



NYS Office of Indigent Legal Services

ILS Standards for Establishing and
Administering Assigned Counsel Programs
BLACK LETTER STANDARDS

July 1, 2019

**New York State Office of Indigent Legal Services
Standards for Establishing and Administering Assigned Counsel Programs
BLACK LETTER STANDARDS**

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New York State Office of Indigent Legal Services
Standards for Establishing and Administering Assigned Counsel Programs
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PART I. INTRODUCTION

1. Preamble

Well-designed, properly maintained, and adequately funded assigned counsel programs (ACPs or Programs) play a vital role in ensuring justice for clients who cannot afford to retain an attorney in criminal defense or family law matters. Every county in New York State depends upon assigned counsel to provide representation for public defense clients. In several counties, ACPs are the primary or sole provider of mandated representation. In most counties, where public defender offices or legal aid societies are the primary providers, the mandated representation of some eligible individuals presents conflicts of interest requiring the assignment of private attorneys.

For compelling reasons beyond conflicts of interest, the continuing involvement of the private bar is essential to the success of public defense. First and foremost, effective public defense requires a robust competition of ideas among practitioners with a broad range of perspectives. By bringing their experiences representing private clients to public defense, private assigned counsel may show staff attorneys new and different ways of doing things, thus helping to ensure that public defense practice remains rich and innovative. Further, private attorneys who represent public defense clients can serve as effective ambassadors to bar associations, legislatures, community groups, and others. They can educate the public and system stakeholders about the needs of the criminal justice system and promote funding and initiatives that will ensure quality public defense. Finally, when public defenders face unanticipated fluctuations in staffing and caseloads, the private bar can help achieve administrative stability and quality of representation.

County Law article 18-B, enacted in 1965, delegates to localities the responsibility for public defense services. Section 722 sets out the types of providers that counties may employ to fulfill the right to counsel. One permissible mechanism is a bar association program in which an Administrator rotates assignments and administers the services of private counsel. However, County Law § 722 provides no details as to the proper establishment of ACPs, so counties and bar associations have created and maintained programs with little guidance. To aid counties and ACP Administrators and to ensure quality representation, the State Office of Indigent Legal Services (ILS), in consultation with the ILS Board, promulgates these Standards for Establishing and Administering Assigned Counsel Programs (Standards), pursuant to Executive Law § 832.

These Standards draw from existing national, state, and local standards; developments in ACPs over the last half-century; and the experience and knowledge of the Standards Working Group and ILS staff. Materials consulted include: New York State Bar Association (NYSBA) Revised Standards for Providing Mandated Representation (NYSBA Revised Standards); National Legal Aid and Defender Association (NLADA) Standards for the Administration of Assigned Counsel Systems (NLADA ACS Standards); and standards promulgated by the New York State Defenders Association (NYSDA), including Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State (NYSDA Standards for Mandated Representation),

and by the American Bar Association (ABA). These Standards reference, and should be read in conjunction with, other relevant ILS standards listed in the Commentary to Standard 1.2, as set forth in the comprehensive version of these Standards including Commentaries.

ILS has created these Standards to help ACPs ensure that panel attorneys can comply with all applicable individual representation standards and with New York Rules of Professional Conduct. There are many unique and challenging aspects of assigned counsel representation. For instance, where judges select attorneys to handle public defense cases, those attorneys may be concerned that zealous representation could discourage future assignments. Attorneys may sometimes feel pressure to consider the fiscal interests of the government, which may be adverse to the needs of clients. These pressures can be exacerbated for the many panel attorneys who depend on assignments as part of a solo or small law practice.

These challenges must not result in any compromise in the quality of representation provided to public defense clients or the independence of panel attorneys. *Gideon v Wainwright*, 372 US 335, 345 (1963), established the right of state criminal defendants to the “guiding hand of counsel at every step in the proceedings.” Implicit in that concept is “the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.” *Polk County v Dodson*, 454 US 312, 322 (1981). The government must adequately fund public defense services and structure ACPs so that lawyers can remain independent, meet their ethical obligations, and deliver quality representation. ILS and its Board will continue to work with stakeholders to secure the funding necessary for compliance with these Standards.

1.1. Applicability. These Standards apply to all existing and future systems in the state for the delivery of mandated representation by assigned counsel.

1.2. Scope. These Standards are designed to guide ACPs to ensure that attorneys can comply with relevant performance standards in providing mandated representation.

1.3. Purpose. These Standards set out the structure and components of ACPs necessary to ensure quality representation.

1.4. Definitions.

1.4.a. Administrator. The organizational leader who administers the ACP and ensures that these Standards are met.

1.4.b. Assigned Counsel. A private attorney or attorneys, other than an attorney or attorneys employed by an institutional provider, paid by the government to represent public defense clients.

1.4.c. Assigned Counsel Program (ACP). An entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensures that those attorneys provide quality representation.

1.4.d. Clients. Persons entitled to representation in criminal defense and family law matters under County Law article 18-B.

1.4.e. Counties. All 62 counties in the state: the 57 upstate counties and the five boroughs of New York City.

1.4.f. Independence. Freedom from improper influence and control by an outside entity, to ensure that ACPs and assigned counsel make decisions based solely on the interests of clients.

1.4.g. Judge. Judges, magistrates, and any other persons with adjudicative powers over clients eligible for mandated representation.

1.4.h. Mandated Representation. Government-funded legal representation that is constitutionally or statutorily required. “Mandated representation” is used interchangeably with “public defense representation.” As employed in these Standards, both terms encompass 18-B representation in family law litigation, regardless of the client’s party status.

1.4.i. Mentor or Mentoring Attorney. An experienced attorney who provides training, consultation, and guidance to less experienced attorneys on the panel.

1.4.j. Panel. The ACP’s list of attorneys eligible to receive assignments, which should be limited to those in good standing and with the requisite skills and training.

1.4.k. Quality Representation. Representation of clients in a professional, skilled, ethical, and client-centered manner.

1.4.l. Supervising Attorney. An attorney who assists the Administrator in ensuring that each individual assigned counsel provides quality representation.

1.4.m. Chief Defender. A leader of a Public Defender office, Conflict Defender office, Legal Aid Society or ACP.

PART II. COUNTY RESPONSIBILITIES

A. Establishment and Maintenance of an Assigned Counsel Program

2. General Policies

2.1. ACP Requirement. Each county should establish and maintain an ACP that complies with these Standards.

2.1.a. Regional Programs. Counties may agree to create a regional ACP to comply with these Standards and to promote the efficient delivery of services.

2.2. Quality Representation. Each ACP shall ensure the provision of professional, skilled, ethical, and client-centered legal representation for all clients.

2.3. Independence. Each ACP shall remain independent and free from improper influence and conflicts of interest.

2.3.a. Independent Office. The ACP shall not be part of a Legal Aid Society, Public Defender office, Conflict Defender office or County Attorney office.

2.3.b. Judicial Supervision. The ACP and individual assigned counsel should be subject to judicial supervision only in the same manner and to the same extent as applies to all other practicing lawyers.

2.3.c. Independent Function. The function of providing mandated representation—including the assignment, selection, funding, and payment of counsel—shall be independent.

3. Required Structure

3.1. Governing Law. Each county should establish an ACP pursuant to a plan of a bar association within the county.

3.2. ACP Board. To ensure that the management of the ACP is independent of all branches of county government, the ACP shall operate under the guidance of a governing Board.

3.2.a. Board Members. The majority of the Board’s members shall be attorneys who are not judges; and no members of the Board shall hold a position as a prosecutor, law enforcement or government official.

3.2.b. Board Supervision. The Board shall appoint the ACP Administrator and may supervise the operation of the ACP and establish policies to support implementation of these Standards.

3.2.c. No Interference. The Board shall not interfere with the representation of individual clients.

3.2.d. Insurance. The ACP shall insure the Board and the Administrator, for all insurable risks incident to the operation of the ACP, to a dollar amount specified by the Board. The funding agency shall indemnify the Board and the Administrator for all liability arising from their authorized activities pursuant to the ACP.

3.3. Assigned Counsel Administrator. The Board shall appoint an Administrator to implement the policies and duties of the ACP.

3.3.a. Administrator Qualifications. The Administrator shall be an attorney licensed in the State of New York who possesses administrative experience and skill in the representation of criminal defendants and/or adults in family law matters and who demonstrates integrity and a commitment to quality representation of public defense clients.

3.3.b. Administrator Selection. The Administrator shall be selected based on merit; appointed for a stated term set by the Board; serve full-time where feasible; if full-time, shall not engage in the private practice of law; and may be dismissed prior to the expiration of his or her term only for good cause, following a hearing.

3.3.c. Administrator Continuity. The ACP shall establish protocols to address personnel transitions in the operation of the Program.

3.3.d. Administrator Functions. The Administrator shall implement and ensure adherence to these Standards and ACP policies.

3.3.d.i. Delegating Duties. The Administrator may delegate day-to-day tasks to foster efficiency, but may not delegate ultimate responsibility for the Administrator's primary functions. The Administrator shall not delegate to a nonlawyer any duties for which legal training is needed.

3.3.d.ii. Spokesperson Role. The Administrator shall act as the spokesperson for the ACP in matters involving policy and the operation of the Program.

3.3.d.iii. Addressing Issues. The Administrator shall address matters that arise among the ACP, its attorneys, and other actors in the criminal justice and parental representation systems.

3.3.d.iv. Planning and Policy. The Administrator shall engage in planning and policy discussions with the county and other entities regarding decisions affecting the ACP, assigned lawyers, and public defense clients; and shall be responsible for preparing and submitting a proposed budget to the funding entity.

3.3.d.v. Assignment Process. The Administrator shall oversee the rotation and coordination of panel attorneys and implement a fair process for assignments.

3.3.d.vi. Vouchers. The Administrator shall establish protocols for the review of assigned counsel vouchers for quality-review purposes and to ensure that attorney billing is accurate.

3.3.d.vii. Non-Attorney Professional Services. The Administrator shall approve applications for the provision of investigative, social work or other professional services; and shall review vouchers submitted for such services.

B: Provision of Necessary Resources

4. ACP Capacity

4.1. Facilities. Each county shall provide suitable facilities so that the ACP can carry out its duties under County Law article 18-B and meet these Standards.

4.1.a. Office Space. Each county shall establish an administrative office for its ACP. Such administrative office shall have a suitable location, and suitable space, technology, equipment, and supplies to facilitate independent, professional representation.

4.1.b. Technology. Each county shall provide its ACP with the technology necessary to effectively and efficiently administer the Program. Such technology shall enable the ACP to communicate efficiently with clients, courts, attorneys, and the public; to collect, analyze, and report on data; and to track caseloads.

4.2. Necessary Services. Each county shall ensure that its ACP provides assigned counsel with access to the following services necessary for quality representation.

4.2.a. Supervision. Each ACP shall ensure that its panel is appropriately supervised by an attorney or attorneys.

4.2.b. Mentoring. Each ACP shall ensure that every attorney new to the representation of public defense clients receives a mentor to help the attorney develop high professional standards and provide quality representation.

4.2.c. Consultation. Each ACP shall ensure that assigned counsel have access to resources to assist in addressing complex or systemic issues arising during individual representation.

4.2.d. Training. Each ACP shall provide its panel with access to appropriate substantive, procedural, and practical training programs.

4.2.e. Second-Chair Program. Each ACP shall create a Second-Chair Program to provide necessary trial experience to attorneys.

4.3. Staffing. Each county shall provide its ACP with suitable personnel to carry out its duties under County Law § 722 (3) and comply with these Standards.

4.3.a. Supervising Attorney. The Administrator shall be responsible for the supervision of assigned counsel, and such responsibility may be delegated to one or more supervising attorneys.

4.3.b. Administrative Staff. The ACP shall include staff responsible for providing administrative services, which may include, but not be limited to, clerical support, data management, and budget and finance support.

4.3.b.i. Hiring Staff. The Administrator shall be responsible for assessing the administrative staff needs of the ACP and shall oversee the hiring of such staff.

4.3.b.ii. Client's Rights. The ACP shall ensure that all staff comply with the Statement of Client's Rights. *See* 22 NYCRR § 1210.1.

4.3.c. ACP Staff Salaries

4.3.c.i. The Administrator's compensation should be set at a level commensurate with the attorney's qualifications and experience and the responsibilities of the position. There should be a parity of compensation as between the Administrator and any other Chief Defender in the county.

4.3.c.ii. The starting pay for ACP legal and administrative staff should facilitate the recruitment of qualified personnel. Salary levels thereafter should promote the retention of staff. All salary levels should reflect parity as to similar positions in the prosecutor's office or local public defense offices.

4.4. Client Communication. The ACP shall work with justice system and other officials to ensure that adequate confidential meeting space for client interviews is provided in courthouses, jails, and prisons. The ACP shall similarly work with officials to establish means by which incarcerated clients can have confidential communication with their assigned counsel by telephone or otherwise.

4.5. Full Partnership. The ACP should have a voice in the county's efforts to maintain and improve the justice system.

4.6. Ensuring Adequacy of Facilities for Representation. The ACP shall require that all panel attorneys have the facilities necessary to provide quality representation.

4.6.a. Confidential Client Communication Facilities. The ACP shall ensure that assigned counsel have access to meeting facilities and equipment as needed to ensure client confidentiality, including a means for clients to contact the attorney by telephone without the client having to incur burdensome charges.

4.6.b. Legal Research Capacity. ACP services and facilities shall ensure that assigned counsel have access to adequate research resources. The ACP is not obligated to provide these support services directly, but should strive to do so where feasible.

5. Timely Representation

5.1. General. The ACP shall implement systematic procedures to ensure the prompt assignment of counsel for all persons eligible for mandated representation.

5.1.a. Assignment During Eligibility Determination. Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

5.1.b. Subsequent Appearances. Eligible persons shall have counsel at every court appearance.

5.2. Counsel in Criminal Cases. Counsel shall be provided as soon as possible to any persons who are subject to state action due to allegations of criminal conduct. The ACP, working with other components of the justice system, shall ensure the provision of counsel at first appearance. Upon request, the ACP shall provide counsel prior to the initiation of formal charges, when it appears that such charges, and mandated representation, are imminent.

5.3. Counsel for Litigants in Family Law Matters. The ACP shall provide counsel, upon request, to any person legally entitled to representation in family law matters; and the Program should make representation available during the investigatory stage of a child protective matter.

6. Duration and Continuity of Representation

6.1. Duration of Representation. The ACP shall ensure that all clients receive legal representation throughout the matter for which representation was approved.

6.2 Continuity of Representation. The ACP shall ensure representation by the same attorney throughout the trial level, unless the needs of the client or unavoidable circumstances require otherwise.

7. Budget and Funding

7.1. General. Each ACP shall be provided with sufficient funding to carry out its functions under County Law § 722 (3) and to ensure quality representation.

7.1.a. Periodic Review. Each county shall conduct periodic evaluation and review of the ACP budget and communicate the fiscal and programmatic needs of the ACP to ILS.

7.1.b. Compliance with all ILS Standards. The ACP and the county shall make known to ILS the state funding needed to comply with these and all other ILS standards.

7.1.c. Budget and Record-Keeping. The ACP shall prepare and submit a detailed budget to the county funding authority and shall maintain records and accounts of expenditures in accordance with accepted accounting practices and relevant laws and regulations.

7.1.d. Voucher Review. The county and ACP shall not delay the payment of vouchers or reduce the amount paid to reduce costs.

PART III. ACP RESPONSIBILITIES

A. General Responsibilities

8. Operational Responsibilities

8.1. Attorney Panels. The ACP shall create panels of attorneys who have demonstrated the skill, experience, and commitment needed to provide quality representation to public defense clients.

8.1.a. Differentiated Panels. To ensure the competence necessary for a given case, the ACP shall create specific types of panels based upon the category and complexity of the case.

8.1.b. Qualifications. The ACP shall create standards and a process for attorneys to apply to participate on the panel, including specific criteria for acceptance onto any subpanel.

8.1.c. Regional Recruitment. While recruitment for the panel may begin with the local bar association, all qualified attorneys shall be considered; and the opportunity to participate in the panel should be publicized to all attorneys within the ACP's county or region.

8.1.d. No Fee. The ACP shall not charge a fee for applying to, or remaining on, a panel.

8.1.e. Administrator Assignments. The selection of assigned counsel for a case should be made by, or at the direction of, the Administrator; should ensure that the ability, training, and experience of panel attorneys are matched to the complexity of the cases to which they are assigned; and should not be made by a judge or court official, except in an emergency, in exceptional circumstances, or when an initial assignment of counsel in one court is continued by a judge in a court to which the case is transferred.

8.1.f. Geographic Areas. To ensure that assigned counsel are available at first appearance for every client, the ACP may establish geographic areas in which each assigned attorney may accept cases.

8.1.g. Malpractice Insurance. The ACP should require all attorneys seeking appointment to the panel to provide evidence of adequate malpractice insurance coverage.

8.2. Requirement that Eligible Clients Receive Representation. The ACP shall utilize applicable ILS Eligibility Standards.

8.3. Procedures for Compensating Panel Attorneys. The ACP shall establish and maintain procedures for compensating assigned counsel.

8.3.a. Full Compensation. The ACP shall compensate assigned counsel for all hours necessary to provide quality legal representation.

8.3.b. Prompt Payment. The ACP shall develop and implement procedures for compensating panel attorneys that ensure prompt payment.

8.3.c. Additional Payment. On the matter to which counsel is assigned, he or she shall not seek to be privately retained to represent the client, shall not agree to be privately retained upon request of the client, and shall neither seek nor accept payment from a client or any other person. Noncompliance with this rule is a ground for removal from the panel. Assigned counsel should not seek nor accept payment from a client or any other source to supplement fees and expenses for non-attorney professional services authorized by the ACP.

8.3.d. Interim Vouchers. Procedures for compensating assigned counsel should include policies allowing for the payment of interim vouchers for fees and expenses.

8.3.e. Post-Disposition Work. Policies for compensating assigned counsel shall allow for payment of vouchers in cases requiring post-disposition work.

8.3.f. Expenses. The ACP shall advise assigned counsel as to which expenses are reimbursable and shall promptly authorize reimbursement for all reasonable out-of-pocket expenses.

8.3.g. Changes in Procedures. The ACP shall distribute prompt, clear information regarding payment or reimbursement procedures to panel attorneys and shall provide prompt, clear information regarding any changes in such procedures.

8.4. Administrative Responsibilities for Panel Attorneys. The ACP shall establish clear, fair guidelines regarding the administrative responsibilities of panel attorneys.

8.5. Access to Appropriate Non-Attorney Professional Services. The ACP shall ensure that individual assigned counsel have access to the non-attorney professional services needed at every phase of the case.

8.5.a. Range of Services. Such professional services shall include access to investigatory, expert, social work, mental health, interpreter, and other relevant services.

8.5.b. Direct Services. The ACP is not obligated to provide these services directly, but should strive to do so where feasible.

8.6. Quality Assurance Procedures. The ACP shall develop and implement comprehensive quality assurance procedures, as set forth below.

B: Quality Assurance Provisions

9. General Provisions

9.1. Compliance with Applicable Standards. The ACP shall ensure that assigned counsel are aware of, and comply with, all applicable performance and ethical standards.

9.2. Client-Centered Representation. The ACP shall ensure that assigned counsel provide client-centered representation, which, at a minimum, shall include:

9.2.a. Contacting clients as soon as possible after appointment.

9.2.b. Promptly meeting with clients (whether in detention or not) prior to a court appearance, and as needed, in a space that complies with Standard 9.2.e.

9.2.c. Accepting telephone calls from clients, including from detention facilities.

9.2.d. Timely responding to client inquiries.

9.2.e. Ensuring that client privacy and the confidentiality of communications are protected.

9.2.f. Communicating relevant information about the case to the client in a timely and respectful manner, and using clear and understandable language, so that the client can make informed decisions.

9.2.g. Discussing relevant documents with the client and providing copies upon request.

9.2.h. Collaborating with the client to achieve the best possible result, consistent with the client's objectives.

9.2.i. In criminal matters, pursuing alternatives to incarceration where appropriate; providing accurate information about sentencing; reviewing the presentence report with the client; acting to correct errors in that report; and filing a defense presentence memorandum where appropriate.

9.2.j. With respect to Family Court cases, providing accurate information about dispositions; reviewing any (pre)dispositional report with the client; acting to correct errors in such report; and, where appropriate, filing a memorandum on behalf of the client advocating an appropriate disposition.

9.2.k. Utilizing appropriate non-attorney professional services, such as investigators, expert witnesses, sentencing advocates, and social workers.

9.2.l. Determining, and explaining to clients, the collateral consequences of any course of action, and where appropriate, using the existence of these consequences to achieve better plea negotiations.

9.2.m. When representing adolescent and young adult clients—whether charged with criminal or delinquent behavior or facing loss of the opportunity to parent their children—developing expertise in adolescent development, custody and care of youth, and other unique needs of these clients.

9.2.n. Taking all necessary steps to protect, preserve, and enforce clients' post-conviction, post-disposition, and appellate rights.

10. Attorney Capability

10.1. Knowledge and Experience. The ACP shall establish and maintain systems to ensure that assigned counsel have sufficient knowledge and experience to provide quality representation to clients.

10.2. Assessment of Attorneys. The ACP shall develop and maintain systems to (a) determine which levels of cases are appropriate for each attorney; (b) recertify panel attorneys; and (c) identify the training needs of panel attorneys.

11. Attorney Caseload

11.1. Attorney Caseloads. The ACP shall establish and maintain systems to ensure that caseloads comply with ILS Caseload Standards.¹

11.1.a. Evaluation of Attorney Caseload. In assigning cases to panel attorneys, the ACP shall take into consideration: (a) the types of cases being handled; (b) the qualifications and experience of the attorneys; (c) the distance between the attorney's office and the courts or other relevant sites; (d) the time needed to interview clients and witnesses; (e) the attorneys' total workload, including the extent of the attorney's private practice; and (f) any other relevant factors.

11.1.b. Review of Attorney Caseload. The ACP shall review attorney caseloads on a regular basis.

12. Training

12.1. Orientation. For new panel members, the ACP shall provide a mandatory orientation, which should include a discussion of expectations for quality representation and administrative procedures.

12.2. Initial Training. The ACP shall ensure that panel attorneys receive appropriate training prior to any case assignments. The ACP may directly provide, or financially support, this training, but is not required to do so.

12.3. Ongoing Training

12.3.a. Obtaining CLE Training. The ACP shall ensure that all assigned counsel obtain continuing legal education (CLE) and other training needed so that their skills and knowledge will enable them to provide quality representation. The ACP should encourage panel attorneys to utilize national, regional, state, and local sources of training.

12.3.b. Mandated Representation Topics. The ACP shall ensure that all assigned counsel allocate a significant portion of their mandatory CLE credit requirement to courses related to the subject matter of the mandated representation they provide.

12.3.c. Monitoring CLE Programs. The ACP shall monitor CLE programs attended by assigned counsel.

¹ILS, Determination of Caseload Standards pursuant to § IV of the *Hurrell-Harring v. The State of New York* Settlement (2016), <https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Caseload%20Standards%20Report%20Final%20120816.pdf> (last accessed Feb. 22, 2019). *See also* Executive Law § 832 (4) (b).

12.3.d. Providing Affordable Programs. The ACP shall ensure that assigned counsel have access to high-quality free or affordable CLE and other training programs relevant to their work.

13. Supervision and Mentoring

13.1. Use of ACP Resources. The ACP shall ensure that assigned counsel are aware of, and utilize, the services described in Section 4.2 of these Standards.

14. Performance Review and Remediation

14.1. Performance Review and Remediation Policies. The ACP shall provide assigned counsel with meaningful, periodic evaluation of their work, based on objective criteria, and shall publicize the criteria applied.

14.2. Complaint Procedures. The ACP shall establish procedures for the receipt, investigation, and resolution of complaints from clients, client family members, co-counsel, opposing counsel, the judiciary, and any other relevant source.

14.3. Remediation. The ACP shall establish policies for remediation to be employed when an attorney's performance fails to satisfy applicable criteria and standards.