



Appellate Standards and Best Practices

(Revised 2023)



New York State Office of
Indigent Legal Services

**Appellate Standards and
Best Practices (Revised 2023)
Table of Contents**

Preamble	1
----------------	---

A. Qualifications, Training, and Oversight of Counsel

1. Competence	2
2. Selection Process	3
3. Ongoing Evaluation	3
4. Brief Review	4

B. Duties of Counsel

5. Accepting Cases	5
6. Conflicts of Interest	6
7. Initial Steps	7
8. Obtaining the Record	7
9. Client Meetings	9
10. Counseling about Risks	10
11. Timely Filing	11
12. The Brief	12
13. The Reply Brief	13
14. Oral Argument	14
15. Leave Applications	15
16. Seeking Relief after Exhausting State Remedies	16
17. Representing Non-U.S. Citizens	17
18. Comprehensive Client-Centered Representation	18
19. Sentencing Issues	18
20. CPL Article 440 Motions	19

C. Special Ethical Considerations

21. Client Communication	20
22. Issue Selection	21
23. <i>Anders</i> Briefs	22
24. Diminished Capacity	23
25. Case File	24
26. Coram Nobis	25

Appellate Standards and Best Practices (Revised 2023)

Preamble

The New York State Office of Indigent Legal Services (“ILS”), in consultation with its Board, promulgates these revised Appellate Standards and Best Practices (“Appellate Standards” or “Standards”), under authority conferred by Executive Law § 832. The Appellate Standards apply to mandated appellate and postconviction representation in criminal cases; mandated representation in criminal-related matters, such as appeals from orders under Correction Law article 6-C and Mental Hygiene Law article 10; and mandated representation provided in family law appeals.¹ Because appellate practice is a specialized realm requiring distinct expertise, particularized standards apply. These Standards should be read in conjunction with more general standards, including ILS Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest, ILS Standards for Parental Representation in State Intervention Matters, ILS Standards for Establishing and Administering Assigned Counsel Programs (“ILS ACP Standards”), and New York State Bar Association Revised Standards for Providing Mandated Representation (“NYSBA Standards”).² The Appellate Standards promulgated here apply to all existing and future systems for the delivery of mandated appellate representation.

After the original appellate standards were published in 2015, ILS was charged with developing plans for quality improvement, caseload relief, and counsel at arraignment for mandated criminal defense statewide, and the State was charged with paying for those reforms.³ ILS continues to work toward obtaining the State funding needed to enable providers to comply with all these Standards, as well as other mandated representation performance standards. The Appellate Standards have been revised to reflect changes in relevant laws, rules, and other standards, as well as developments in criminal defense and parental representation; to assist providers of mandated representation in advocating for the resources needed to provide quality representation; and to improve clarity and readability.

¹ The primary statutory provision regarding the right to mandated representation is County Law § 722.

² The ILS and NYSBA Standards cited above can be found here:

[Overview of ILS Standards \(ny.gov\)](https://www.ils.state.ny.us/standards/overview)

[Standards for Quality Mandated Rep 2021.pdf \(nysba.org\)](https://www.nysba.org/standards/standards-for-quality-mandated-representation-2021.pdf)

³ Significant State funding has been provided for criminal defense statewide, pursuant to the *Hurrell-Harring Settlement*, approved in 2015, and its extension statewide via L 2017, ch 59, Part VVV. However, there is an urgent need for greater State funding for mandated parental representation, as found in the 2019 Interim Report of the Commission on Parental Legal Representation.

A. Qualifications, Training, and Oversight of Counsel

1. Competence

Before accepting responsibility for an appeal in a criminal or family law case, an attorney must demonstrate competence to handle the assignment.

COMMENTARY

“Appellate advocacy is meaningful when it reflects a competent grasp of the facts, the law, and appellate procedure, supported by the appropriate authority and argument.”⁴ A competent appellate attorney knows the laws, rules, and principles governing appellate practice, including preservation, harmless error, mode-of-proceedings error, and interest-of-justice jurisdiction. Also integral to effective appellate representation is a knowledge of the materials needed for a complete record on appeal; the ability to identify viable appeal issues; the skill to write a persuasive brief; an understanding of the elements of competent, client-centered representation; and proficiency in technology related to e-filing, document storage, and electronic transmission of confidential information.⁵ Requiring such competence before an attorney is assigned to an appeal is consistent with the Rules of Professional Conduct (22 NYCRR Part 1200), Rule 1.1 (a).⁶ Newer attorneys must consult with more experienced attorneys in any areas in which they need support to ensure meaningful appellate advocacy.⁷

Cultural consciousness is an ideal that must be addressed through personal reflection, professional development, and continuing education. These standards acknowledge the racial disparities in the criminal and Family Court systems, the impact of implicit bias, and the trauma individuals experiencing poverty endure. Attorneys must regularly evaluate their own biases and, when appropriate, advocate on behalf of the client regarding issues of race, bias, and the impact of trauma.

Attorneys assigned to criminal appeals should know when and how to file motions to vacate convictions and set aside sentences pursuant to CPL article 440. See Appellate Standard 20 (440 motions). Further, appellate counsel should be familiar with civil proceedings related to criminal defense, such as Sex Offender Registration Act (“SORA”) proceedings, writs of habeas corpus under CPLR article 70, and writs of mandamus or prohibition pursuant to

⁴ See *People v Stultz*, 2 NY3d 277, 285 (2004).

⁵ The First, Third, and Fourth Departments use NYSCEF for e-filed appeals. NYSCEF e-filing training materials are available at <https://iappscontent.courts.state.ny.us/NYSCEF/live/training.htm>. The Second Department utilizes an internal e-filing system for criminal and family law appeals. More information about Second Department e-filing rules and procedures is available at <https://nycourts.gov/courts/ad2/efiling>.

⁶ Rule 1.1 (a) states: “A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

⁷ Comment [2] to the Rules of Prof. Conduct, Rule 1.1 (a), explains that, sometimes to provide competent representation, a lawyer should associate “with a lawyer of established competence in the field in question.”

CPLR article 78. Regarding family law appeals, attorneys should be knowledgeable about relevant provisions of the Family Court Act, CPLR, Domestic Relations Law, and Surrogate's Court Procedure Act. Attorneys who are trained and supervised by institutional providers may demonstrate their competence through recommendations and formal evaluations in their offices. In the alternative, attorneys can establish their proficiency by submitting five substantive appellate briefs or by other relevant experience, such as clerkships.

2. Selection Process

A selection committee shall review applications for membership in an assigned counsel program and shall interview all candidates for appointment to appellate criminal and family law panels.

COMMENTARY

A selection committee shall interview all attorneys applying for an appellate criminal or family law panel.⁸ Such committees shall include three or more persons, all of whom should be experienced local appellate practitioners residing or practicing in the given county or an adjacent county. In considering applicants, the selection committee shall review the appellate briefs and other materials submitted by applicants. Briefs should be evaluated based on legal analysis, writing skills, and persuasiveness. See Appellate Standard 12 (briefs). In interviews with candidates, the selection committee should gauge their ability to answer questions in a professional and thoughtful manner and probe their knowledge of relevant areas of the law, with attention to whether and how the applicants stay abreast of developments in the law.

3. Ongoing Evaluation

Institutional offices and assigned counsel programs shall develop programs to periodically reevaluate staff and panel members, respectively, and to thereby ensure that all attorneys continue to provide competent and effective representation after their initial hiring or acceptance to an appellate panel.

COMMENTARY

Institutional offices must hire based on merit and have an evaluation system to ensure that attorneys are providing high-quality representation. To reevaluate panel members, ACPs shall create a system that relies on the judgment of an administrator or a committee of panel

⁸ This selection process standard is consistent with ILS ACP Standards, which state that the ACP shall create panels of attorneys possessing the skills, experience, and commitment needed to provide quality representation (Standard 8.1) and that the ACP shall create standards and a process for attorneys to apply to participate on the panel (Standard 8.1.b).

members.⁹ Reviewers shall consider the attorney's skills in issue identification, research, analysis, writing, and client communication. Further, reviewers shall consider the CLE programs panel members have completed and research tools they use. New panel members shall be reevaluated after one year on the panel or the filing of three substantive briefs, whichever comes first. All such briefs, as well as any *Anders* briefs, must be read in conjunction with the record on appeal. Other panel members shall be reevaluated periodically.

4. Brief Review

No appellate criminal or family law brief should be filed without having been reviewed by another experienced attorney.

COMMENTARY

Effective appellate representation requires consultation and supervision to ensure that viable issues are identified and arguments are well-honed.¹⁰ Attorneys at institutional offices must have their briefs reviewed by supervising attorneys. Other senior attorneys must review senior colleagues' work. No matter what level of experience they possess, all panel members must submit their briefs for critique to an attorney with at least three years' experience in criminal or family appeals. Traditionally, many panelists have sought review from more accomplished colleagues on a pro bono basis. Given the clients' constitutional right to meaningful representation and the critical role of brief review in achieving quality, review of briefs should not depend on the generosity of colleagues but should instead be available from compensated counsel.

For this critical Appellate Standard to be met, funders must cover the costs involved. One potential resource for review is the ACPs. Now many counties have managed ACPs with structures in place for mentors, supervising attorneys, and other qualified attorneys who may be called upon to serve as reviewers. If review is performed by a fellow panelist, that attorney should be compensated at the assigned counsel rate for such services. Regardless of who conducts the review, a reviewer must not evaluate briefs of multiple parties in the same case.

When examining the briefs of new panel members, experienced counsel must also review the record on appeal to ensure that meritorious issues have been identified and properly presented; that appropriate relief has been sought; and that adverse facts have not been overlooked. Such record review shall continue until all attorneys who have appraised the new panelist's work deem that attorney competent to evaluate the record without oversight and the attorney has been recertified to the panel. Reviewers are not responsible for editing briefs but may make editing and substantive suggestions.

⁹ See ILS ACP Standards, Standard 14.

¹⁰ Regarding supervision generally, see ILS ACP Standards, Standard 4.2.a; and the NAPD Policy on Active Supervision of the Representation of Clients.

B. Duties of Counsel

5. Accepting Cases

To accept an assignment, an attorney or institutional provider must possess the expertise, time, and resources needed to provide quality representation.

COMMENTARY

Attorneys handling assigned appeals, whether at an institutional office or ACP, should refuse to accept cases that exceed their ability and resources. If possessing only minimal experience, counsel should not handle complex cases. See Rules of Prof. Conduct, Rule 1.1 (b).¹¹ Accepting cases beyond one's ability may result in the failure to address potentially meritorious issues. Competent appellate representation requires not only knowledge of appellate law and practice, but also knowledge of evolving law and its impact on trial practice and appellate issues. For example, an appellate attorney may be called upon to assess whether a ruling under discovery reform laws was erroneous and potentially impacted the judgment of conviction. Further, counsel must understand the potentially life-altering consequences of convictions, including upon clients whose circumstances create unique risks, such as clients charged with sex offenses and noncitizen clients, and relief available via postconviction motions. See Appellate Standards 17 (noncitizens) and 20 (440 motions).

In the family law realm, competent appellate representation requires a knowledge of not only substantive provisions of the Family Court Act as to various proceedings, but also article 11 regarding interlocutory appeals as of right and by permission and stays pending appeal. Counsel should also be familiar with provisions of the CPLR, which may be applicable pursuant to Family Ct Act § 165 (a), including as to what orders are brought up for review upon an appeal from a final order or judgment (see CPLR 5501 [a] [1]) and when a motion to vacate the challenged order should be made, such as for default orders (see CPLR 5015 [a] [1]).

Accepting too many cases may result in delays in prosecuting appeals. Institutional offices and assigned counsel panelists should not be required to carry excessive workloads. Justice delayed is justice denied for an incarcerated defendant or an aggrieved family member. Appellate attorneys must use their best professional judgment in determining whether taking on additional cases or continuing representation in current cases may result in inadequate representation because of an excessive workload. See Appellate Standard 6 (conflicts). If so, the individual attorney must take appropriate steps, including declining new cases and seeking leave to withdraw from existing cases. Further, institutional offices should seek funds for additional staff or resources.

¹¹ Rule 1.1 (b) states: "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."

6. Conflicts of Interest

Upon being assigned, appellate counsel must ensure that no conflict of interest exists and must move to be relieved when a conflict is discerned. In family law cases, where multiple parties may be involved, a conflict check must be done as to every party.

COMMENTARY

The right to effective counsel ensures that the representation is conflict-free and single-mindedly devoted to the client's best interests.¹² Like all clients, those receiving mandated representation are entitled to an attorney who has no conflicts of interest, so appellate counsel must have a system to check for conflicts.¹³ Conflicts upon appeal can take many forms; an exhaustive list is impossible. The most obvious conflicts arise from the representation of criminal codefendants or multiple respondents in family law cases. While some conflicts may be waivable, any waiver must be fully explained to both clients, and if either one is unwilling to waive the conflict, counsel must move to be relieved.¹⁴ Other conflicts are presented when counsel represents a critical witness.

Additional concerns are presented in "mixed provider" institutional offices where the client was represented by the trial division; representation continues for the appeal; and claims of ineffective assistance of trial counsel are presented, whether in a criminal or a family law case. A threshold issue is who should screen the case. Such activity should not be performed by an attorney who represented the client at the trial level or where there is otherwise a significant risk that the attorney's own interests could cloud professional judgment. Where claims of ineffective assistance are arguable, the appellate attorney should seek to be relieved. An institutional office need not advise every client represented by the trial division that the office cannot raise a claim of ineffective assistance, since doing so could signal to the client that there may be a viable issue, though none exists.

Conflicts may also arise from insufficient funding or excessive caseloads or both, resulting in unfairly preferencing the interests of one client over another.¹⁵ Moreover, conflicts may exist for part-time public defenders or assigned counsel as between their retained and assigned

¹² See *People v Berroa*, 99 NY2d 134, 139 (2002).

¹³ See Rules of Prof. Conduct, Rule 1.10 (e) ("A law firm shall *** maintain a system by which proposed engagements are checked against current and previous engagements when: (1) the firm agrees to represent a new client; (2) the firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter.")

¹⁴ See Rules of Prof. Conduct, Rule 1.7 (conflict as to current client); Rule 1.9 (conflict as to former client); and Rule 1.0 (j) (definition of informed consent).

¹⁵ See Heidi Reamer Anderson, *Qualitative Assessments of Effective Assistance of Counsel*, 51 Washburn LJ 571, 584-585 (Aug. 2012) (excessive caseloads can create a conflict of interest that prevents attorneys from meeting their ethical obligations). Regarding ILS Caseload Standards, see also [Caseload Standards Report Final 120816.pdf \(ny.gov\)](#); ILS ACP Standards, Standard 11.

cases, in light of the incentive to favor clients in retained cases producing greater compensation than assigned cases.¹⁶ Such conflict is pronounced when assigned counsel rates are stagnant and low,¹⁷ when assigned counsel compensation is “capped,” or when assigned attorneys are legitimately concerned that they will not be fully compensated for their time spent on the appeal.

7. Initial Steps

Immediately upon assignment, counsel should contact the client. As soon as practicable, counsel should perform an initial assessment of the case, including whether a stay and bail pending appeal should be sought.

COMMENTARY

The initial case assessment should encompass determining whether: to seek a stay and bail pending appeal;¹⁸ to file a CPL article 440 motion; to seek advice about immigration issues;¹⁹ and to address additional convictions or other related matters. See Appellate Standards 17 (noncitizens) and 20 (440 motions). If a postconviction motion was previously filed and denied, counsel should find out whether a motion for leave to appeal was filed, and if not, whether such motion could still be filed.²⁰ When appropriate, counsel should seek to consolidate the appeal from the denial of the motion with the direct appeal. In family law cases, the initial analysis should encompass ascertaining whether the appeal should be expedited or case developments have rendered the appeal academic or should otherwise affect appellate strategy. See Appellate Standard 22 (issues).

8. Obtaining the Record

Counsel must ascertain whether the appellate record is complete and, if not, must obtain all missing materials as expeditiously as possible.

¹⁶ See Rules of Prof. Conduct, Rule 1.7 (a) (2) (an attorney shall not represent a client where “there is a significant risk that the lawyer’s professional judgment *** will be adversely affected by the lawyer’s own financial *** interests”).

¹⁷ See Norman Lefstein, *Securing Reasonable Caseloads, Ethics and Law in Public Defense*, at 14-15 (ABA 2011) (a conflict is created when the government is paying a meager sum for mandated representation, whereas the lawyer is far better compensated to represent retained clients; and the conflict is exacerbated if the lawyer has a heavy caseload and is thus tempted to devote even less time to assigned cases).

¹⁸ See NLADA Performance Guidelines for Criminal Defense Representation, Guideline 9.3 (bail pending appeal).

¹⁹ Free expert consultation is available via a statewide network of Regional Immigration Assistance Centers. See [ILS RIAC General Information \(ny.gov\)](https://www.ilsriac.org/).

²⁰ See CPL 460.10 (4).

COMMENTARY

Obtaining a complete and accurate record of proceedings in the trial court is a vital and sometimes daunting task. Lengthy delays may be experienced in acquiring transcripts, and thus counsel should promptly order them.²¹ Given the duty to expeditiously prosecute family law appeals, it is especially critical that, in such cases, the appellate attorney promptly orders record documents. In all appeals, if encountering difficulties in obtaining transcripts or other record materials, counsel should seek aid from the relevant appellate court.

In criminal cases, appellate counsel should ensure that the transcripts encompass pretrial proceedings, plea proceedings, the trial including jury selection, and sentencing.²² If material portions of the minutes are lost, counsel should seek a reconstruction hearing. In addition, counsel should seek transcripts of relevant proceedings not directly covered by the assignment and should obtain a copy of the entire court file. If papers or other materials were filed but are not part of the court file, appellate counsel should seek them from trial counsel. In addition to the notice of appeal and motion papers and decisions, counsel should obtain the file jacket, endorsements, accusatory instruments, prosecutor's disclosure statements, written waivers, exhibits (including digital exhibits) received in evidence, jury notes, the verdict sheet, predicate felony statements, the presentence report,²³ the sentence and commitment order, and any other sentencing documents. In SORA cases, counsel should obtain the Risk Assessment and Case Summary of the Board of Examiners of Sex Offenders and should move to unseal relevant records.²⁴

Regarding family law cases, relevant transcripts may include minutes and orders from related proceedings involving the same parties, which should be judicially noticed; and confidential *Lincoln* hearing transcripts, to be provided only to the Appellate Division and the appellate attorney for the child. Relevant court file documents will include the notice of appeal, decision and order appealed from, pleadings, motion papers and decisions, exhibits received in evidence, mental health studies, probation reports, and written closing statements.

²¹ See Rules of Prof. Conduct, Rule 1.3 (a) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

²² For appeals from local criminal courts, appellate counsel has an additional duty. Where an affidavit of errors is required, counsel must file such document within 60 days after receiving transcripts of the electronically recorded proceedings. See CPL 460.10.

²³ Appellate counsel is entitled to a copy of the presentence report (PSR). See CPL 390.50 (2) (a). Generally, factual errors in the PSR should be challenged at sentencing and cannot be corrected after that. See e.g. *Matter of Delrosario v Stanford*, 140 AD3d 1515, 1516 (3d Dept 2016). On direct appeal, appellate counsel should raise preserved issues regarding PSR inaccuracies. See e.g. *People v Infinger*, 194 AD3d 1183, 1188 (3d Dept 2021), *lv denied* 37 NY3d 965 (2021). An inaccurate PSR can have a profound impact on the defendant's fate regarding parole determinations and in other future contexts. See *People v Washington*, 170 AD3d 1608, 1609-1610 (4th Dept 2019), *lv denied* 33 NY3d 1036 (2019).

²⁴ Counsel should review relevant guidebooks, such as Alan Rosenthal, SORA Manual (2d ed 2022) and SORA Modifications Manual (2019).

<https://www.ils.ny.gov/sites/ils.ny.gov/files/sora-manual-second-edition-2022.pdf>

<https://www.ils.ny.gov/sites/ils.ny.gov/files/SORA%20Modification%20Manual.pdf>

Counsel should request, and diligently pursue obtaining, trial counsel's file in every criminal and family law case involving a trial, not only in cases in which the record suggests a possible ineffective assistance claim. Further, appellate counsel should determine if issues were raised or litigated that may not be apparent from the appellate record. Regarding the content of the record on appeal, counsel should consult the Statewide Practice Rules of the Appellate Division (22 NYCRR Part 1250) ("Statewide Practice Rules"), in particular, Rule 1250.7 governing the form and content of records, as well as the local Department's rules, which may impose unique record requirements.²⁵

9. Client Meetings

To establish a relationship of trust and confidence with the client, counsel should use the means of communication best suited to meet the client's needs and the attorney's duty to consult, counsel, and advise the client. Such means include in-person visits, videoconferences, and telephone calls, as well as correspondence. Having at least one in-person visit is important.

COMMENTARY

The appellate attorney is assigned to represent a client, not write a brief. Just as trial counsel, appellate counsel should build and sustain a productive relationship with each client. Effective communications are essential to such a relationship and to quality representation. "Assigned counsel has a special responsibility to develop a relationship of trust and confidence with the client so that the client will appreciate that the lawyer knows the case and has the client's best interests clearly in mind."²⁶ Establishing trust is a particular challenge for public defense attorneys since clients have little or no choice in the selection of counsel. In identifying the best means of communication, counsel should consider many factors, including: the client's reluctance to convey information based on trauma or mental illness or other factors; risks inherent in pursuing possible appeal issues; the potential for collateral litigation; health issues or literacy level impacting the ability to communicate; differences between the attorney's and client's race, ethnicity or gender that may create barriers; and the urgency of obtaining relief. See Appellate Standards 10 (risks), 20 (440 motions), 21

²⁵ [Appellate Division Practice Rules.pdf \(nycourts.gov\)](#)
[First Department Rules.pdf \(nycourts.gov\)](#)
[Second Department Rules.pdf \(nycourts.gov\)](#)
[Third Department Rules.pdf \(nycourts.gov\)](#)
[Fourth Department Rules.pdf \(nycourts.gov\)](#)

For appeals from local criminal courts to County Court or Appellate Term, counsel should consult clerks of those courts regarding applicable procedures governing records.

²⁶ See Commentary, ABA Standards, Criminal Justice, Prosecution Function and Defense Function, Standard 4-8.3, at 241 (3d ed. 1993). Current ABA standards state that defense counsel "should actively work to maintain an effective and regular relationship with all clients. [That] obligation...is not diminished by the fact that the client is in custody. ABA Criminal Justice Standards for the Defense Function (4th ed. 2017) ("ABA Defense Standards"), Standard 4-3.1. Executive Law § 832 (4) (c) provides that a component of quality representation is effective communication.

(communication), and 24 (diminished capacity). The appellate attorney must also determine if English is not the client's best language and the client is not proficient in English. If so, counsel should arrange for a colleague or other paid professional to serve as an interpreter for in-person meetings and for a translator to translate written materials.²⁷

As to all clients, written communications alone are not enough. Legal calls are superior and, if and when available, virtual legal visits are better still. The optimal mode of communication is an in-person meeting. By visiting incarcerated clients, the appellate attorney may learn of and convey far more information than otherwise possible. Certainly, meeting in person with an incarcerated client may demand substantial resources. But doing so at least once in each case is strongly recommended. If there is only one in-person visit, it should occur before the brief is filed, so that the attorney and client can explore the issues to be raised. Ideally, counsel should have as many visits as needed to develop and sustain a strong attorney-client relationship. In the end, in-person discussions may save time and resources by helping to overcome points of disagreement. Appellate counsel should be reimbursed for travel time and costs, as well as other expenses of communicating with the client. Regardless of the mode of communication used, counsel should be sensitive to issues of security and confidentiality. For in-person meetings with clients, counsel should use confidential space. When communicating remotely with clients, appellate counsel should employ a secure videoconferencing link or phone line. Counsel should be alert to clients who live with codefendants or co-respondents.

10. Counseling about Risks

Counsel must advise the client about potential risks involved in pursuing the direct appeal or collateral litigation and attempt to minimize such risks as the appeal progresses.

COMMENTARY

Counsel must advise the client about any potential risks presented by the appeal via a careful letter. While the factual and legal scenario may be complex, counsel should strive to “meet the clients where they are.” That means avoiding legalese; using plain, understandable language; and being alert to any language, cognitive, or other limitations that may impact communication. If English is not the client's best language and the client is not proficient in English, then the attorney must provide for verbatim translation of the risk letter and should arrange for an interpreter to come to any follow-up meetings. See Appellate Standard 9

²⁷ The interpreter or translator should have mastered both the client's best language and English and have expertise in translating legal terms. Commercial interpretation services available over the phone may be effective in limited circumstances for phone calls with clients. However, a qualified interpreter should accompany counsel for in-person meetings with incarcerated clients. Interpretation and translation services are reasonable and necessary expenses of representation. Free services such as Google Translate are inadequate for legal communications.

(client meetings). At a minimum, a conversation with the client is necessary to discuss the risks set forth in the letter. The area of greatest danger involves an appeal seeking vacatur of a guilty plea. Success upon appeal may result in the reinstatement of all charges and, ultimately, a greater sentence. If it appears that potential risks outweigh potential benefits, appellate counsel should so advise the client. An in-person meeting may be needed where the client wishes to proceed. See Appellate Standards 9 (client meetings) and 21 (client communication). Before going forward with the appeal, counsel should ensure that the client fully understands the risks described. Often the most reliable way of doing so is to obtain the client's signed, written statement declaring that counsel explained the risks and the client understood them and decided to proceed. Similar steps should be taken regarding collateral litigation.

In both criminal and family law appeals, appellate counsel should take particular care in explaining potential immigration consequences to noncitizen clients. See Appellate Standard 17 (noncitizens).

Distinct risks presented by family law appeals arise from the constantly evolving nature of family situations. Appellate counsel should make contact, and remain in contact, with trial counsel; explain that subsequent developments may supersede and moot the appeal; and seek information about such matters from the client and trial counsel. Further, counsel should advise the client when, based on mootness or a lack of nonfrivolous issues, the best strategic option is not to pursue the appeal but to file a new application, such as a petition to modify custody based on changed circumstances or a motion to vacate a Family Court Act article 10 order based on good cause.

11. Timely Filing

Counsel shall file the appeal expeditiously and protect the client's rights by taking all necessary steps to meet deadlines without sacrificing quality.

COMMENTARY

The appeal process is inherently lengthy, and counsel has a duty to prosecute the appeal as expeditiously as possible, without sacrificing the quality of representation.²⁸ Clients must often wait months for appellate counsel to be assigned. Promptly upon assignment, counsel should write to the client and clearly explain the appellate process and seek to obtain record documents. See Appellate Standard 8 (record). While compiling the record, counsel should update the client on an ongoing basis. After the record is complete, other steps in the appellate process include record review and issue identification, research and analysis, and brief writing. When prioritizing cases, counsel handling multiple appeals should consider the client's perspective; whether the client is currently incarcerated; how long the sentence is;

²⁸ See note 21.

immigration consequences; SORA issues; and, with respect to family law appeals, the custody and placement of children. Regarding family law appeals, Family Court Act § 1112 (a) and CPLR 5521 (b) confer a statutory preference for certain cases. Counsel may also want to consider moving for an expedited briefing schedule to minimize delays caused by court calendaring procedures and extensions for responding briefs. Regarding criminal cases, priority should be given to appeals for incarcerated clients over those for non-incarcerated clients. See Appellate Standard 5 (accepting cases).

12. The Brief

The appellate brief should clearly and concisely recite relevant facts and law; make persuasive legal arguments; and set forth the relief sought.

COMMENTARY

The brief is the heart of the appeal and presents an opportunity for counsel to convince the court to rule for the client. Counsel should be mindful that appellate judges and their law clerks must handle a large caseload. Clarity and brevity are critical. The primary elements of the brief are the facts, the law, and the arguments. The court should be provided with the facts needed to understand the case and to resolve the legal issues. To write an effective statement of facts, counsel must first identify the legal arguments to be made, since they will drive how to shape the facts. Each factual statement should cite to the relevant page or pages of the record. While the fact section must be accurate and address unfavorable but key evidence, it also presents an opportunity for advocacy. A skillful narrative can tell a story and personalize the client, such as by using the client's name, rather than generic terms such as "defendant."

Family law cases present distinct concerns as to what information may be conveyed regarding salient facts. A cardinal rule of appeals is that matters dehors the record may not be presented. However, after a Family Court order was rendered and appealed from, there may have been important developments relevant to parental fitness, such that the proper relief would be remittal for a reopened hearing, as set forth in *Matter of Michael B.*, 80 NY2d 299 (1992). In such event, counsel should ask the appellate court clerk about protocols governing use of such documents and information. If using the appendix method, upon completion of the statement of facts, counsel should create an appendix that complies with relevant Appellate Division rules.

Generally, in both criminal and family law appeals, the argument section should begin with the strongest point—unless there is a valid reason to begin with another claim, such as one that would result in the greatest relief. The relevant controlling authority should be stated, with accurate citations, and then the law should be applied to the facts. Key favorable cases should be analogized, and key unfavorable cases should be distinguished, with emphasis on decisions by the Court of Appeals and the relevant Appellate Division Department. Where

possible, appellate counsel should federalize the brief, i.e., framing arguments as federal issues to preserve them for potential federal habeas corpus review. In addition, creative counsel may test legal boundaries, including arguing for reasonable, nonfrivolous changes in the law.²⁹ See Appellate Standards 22 (issues) and 23 (*Anders* briefs). Being attuned to record proof of possible racial and gender bias can be another aspect of effective appellate advocacy. The bias may emanate from police, prosecutors, social service agencies, or trial judges and may provide the basis for an appellate argument, regardless of whether the issue was preserved for appellate review.³⁰

When possible, an overarching theme should tie together the facts and each point of the argument. Such theme can be introduced in the opening section of the brief, giving the court a *précis* and preview of the brief. Counsel should consult the Statewide Practice Rules, in particular, Rule 1250.8 governing the form and content of briefs; Rule 1250.15 regarding requesting oral argument on the main brief cover; and the local Department's rules and the electronic filing rules of the Appellate Division.³¹ Finally, the brief should be professional in appearance, free of typographical errors, and accurate in record and legal cites. If English is not the client's best language and the client is not proficient in English, the attorney should consider an in-person visit with an interpreter present to convey the core content of the brief. See Appellate Standards 9 (meetings) and 10 (risks).³²

13. The Reply Brief

Appellate counsel should file a reply brief that addresses arguments in the respondent's brief, unless a reply brief would not serve the client's best interests. In family law cases where there are multiple parties, the reply brief should respond to arguments raised by all parties and the attorney for the child or children.

²⁹ A lawyer may advance a claim or defense that is unwarranted under existing law "if it can be supported by good faith argument for an extension, modification, or reversal of existing law." See Rules of Prof. Conduct, Rule 3.1 (b) (1).

³⁰ See e.g. *People v Jones*, 210 AD3d 150 (3d Dept 2022) (exclusionary rule applied for first time to racial profiling in traffic stop); *People v Johnson*, 197 AD3d 61 (3d Dept 2021) (judicial racism in sentencing; punishment reduced); *People v Price*, 186 AD3d 903 (3d Dept 2020) (possible police racism addressed in suppression analysis).

³¹ See note 25 as to Statewide and Department Rules of Practice. Regarding E-filing rules, see 22 NYCRR Part 1245: <https://www.nycourts.gov/courts/ad2/pdf/efilingrules.pdf>

³² While counsel may want to consider having the entire brief translated into the client's best language, in some cases, that may be less helpful to the client than having an in-person discussion with counsel about the contents of the brief.

COMMENTARY

Filing a reply brief should be the default approach since appellate counsel must take advantage of every opportunity to advocate effectively for the client. In most cases, a reply brief will advance the client's cause by attacking weaknesses in opposing arguments, sharpening issues for oral argument, and serving as the final word on salient issues. The reply brief should not merely rehash arguments made in the main brief. Where the opposing brief contains misstatements of law or fact or raises new issues or where a new relevant decision has been rendered, a reply brief is particularly critical.

14. Oral Argument

Counsel should orally argue where permitted, thoroughly prepare by reviewing the record and briefs, and present arguments in a cogent and persuasive manner.

COMMENTARY

Oral argument is a valuable opportunity to advocate for one's client; to answer the court's questions; to potentially influence the outcome of the appeal, especially in a close case; and to achieve justice for the client and create favorable precedent. Rather than dealing only with a cold record, the appellate panel is presented with a human face. In being present and prepared, counsel conveys conviction about the arguments in the brief. An appellate attorney's presence and voice, not just words, may effectively convey nuances and a sense of urgency about the arguments presented. Even if the client does not ultimately prevail, the oral argument may have yielded a more accurate and less damaging decision. For all these reasons, where permitted by the court, oral argument is strongly encouraged; foregoing argument should be the exception; and the attorney should fully explain to the client any strategic reasons for waiving oral argument.

While the time available for oral argument is short, the preparation is labor-intensive and involves reviewing the record, the briefs, and the law, including any new decisions issued. Before undertaking any preparation, counsel should review the Statewide Practice Rules, in particular, Rule 1250.15 (b)–(d) and local Department rules, or the rules of the relevant appellate court. The rules address topics for which oral argument is not permitted as of right, citations of recent decisions, and post-argument submissions. In addition, the rules specify how counsel will be alerted to the date and time of argument—information that should promptly be conveyed to the client.³³

³³ If it is not possible to arrange for incarcerated clients to watch oral arguments livestreamed by the relevant Appellate Division Department, appellate counsel should report on the oral argument in a letter. For noncitizen clients, counsel should provide for the translation of such report.

The argument preparation process should yield an outline of key points counsel seeks to make, record cites, decisions, and answers to anticipated questions. The best practice is to moot any case that appellate counsel plans to argue. The oral argument is not scripted and read—it is internalized. Where the appellate court panel is engaged, the argument will be an interactive and edifying conversation about the issues. Counsel for respondent should pay close attention to the appellant’s argument and follow up to counter points made or questions asked by the panel. Similarly, appellant’s counsel should be alert throughout respondent’s argument and formulate responses to be made if rebuttal is allowed. Additionally, where appropriate, appellant’s counsel should seek opportunities for post-argument submissions. Having the final word can be a powerful opportunity.

15. Leave Applications

If the intermediate appellate court does not grant full relief in a criminal case, counsel must make an application for leave to appeal to the Court of Appeals, unless the client instructs counsel not to do so. In family law cases, counsel should explain the possibility of further appeal and abide by the client’s wishes. If opposing counsel files a leave application, the assigned attorney must oppose it.

COMMENTARY

In criminal cases, all Appellate Division Departments require appellate counsel to file a leave application if the appeal is unsuccessful.³⁴ When unable to consult with the client within the time allowed for filing a leave application,³⁵ counsel should file the application. If the client subsequently expresses a desire to not proceed, counsel should withdraw the application. The statutory provisions and court rules regarding criminal versus civil leave applications are very different, and counsel must review the relevant provisions in determining how to proceed.³⁶

In criminal cases, if the Court of Appeals lacks subject matter jurisdiction—such as in a case involving only the issue of harsh and excessive sentence—the initial form letter to the Court Clerk may be sufficient for the leave application. However, where the appeal presents viable legal issues, effective representation demands a substantive leave letter to the assigned judge. Such submission should persuasively explain why the case warrants review—such as because of a split of authority, a novel issue or one of statewide importance, or a recent grant of leave in a case involving a similar issue. In addition, the appellate attorney should explain how the issue is preserved and include relevant portions of the record. Finally, all issues cognizable in a federal habeas petition should be included in the leave letter. Similar

³⁴ See 22 NYCRR 606.5, 671.4, 821.2, 1015.7.

³⁵ Counsel should review relevant statutes regarding deadlines for leave applications, including CPL 460.10 (5) and CPLR 5513.

³⁶ See CPL 460.20; CPLR 5601, 5602; 22 NYCRR 500.20-500.22.

principles apply as to the duty to make a substantive submission in appeals under SORA, Mental Hygiene Law article 10, and family law—albeit pursuant to distinct procedural requirements. Counsel should seek assistance, such as from a mentor or resource attorney, to ensure that effective representation is provided regarding leave applications and should review relevant materials, including Court of Appeals guidance for filing civil and criminal leave applications.³⁷

16. Seeking Relief after Exhausting State Remedies

After state remedies have been exhausted, counsel must advise the client of any further available litigation options. Counsel should also consider pursuing further viable avenues for relief.

COMMENTARY

In most cases, once the state conviction becomes final, further action by appellate counsel is not required. However, in some cases, there may be a realistic possibility of success as to a federal habeas corpus petition or a petition for certiorari to the U.S. Supreme Court. The deadline for the former is one year from the date the state court judgment became final, and for the latter, 90 days from the final judgment of the New York Court of Appeals.³⁸ Counsel should pursue viable federal remedies if adequate resources are available.³⁹ Otherwise, appellate counsel should consider referring the case to law school clinics, legal services organizations, or law firms with robust pro bono programs. There is no obligation to act where it appears that further efforts would be futile, but the client should be informed of options available for pro se litigation. In the closing letter to the client, counsel should set forth the time periods for a federal habeas petition or a petition for certiorari without stating specific deadline dates. The letter should be carefully worded, given potential complicating factors as to due dates.

³⁷ See Court of Appeals FAQs regarding civil motions and applications for permission to appeal: [Civil Motions Frequently Asked Questions \(nycourts.gov\)](https://www.nycourts.gov/civil-motions-frequently-asked-questions/)
[Frequently Asked Questions | Applications Seeking Permission to Appeal to the Court of Appeals \(nycourts.gov\)](https://www.nycourts.gov/frequently-asked-questions-applications-seeking-permission-to-appeal-to-the-court-of-appeals/)

³⁸ See 28 USC § 2244 (d); U.S. Supreme Court Rules, Rule 13 (1).

³⁹ See ABA Defense Standards, Standard 4-9.5.

17. Representing Non-U.S. Citizens

When the client is not a United States citizen, counsel must promptly determine whether immigration proceedings are pending, what potential impact the appeal could have on immigration status, and whether the appeal presents viable issues related to potential immigration consequences. Counsel must investigate the advice provided by trial counsel concerning immigration consequences and, where appropriate, pursue an ineffective assistance claim. As soon as practicable, counsel should do an initial assessment of the case, including regarding whether a stay and bail pending appeal should be sought.

COMMENTARY

Counsel must promptly determine whether the client is a United States citizen, whether immigration proceedings are pending, and how the appeal could impact the client's immigration status. Unless possessing sophisticated knowledge of immigration law and its impact on criminal prosecutions and family law litigation, appellate counsel should consult an expert, such as at a Regional Immigration Assistance Center.⁴⁰ Counsel must investigate and pursue any viable issues relating to immigration consequences. If the plea court failed to properly notify the accused person about potential deportation consequences of a guilty plea, such violation of *People v Peque*, 22 NY3d 168 (2013), and CPL 220.50 (7) must be raised upon direct appeal. Where counsel failed to properly advise the client about the immigration consequences of a guilty plea, as mandated by *Padilla v Kentucky*, 559 US 356 (2010), counsel should pursue a claim of ineffective assistance, which would typically require a CPL 440.10 motion. See Appellate Standard 20 (440 motions).

An ineffective assistance claim may also be presented where the sentence imposed carried immigration consequences and trial counsel failed to advocate for an immigration-safe sentence. A reduction in a sentence by the Appellate Division in the interests of justice would likely not be recognized by the immigration court. State court orders altering a sentence will be given effect only if based on a procedural or substantive defect in the underlying criminal proceedings.⁴¹ Such orders will have no effect for immigration purposes if they rest solely on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or the avoidance of immigration consequences. Where pending immigration proceedings are based on a conviction that is not the subject of the assigned appeal, counsel should explore ways to vacate that conviction. A client's deportation does not relieve counsel of the obligation to pursue appellate and postconviction remedies.⁴² Obtaining relief may enable a client to return to the United States.

⁴⁰ See note 19 (link to RIACs on ILS's website).

⁴¹ See *Matter of Thomas and Thomas*, 27 I&N Dec. 674 (AG 2019).

⁴² See *People v Harrison*, 27 NY3d 281 (2016).

18. Comprehensive Client-Centered Representation

Counsel should provide comprehensive, client-centered representation and ascertain whether the client needs assistance with matters beyond the appeal, such as parole advocacy, immigration advice, reentry assistance, or prison conditions.

COMMENTARY

Incarcerated clients are ill-equipped to handle on their own many of the challenges they face. They usually have difficulty accessing legal and social services. Appellate counsel is often their only hope of finding information or assistance. Counsel should speak to each client on a regular basis and attempt to establish a relationship of trust. When unable to personally help, counsel should try to connect the client with relevant resources, such as social workers. Possible sources of information and assistance are set forth below.

A Jailhouse Lawyers' Manual: <http://jlm.law.columbia.edu>

Legal Action Center: <https://www.lac.org>

New York Civil Liberties Union: <http://www.nyclu.org>

New York State Defenders Association: <https://www.nysda.org>

Parole Preparation Project: <https://www.paroleprepny.org>

Prisoners' Legal Services of New York: <https://plsny.org>

19. Sentencing Issues

Upon direct appeal in a criminal case, counsel must determine whether the sentence was legal and whether it was properly calculated by jail or prison officials and must take steps to correct any errors disadvantaging the client. Counsel should raise claims of harsh and excessive sentences if appropriate.

COMMENTARY

New York's sentencing laws are complex, errors in sentencing often occur, and they are sometimes overlooked by counsel. To provide effective representation, appellate counsel must carefully review all components of the sentence imposed to determine whether it was legal. Regarding whether to argue that the sentence was illegal upon direct appeal or in a CPL 440.20 motion, see Appellate Standard 20 (440 motions).

Of course, in addition to challenging illegal sentences, counsel should invoke the intermediate appellate court's broad power in the interest of justice and raise claims of harsh and excessive sentences where more than the minimum period of incarceration or

postrelease supervision was imposed.⁴³ In a case where any part of the client's sentence is below the legal minimum sentence, counsel should advise the client about risks of moving forward with the appeal and potentially exposing the advantageous error. See Appellate Standard 10 (risks). Note that in most plea cases, as a threshold matter, counsel will need to attack the validity of the waiver of the right to appeal.⁴⁴

Furthermore, even where the sentence was legal, errors can occur when correctional facilities calculate sentences, including in not properly crediting jail time. Thus, appellate counsel should scrutinize such determinations⁴⁵ and seek correction where harmful errors are found.

20. CPL Article 440 Motions

Counsel assigned to a direct appeal in a criminal case must determine whether a CPL 440.10 or CPL 440.20 motion is warranted and, if so, file such motion (or help to ensure other representation for the client to pursue the claim or claims); seek leave to appeal from a denial of the application; and represent the client if leave is granted to the client or the prosecutor.

COMMENTARY

Appellate counsel assigned to the direct appeal must consider whether any issues should be raised by a CPL 440.10 motion to set aside the judgment of conviction or a CPL 440.20 motion to set aside the sentence.⁴⁶ A critical development on the postconviction front occurred when County Law § 722 was amended (L 2019, ch 440, § 1, eff Nov. 8, 2019). The law now authorizes appellate counsel, during the pendency of the appeal, to investigate and, if warranted, file a CPL article 440 motion to vacate a judgment or set aside a sentence, or to request the assignment of counsel from the local assigned counsel panel to perform such function. Counsel will be compensated under County Law §§ 722-b and 722-c. As pointed out by one Memorandum in Support, almost every exoneration of wrongfully convicted persons comes about via a CPL 440.10 motion.⁴⁷

CPL 440.10 motions generally must be used as the vehicle for challenging convictions where the underlying facts to support the legal ground or issue are dehors the record. Appellate counsel should review cases for red flags regarding convictions lacking integrity, such as

⁴³ See *People v Delgado*, 80 NY2d 780, 783 (1992); see also *People v Baldwin*, 39 NY3d 1097, 1098-1099 (2023) (Wilson, J., concurring).

⁴⁴ See *People v Thomas*, 34 NY3d 545 (2019).

⁴⁵ Appellate counsel should consider reaching out to the Office of Counsel at the Department of Corrections and Community Supervision (DOCCS) to request the sentencing calculation and sentencing review.

⁴⁶ See NYSBA Standards (where credible CPL article 440 claim exists, counsel must investigate and file a motion if warranted or attempt to secure other representation for the client to pursue the claim).

⁴⁷ Memo in Support, NYSBA, Committee on Mandated Representation & the Task Force on Wrongful Convictions (February 1, 2019).

questionable eyewitness identifications, possible false confessions, unreliable forensic science, prosecutorial and police misconduct, and the use of informants. Perhaps the most common ground for a CPL 440.10 motion is ineffective assistance, based on trial counsel's failure to investigate a case or prepare a defense. Another ineffectiveness ground is counsel's failure to properly advise a noncitizen client about immigration consequences of a plea. See Appellate Standard 17 (noncitizens). Appellate counsel should be aware of other possible bases for seeking relief. Particularly in trial cases, such issues may include *Brady* violations, the client's mental illness or cognitive impairment, juror misconduct, newly discovered evidence, or actual innocence as a freestanding claim.

A CPL 440.20 motion should be filed where the sentence was "unauthorized, illegally imposed, or otherwise invalid as a matter of law." While the issue of an illegal sentence can generally be raised upon direct appeal, counsel should file a CPL 440.20 motion where the illegal sentence issue is unpreserved and the Appellate Division declines to reach it in the interests of justice.⁴⁸ Even where the issue could have been, but was not, raised upon direct appeal, counsel can file a CPL 440.20 motion. Counsel should advise the client that filing a CPL 440.10 or 440.20 motion prior to perfecting the direct appeal may cause a delay in obtaining relief. See Appellate Standards 10 (risks) and 21 (client communication). If the CPL 440.10 or 440.20 motion is denied, counsel must seek permission to appeal from such denial and, if leave is granted, represent the client on appeal. Counsel should represent the client where the motion was successful and the prosecutor appeals.

C. Special Ethical Considerations

21. Client Communication

Counsel has an ethical obligation to keep the client informed throughout the appellate proceedings, including by providing general information about the process at the outset, setting forth possible issues, explaining delays, providing copies of documents, responding to client correspondence, providing court decisions, and proposing further action. Counsel should inform the client of the right to file a pro se brief where such right exists, and counsel should provide procedural advice required to conform the client's filing to the rules of the court.

COMMENTARY

Counsel's duty to keep the client reasonably informed about the case throughout the appeal process is governed by Rule 1.4 (a) of the Rules of Prof. Conduct. That rule requires the lawyer to promptly apprise the client of any decision or circumstance requiring informed consent and material developments in the case, among other things. Further, counsel must

⁴⁸ See e.g. *People v Jurgins*, 26 NY3d 607 (2015).

promptly comply with a client's reasonable requests for information. Comment [1] of the above Rule explains that reasonable communication is necessary for the client to participate effectively in the representation.

Since clients in criminal cases are often incarcerated, appellate counsel must be proactive in facilitating communication. From the outset of representation, counsel must ascertain if there are other impediments to meaningful communication—such as language differences, illiteracy, youth, and mental or physical limitations—and must take steps to ensure that information is understood. See Appellate Standards 9 (meetings), 10 (risks), and 24 (diminished capacity). This might involve the use of an interpreter or translator and meetings in person to convey information. Further, counsel should find out what the client would like to be called and honor those choices.

22. Issue Selection

While the client has the ultimate authority to decide whether to take an appeal, the choice of what arguments to make upon appeal belongs to appellate counsel. However, counsel should actively consult with the client regarding issues to be argued and set forth any colorable issues the client desires, unless doing so could prejudice the client.

COMMENTARY

Counsel has the authority to apply professional judgment to determine what specific arguments to raise in the appeal.⁴⁹ Thus, counsel has no duty to raise every nonfrivolous issue requested by the client.⁵⁰ Of course, when an issue carries risks, it must not be raised unless the client has been fully counseled and agrees to go forward with the issue. See Appellate Standard 10 (risks). While possessing wide latitude in issue selection, counsel has an ethical duty to consult with the client about all proposed issues and should strive to reach an agreement about the issues.⁵¹ In most cases, there should be no ultimate disagreement about arguments to be presented. Where the client would like to have issues presented against advice, counsel should generally accede to the client's wishes and only decline to raise a desired issue if doing so would negatively impact the appeal. After all, the client generally has no say in the attorney assigned and should have maximum possible agency in the appellate process. Where declining to present a requested issue, counsel must inform the client of the right to file a pro se supplemental brief under the Statewide Practice Rules, in particular, Rule 1250.11 (g) and local Department rules, and must assist the client in adhering to the rules.

⁴⁹ See *Garza v Idaho*, 139 S Ct 738, 746 (2019).

⁵⁰ See *Jones v Barnes*, 463 US 745, 751-754 (1983); *People v Stultz*, 2 NY3d at 285, *supra*.

⁵¹ See Rules of Prof. Conduct, Rule 1.2 (a) (duty of consultation as to means to achieve client's objectives).

23. *Anders* Briefs

Counsel should file an *Anders* brief rarely—only when the client pleaded guilty; there were no substantive hearings and no denials of substantive hearings; the minimum sentence was imposed; and no grounds exist to vacate the plea.

COMMENTARY

Convicted persons are entitled to effective appellate representation.⁵² That representation will generally result in a merits review by the intermediate appellate court. Counsel should avoid filing briefs, pursuant to *Anders v California*, 386 US 738 (1967), asserting that no nonfrivolous issues exist and seeking to withdraw as counsel.⁵³ Usually, a careful review of the record and law will yield an arguable issue. After all, any trial will involve some errors; and often there are flaws in the plea colloquy. Further, many issues survive a knowing, voluntary, intelligent guilty plea and even a valid waiver of the right to appeal—and such waivers are often defective.⁵⁴ Where the minimum period of incarceration was imposed, counsel might still be able to argue that the period of postrelease supervision should be reduced. If the client served the full sentence, immigration consequences might endure. In addition, counsel may make nonfrivolous arguments for changes in the law.⁵⁵

Finally, even if the direct appeal presents no real options, counsel has a duty to explore the possibility of a collateral attack on the judgment. In rare circumstances, an *Anders* brief may be appropriate where these elements exist: the client pleaded guilty; there was no substantive hearing or no denial of a request for a hearing; the minimum permissible terms of incarceration and postrelease supervision were imposed; and the record reveals no colorable claim to vacate a defective plea. In a plea case where the client decides not to take the risk associated with seeking to vacate a defective plea (see Appellate Standard 19 [risks]), it is more appropriate to file a stipulation to withdraw the appeal with the client's authorization than to file an *Anders* brief.

Principles regarding *Anders* briefs also apply in family law cases. *Matter of Giovanni S.*, 89 AD3d 252 (2d Dept 2011), contains an illuminating discussion of *Anders* briefs and exemplifies when such a brief should *not* be filed in a family law case. *Giovanni S.* indicates that one reason an assigned attorney may improperly file an *Anders* brief is the conflation of

⁵² See *People v Stokes*, 95 NY2d 633, 635-636 (2001).

⁵³ American Bar Association Standards, for example, declare: "Appellate counsel should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit." ABA Standards, Criminal Justice, Prosecution Function and Defense Function, Standard 4-8.3 (a) (3d ed. 1993). That standard would allow withdrawal only where continuing representation would mislead the court. Commentary points out that, if a ground for relief "lacks any legal support or is contravened by existing law, counsel may nonetheless argue for extension, modification, or reversal of existing law."

⁵⁴ Additionally, many appellate courts expect that, where there is any appeal waiver, such waiver should be attacked.

⁵⁵ See note 29.

two distinct questions—whether there is a likelihood that the client could prevail versus whether any issues of arguable merit should be presented. In family law, an *Anders* brief might be appropriate in situations involving a lack of aggrievement or mootness—for example, where an order was entered on consent and there is no basis for collaterally attacking the consent; the only relief desired concerns a dispositional period that has expired by its own terms; or other subsequent developments have rendered the appeal academic. Even in those situations, creative and competent counsel might find other avenues to help the client, such as through a modification petition.

24. Diminished Capacity

If counsel believes that a client has diminished capacity based on the record, personal contact with the client, or information from third parties, then counsel should maintain a conventional relationship with the client as far as reasonably possible. Where it appears that the client is unable to make decisions about the appeal, counsel should determine if protective measures are appropriate and should take into consideration any significant risks to the client.

COMMENTARY

Some appellate clients have diminished capacity.⁵⁶ Such condition may be revealed by the record or information from a third party. Diminished capacity may also be discerned based on appellate counsel's personal contact with the client—which underscores the importance of meeting in person or at least having a phone conversation with each client. See Appellate Standard 9 (client meetings). Regarding clients with diminished capacity, Rule 1.14 (a) of the Rules of Prof. Conduct advises counsel to maintain a conventional relationship “as far as reasonably possible.” Subdivisions (b) and (c) provide guidance on how to proceed when such a relationship cannot be maintained, such as by consulting trusted family members or friends identified by the client. Protecting the wishes and interests of criminal defense clients takes on heightened importance where appeals involve significant risks. See Appellate Standard 10 (risks).

Rule 1.14 addresses diminished capacity generally but provides no specific guidance as to criminal appeals and the thorny issues that may arise regarding clients who lack competence to make informed decisions about their appeals. While CPL article 730 sets forth a comprehensive framework as to competence to stand trial, there is no parallel statutory mechanism as to appeals. This gap is problematical. Some appellate clients' incompetence at the trial level may have been overlooked, while others may have become incompetent since the time of conviction. ABA Criminal Justice Standards on Mental Health contain a helpful definition regarding competence to proceed upon appeal from a judgment of

⁵⁶ More than 70% of people in U.S. jails and prisons have at least one diagnosed mental illness or substance use disorder or both, and up to one third have a serious mental illness. See National Judicial Task Force to Examine State Courts' Response to Mental Illness Report and Recommendations, Oct. 2022, at 9.

conviction, as well as suggested protocols to follow.⁵⁷ There is also an acknowledgment that prejudice may result when an incompetent client's appeal is prosecuted.⁵⁸ Counsel representing an incompetent client should weigh relevant factors in determining the most appropriate course of action. For one thing, disclosure to the court about incompetency could adversely affect the client, such as by resulting in unwarranted conditions of confinement. For another thing, since convicted persons possess the ultimate authority to make the fundamental decision as to whether to take and prosecute an appeal,⁵⁹ a motion to hold the appeal in abeyance until if and when the client regains competence could be considered. However, counsel must be mindful that harm to the client could result from delaying the relief that a successful appeal could yield.

25. Case File

Counsel's case file belongs to the client, with minor exceptions; should be retained for the client's life, under secure conditions; and should promptly be furnished upon request to successor counsel, except that client permission is needed to disclose confidential information.

COMMENTARY

Upon termination of the attorney-client relationship, the client presumptively is entitled to full access, with narrow exceptions, to the entire attorney's file in the represented matter, as set forth in *Sage Realty Corp. v Proskauer Rose Goetz*, 91 NY2d 30, 36-38 (1997).⁶⁰ Files for mandated representation clients should generally be retained for the client's life, since they may be needed in the distant future, such as for federal habeas corpus proceedings, immigration proceedings, predicate offender determinations, and Family Court matters.⁶¹ Copies may be kept in "any medium that preserves an image of the document that cannot be altered without detection."⁶² Assigned counsel may consider providing the file to a client

⁵⁷ Standard 7-8.8 (a) of the ABA Criminal Justice Standards on Mental Health (2016), provides that "the test for determining whether the defendant is competent to make a decision regarding whether to appeal a conviction***should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision." Possible protective measures are addressed in Standard 7-8.8 (a) (ii).

⁵⁸ ABA Standard 7-8.8 (b) states that "incompetence of the defendant during the time of the appeal should be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's competence."

⁵⁹ See *Roe v Flores-Ortega*, 528 US 470, 479 (2000); *Jones v Barnes*, 463 US 745, 751 (1983).

⁶⁰ The attorney should not be required to disclose documents that might violate a duty of nondisclosure owed to a third party or otherwise imposed by law, and nonaccess would be permissible as to documents intended for internal law office review and use. See *Sage Realty v Proskauer Rose*, 91 NY2d at 37-38.

⁶¹ See 8 NYCRR 185.15 (Appendix L) (Retention and Disposition Schedule for NY Local Government Records [LGS-01] [2020] [requiring public defenders to maintain case files until client's death or 80th birthday]).

⁶² See Rules of Prof. Conduct, Rule 1.15 (d) (3).

if unable to retain it for the client's life and, upon doing so, must make a record of such action. When appellate counsel's representation has ended and the client has obtained successor counsel for proceedings in the same matter or another matter in which the file is relevant, the file must be provided to successor counsel.⁶³ Client permission is needed to disclose confidential information.⁶⁴ Counsel may not withhold a file based on the client's inability to pay for copies.

26. Coram Nobis

If the effectiveness of appellate counsel is challenged in a coram nobis proceeding, counsel must maintain their duty of loyalty to the client. Generally, counsel must not disclose confidential information unless required to do so by the court, and even then, may do so only as necessary for the purposes of such proceeding.

COMMENTARY

Convicted persons have a constitutional right to effective assistance of appellate counsel, and the same standard—meaningful representation—applies to appellate counsel as to trial counsel.⁶⁵ Sometimes appellate counsel is charged with ineffective assistance in a petition for a writ of coram nobis.⁶⁶ Counsel facing such an application owes a continuing duty of loyalty to the former client.⁶⁷ The enduring duty regarding confidences generally bars counsel from revealing a former client's confidential information.⁶⁸ Counsel may not testify nor reveal confidences unless ordered by the court to participate in a formal judicial proceeding, and even then, may do so only as necessary for the purpose of such proceeding.⁶⁹ A self-defense exception allows counsel to disclose privileged information outside a formal proceeding only “to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim.”⁷⁰ Generally, appellate counsel is less likely than trial counsel to possess information vital to an ineffective assistance claim since the record and briefs will often suffice to resolve the matter. Counsel's opinion should not be offered if it would only constitute a self-serving rationalization. When in agreement that lapses in appellate representation did indeed occur, counsel should submit an affirmation to that effect. Learning lessons from errors can make counsel a more capable advocate for clients going forward.

⁶³ See Rules of Prof. Conduct, Rule 1.16 (e).

⁶⁴ See Rules of Prof. Conduct, Rule 1.6 (a) (1).

⁶⁵ See *People v Stultz*, 2 NY2d at 285, *supra*.

⁶⁶ See e.g. *People v Louis*, 200 AD3d 1008 (2d Dept 2021); *People v Downing*, 200 AD3d 704 (2d Dept 2021).

⁶⁷ See Rules of Prof. Conduct, Rules 1.6 and 1.9; ABA Defense Standards, Standards 4-1.3 (a), 4-9.5 (c), and 4-9.6 (d).

⁶⁸ See Rules of Prof. Conduct, Rules 1.6 (a) and 1.9 (c).

⁶⁹ See ABA Defense Standards, Standards 4-9.6 (c); ABA Formal Opinion 10-456.

⁷⁰ See Rules of Prof. Conduct, Rule 1.6 (b); ABA Formal Opinion 10-456 (under this narrow exception, lawyer may act only to defend against charges posing imminent threat of serious consequences).

NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

**Appellate Standards and
Best Practices (Revised 2023)
Working Group**

Mardi Crawford

Senior Staff Attorney
NYSDA
Albany, NY

Robert Dean

Attorney-in-Charge (retired 12/31/22)
Center for Appellate Litigation
New York, NY

Cynthia Feathers

Director of Quality Enhancement for
Appellate and Post-Conviction Representation
NYS Office of Indigent Legal Services
Albany, NY

Tammy Feman

Appeals Bureau Chief
Legal Aid Society of Nassau County
Hempstead, NY

Robert Gregor

Supervising Attorney
Warren County Office of Assigned Counsel
Lake George, NY

Mandy Jaramillo

Senior Appellate Attorney
Statewide Appellate Support Center
NYS Office of Indigent Legal Services
Albany, NY

Caprice Jenerson

Attorney-in-Charge
Office of the Appellate Defender
New York, NY

Felice Milani

Appeals Bureau Chief
Legal Aid Society of Suffolk County
Riverhead, NY

Patricia Pazner

Attorney-in-Charge
Appellate Advocates
New York, NY

Cara Waldman

Assigned Counsel
Ontario County
Fairport, NY

Jane Yoon

Assistant Public Defender
Monroe County Public Defender's Office
Rochester, NY