

Indigent Representation: Post-Conviction Best Practices

In less than a year since implementation, the Office of Indigent Legal Services' Standards and Best Practices for Appellate and Post-Conviction Representation¹ are already serving as a road map for best practices. This article addresses the standards overall with particular attention to four of the 26 standards that have resulted in the most discussion from the bar: Collateral Litigation—Standard XX, Meeting With the Client—Standard IX, Issue Selection—Standard XXII and Mandatory Brief Review—Standard IV.

When the Office of Indigent Legal Services (ILS) was created by the New York State Legislature in 2010, its core mission was to improve quality and set standards for the representation of indigent clients. The impetus for the creation of ILS was the 2006 Kaye Commission report,² which laid bare the constitutionally inadequate indigent defense system in New York. Among the report's findings were:

- That New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused;
- There is no statewide standard that defines "adequate" indigent defense and there exists no mechanism to enforce any particular set of standards.

Prior to the formation of the Kaye Commission, two significant events occurred in the realm of examining the quality of indigent defense. In November 2003, the Office of Justice Initiatives of the Office of Court Administration convened a summit at Pace Law School to examine the structure, method of financing, and quality of indigent representation.³

The summit was attended by criminal defense attorneys, prosecutors, judges and other stakeholders in the criminal justice system. The summit reached a consensus on the essential components of a quality indigent defense system: (1) detailed statewide standards of practice for public defense providers; (2) meaningful training, supervision and mentoring; (3) parity in salary and resources between prosecution and defense; (4) independence of public defense offices; and, (5) development of a client-centered ethos. And, in 2004, the New York State Bar Association created the Committee to Ensure the Quality of Mandated Representation, and published performance standards in 2005.⁴

Although the Kaye Commission report set out detailed recommendations for the formation of an Indigent Defense Commission as well as a statewide public defender, those recommendations were not adopted nor formally implemented when ILS was created. While the gravamen of the report was taken to heart in the creation of ILS, the specific recommendations set out in the report were not codified. Most significantly, no statewide public defender office was created.

And, although the Office of Indigent Legal Services was given the power to distribute funds to the counties for the provision of indigent legal services, and set attorney performance standards, no enforcement powers were given to the office with respect to performance standards.⁵

It was against this backdrop that the Office of Indigent Legal Services endeavored to draft standards and best practices for appellate and post-conviction representation of indigent clients. In order to draft statewide standards, a working group was formed by gathering attorneys from across the state with a wide variety of practice experience. Seventeen appellate lawyers who practice in each of the four appellate divisions accepted the invitation to join the working group. They worked as: sole practitioners, law professors, public defenders, and in policy and research organizations.⁶ Co-author Risa Gerson chaired the working group.

Best Practices

Once the working group was formed, we had to determine whether the standards would set out the minimum required, or whether the standards would set out "best practices" that an experienced, competent, and adequately funded attorney would engage in. The New York State Bar Association's Committee to Ensure the Quality of Mandated Representation had chosen the former tack; in contrast, the ABA Criminal Justice Standards are aspirational.⁷

The ILS working group decided to draft standards in the ABA mold: best practices for all attorneys. The working group recognized that it would be impossible for every attorney in the state to comply with every standard and best practice. The preamble to the standards acknowledges this, noting: "ILS recognizes, however, that not all existing systems comply with these appellate standards, and will assist counties in developing plans that do meet the standards." As with the ABA standards, failure to comply with the ILS standards should not be the basis for professional discipline.

The working group also made a decision to be cognizant of current professional norms—recognizing the shift in the profession to a client-centered model of representation, and acknowledging the unreliability of outcomes in the criminal justice system, evidenced by the disturbing number of wrongful convictions. There was a consensus that as the last attorney an indigent client would have at state expense, assigned appellate counsel has a professional duty and a moral obligation to pursue all reasonable avenues of relief.

Standard XX: Collateral Litigation. The standard governing the duty of assigned appellate counsel to file a post-conviction motion challenging the conviction in lieu of, or in addition to, the direct appeal proved most difficult to draft. Some of the sole practitioners in the working group voiced concern that the order of assignment issued from the Appellate Division does not encompass the filing of such a motion, and a standard requiring that such motions be filed in appropriate cases compels assigned counsel to engage in uncompensated work. The working group looked to the ABA standards, which require counsel to consider whether the challenge to a client's conviction should be brought in a post-conviction motion,⁸ and also considered that most institutional defense offices are funded to engage in post-conviction motion practice.

Striving for uniformity, and recognizing (as set out in the preamble) that not all plans currently comply with the standards, the working group decided that the best practice was that post-conviction motions must be filed in cases where appellate counsel's professional opinion as to the best issue available to challenge the conviction could only be raised in a post-conviction motion. Not wanting to compromise the quality of representation, the working group made the decision that the best practice was for assigned counsel to file CPL Article 440 motions in appropriate cases, but included in the standards commentary the exhortation that counties must provide funding for counsel to pursue these motions.

Standard IX: Meeting With the Client. This standard states that in order to establish a relationship of trust and confidence, counsel must meet with the client. Some working group members took the position that because the direct appeal must be based on the record below, there is nothing that can be obtained in a client meeting that could be included in the appellate brief, and such a meeting was not necessary. Sole practitioners pointed out that assigned counsel plans do not compensate for travel to and from state prisons (many of which are hundreds of miles from attorneys' offices), and those who work at institutional defense organizations noted that their budgets would not be able to fund travel for every lawyer to visit every client incarcerated in state prison.

Other members of the working group, who worked at client-centered institutional providers in New York and in other states that required an attorney-client meeting for appellate representation, stressed the benefits of meeting with clients. These benefits include: closing out cases quickly where clients received beneficial plea bargains and vacating the plea would involve the risk of reinstating the original indictment; learning that the client suffered from a mental illness (which may not be discernable from the record), and being able to communicate with clients who were not literate, or who had information they wanted to impart that they did not feel comfortable writing in a letter or discussing in a phone call.

An overarching benefit of instituting a policy of meeting with every client is that it is far easier to develop a relationship of trust and confidence with clients, as is required by ABA Standard 4-8.3. Realizing that funds for meeting with clients are typically not available at the present time, the commentary to the standard notes that funders must cover these additional costs.

Standard XXII: Issue Selection. Whether it is the lawyer or the client who decides which issues to include in the brief also engendered a spirited discussion among the members of the working group. Some members believed that inherent in the role of appellate counsel was to choose among the issues and raise only the strongest issues regardless of the client's desires, relying on the majority opinion in *Jones v. Barnes*, 463 U.S. 745 (1983) (holding that it is not ineffective assistance of counsel for an appellate attorney to decline to raise colorable issues pressed by the client).

Others reasoned that because it is impossible to predict which issues will persuade the appellate court, there was no downside to including an issue the client believed to be strong. And, including an issue the client strongly believed in had the benefit of winning the client's trust and confidence; we reasoned that if the client had retained counsel, that attorney would likely raise the non-frivolous issues the client desired—assigned counsel should do no less.

The working group ultimately focused the standard on the importance of communicating effectively with the client, which would resolve most cases in agreement. In the small number of cases in which the lawyer and client cannot reach a consensus, the working group believed that Justice William Brennan's dissent in *Jones v. Barnes*, in which he argued that the Sixth Amendment right to assistance of counsel incorporated the right for an indigent client for whom the state had provided an attorney, to compel counsel to raise colorable issues he or she desired, hewed more closely to current professional norms, which favor a client-centered approach to representation.

Standard IV: Mandatory Brief Review. While there was no disagreement about whether appellate briefs should be reviewed by an experienced attorney prior to filing, the issue of concern was how strictly the standard should be written. Many members of assigned counsel panels are sole practitioners who do not have anyone to review their briefs. The working group considered whether the standard would be drafted to conform to the current practice, or whether the standard should be drafted to guide future systems.

The specifics set out in the commentary, which require that panels set up mentoring programs and that brief reviewers be paid at County Law 18-B rates, is a practice that cannot be implemented until adequate funding is secured. The Office of Indigent Legal Services encourages counties, in consultation with appellate providers, to develop mentoring programs that comply with this standard, and stands ready to fund such programs.

Conclusion

In this article, we have focused on four of the 26 standards that have prompted the most discussion among members of the bench and bar. The remaining 22 standards have not raised many questions. The consensus seems to be that the vast majority of the standards have not introduced additional requirements to representing indigent clients, but have set out what most highly skilled lawyers have been doing all along. As to the standards which require funding to achieve full compliance, ILS encourages the counties to seek funds through the non-competitive distribution process. It is a proud development that New York State is leading the way on the road to best practices for appellate and post-conviction representation in indigent defense.

Endnotes:

1. See <https://www.ils.ny.gov/files/AppellateStandardsFinal010515.pdf>.
2. See http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.
3. The Summit is described in the Kaye Commission Report at page 13.
4. See <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644>.
5. See Executive Law Section 832.

6. The working group members, and their affiliations, are available here:
<https://www.ils.ny.gov/node/54>.

7. ABA Criminal Justice Standards for the Defense Function, Standard 4-1.1(b) (4th edition 2015)
http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

8. ABA Criminal Justice Standards for the Defense Function, Standard 4-9.2(b) (4th ed. 2015)
http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

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