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Standards Issued for Counsel on Indigent Criminal Appeals

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ALBANY - The first set of standards has been established to guide assigned counsel and lawyers working for institutional providers in mandated criminal appellate cases.

The state Office of Indigent Legal Services (ILS) said its "[Standards for Appellate and Post-Judgment Representation](#)," effective Monday, will apply to the representation of criminal defendants, appeals involving indigent litigants in Family Court, risk-level assessments for sex offenders and civil confinement cases under Article 10 of Mental Health Law.

An ILS working group of private attorneys, institutional defense providers and law school educators developed the standards and the accompanying commentary.

Risa Gerson, director of quality enhancement for appellate and post-conviction representation at ILS, coordinated the drafting of the new standards. She said they are based on American and New York State Bar Association standards for criminal appeals, on federal and state case law in ineffective-assistance-of-counsel cases and on standards established in a few other states.

"One of the things that make these standards such a breakthrough is that there aren't many states that have fully developed standards for appellate practice," Gerson, a former attorney for the Legal Aid Society and Office of the Appellate Defender, said in an interview.

Among the standards and best practices are:

- Attorneys must demonstrate "competence" before they can work on appeals for institutional providers or qualify for 18-b assigned counsel panels. This includes knowledge of basic rules and procedures governing appellate practice. Proving such knowledge may require submission of appellate briefs and other demonstrations of qualifications, such as court clerkships.
- All briefs submitted by an institutional or assigned appellate counsel must be reviewed by another experienced lawyer. ILS said briefs prepared by assigned counsels may be reviewed by other experienced counsels on their panels.
- Clients must be fully apprised of the risks they face on appeal. ILS said that is especially important in cases where a vacatur is sought on a guilty plea and attorneys know that clients could suffer a more serious conviction and a higher penalty than if no appeal is attempted.

- Lawyers must meet face-to-face with clients, except where it would not be in the client's best interests.

Prison Visits Required

Perhaps the most controversial issue was whether appellate attorneys should be obligated to meet in person with clients, Gerson said.

She acknowledged that achieving compliance will require more funding, especially considering that criminal defendants in appellate cases are usually incarcerated, often far from where their attorneys are based.

In its commentary, ILS said face-to-face contact is crucial "to establish a relationship of trust and confidence."

"It is recognized that the resources to cover these substantial costs are not currently provided to appellate counsel," ILS said. "For this important standard to be satisfied and for prison visits to become routine, funders must cover the additional expenditures that will be required."

Gerson said that in some cases, clients may decide after conferring with counsel in person that appeals are not in their best interests—and that, ultimately, money will be saved by not pursuing fruitless or risky appeals.

The guidelines are designed to complement [standards issued by ILS in 2012](#) for providing mandated trial representation in cases involving a conflict of interest. They, in turn, hew closely to the New York State Bar Association's [Revised Standards for Providing Mandated Representation](#), which were last revised in 2010.

Richard Greenberg, attorney-in-charge of the Office of Appellate Defender, an institutional provider in the Appellate Division, First Department, applauded ILS for establishing standards for what he called the "holistic" representation of appellate clients.

"I think they did a great job," he said in an interview. "I think they may be somewhat aspirational at this point. But they are very clear: They recognize that at this point in time that if everything is not possible, they call upon the state to provide funding to move in that direction. I think that is what it is all about, trying to lift the quality of representation."

Norman Effman, executive director of the Wyoming County-Attica Legal Aid Bureau, said that although criminal appeals are based on the written record, it is probably best for attorneys to meet with their clients.

"It is certainly the best way to go, but whether it is practical or not or we have the ability to do it, that's the question," he said in an interview.

Effman said he expected that the release of the standards would prompt a review by the state bar's Committee to Ensure Quality of Mandated Representation. He is on the state bar committee.

John Cirando, a partner at D.J. & J.A. Cirando in Syracuse and a frequent counsel for criminal defendants in the Third and Fourth Departments and the Court of Appeals, called the standards comprehensive and thorough.

But he questioned whether a face-to-face meeting between lawyer and client is always necessary.

"When you do an appeal, everything is based on the record," said Cirando, who represents private appellate clients and takes on 18-b assignments. "So is a personal interview really necessary when you have telephone contact and correspondence? Maybe in some cases it may be necessary. It may not be necessary in all cases."

Chief Judge Jonathan Lippman is chairman of the ILS board, which approved the guidelines. He said the board knows some aspects of the standards are "aspirational," and that institutional providers and assigned counsels will need more funds to comply with them.

"There are a lot of practical issues involved," Lippman said Wednesday. "We don't live in a dream world. But by the same token, if we don't put out there what the gold standard in representation is, then you certainly are not going to get it."

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