) ensure that such objections are made on the record and recorded; and (iii) identify the particular element or elements for which the evidence is insufficient when moving to dismiss at the close of the prosecution's case.

i. In the event of, and in advance of, sentence: (i) gathering favorable information and, where appropriate, presenting that information in written form; (ii) reviewing the probation department report to ensure that it is accurate and taking whatever steps are necessary to correct errors; and (iii) utilizing forensic resources if appropriate;

j. Following a final disposition other than a dismissal or acquittal: (i) advising the client of the right to appeal and the requirement to file a notice of appeal; (ii) filing a notice of appeal on the client's behalf if the client requests; (iii) advising the client of the right to seek appointment of counsel and a free copy of the transcript; (iv) applying for appointment of counsel and a free copy of the transcript if the client requests; and (v) cooperating fully with appellate counsel;

k. Following a disposition from which the prosecutor has a right to appeal: (i) advising the client of the possibility that the prosecutor will pursue an appeal; (ii) advising the client of the client's right to appointment of counsel should the prosecutor appeal; and (iii) applying for appointment of counsel if the client requests; and

l. The case file maintained by counsel belongs to the client. Following any disposition: (i) retaining the file under as secure conditions as reasonably feasible for that period of time as required by law, unless directed otherwise; and (iii) promptly furnishing a client's file to successor counsel upon counsel's request, except for confidential information unless the client gives permission.

#### **I-8. Juvenile Delinquency and Juvenile Offender Matters**

a. Attorneys representing children in Family Court shall investigate, research and prepare in the same manner and using the same tools as attorneys in criminal cases. Thus, to the extent consistent with these types of matters, the Performance Standards contained in §I-7, *supra*, apply here. Counsel in Family Court shall also comply with the New York State Bar Association standards for representing children in the relevant proceeding.

b. The attorney shall take into consideration the age of the client and any attendant emotional and psychological needs of the client. Where appropriate, the attorney shall employ the services of a forensic social worker or other qualified professionals.

c. Considering the flexibility available to judges in entering dispositional orders in cases involving children, attorneys representing them shall be especially vigorous in advocating for the least restrictive alternative, including dismissal.

#### **I-9. Abuse and Neglect Matters**

a. Attorneys representing adults in abuse and neglect cases shall investigate, research and prepare in the same manner and using the same tools as attorneys in criminal cases. Thus, to the extent consistent with these types of matters, the Performance Standards contained within §I-7, *supra*, apply here.

b. The attorney shall take into consideration any attendant emotional and psychological needs of the client. Where appropriate, the attorney shall employ the services of a forensic social worker or other qualified professionals.

c. The attorney shall be aware of the possibility of criminal prosecution based upon the same conduct at issue and plan strategy and advise the client accordingly.

d. When an attorney has been appointed to represent children of the client, the attorney shall advise the client regarding the role of the child's attor-



ney and, when appropriate, shall prepare the client for contact or interviews with the child's attorney.

e. Attorneys shall counsel clients regarding all of the potential consequences of any particular resolution of the matter before clients are asked to make decisions regarding potential dispositions.

#### **I-10. Appeals**

Zealous, effective and high quality representation at the appellate stage means, at a minimum:

- a. Obtaining and reviewing all relevant portions of the record;
- b. Researching the applicable law, including substantive law, procedural law and rules regarding the appeal;
- c. Strategically selecting among the issues presented by the facts, considering the strength of authority, the facts, and the standard and scope of review. The selection of issues must be made with an awareness of the consequences for later post-conviction or post-disposition proceedings;
- d. Preparing a statement of facts that accurately sets out the significant and relevant facts, with supporting record citations;
- e. Presenting legal arguments that apply the most relevant and persuasive law to the facts of the case;
- f. Writing in a clear, cogent and persuasive manner;
- g. Requesting oral argument when such argument would be in the client's interests and, when oral argument is granted, being thoroughly prepared and presenting the argument in a clear, cogent and persuasive manner;
- h. Preparing and filing an application for leave to appeal to the New York State Court of Appeals should the client not prevail on the appeal to the intermediate appellate court, and preparing and filing an opposition to the prosecutor's application for leave to appeal to the Court of Appeals, should the client prevail on the appeal to the intermediate appellate court;
- i. In the event of a favorable determination of the appeal that results in a remand to the trial court for further proceedings, ensuring that appropriate action is taken in that court.
- j. Where, during the course of appellate representation, new and material evidence comes to light which suggests that the defendant may actually be innocent, undertaking reasonable efforts to investigate the viability of such a claim, and if warranted either raising such a claim or else attempting to secure other representation of the defendant to pursue such a claim;
- k. Making oneself available to the trial courts for assignment pursuant to Article 722 to pro se Article 440 or other pro se post-conviction motions, where the court believes counsel should be assigned, if such representation would be compensated pursuant to Article 722; and

1. In the event of affirmance of an unfavorable intermediate appellate disposition, reversal of a favorable intermediate appellate disposition or denial of leave to the Court of Appeals, advising the client of (i) the right to petition the United States Supreme Court for a writ of certiorari and the procedures by which the client may do so; (ii) the circumstances under which the client may file a state court application for post-conviction or post-disposition relief; and (iii) the circumstances under which the client may file a federal petition for a writ of habeas corpus, including the time limitations and the requirements of preservation and exhaustion.

## **J. QUALITY ASSURANCE**

**J-1.** Institutional providers of mandated representation shall provide both professional and support staff with meaningful periodic and ongoing evaluation of their work according to objective criteria. Institutional providers of mandated representation shall establish objective criteria to be used in determining whether they are providing quality representation. Such objective criteria shall include, but are not limited to, the Performance Standards contained herein.

**J-2.** Discipline or discharge should be options where staff performance evaluations indicate a failure to meet the institutional provider's standards of quality representation.

**J-3.** Institutional providers of mandated representation shall develop procedures for tracking and managing individual cases to ensure that performance standards are met at all stages of proceedings.

**J-4.** Institutional providers of mandated representation shall establish procedures for the receipt, investigation and resolution of comments and complaints from clients and the client community.<sup>16</sup> All staff must be informed of and required to comply with such procedures.

**J-5.** Assigned counsel plans shall provide assigned counsel with meaningful, periodic and ongoing evaluation of their work according to objective criteria. The standards against which an assigned counsel's performance is measured should be those of a skilled, knowledgeable and conscientious practitioner in the same field. An assigned counsel plan's objective criteria shall be publicized and shall include, but not be limited to, the Performance Standards contained herein.

**J-6.** Assigned counsel plans shall establish a system for the periodic and ongoing evaluation of assigned counsel performance according to objective criteria. Assigned counsel plans shall establish policies for the imposition of penalties, including removal from the roster of counsel eligible for assignment to cases, when counsel fails to provide quality representation according to these objective criteria.

**J-7.** Assigned counsel plans shall establish procedures for the receipt, investigation and resolution of client complaints. Assigned counsel shall be informed of, and be required to comply with, such procedures.

**J-8.** An independent monitoring and enforcement mechanism shall be established for the evaluation of providers of mandated representation. This

mechanism shall ensure that all providers of mandated representation meet the standards of quality representation contained herein.

**J-9.** All attorneys providing mandated representation, regardless of whether pursuant to an assigned counsel plan, a public defender office, a legal aid bureau or society or any other institutional or associational structure, shall keep records of all time spent on the representation of each individual client, indicating the duration and nature of the work done and the dates on which the work was performed.

## **K. COMPENSATION**

**K-1.** There shall be parity between the compensation provided to counsel who provide mandated representation and the compensation provided to attorneys for the government working on the same matters.

**K-2.** Contracts with institutional providers of mandated representation shall require that there be parity between the compensation paid to their attorneys and other staff and to attorneys and other staff performing comparable duties for the government on the same matters.

**K-3.** Assigned counsel shall receive prompt compensation at a reasonable hourly rate sufficient to cover their actual overhead costs and expenses and to provide them in addition with a reasonable fee.

**K-4.** No distinction shall be made between the rates paid to assigned counsel for work performed in court and work performed out of court.

**K-5.** The rates of compensation paid to assigned counsel shall be reviewed on an annual basis to ensure their adequacy.

**K-6.** Assigned counsel shall be compensated for all hours necessary to provide quality legal representation, including work done post-disposition.

**K-7.** Assigned counsel shall be promptly reimbursed for all of their reasonable out-of-pocket expenses.

**K-8.** Under no circumstances may any attorney who has represented a person pursuant to assignment to provide mandated legal representation accept any payment whatsoever on behalf of the client in connection with the matter that is the subject of the assignment.

**K-9.** Assigned counsel plans shall have policies allowing payment of interim vouchers for fees and expenses and payment of supplemental vouchers for post-disposition work.

**K-10.** Where an assigned counsel's request for compensation is reduced in any respect, counsel must be afforded a meaningful opportunity to contest said reduction, including the right to be heard and present relevant information and argument supporting the request. A reduction shall be made and sustained only where the request clearly overstates the amount of hours necessary to provide quality legal representation or the expenses incurred in the particular case.

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